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THE TAFT LECTURE: LIVING UNDER SOMEONE ELSE'S LAW

Heather K. Gerken*

INTRODUCTION

When the national government passes a law and state officials think the feds have overstepped their bounds, everyone knows the script. We all know it's a federalism problem, we all know the doctrinal tools the states will deploy, and most of us are either rooting for Team State or suiting up with the National[ists]. Most of us can even tell you why it's a good thing that the states and federal government engage in turf wars no matter which side we're on, and some of us even have a theory about whether and when courts should referee these fights.

The states also intrude on each other's turf, but this script isn't nearly as clear. We definitely have a name for these phenomena—spillovers—and most people worry about them. We worry when lax gun-ownership enforcement in Georgia increases the number of firearms in New York.¹ We worry when California's emissions standards trump the standards of every other state and the EPA.² We worry when the Texas school board moves its curriculum in a more conservative direction and brings the entire textbook industry along with it to the dismay of school officials in blue states.³ We once even worried when same-sex couples married in one state moved to a state that didn't recognize such marriages.⁴

These controversies don't just generate handwringing; they generate legal fees. In the last year alone, we've seen federal lawsuits designed to put a stop to spillovers stemming from Colorado's legalization of

* J. Skelly Wright Professor of Law, Yale Law School. I owe thanks to the dean and faculty of the University of Cincinnati School of Law for their kind invitation to deliver the Taft Lecture. What follows is a lightly edited, lightly footnoted version of the speech I delivered on October 7, 2015. I owe special thanks to two of my coauthors, Ari Holtzblatt and James Dawson, who have both written on these topics with me and influenced my thinking on them. Parts of this article are adapted from an article Ari and I wrote in the *Michigan Law Review* and an essay James and I wrote in the *Democracy Journal*. Excellent research was provided by Arielle Humphries, Andy Mun, Rosa Po, Dan Rauch, and Sarah Weiner.

1. New York City, concerned that lax enforcement outside of New York was creating a market in which illegal guns were flooding the city, conducted a sting operation in Georgia and elsewhere and then filed suit against gun dealers in those states. See Amended Complaint, *City of New York v. A-1 Jewelry & Pawn, Inc.* (E.D.N.Y. Sept. 6, 2007) (No. 06 CV 2233), 2007 WL 2739888.

2. E.g., *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1155–57 (E.D. Cal. 2007), *aff'd on reh'g*, 563 F. Supp. 2d 1158 (E.D. Cal. 2008); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 300–03 (D. Vt. 2007).

3. See DIANE RAVITCH, *THE LANGUAGE POLICE* 71–72, 98–107 (2003).

4. E.g., *Godfrey v. Spano*, 920 N.E.2d 328, 337 (N.Y. 2009) (Ciparick, J., concurring). Happily, this case can now be followed by a “but see.” *But see Obergefell v. Hodges*, 136 S. Ct. 2071 (2015).

marijuana,⁵ Vermont's regulation of food labels,⁶ Minnesota's ban on purchasing electricity from coal-fired plants,⁷ and California's efforts to regulate the treatment of animals by the food industry.⁸ All of these activities have affected people in other states, and all have kicked up interstate brouhahas.

For some of these disputes, you may be able to identify a ready frame for resolving them—due process, the Full Faith and Credit Clause, the Dormant Commerce Clause. For others, you may not be able to identify an obvious means to do so. You may not even have a fully formed view on *how* these disputes ought to be resolved, save the vague sense that spillovers are bad. It's unsettling, after all, when one state's policies stretch beyond its territories. It's unsettling for the simplest of reasons: *no one wants to live under someone else's law*.

What I just described is pretty much how the two halves of "Our Federalism" look in terms of doctrine and theory. Federalism is commonly thought to be a single field of study, but in fact it is two; it encompasses not just relations between the states and the federal government, but *among* the states. Vertical federalism is so familiar that we can recite the reasons to value states' role in our federal system as easily as children recite the alphabet. The law of horizontal federalism, in contrast, has mostly developed within its doctrinal silos—the Dormant Commerce Clause, personal jurisdiction, the Full Faith and Credit Clause. That's not necessarily a bad thing. Horizontal federalism's problem-centered approach allows for adaptation and attention to context. But even though these doctrinal silos are setting the terms on which states interact, we've done relatively little to theorize the ways states *ought* to interact across doctrinal domains.

In this lecture, I will make two points. First, it's both strange and instructive that the two halves of "Our Federalism" have developed so differently given that they are both preoccupied with the same problem: what happens when one government invades another's turf? Vertical federalism offers a single narrative for adjudicating federal-state relations. It asks the same question in every case—how should we think of federal-state relations writ large?—and unsurprisingly gets the same answer in virtually every case from scholars and judges alike.

5. See, e.g., Motion for Leave to File Complaint, Complaint, and Brief in Support, *States of Nebraska and Oklahoma v. State of Colorado*, 2014 WL 7474136 (U.S.); Plaintiffs' Complaint For Declaratory and Injunctive Relief, *Smith et al. v. Hickenlooper*, Civ. Action No. 15-462, (D. Colo. Mar. 5, 2015), http://jurist.org/paperchase/uploads/Smith_v_Hickenlooper_Complaint.pdf.

6. *Grocery Mfrs. Ass'n v. Sorrell*, No. 5:14-CV-117, 2015 WL 1931142 (D. Vt. Apr. 27, 2015).

7. *North Dakota v. Heydinger*, 15 F. Supp. 3d 891 (D. Minn. 2014).

8. *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013) ("Harris I"); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 79 F. Supp. 3d 1136 (C.D. Cal. 2015) ("Harris II") (on remand); *Missouri v. Harris*, 58 F. Supp. 3d 1059 (E.D. Cal. 2014).

Horizontal federalism, meanwhile, resolves state-federal tussles issue by issue, problem by problem, domain by domain. Rather than focusing on a single big question—how should we think of state-state relations writ large?—it emphasizes context and facts on the ground and a myriad of doctrinal questions writ small.

While there are certainly benefits to horizontal federalism's seriatim approach, it's missing what vertical federalism theory has long provided: a broad-gauged account of how our governing institutions ought to interact. Only with such an account can courts sensibly referee the conflicts that arise between states, let alone decide which conflicts to adjudicate in the first place.

Second, if we're going to build an overarching narrative for horizontal federalism, it shouldn't be the story scholars have offered thus far. The moral of *that* story is that no one should be forced to live under someone else's law. But that tale is premised on an outdated attachment to state sovereignty and an unrealistic impulse to tamp down on state spillovers.

