1. The ‘vertical gaze’ of federalism scholarship

Like an eighties’ living room built around the television set, federalism scholarship, both in the EU and in the US,\(^1\) is focused on the relation between the center and the periphery. Federalism implies that the states retain some measure of constitutionally entrenched autonomy, that is, that there are certain subject-matters that they alone can regulate and that at least some aspects of that allocation of authority are enforceable as a matter of legal right.\(^2\) Asking how broad that autonomy still is, what political and judicial safeguards exist to protect it, and what values are served by this arrangement has been the bread and butter of federalism scholarship for decades. Structural analysis of the US Constitution or the EU Treaties invariably concentrates on this vertical axis, exploring the relations between the states and the union.

As a consequence, scholars as well as courts have a story about federalism that transcends this or that substantive area of the law. In the US, federalism is said to afford people a choice in the set of laws by which they want to be governed because they can move to a different state – one with lower taxes, for instance, or one in which same-sex couples are allowed to adopt children. Because people can vote with their feet, this is said to create a healthy competition between states that safeguards individuals against abuse.\(^3\) The states also serve as laboratories of democracy, as

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\(^1\) It is no longer controversial to apply the federalism label to the EU, nor should it ever have been. The concept of federalism is much older than the federal state. See generally SR Davis, *The Federal Principle. A Journey Through Time in Quest of Meaning* (University of California Press, 1978).


Brandeis, J., famously put it in *New State Ice Co. v. Liebmann.* It is ‘one of the happy incidents of the federal system’, he wrote, that they engage in public policy experiments that, when successful, may convince a national majority to adopt it as a federal policy and, when they fail, do not affect the whole system. Furthermore, by dividing power not just between different branches of government but also between state and federal governments, federalism is considered a bulwark against tyranny and a guarantee of individual liberty. It also allows minorities at state level to team up into a national majority and thus solves the democratic deficit of ‘confederal’ arrangements that only allow policy rifts along territorial lines. If one treats federalism as going ‘all the way down’ to the local level, as some do, one may add that it gives minorities the opportunity to gain experience in governance because they can be a majority at the local level. In a similar vein, de Tocqueville and JS Mill have argued more broadly that local government serves as a schoolhouse of democracy, teaching people how to engage with each other in governing themselves.

In the EU, that story is less developed and puts more emphasis on unity than on diversity: federalism provides a way for war-prone states to tie themselves to the mast; it provides a permanent negotiating table for states from which they cannot run away, and allows them to make

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4 285 U.S. 262 (1932) (Brandeis, J., dissenting) (stating that it is ‘one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country’ and warning that for the Court to say such experimentation may be ‘fraught with serious consequences for the nation’).
5 Federalist No. 51 (Alexander Hamilton and James Madison) (Clinton Rossiter, ed.), at ___ (‘In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.’)
9 L Van Middelaar, *The Passage to Europe: How a Continent Became a Union* (Harvard University Press, 2014), at ___ (arguing that the decision of the five remaining Member States to continue without France during the empty chair crisis represented a constitutional moment in which the Union moved away from the intergovernmental logic)
credible commitments to each other. Substantively, it permits them to deal with issues that exceed the jurisdiction of any one state and that require action which, because of its scale or effects, cannot be sufficiently achieved by the Member States (Article 5(3) TEU).\(^\text{10}\) Many of the values that Americans ascribe to their federal system also apply to the EU, but this is not often acknowledged.\(^\text{11}\) That said, more so perhaps than the US Constitution, the EU Treaties care about the protection of the ‘rich cultural and linguistic diversity’ (Article 3(3) TEU),\(^\text{12}\) as well as about the safeguarding of Member States’ ‘national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’ (Article 4(2) TEU).\(^\text{13}\)

On both sides of the Atlantic, this story of federalism undergirds more technical debates about the constitutional principles that ought to govern state-federal relations generally. Do both levels of government operate in separate, non-overlapping spheres, whereby the subject-matter determines which level may regulate? Or is such a priori delimitation elusive in practice, and do courts consider both governments to share legislative power in the same area, with the caveat that