It takes a theory to beat a theory, of course, and any effort to build an alternative account of interstate relations must squarely address the powerful intuition that fuels the current debate—that *it is illegitimate when one is forced to live under someone else's law*. I hope to offer the beginnings of a counternarrative not by denying the well-known costs associated with spillovers,⁹ but by showing that our intuitions capture only half the story. Democracy is surely about self-rule. But it's also about ruling together. And in an age like ours—one in which we've sorted ourselves into all-too-comfortable red and blue enclaves—spillovers are an important mechanism for fostering a well-functioning democracy.

Part I will argue that although vertical and horizontal federalism address what is, at the root, the same problem, the two fields have traveled quite different doctrinal paths. Vertical federalism offers a one-size-fits-all framework for adjudicating federal-state relations, whereas the analysis in horizontal federalism cases tends to be highly contextual and quite variegated. After identifying the costs and benefits of these two approaches, this Part will make the case for creating an overarching account of interstate relations to match the narrative that vertical federalism supplies. Part II will criticize scholars' initial efforts to build an overarching tale of horizontal federalism and sketch an alternative, democratically inflected account that we should deploy going forward.

9. For a survey of those well-trod arguments, see Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 69-78 (2014).

I. VERTICAL AND HORIZONTAL FEDERALISM: A TALE OF TWO FIELDS

If you were to read the U.S. Reports, you'd probably miss the fact that "Our Federalism" encompasses relations among the states as well as relations between the states and federal government. Vertical federalism is federalism as far as most people are concerned. Many have never even heard of horizontal federalism, let alone imagined it as a field of study.

As a result of this neglect, vertical federalism offers a fully developed doctrinal tale, even an epic of its own. We know what's supposed to happen when the states tussle with the federal government. The values associated with vertical federalism are so familiar that they now resemble a bedtime story for law students. Vertical federalism is thought to promote choice, foster competition, facilitate participation, enable experimentation, and ward off the national Leviathan.¹⁰

Horizontal federalism, in sharp contrast, resembles an anthology of short stories. Although courts routinely referee disputes among states, we don't have an overarching narrative of how interstate relations are supposed to work. While some scholars have started to build one, as I'll discuss in Part II, judges and scholars mostly approach these cases *seriatim*.¹¹ We tell one story about the Dormant Commerce Clause, another about personal jurisdiction, still another about Full Faith and Credit.

If the scholarly world is divided between lumpers and splitters—between those who see connections across subject areas and those who think context matters most—vertical federalism is the province of the lumpers. A single narrative shapes the doctrine in every domain. Horizontal federalism, meanwhile, is the province of the splitters. It has developed issue by issue, problem by problem, domain by domain, and it lacks a unified narrative that cuts across issues, problems, and

10. For summaries of these arguments, see, e.g., Gregory v. Ashcroft, 501 U.S. 452, 457–59 (1991); DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 75–106 (1995); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229 (1994); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 109–10 (2001); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 774–79 (1995); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 53–63 (2004); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–1511 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)). For the case that we reel these arguments off too easily, see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997).

11. E.g., MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 96 (2012); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 495 (2008); Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289, 326 (2003); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1474 (2007).

domains.

It's strange that these two halves of federalism have developed so differently because they both address the same problem: the conflict that arises when one government's policies intrude upon another's. States, after all, tread on each other's policymaking turf just as often as the states and federal governments regulate at cross-purposes. The boundaries for these skirmishes are different, to be sure. We typically mark state boundaries along territorial lines and federal boundaries along subject matter lines. But at bottom they are just different kinds of turf wars.

The natural question, of course, is which half of the field has it right? Is it better to be a lumper or a splitter in studying "Our Federalism"? Or, if you prefer Isaiah Berlin's formulation,¹² is it better to be a hedgehog or a fox, the creature that knows one big thing or the creature that knows many small ones?

Vertical federalism is a field with one theory to rule them all.¹³ That single-minded focus has its pluses. This unified account lends order and coherence to an otherwise motley range of doctrinal questions, from preemption to the Spending Clause, from interstate commerce to commandeering. It's an account that ensures that judges keep their eye on the ball: maintaining the healthy state-federal interactions that undergird our democracy. It's also a clear and comprehensible story, one that makes intuitive sense and ensures a reasonable amount of doctrinal consistency across cases. I should note that this praise represents a begrudging admission on my part, as I think the narrative that dominates vertical federalism is largely claptrap. But it's important to give the devil its due. Sometimes, as I've written elsewhere,¹⁴ bad theory makes for not-so-bad case law.

There are costs to the one-size-fits-all approach, however. To begin, doctrine is not tailored to context. Commandeering doctrine is applied when the federal government has roped in understaffed local sheriffs to enforce gun laws¹⁵ and when the states themselves have called upon Congress to help them deal with the shared problem of nuclear waste disposal.¹⁶ Spending Clause doctrine applies both to a relatively trivial case involving conditional highway funding¹⁷ and to one of the most

12. ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY* (1953).

13. With apologies to Tolkien.

14. See Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 99-101 (2014).

15. See *Printz v. United States*, 521 U.S. 898 (1997).

16. See *New York v. United States*, 505 U.S. 144 (1992).

17. See *Dole v. South Dakota*, 482 U.S. 203 (1987).

important cooperative federal regimes of the 20th century.¹⁸

The Supreme Court also lacks much by way of a calibrating mechanism. Because vertical federalism focuses on a single narrative, the doctrine is built entirely around a judge's assessment of nation-state relations writ large. Every time the Court renders a decision, it's thinking about one big question—are the states weak or strong vis-à-vis the federal government?—rather than the myriad of smaller questions that might be relevant to the decision. *New York v. United States*¹⁹ is a perfect example. You can imagine why a Court concerned about the erosion of state power would announce an anti-commandeering rule. But the case may have been a poor vehicle for adopting such a rule. *New York*, after all, involved a scheme negotiated by the states themselves. It was pushed by the National Governors' Association,²⁰ which supplied much of the bill's language,²¹ and thirty-nine states opted into interstate compacts that Congress ratified.²² Congress was arguably serving as helpmate, not Leviathan.²³

Or think about the Necessary and Proper Clause. The Court uses the same test to evaluate a federal prohibition on the sale of medical marijuana²⁴ and the detention of a mentally ill federal prisoner.²⁵ By forcing such disparate problems into the same doctrinal framework, the Court has moved from identifying a sensible connection between an enumerated power and a subject area to detecting what Alison

18. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2590 (2012).

19. 505 U.S. 144 (1992).

20. *Low-Level Radioactive Waste Disposal: Joint Hearing Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources and the Subcomm. on Nuclear Regulation of the Senate Comm. on Env't and Public Works on S. 1517 and S. 1578*, 99th Cong., 1st Sess. 249-51 (1985) (statement of Gov. Booth Gardner, State of Washington).

21. *Low-Level Radioactive Waste: Hearings on H.R. 862, H.R. 1046, H.R. 1083, H.R. 1267, H.R. 2062, H.R. 2635, and H.R. 2702 Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 35 (1985) (statement of Rep. John Dingell, State of Michigan) ("I am encouraged by the progress which has been made under the auspices of the National Governors' Association . . . Flexibility and the spirit of compromise has characterized [these negotiations] . . . I understand that those States which do not now have disposal sites [are] willing to support a legislative compromise which submits them to a tight new timetable with serious consequences for failure to meet the milestones established.").

22. See 42 U.S.C. § 2021 (d) (Supp. III 1985).

23. Or perhaps it wasn't. While state officials pushed for the regime as a whole, the "take title" provision struck down in *New York* was enacted over state opposition and without much opportunity for the states to negotiate. See Dan M. Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low Level Radioactive Waste Policy Amendments Act of 1985?*, 1 HARV. ENVTL. L. REV. 437, 447 (1987); A. Marie Ashe, *The Low-Level Radioactive Waste Policy Act and the Tenth Amendment: A Paragon of Legislative Success or a Failure of Accountability*, 20 ECOLOGY L.Q. 268, 285 (1993). The point here isn't to resolve this question, but simply to point out that the *New York* majority paid no attention to it.

24. *Gonzalez v. Raich*, 545 U.S. 1 (2005).

25. *United States v. Comstock*, 130 S. Ct. 1949 (2010).

LaCroix astutely calls a “formalistic, quasi-jurisdictional nexus between specific individuals and federal instrumentalities.”²⁶

The absence of a calibrating mechanism is also one of the reasons that academics who write about vertical federalism divide into camps, with nationalists favoring centralization in almost every case, and federalism's stalwarts inevitably favoring devolution. As I've explained elsewhere,²⁷ it's odd that there are camps in federalism debates. After all, there are many sensible justifications for moving decisions up or down the governance hierarchy. You would expect that views on devolution to be highly contextual and fall along a broad continuum. What we see instead are firm commitments to a single institutional design strategy across policymaking spheres.

Camps exist in part because vertical federalism is focused on a single narrative. We ask the same question in every case, and it's not surprising that we come out with the same answer. Every case, in effect, asks us to evaluate the federal-state balance writ large. No wonder federalism's stalwarts favor state power in almost every instance and nationalists deploy a one-way ratchet of their own. It's as hard for scholars to calibrate as it is for the Court.

The law of horizontal federalism has developed quite differently precisely because it lacks one theory to rule them all. Without an overarching narrative, the doctrine has developed in a problem-centered fashion. As a result, the case law is quite diverse. Horizontal federalism does not ask the same question in every case, and it's not surprising that the courts and scholars have generated a far more wide-ranging set of answers.

Certain kinds of state spillovers, for instance, fall into clear doctrinal frameworks while others have been left to the political process to work out.²⁸ Even for those controversies the courts are willing to referee, the doctrine is highly variegated. Due process cases look quite different from Dormant Commerce Clause cases, which differ in turn from those that fall under the Full Faith and Credit Clause. There isn't even consistency *within* doctrinal domains. Personal jurisdiction questions, for example, were once cast in the vernacular of federalism, with its talk of territory and sovereigns.²⁹ Now they are cast in terms of individual rights.³⁰

26. Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2077 (2014).

27. Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS L. REV. 997, 999-1000 (2015).

28. For a survey of both types of cases, see Gerken & Holtzblatt, *supra* note 9, at 73-78, 105-19.

29. See, e.g., *Pennoy v. Neff*, 95 U.S. 714 (1877).

30. See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945). For an analysis and evaluation of this shift, see Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75 (1984); Patrick J. Borchers & J. McIntyre

Courts also enjoy more room to calibrate in horizontal federalism cases. Some doctrinal silos, for instance, are more tolerant of interstate spillovers than others. Personal jurisdiction is premised on the notion that it's sometimes *appropriate* for one state to exert control over the citizens of another. The *BMW* line of cases on punitive damages, also rooted in due process, is more skeptical of such intrusions.³¹ Much of the doctrine is designed to prevent spillovers, when state law reaches outside its borders but shouldn't. But some doctrine (such as the Full Faith and Credit Clause) addresses what I've termed *spillunders*, which occur when a state's law should extend beyond its borders but doesn't.³²

If you are a splitter, you might well celebrate this approach. You might think we *shouldn't* do what we do in vertical federalism—ask the same question and get the same answer—for every interstate kerfuffle. You might think that assessing the respect owed to the out-of-state judgments is fundamentally different from policing the economic self-dealing of state legislatures, which in turn differs from deciding whether a citizen can be haled into another state's court.

Horizontal federalism has also done a better job of responding to the doctrinal equivalent of a stress test: adjusting to the extraordinary level of economic, democratic, and regulatory integration that emerged during the 20th century. Until quite recently, judges and academics have clung to a story about autonomous sovereigns in vertical federalism.³³ I suspect that's in part because they are assessing cases at such a high level of generality, looking to state-federal relations writ large rather than to the specifics of the regulatory regime in front of them. Had

Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test, 44 CREIGHTON L. REV. 1245 (2011); Dan Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 SYRACUSE L. REV. 533 (1982); John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1050 (1983); Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984); Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699 (1983); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1113–14, 1117–20 (1981). For arguments that the Court should pay more attention to the federalism dimensions of these cases, see Florey, *supra* note 59. See also Erbsen, *supra* note 11; Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. (2014); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617 (2006); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987); Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5 (1989); Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377 (1985). For signs that at least some of the Justices are likely to be sympathetic to such an approach, see an opinion recently penned by Justice Kennedy, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011).

31. For an overview, see Gerken & Holtzblatt, *supra* note 9, at 75–76.

32. *Id.* at 78–79, 118.