\(^{12}\) Judgment in *Las*, C-202/11, EU:C:2013:239, paras 26-27 (the objective of promoting and encouraging the use of an official language within a Member State constitutes a legitimate interest which, in principle, justifies a restriction on free movement); Judgment in *British Film Institute*, C-592/15, EU:C:2017:117, para. 22 (recognition of discretion for Member States in administering VAT law exceptions in cultural services because of cultural diversity between and within Member States). See also the Opinion of AG Bot in the case, EU:C:2016:733, point 23.

federal law trumps state law to the extent that both conflict? Furthermore, what constitutes a conflict – does it also include instances where state law hinders the full effectiveness of federal law’s purposes? Should courts err on the side of the states in determining whether a state and federal norm do in fact conflict? Finally, does safeguarding the federal balance fall to the judiciary or is it chiefly for the political branches to prevent federal overreaching? Any general theory of federalism hinges on the answers to these questions.

Remarkably, federalism theory has largely neglected the relationship between the states and has not developed a similar account of horizontal federalism. While some scholars have analyzed instances of state-state interaction, their efforts were usually limited to a specific instance, a particular area of law or one of constitutional law’s doctrinal silos. Until quite recently (and only in the US), little effort was made to tell an overarching story about the values that horizontal federalism serves, or to examine interstate relations generally. As a consequence, state-state dynamics have remained undertheorized.

The dearth of scholarship on interstate relations may be even more striking with respect to the EU. The cardinal aim of the EU Treaties, after all, is to secure peaceful relations between the EU Member States. While it is eminently important to study the question of competence, the extent to which the Treaties prevent, canalize and solve interstate friction would appear to merit similar academic attention. That such friction has rarely resulted in state v. state disputes, either


15 See the preamble to the Lisbon Treaty (‘Recalling the historic importance of the ending of the division of the European continent…’). See already the preamble to the 1951 Paris Treaty establishing the European Coal and Steel Community (‘Convaincus que la contribution qu’une Europe organisée et vivante peut apporter à la civilization est indispensable au main ten des relations pacifiques’). Note that, in 1951, the ‘founding fathers’ of the European construction were well aware that the peace on the European continent was inextricably linked to peace in the world, as they also considered ‘que la paix mondiale ne peut être sauvgardée que par des efforts creatures à la mesure des dangers qui la menacent’.
before the CJEU or elsewhere,\textsuperscript{16} may partly explain why it has not yet succeeded in capturing lawyers’ imagination.\textsuperscript{17}

2. **Horizontal federalism and spillovers**

What aspects of state-state relations are on the radar of the burgeoning horizontal federalism scholarship in the US? Broadly speaking, like its vertical counterpart, it has a dual focus. On the one hand, it is concerned with cooperation between the sub-entities of federal systems. It may examine, for example, the conditions under which a select number of states (may) have recourse to interstate compacts,\textsuperscript{18} for instance to manage the river basins that they share, spare their citizens from double taxation or share speeding ticket information.\textsuperscript{19} It may also look into the formal and informal mechanisms through which states exchange information, bargain, compromise and collaborate. On the other hand, horizontal federalism is occupied with conflict between two or

\textsuperscript{16} Article 259 TFEU permits a Member State that considers that another Member State has failed to fulfil an obligation under the Treaties to bring the matter before the CJEU. There have only ever been four cases that saw a Member State pitted against another Member State and resulted in a judgment. See the judgments in Hungary v. Slovak Republic, C-364/10, EU:C:2012:630; Spain v. United Kingdom, C-145/04, EU:C:2006:543; Belgium v. Spain, C-388/95, EU:C:2000:244; France v. United Kingdom, 141/78, EU:C:1979:225.

\textsuperscript{17} A notable exception is the recent edited volume by D Kochenov and E Basheska (eds), *Good Neighbourliness in the European Legal Context* (Brill-Nijhoff, 2015). That said, the predominant focus of this work is on specific examples of interstate conflict rather than the notion of federalism; its main contribution is the application of the international law principle of good neighborly relations to the EU context.