33. For an overview, see Heather K. Gerken, Foreword, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 11, 18 (2010).

judges paid more attention to facts on the ground, they would have realized that the tale of autonomous sovereigns is hard to square with today's realities, where the states and federal governments govern shoulder-to-shoulder in a tight regulatory space.³⁴

To be sure, the stubborn facts of modernization have not gone unnoticed in federalism debates, and sovereignty has been declared "dead" so many times that one starts to believe in the doctrinal version of reincarnation.³⁵ But the scholarly reaction to this shift has been either to move to the nationalist camp, all but erasing the states from constitutional discourse, or to pivot from a sovereignty account of state power to an autonomy account. Both reveal the persistence of the old, sovereignty story.³⁶ The nationalist move simply endorses a sovereignty account of a different sort, one in which the *national* sovereign trumps the state sovereign.³⁷ And while most of federalism's stalwarts have abandoned sovereignty for autonomy in describing the power of the state, the two are little different from one another.³⁸ An autonomy account is softer around the edges and does not demand formal judicial protections, so it's more palatable to academics who fancy themselves *au courant*. Deep down, however, both a sovereignty account and an autonomy account rest on the same basic conception of state power, one in which states preside over their own empire and regulate free from federal interference. That means that both the sovereignty and autonomy account depend on open regulatory space for the states to govern freely. The trouble is that there's not much of it left anymore. That's why the sovereignty/autonomy debate is becoming increasingly irrelevant to facts on the ground even as it retains its hold on the imaginations of judges and commentators alike.

Because horizontal federalism lacks an uber-narrative directing judges' attention to interstate relations writ large, courts have done a better job of adapting to the reality of integration and overlap in at least some parts of the field. At the very least, judges and scholars have noticed how interstate relations actually function on the ground. As a result, we see more engagement with the realities of regulatory spillovers and concurrent jurisdiction.

34. For a survey of the scholarship making this point, see Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1913-15 (2014).

35. The tradition dates back at least to Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

36. For an analysis, see Gerken, *supra* note 33, at 11-17 (discussing the deep continuities between autonomy and sovereignty); *id.* at 71-73 (noting the strong ties between sovereignty and a traditional nationalist account).

37. Gerken, *supra* note 33, at 71-73 (noting the strong ties between sovereignty and a traditional nationalist account).

38. *Id.* at 11-17 (discussing the deep continuities between autonomy and sovereignty).

Personal jurisdiction, for instance, is premised on the notion that one state may reach out and regulate—even hale into court—the citizens of another. Although these cases plainly implicate horizontal federalism and state sovereignty³⁹—they were once explicitly linked to such concerns⁴⁰—the Court has recast them in the language of individual rights. Prior to 1945, the Court clung to the idea that, to quote *Pennoyer v. Neff*, “no State can exercise direct jurisdiction and authority over persons or property without its territory.”⁴¹ This sovereignty-based approach forced courts to devise one formalist workaround after another to deal with the realities of interstate travel and interstate commerce.⁴² Eventually, however, the courts’ sovereignty framework shattered under the pressures created by an integrated national economy.⁴³ The Court finally began asking itself the right question: how to deal with the problem of regulatory overlap.

The Supreme Court famously answered that question in *International Shoe*,⁴⁴ where it turned to due process as the touchstone for jurisdiction fights and offered a more realistic approach to the problems of concurrence. Judges no longer defined state power solely as the ability to shield its residents from the influence of other states (the spillover problem). Instead, the Court acknowledged that state power sometimes includes the ability to extend its reach outside its territory (the spillunder problem). That shift allowed the courts to move away from an unproductive frame, one that imagined a state exercising exclusive control within, and only within, its territory. It thus prodded judges to think about the right question: under what circumstances *should* a state’s power reach beyond its borders?

We see the same adaptation occurring in the context of the Full Faith

39. Even setting aside the most obvious vestiges of a sovereignty approach, e.g., *Burnham v. Superior Court*, 495 U.S. 604 (1990) (plurality opinion), worries about spillovers, sovereignty, and horizontal relations often implicitly (and sometimes explicitly) inform the Court’s assessment of what process is owed a citizen who is subject to the jurisdiction or laws of another state. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Hanson v. Denckla*, 357 U.S. 235 (1958).

40. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

41. 95 U.S. 714, 722 (1877).

42. The history is familiar to all. For early accounts, see Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1146–47 (1966) (explaining how the “growing mobility and complexity of modern life” lies behind jurisdictional developments in the field); Bernard Auerbach, *The “Long Arm” Comes to Maryland*, 26 MD. L. REV. 13, 14 (1966). For specific examples of these efforts, see 4 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 1065, 1066 (3d ed. 2013).

43. For a seminal critique of *Pennoyer*’s underpinnings, see Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 262–72. For the funniest summary of the canonical story and an effort to complicate and undermine it, see Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 258 (1990) (“Many years ago (in 1877, to be exact) there came into the realm of American jurisprudence an evil dragon known as *Pennoyer v. Neff*. . .”).

44. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

and Credit Clause. That may be due in part to the text of the Clause, which can be read as a textual sanction of state policies moving beyond their borders because it requires states to enforce the judgments of other states.⁴⁵ Presumably as a result, some—but decidedly not all—of the doctrine and scholarship to emerge from the Full Faith and Credit Clause helps us think about the problem of spillovers, spillunders, and regulatory overlap. Consider, for instance, the scholarly work on the recognition of same-sex marriage before the Court resolved this issue for the nation in *Obergefell v. Hodges*. Academics who wrote on the subject often eschewed the notion that the only form of state power that matters is a state's ability to shield its citizens from out-of-state policies. They recognized that state power also encompasses the ability to extend state policies beyond its bounds.⁴⁶

One might even be able to say something similar about the Dormant Commerce Clause. Here again, the courts sometimes ask the right question. Rather than deny the reality of spillovers, judges are asking which spillovers should be shut down and which should be allowed to run their course. Notions of “discriminatory” and “nondiscriminatory” state regulations offer at least a rudimentary vocabulary for determining which spillovers require court intervention and which can be left to what I've called “the political safeguards of horizontal federalism.”⁴⁷

You can see, then, the relative costs and benefits to the lumpers and splitters approaches. Vertical federalism is the province of the lumpers. Its unifying narrative lends coherence to a disparate range of cases. Built up over time, it fits well with judicial intuitions, does a fairly good job of cabining judicial discretion, and has real staying power.