\textsuperscript{18} Article I, Section 10 of the US Constitution provides that ‘No State shall, without the Consent of Congress … enter into any Agreement or Compact with another State’. In the EU, such agreements are typically referred to as inter se treaties (although one could arguably also treat enhanced cooperation under Article 20 TEU (and Article 326 to 334 TFEU) as such). One notable example is the Treaty on Stability, Coordination and Governance (also known as the Fiscal Compact or the Fiscal Stability Treaty). Such treaties may not violate the EU Treaties and, following the Court’s seminal judgment in *Commission v. Council* (‘ERTA’), 22/70, EU:C:1971:32, the Member States lack the power to enter into agreements that are liable to affect common EU rules or to alter their scope. See further R Schütze, *Foreign Affairs and the EU Constitution* (CUP, 2014), 120–172 and B de Witte, ‘Old-Fashioned Flexibility: International Agreements between Member States of the European Union’, in G De Búrca and J Scott, *Constitutional Change in the EU. From Uniformity to Flexibility?* (Hart, 2000), 31.

more states. Here the relevant questions look like nuisance law writ large. What kind of harm must the cross-border effects of state policy cause before they have legal consequences? On the basis of what criteria do courts decide where to draw the line when two jurisdictions overlap? More fundamentally, what values are served by asking courts to draw tidy lines, rather than leaving the political process to deal with friction and letting states come to a negotiated if less principled compromise?20 As this last question makes clear, conflict and cooperation are connected in the sense that the latter is often prompted by the former. It is thus apposite to focus first and foremost on conflict.

As is to be expected between neighbors, friction is omnipresent both between the American states and between its EU counterparts.21 Belgium’s decision to recommission its worn-out nuclear plants leads to worries among the residents of cities across the border in Germany, France and the Netherlands. Dutch ‘coffee shops’ undermine the French war on soft drugs, just like Ireland’s restrictions on abortion may be circumvented by travelling to the United Kingdom or, in more recent years, by simply ordering abortion pills online. Similar stories can be told about the US, where the lax gun ownership legislation in one state leads to an increase in shootings in a neighboring state, or the granting of building permits for coal-powered industries by upwind states wreaks havoc among the residents of their downwind neighbors.

20 See generally, HK Gerken and A Holtzblatt, supra note 14.
21 Eyal Benvenisti (‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’, 107 AJIL (2013) 2, at 295) capitalizes on the helpful metaphor of neighbors to explain why being part of the international community involves more stricutures on sovereignty than it used to: ‘In past decades the predominant conception of sovereignty was akin to owning a large estate separated from other properties by rivers or deserts. By contrast, today’s reality is more analogous to owning a small apartment in one densely packed high-rise that is home to two hundred separate families. The sense of interdependency is heightened when we recognize the absence of any alternative to this shared home, of any exit from this global high-rise.’ The same idea applies to the relations between the states of a federal-type system on a path to closer integration.
To an economist, the common theme is clear. In each of these situations, a state’s actions cause ‘spillovers’ outside of its territory. The state thereby ‘externalizes’ some of the costs of its policy, such as the dire environmental or health consequences of it, which are borne by out-of-state residents.\(^{22}\) Economics dictates that costs ought to be internalized,\(^{23}\) which means that they must either be limited to the territory or must give rise to compensation on the part of originating state.

Lawyers take issue with spillovers not so much out of a concern over ensuring the most efficient allocation of scarce resources but because they tend to raise fundamental issues of democracy, sovereignty and subsidiarity.\(^{24}\) The situations portrayed earlier all essentially ‘force residents of one state to live under the laws of another state.’\(^{25}\) That sits uneasy with the notion of self-government that is an integral part of the democratic principle. Whether one thinks that law derives its binding force from the (hypothetical) consent of the governed or from their membership to a political association,\(^{26}\) the residents of neighboring states cannot plausibly be said to be subject to it. Moreover, on a democratic conception of subsidiarity decisions ought to be taken at the level that ensures that those affected by them are appropriately represented.\(^{27}\) On that principle, out-of-state residents must at the very least be involved in the decisions that will affect them. This is the logic behind the Espoo Convention, for instance, which imposes duties of notification and consultation vis-à-vis ‘affected parties’ on states that undertake activities with ‘significant adverse transboundary environmental impact.’\(^{28}\) The upshot is that lawyers tend to see spillovers as

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24 HK Gerken and A Holtzblatt, *supra* note
25 HK Gerken and A Holtzblatt, *supra* note 14, at ____.
26 For a brief overview of the different arguments and theories, see L Green, ‘Associative Obligations and the State’, in J Burley (ed.), *Dworkin and His Critics* (Blackwell Publishing, 2004), 267.
anomalous – they would much prefer the effects of each state’s policies to be contained within its borders.

An important realization of the emergent theory of horizontal federalism is that lawyers’ notion of spillovers needs more nuance. First of all, externalities are not necessarily negative in nature. If Germany, Belgium and France make efforts towards securing clean air, for instance, Luxembourg will benefit from that, too. This example immediately also demonstrates a second point: that some externalities, whether they are positive or negative, are unavoidable. This is the case in particular when dealing with so-called non-excludable goods. In other words, not all spillovers are created equal.

With this in mind, Erbsen, one of the early movers in the field, has sought to develop a typology of spillovers. The scenario in which a state bluntly extends its sovereignty across its borders, for instance over one of its officials or an embassy (dominion), is entirely different from that in which a state changes its policy to attract residents or companies from neighboring states (competition). The situation in which a state acts as sanctuary for behavior, services or goods that other states ban, such as marijuana or same-sex marriage (haven) in turn differs from that in which it favors its own industry or residents over their out-of-state counterparts (favoritism). While these are just four of the eight types of spillovers that Erbsen described, this may suffice to convey the point that spillovers come in many shapes and sizes. One aspect of this project, therefore, is to examine to what extent this typology is helpful in explaining how judges, both in the EU and in the US, have dealt with interstate friction in the past.

29 A Erbsen, supra note 14, at 514 et seq.
There are two further points to consider when using the notion of spillovers in developing a theory of horizontal federalism. First, the distinction between positive and negative externalities may be in the eye of the beholder. Føllesdal has illustrated this point as follows:\(^{30}\)

‘What counts as costs is in part a matter of which objectives are recognized as legitimate ... Consider cases where one unit creates competition by maintaining attractive regulations, for example, lower tax rates and corresponding lower redistributive services to the distraught. Other units or their citizens may regard such competition as a race to the bottom, insofar as businesses exit and thereby limit the ability to tax. This may count as a negative externality for these other units, but the unit that lowers its taxes may disagree – if redistribution is not part of its objectives.’

While he made this observation in the context of a discussion of state-federal relations, it goes to show that developing an objective notion of harm may not be in the cards for this project.

Second, borrowing economists’ concept of spillovers is only helpful to a point. As Gerken and Holtzblatt point out, states often may have a legitimate expectation that their legislation be allowed to have some extraterritorial effects.\(^{31}\) When another state denies it that effect, the issue is one of – for lack of a better term – ‘spillunders’, rather than of spillovers. The best example is the recognition, by state A, of marriages, driver’s licenses, family ties, ... established under the law of state B. Whether as an application of the Full Faith and Credit Clause, the principle of mutual recognition or a vague notion of comity between sovereigns, fact is that in some instances the law travels with a person, across borders. Prima facie, a state’s refusal to recognize this legitimate extraterritorial effect ought to have a place in Erbsen’s typology as well.

### 3. Territoriality and regulatory overlap

This exposes a more fundamental fault line. Like international law, constitutional law is wedded to the territorial character of sovereignty. As the US Supreme Court held in *Pennoyer v. Neff*, the

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\(^{30}\) A Føllesdal, *supra* note 10.

\(^{31}\) HK Gerken and A Holtzblatt, *supra* note 14, at 78 et seq.
authority of the several states is independent and territorial, which implies that they ‘possess exclusive jurisdiction and sovereignty over persons and property within [their] territory’ but that they cannot ‘exercise direct jurisdiction and authority over persons or property without [their] territory.’ A remarkably similar sound may be heard in classic international law, the DNA of the EU Treaties. As the arbitrator in the well-known *Islands of Palmas* case formulated it, back in 1928:

‘Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State’

In both instances, the vision thus is one that treats the states’ retained sovereignty as discrete pockets of exclusive authority that can be tidily delineated. It implies not just that, certain areas excluded, there is no superior authority but also that, within its territory, it must not share its authority. The practical realities of overlapping jurisdictions do not fit well into this model.

Much like its more developed vertical counterpart, horizontal federalism thus seems to be open to a dualist and a cooperative conception. The former is premised on the idea that it is feasible neatly to delineate separate, non-overlapping spheres of power in a meaningful and consistent manner. Because the criterion is clear-cut, courts also are well-equipped to apply it in policing the demarcation line. The latter, cooperative philosophy, by contrast, considers it impossible to draw that dividing line in a principled fashion.