Vertical federalism's strengths, however, are the flip side of its weakness. The power of its narrative has held the courts steady, lending shape and consistency to the doctrine. The judges ask themselves the same question in every case—how strong are the states vis-à-vis the federal government?—and unsurprisingly come up with a consistent answer. But vertical federalism's doctrinal toolbox contains mostly one-way ratchets—arguments that consistently favor lodging power with either the national government or the states—rather than tools capable of calibrating the doctrine to varied institutional settings. The narrative also directs our focus to a high level of generality—federal-state relations writ large—and draws our attention from the facts on the ground, facts which should prod courts to deal with the reality of

45. U.S. CONST. art. IV, § 1 (“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”).

46. For an overview of this work, see Gerken & Holtzblatt, *supra* note 9, at 117-18.

47. For an overview, see *id.* at 114.

integration and regulatory overlap. Put simply, by focusing on the one big question—how the states and federal government should interact—vertical federalism has failed to answer many of the small ones.

Still, the splitters can't just claim victory and leave the field. To be sure, horizontal federalism's doctrine is better calibrated to its doctrinal silos and the reality of regulatory overlap. But the cases are *so* variegated that you might forget they all descend from the same stock. The field's doctrinal silos have generated radically different answers to what is, at bottom, the same question—how should the states interact with one another?⁴⁸ We even see inconsistency *within* doctrinal silos. Witness, for instance, the massive doctrinal switch that occurred in the context of personal jurisdiction.⁴⁹ Or confine yourself to a single constitutional clause and think about how differently due process treats spillovers in the context of punitive damages, on the one hand, and personal jurisdiction, on the other.⁵⁰

Inconsistency isn't horizontal federalism's only problem. These cases are ultimately dictating the terms on which the states interact, and yet courts lack a cohesive account of how states *ought* to interact. Surely there's some space between what we see in vertical federalism—which focuses exclusively on the same big question—and not asking the big question at all. Indeed, in some instances (like personal jurisdiction) interstate relations have faded so far into the background that some have called for a return to basic federalism tenets, returning personal jurisdiction to its territorial and sovereignty-based roots.⁵¹ Whatever you think of that move, it is animated by a desire to focus on the big question at stake in all horizontal federalism cases. Adapting a broad principle to a doctrinal domain makes perfect sense, but one needs a broad principle in the first place.

To be fair, inconsistency wouldn't be a problem if these questions bore no relation to one another. But the Constitution is designed to preserve a well-functioning federal system. That includes not just healthy relations between the states and federal government, but among the states themselves.⁵² We need an account of how a well-functioning system is supposed to work. Vertical federalism may be fairly criticized for missing the trees for the forest, but horizontal federalism deserves the more traditional variant of the rebuke.

48. *Supra* notes 37-42 and accompanying text.

49. *Supra* notes 39-44 and accompanying text.

50. *Supra* notes 31-32 and accompanying text.

51. Erbsen, *supra* note 11; Parrish, *supra* note 30.

52. That's one of the main purposes of Article IV and some parts of Article I.

II. TOWARD AN OVERARCHING NARRATIVE

In recent years, a handful of scholars have noticed the absence of a guiding narrative in horizontal federalism and tried to develop a transsubstantive account of interstate relations to match the one routinely deployed in vertical federalism.⁵³

These scholars are right to think that we need a story to tell about interstate relations. They've just been telling the wrong story. Most—but decidedly not all⁵⁴—of the scholars who have tried to craft a new narrative aim to tamp down on the spillovers that naturally emerge from our highly integrated system. The storyline scholars are pushing, in other words, is that no one should live under someone else's law.

This emerging account is deeply rooted in the notion of sovereignty.⁵⁵ Just as the sovereignty types once tried to confine states and the federal government to their own regulatory spheres, scholars of horizontal federalism want to confine states to their own territorial spheres.⁵⁶ Doug Laycock makes this connection explicit. Just as the Framers allocated authority between the states and federal government based on subject matter, he writes, they allocated authority among the states based on territory, which plays a crucial role in defining states' "semi-sovereign" status.⁵⁷ Much of the work is thus premised on the assumption that it's possible to cut back on regulatory overlap and confine states' reach to

53. Two of the early movers on this front were Gillian Metzger and Allan Erbsen, and both accounts continue to dominate the field. See Erbsen, *supra* note 11; Metzger, *supra* note 11. Erbsen has even taken the next step, deploying what he takes to be the general mandates of horizontal federalism and applying them to one of the field's doctrinal silos. See Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1 (2010) (discussing how horizontal federalism principles might affect personal jurisdiction jurisprudence). While Erbsen and Metzger ignited this debate, one should acknowledge the early work of Doug Laycock, which invoked the notion of territoriality in building an account of interstate relations that transcended horizontal federalism's doctrinal silos, as well as the work of Judith Resnik, which has focused on federalism's horizontal and even its "diagonal" dimensions. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992); Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929 (2008); Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008); Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105 (2008); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 44 (2007) (noting that "[h]orizontal federalism . . . is coming into view as a subject for the legal academy . . ." and offering one of the early contributions to trend); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1581 (2006).

54. The work of Gillian Metzger and Mark Rosen, in particular, stand as exceptions to this rule. Gerken & Holtzblatt, *supra* note 9, at 108-10 (situating their work in the field).

55. For a full exploration, see Gerken & Holtzblatt, *supra* note 9, at 71-73, 91-95.

56. For an overview, see *id.* at 101.

57. Laycock, *supra* note 53, at 296-97.

their own territories, all with an aim to ensure that the policies of one state don't affect the citizens of another's.

This turn to sovereignty might be quite surprising given that vertical federalism scholars (but not the courts) typically treat sovereignty talk as a quaint relic of the past. As I noted above,⁵⁸ while vertical scholars have clung to what is in essence a sovereignty-like view of state power, they understand themselves to have interred sovereignty decades ago. It's a bit startling, then, to read an account of horizontal federalism that is unabashedly sovereigntist in orientation.

There is, however, a deep connection between a distaste for spillovers—a concern with the costs associated with living under someone else's laws—and a sovereignty account. Indeed, sovereignty stands in for a larger set of concerns about equality among the states, territoriality, and self-rule,⁵⁹ each of which offers a deeply intuitive

58. *Supra* notes 13-27 and accompanying text.

59. These principles amount to something of a mantra in the horizontal federalism literature and are regularly invoked, separately and together, in much of the work on the subject even by those who don't use the term sovereignty. See Ann O'M. Bowman, *Horizontal Federalism: Exploring Interstate Interactions*, 14 J. PUB. ADMIN. RES. & THEORY 535 (2004) (discussing sovereignty and equality); Erbsen, *supra* note 11, at 507–10, 514–16, 527–28 (discussing all four concerns); Patrick M. Garry et al., *Raising the Question of Whether Out-of-State Political Contributions May Affect a Small State's Political Autonomy: A Case Study of the South Dakota Voter Referendum on Abortion*, 55 S.D. L. REV. 35, 40 (2010) (“[H]orizontal federalism reflects the view that each state must have a sufficient degree of independent and autonomy for other states.”); Michael S. Greve, *Choice and the Constitution*, AM. ENTERPRISE INST. (2003), <http://www.aei.org/outlook/politics-and-public-opinion/judicial/choice-and-the-constitution/> (describing the fundamental principles guiding horizontal federalism: state equality, democratic self-rule, and “a presumption that state sovereignty must end at the borders”); David V. Snyder, *Molecular Federalism and the Structures of Private Lawmaking*, 14 IND. J. GLOBAL LEGAL STUD. 419, 432 (2007) (arguing that spillovers “[i]n democratic terms . . . reflect[] a lack of representation”); Katherine Florey, *State Courts, State Territoriality, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057 (2009) (offering a comprehensive take on extraterritoriality); see also Gerken & Holtzblatt, *supra* note 9, at 99–104 (collecting sources). We see a similar tendency among scholars who write within the doctrinal silos that fall within the ambit of horizontal federalism. See Margaret Meriwether Cordray, *The Limits of Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 292–99 (1999) (calling for sovereignty-based, territorial limitations on punitive damages awards); Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485 (2013) (offering a historical account of the Full Faith and Credit Clause which would place “territorial-based” limits on the ability of Congress to give a state's law extraterritorial effect); Laycock, *supra* note 53, at 315-21 (arguing that states are not sovereign in the sense that countries are sovereignty but relying on notions of state equality and territoriality to define state's “semi-sovereign” status to understand choice-of-law issues); Laylock, *supra* note 53, at 250-52 (looking to territoriality and state equality as principles for defining the limits of the Full Faith and Credit Clause); A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1094 (2006) (“the sovereign authority of states does not properly extend to the punishment of lawful extraterritorial activity within the federal system”); Michael Greve, *Federalism's Frontier*, 71 TEX. REV. L. & POL. 93, 95-100 (2002) (arguing that our current torts regime, with its generous choice of law rules, undermines horizontal federalism and violates the “principles of state autonomy and equality,” which require that “each state govern its own territory and citizens but not, of course, the territory and citizens of other states”); Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L.

frame for anyone worried about living under someone else's law.

Sovereignty and self-rule are natural intellectual traveling companions if you are concerned with the problem of living under someone else's law. One of the reasons we are uncomfortable with spillovers is that they deprive people of the chance to exercise control over their own destinies. They allow representatives of one state's citizens to tell another's what to do.⁶⁰ On this view, being forced to live under someone else's law seems profoundly antidemocratic.

So, too, a preoccupation with territoriality is completely understandable if one worries about the costs associated with living under someone else's law. The most obvious way to bound a state's laws, after all, is to insist that they stay within a state's territorial bounds.

Even the notion that the states must be treated as coequal makes sense in this larger narrative. If you are worried about the citizens of one state living under someone else's laws, the states you'll worry most about are the big, populous states. In large part due to their market power, populous states setting policies for themselves often end up setting policy for others. California is the prime example. During the last few years, it has managed to annoy just about everyone at some point or another by passing laws that spill over into other states.⁶¹

As must be clear from the first half of this essay, I'm all for developing an overarching narrative in horizontal federalism. But I'd hate to see us make the same mistake in horizontal federalism that we have in vertical federalism and anchor ourselves to the wrong story. The sovereignty model has lots of attractions for anyone worried about living under someone else's law. But its factual underpinnings are too unstable to support the doctrinal edifice it's designed to support. As a formal matter, the states are sovereign, they are equal, and they can only control those within their own territories. As a realistic matter, sovereignty is no more to be had in the horizontal realm than it is in the vertical one, equality is myth, and spillovers occur all the time.

To be sure, policymaking would certainly be simpler if states'

REV. 485, 489 (2013) (looking to principles of "territorial-based jurisdictional principles" to cabin Congress' power to give state laws extraterritorial effect and relying on the courts to protect state sovereignty).

60. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987); Cordray, *supra* note 59, at 308 (expressing concern when a state "projects its own regulatory choices . . . onto other states" and thereby "infring[es] the policy choice of other States") (quoting *BMW v. Gore*, 517 U.S. 559, 572) (1996) (internal quotation marks omitted); Florey, *supra* note 59, at 1115 (one of the "ideological principles of federalism" is that "states are entitled to some autonomous sphere in which to make policy free of interference from other sovereigns").

61. See Heather K. Gerken & James T. Dawson, *Living Under Someone Else's Law*, 36 DEM. J. 42 (2015).

policies never crossed territorial lines—if no one ever had to live under someone else's laws. But in a highly interconnected, tightly networked system like our own, states inevitably affect one another, and spillovers are pervasive. Regulatory overlap is a stubborn fact in both the horizontal and vertical realm.⁶² None of this is to deny that sovereignty captures important intuitions about the appropriate limits of state power. But the fact that something is intuitive or even important doesn't make it true.

The sovereignty narrative in horizontal federalism is also premised on the idea that the states are equal to one another, thus rendering it vaguely offensive when large states' policies influence small ones. Here again, the formal truth is belied by informal realities. Just as there are "superstatutes"⁶³ and "superprecedents,"⁶⁴ there are what I call "superstates."⁶⁵ Populous states like California and Texas can affect the policies of other states in a way that Rhode Island and Montana cannot.

We could try to change the existing state of affairs. But, as with vertical federalism, the price for maintaining clean jurisdictional lines and limited policymaking domains is too steep. We'd have to give up on an integrated market. We'd have to give up on a national democracy. We might even have to stop our citizens from crossing state lines. While self-rule sounds like a trump card in the abstract, when we recognize the normative goods we'd have to sacrifice to attain it, the trade-off is less appealing.

I'm not just worried that the emerging narrative is unrealistic, however. While law is the rare field in which it is acceptable to answer a normative argument with a descriptive one, there is also a strong *normative* case to be made against the emerging sovereignty narrative in horizontal federalism, an argument that squarely addresses the key intuition that animates that narrative. It takes a theory to beat a theory, after all.