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34 Of course, as J Agnew points out (‘Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics’, 95 *Annals of the Association of American Geographers* (2005) 2, 437, at 441) all forms of polity – whether it is a nomadic kinship, a Greek city-state, a trade pact or a sphere of influence – occupy some sort of space. But state sovereignty is ‘not necessarily predicated on and defined by strict and fixed territorial boundaries’ (emphasis added).
36 EA Young, *supra* note 2, at 36 (stating that dual federalism died in the US because the Supreme Court was unable to draw determinate lines to define the exclusive sphere of state authority).
that there is not a single substantive area of policy within which the states are completely sovereign. In other words, there is no nucleus of sovereignty,\(^{37}\) whether it be military policy, culture or even the states’ relationship with their own employees within which states may take decisions without complying with federal law. The cooperative paradigm thus accepts that areas of power overlap and that authorities share (or jointly exercise) power. This however requires a preference rule on the basis of which courts may decide which exercise of power – that of the center or that of the periphery, that of state A or that of state B? – must give way. Alternatively, it may be left to the political process to organize cooperation in the pursuit of a compromise, either at the interstate or at the federal level.\(^{38}\)

The default way of dealing with interstate relations bears the hallmarks of a dualist paradigm. The governing principle is to keep the spheres of power separate and shield one state from the effects of the exercise of another state’s authority. The judgments quoted earlier support this point. The Supreme Court held in *Pennoyer v. Neff*, that ‘the several States are of equal dignity and authority, and the independence of one implies the exclusion of powers from all others’. The arbitrator in *Islands of Palmas* expressed the same point but added an important nuance:\(^{39}\)

> ‘Territorial sovereignty … involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.’

This passage thus acknowledges that, even under general international law, states have an obligation to take into account the interests of other states when acting within the sphere of their

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\(^{39}\) See note 33, at 839.
own powers. As the *Alabama Claims*\(^{40}\) and later the *Trail Smelter* arbitration established,\(^{41}\) states are also under a positive obligation to protect other states from injurious acts by individuals from within its territory. While the above passage is underpinned by a philosophy of separate spheres, the states’ equality as sovereign members of a legal community constrains their right to exercise that sovereignty. While all of this is self-evident today, both under the Articles of State Responsibility and as a matter of US constitutional law, the (Kantian) point that a state’s sovereignty ends where that of another begins is an important one. What emerges from all this is that horizontal relations between states, whether in the international community at large or in a federal system, occur against the background of three basic principles: territoriality, sovereignty and equality.\(^{42}\)

4. **Defining interstate harm?**

Any theory of interstate relations – at least when one accepts that judicial safeguards remain necessary – must develop some minimally coherent conception of cross-border harm. Unlike in vertical federalism, there is no clear preference rule that determines which set of laws prevails in case of conflict. This poses a challenge. When Colorado’s decision to legalize marijuana gives rise to an increase in the number of drug-related offenses in neighboring states, is this a sufficient basis for a legal claim, provided that the causal connection can be proven? Is the mere risk that Belgium’s worn-out nuclear plants pose to the health and safety of neighboring states’ residents? Could there be circumstances under which the disparate harm created by regulatory competition meets the threshold for harm?

\(^{40}\) *Alabama Claims* (*United States v. Great Britain*) (arbitration), 8 May 1871, *Recueil des sentences arbitrales*, XXIX, 125-134.


\(^{42}\) See generally A Erbsen, *supra* note 14.
In other words, what variables determine whether negative externalities are legally cognizable? In the context of a state’s application for an injunction against an upstream state discharging sewage in a shared river, the US Supreme Court has held that it

‘should only intervene to enjoin the action of one state at the instance of another when the case is of serious magnitude, clearly and fully proved, and in such a case, only such principles should be applied as this Court is prepared deliberately to maintain’

While this remains rather abstract, it suggests that the scale, impact and possibly the salience of negative externalities are all judicially relevant factors. In the EU context, the CJEU has not yet spoken to the issue directly. Nonetheless, it would seem that the principle of sincere cooperation as well as general international law offer a good starting point for an analysis.

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