If you want to write a new storyline for horizontal federalism, then, you must come to grips with the powerful intuitions that undergird its competitor. You have to show that living under someone else's law isn't a painful reality that we must tolerate if we want an integrated democracy. It is instead an essential feature of a well-functioning democracy. Spillovers, in other words, are a symptom of—and

62. Cf. Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L. REV. 1051, 1105–08 (2010).

63. WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 8 (2010).

64. Jeffrey Rosen, *So, Do You Believe in 'Superprecedent'?*, N.Y. TIMES (Oct. 30, 2005), http://www.nytimes.com/2005/10/30/weekinreview/30rosen.html?_r=0.

65. Gerken & Holtzblatt, *supra* note 9, at 103.

contributor to—a healthy democracy. At least, that's what I am to convince you.⁶⁶

In making this argument, I don't mean to denigrate the value of self-rule. The notion that we should all be able to live under our own law is a deeply intuitive, deeply principled argument.⁶⁷ But it's only half the story. Democracy is surely about self-rule. But it's also about interaction, accommodation, and compromise. Every community would like to live according to its own preferences. Every *person* would like to live according to his own preferences. But we quickly learn that our preferences differ. Democracy requires us to work it out. Sometimes we work it out directly. Sometimes we need a referee. Sometimes we just take our lumps and live under a policy we don't like. And we do so for a simple reason: we'd rather live with other people than without them.

Living under someone else's law is especially important these days. We live in the time of what Bill Bishop has called "the Big Sort."⁶⁸ Not only are our voting patterns deeply polarized, but too many of us have retreated into all-too comfortable red or blue enclaves, be they Fort Worth or Portlandia. It's very useful for our worlds to collide now and then. Those collisions give us a chance to see how other people live, to try someone else's policy on for size. Ultimately, these collisions force us to engage with our opponents and search for common ground. Interstate spats spur democratic engagement, and democratic engagement is in short supply these days.

These are all pretty atmospheric claims, so let me get more concrete about the kinds of interactions that spillovers foster in order to convince you that living under someone else's law can be a democratic good unto itself. Here I'll move top-down—from the national stage to the local one—to give you a sampling of the sort of democratic engagement that spillovers can catalyze.

Our national politics, of course, are so locked up by polarization that members of Congress prefer naming post offices to passing laws.⁶⁹ It is all too easy for Congress to leave the hard democratic decisions to states

66. This section adapts arguments sketched out in Gerken & Holtzblatt, *supra* note 9, and Gerken & Dawson, *supra* note 61.

67. The idea is so intuitive that some scholars merely refer to it in shorthand, *see, e.g.*, Snyder, *supra* note 59, at 432 (terming interstate spillovers a "problem [that] reflects a lack of representation"), or describe it as a bedrock principle of horizontal federalism, *e.g.*, Florey, *supra* note 59, at 1115.

68. BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2009). Bishop was talking about a far more granular form of sorting than we do here, but we nonetheless think the general point holds.

69. Jeremy W. Peters, *One Area In Which Congress Excels: Naming Post Offices*, N.Y. TIMES: THE CAUCUS (May 28, 2013, 12:38 PM), <http://thecaucus.blogs.nytimes.com/2013/05/28/one-area-in-which-congress-excels-naming-post-offices/>.

and localities, where policymaking is easier because less compromise is required. Federalism licenses national politicians to take the easy way out. In the past, it was too easy for Congress to let states in the Jim Crow South resolve questions of racial equality for themselves. Now it's too easy for Congress to let states navigate the hard questions raised by gun rights, gay rights, and abortion.

It's perfectly fine to decide to devolve authority, of course. But red and blue silos are not the products of a well-functioning national democracy. Democracy doesn't require rigid uniformity, but it does require hashing things out. We should at least deliberate about which departures from the national policy are consistent with our norms and which are outside the bounds.⁷⁰ Nowadays, however, we aren't deliberating; we're punting. States and localities are not pursuing different paths because we've decided that, all things considered, these are worthy paths to pursue. They are doing so because we can't even manage a conversation about national norms in the first place, let alone make a collective decision about when and how they should matter.

Spillovers are one solution to this problem because they force issues onto the national agenda. That's no mean feat these days. When one side forces another to live under someone else's laws, the aggrieved party almost always looks for a federal referee. When California used its robust market power to force the rest of the country to live under its strict environmental policies, auto executives from Detroit begged the EPA to preempt them.⁷¹ When Hawaii threatened to legalize same-sex marriage during the early stages of the marriage equality movement, opponents sought assurances from Congress that they need not recognize those marriages.⁷² Spillovers, in short, pull national elites into the conversation even when they'd rather stay out of it. And once national elites are drawn into the conversation, they will begin pounding the table and pressing for change, thus drawing even more attention to an issue.

Spillovers can also shift the political calculus in Washington. Much of the game on the Hill involves gridlock. When the states are doing nothing on an issue, shutting down a bill in committee or filibustering is a no-brainer for those who favor the status quo. When a state not only enacts a policy, but that policy spills over to other states, the calculus

70. That, indeed, is what some think liberalism is all about. See Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* 12 (1970) (arguing that "the historical basis of liberalism is in large part simply a series of [] recognitions" of "the claims of smaller groups" for exemptions from general rules).

71. *Supra* note 2 and accompanying text.

72. For an account, see MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 57–60 (2013).

changes. Blocking change in DC is no longer enough. Those who favor the status quo suddenly have an incentive to come to the bargaining table. Obstructionism doesn't reap the same rewards and a compromise solution becomes more likely.

Living under someone else's law also generates democratic goods at the state and local level. The "Big Sort" doesn't just excuse national officials from doing the tough work of democratic compromise; it also excuses their state and local counterparts. State legislators always know that some of their constituents are unhappy with the enclave they've built for their citizens, be it red or blue. But arguments for change are usually put forward by people who lack the votes to do anything about it, making it easy to brush their concerns aside. Politicians have few reasons to cross party lines or compromise with dissenters.

The magic of "Our (Horizontal) Federalism" is that one jurisdiction's dissenters are a neighboring state's majority. Those out-of-state majorities can impose policies from the outside that the minority cannot demand from the inside. It's easy to ignore the opposition inside your state. But, counterintuitively, it's hard to ignore the opposition outside the state, at least when it has the votes to impose its views on your unhappy constituents. Oftentimes, as previously noted, state politicians will look to a national referee when they encounter a spillover problem. But when a national umpire is unavailable, spillovers force state and local officials to do what they are supposed to do: politic, find common ground, and negotiate a compromise that no one likes but everyone can live with. As with national officials, then, spillovers force state and local politicians to suit up and get in the game.

Living under someone else's law matters even at the granular level: the habits of everyday citizens. Political enclaves make things too easy for political elites, but they also make things too easy for the rest of us. When we sort ourselves into comfortable right-thinking (and left-thinking) communities, the odds are that we'll ignore those with different views. Enclaves encase us in a protective policy-making bubble, shielded from laws with which we disagree. Opportunities for democratic engagement are reduced. More importantly, incentives for democratic engagement are reduced.

Spillovers enlist everyday citizens in the practices of pluralism. At the very least, they prevent us from being oblivious. When we live under someone else's law, we have to confront our opponents' view directly. Progressives who decry social conservatism might actually have to read the Texas school board's texts and think about why these issues matter to someone else. And before *Obergefell*, opponents of same-sex marriage might find themselves living next door to a same-sex couple that was married in another state. People who insist that

environmental regulations cost too much might find themselves driving inexpensive cars that meet California's low-emissions standards.

Spillovers also make it easier to identify where compromise can be found. In politics, we usually ask voters what they want rather than what they can live with. But the second question is far more important. When we are forced to live under someone else's law, we're forced to answer that second question. We must drive a more fuel-efficient car. Or teach from a textbook more conservative than we'd prefer. Or live next to someone who owns guns or smokes pot that couldn't be purchased in-state.

These real-world experiences matter. It's easy to oppose something in the abstract. Reality is more complicated. It is one thing, for instance, to vote against marriage equality in the privacy of the voting booth. But when a gay couple buys the house next door and shows up with a casserole, that position is harder to maintain. Sometimes when we live under someone else's law, we'll discover that the law isn't as bad as we thought.

Sometimes engaging directly with a policy will cement our view that it's a mistake, and that matters as well. In our highly polarized system, it sometimes seems like we disagree about everything. Spillovers help us sort out annoying differences that prompt little more than a collective shrug from genuinely deep disagreements that require our collective attention. They help us sort out the policies we'd reject in a poll and those we'd actually work to overturn. Spillovers can thus tell us a great deal more than polling or voting about whether a *modus vivendi* can be had. And a *modus vivendi* is a fine thing indeed in a polarized world like our own.

III. CONCLUSION: THE DEMOCRATIC POSSIBILITIES ASSOCIATED WITH A DEMOCRATIC THEORY

I began this essay describing the relative costs and benefits of the vastly different approaches we see in vertical and horizontal federalism. Vertical federalism has one theory to rule them all. It asks the same question in every federalism case—how should the states and federal government interact?—and unsurprisingly gets the same answer in every case. That overarching account gives shape and form to a wide range of cases, but the one-size-fits-all approach makes it hard for courts to calibrate its holdings. States get the same protections in areas where they are strong and where they are weak. The Court is just as likely to second-guess a federal-state bargain where states played a small role in the bargaining process as those where they played an outsized role. Moreover, the narrative is pitched at such a high level of generality that

courts haven't noticed the facts on the ground, which means they haven't paid enough attention to today's regulatory realities.

Horizontal federalism has proved much more adaptive. Because judges and scholars approach the doctrine problem-by-problem and issue-by-issue, horizontal federalism's doctrinal tool box is more variegated and contains fewer one-way ratchets. Moreover, judges have paid more attention to the reality of regulatory overlap and adjusted the doctrine accordingly.

The trouble with horizontal federalism, however, is that judges have no answer to the question that they are adjudicating in every case—how should the states interact? We need an overarching narrative of interstate relations, albeit not the one scholars are busily developing. It's important, of course, to adapt principle to context. But you still need a principle to adapt.

Based on what I said in the first half of this paper, you might wonder whether the game is worth the candle (at least if you are a splitter by trade). To be sure, there's a danger that developing an overarching narrative for horizontal federalism might lead us to make the same mistakes we've made in vertical federalism. And certainly the emerging work in horizontal federalism compounds that worry. The scholars who have begun to develop a sovereignty-based account of horizontal federalism deploy the same sort of one-way ratchet we see in vertical federalism.

While I take these concerns seriously, the sort of democratically inflected account I've proposed should provide a looser, more flexible narrative for the courts than a sovereignty account. Rather than begin with the assumption that all spillovers are bad, my account would force courts to think about the democratic costs and benefits associated with certain spillovers.⁷³ Such an account wouldn't just provide a theory for sorting spillovers;⁷⁴ it would tell judges when they should step in to stop a spillover and when they should leave spillovers to the free play of politics.⁷⁵ One could imagine, then, courts developing a political safeguards account of horizontal federalism, one in which they would harness interstate friction in the service of democratic ends while shutting down the costly spillovers when the game isn't worth the candle. After all, the costs of spillovers are real and important. If states impose too many conflicting regulations on companies, the economy suffers. If states can impose the costs of their policies or inaction on other states, people suffer. And sometimes compromise isn't possible, which means that spillovers can only harden our positions.

73. For an initial effort to do so, see Gerken & Holtzblatt, *supra* note 9.

74. *Id.* at 86-98

75. For an initial take on this question, see *id.* at 113-19.

All of this brings me back to the key claim in this essay—the one idea I hope you’ll have in the back of your mind when you set this essay down. I haven’t suggested that spillovers are an unmitigated good. But we sometimes forget that there are benefits to the friction that interstate conflict generates. When we are forced to live under someone else’s law, we learn to accommodate one another’s preferences, to identify second-best solutions, and to engage in the practice of pluralism. It’s not easy, and it’s certainly not fun. But these democratic benefits should matter when we tote up the costs and benefits of spillovers.

The reasons that the debate has been so one-sided thus far is that the arguments against spillovers—rooted as they are in the principle of self-rule—are so intuitive. At first glance, living under someone else’s law sounds like an unmitigated problem. But it’s worth remembering that while our democratic commitments may begin with self-rule, they should not end with it. Democratic self-rule is often played as a trump card, but it isn’t. Democracy requires us to do just what spillovers prompt us to do: Work it out. And working it out is the most important—and challenging—thing we can do in this polarized age. As I noted early in this essay, everyone would like to live according to his own preferences. But we quickly learn that our preferences differ. Democracy requires us to work it out. And we do so for a simple reason, a lesson that only misanthropes and academics resist—we’d rather live with other people than without them.