

Spillover Federalism

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Gerken and Holtzblatt, [The Political Safeguards of Horizontal Federalism](#), 113 *Mich. L. Rev.* 57 (2014).

An essay by [Heather Gerken](#) and James Dawson entitled [Living Under Someone Else's Law](#), 36 *Democracy Journal* 42 (2015) caught my attention several months ago. The topic was horizontal federalism, and the context was “spillovers,” extraterritorial effects that regulations of one state have on other states. Spillovers do not intentionally discriminate against a state’s neighbors or their citizens, do not favor insiders (citizens or businesses), and do not erect protectionist barriers at state lines. But spillovers have consequences, sometimes annoying, sometimes costly, for neighboring states.

Spillover examples include California emissions controls, Colorado marijuana legalization, and red state permissive gun-control regulations. Tighter emissions controls by California raised car prices to buyers in all states as national companies produced cars to comply with California rules. This adversely affected auto buyers elsewhere as surely as industrial pollution affected states downwind of the pollution. Likewise, recreational marijuana legalization increased drug trafficking across state lines, upsetting Colorado’s neighbors. Permissive gun sale laws in red states permit citizens in blue states to cross state lines, buy guns, and tote them home. Same-sex marriage bans in red states led, before the Supreme Court’s *Obergefell* decision, to concern in blue states: would their same-sex marriages be recognized (given ‘full faith and credit’) in neighboring states? The authors cleverly call this situation a “spillunder,” where under-recognition of one state’s law poses potential problems for its citizens when they are in other states.

In a longer article, *The Political Safeguards of Horizontal Federalism*, Gerken and co-author Ari Holtzblatt examine the underdeveloped legal literature and doctrinal signposts concerning spillovers and compare this virtual vacuum with the extensive literature concerning vertical federalism. They then suggest an approach to horizontal federalism premised on insights from vertical federalism scholarship.

As the authors put it, “lawyers hate spillovers.” When a state’s regulations affect its neighbors, the lawyerly instinct is to file suit, demand judicial intervention to halt the intrusion, citing the economic and political friction caused by the state whose legal regime affects its neighbors. Resisting this knee-jerk reaction, Gerken and Holtzblatt trumpet spillover benefits: they force productive conversations among political actors who otherwise would only listen to one side of arguments in accord with local constituency wishes. If the “Big Sort” isolates conservatives into red states and liberals into blue states, spillovers of red policies into blue states and the converse force politicians and their constituents to deal with a broader and less homogeneous regional and national political reality. There are benefits in harnessing this friction: efforts to formulate broader workable policies and greater democratic inclusion.

Perhaps, the authors say, political processes rather than lawyers and courts should sort out spillovers, just as politics generally resolves vertical federalism issues. There are also legal limits to federal power to override state law, but they are minor in the broad scheme of American governance. First, the Commerce Clause can’t be used to regulate “noneconomic” matters ([Lopez](#), [Morrison](#) and [NFIB](#)). But it still affords broad regulatory powers to Congress, especially when coupled with the Necessary and Proper clause. ([Wickard](#), [Heart of Atlanta](#), and [Raich](#)). Second, Congress can’t “commandeer” state legislatures or other officials ([New York](#) and [Printz](#)), but it has plenty of other tools, such as conditional spending, to push states to comply with its policy preferences ([Dole](#)) up to the point of coercion ([NFIB](#)). Third, suits by private attorneys general have hit some sovereign immunity shoals ([Seminole Tribe](#), [Alden](#), and [FMC](#)). But a determined Congress can generally use broad governmental enforcement tools to bend the state to its will. And where federal legislation is valid, it preempts conflicting state regulation, thanks to the Supremacy Clause ([Geier](#) and

[Garamendi](#)).

Contrast horizontal federalism. Does Congress step in whenever one state affects its neighbors? Generally no. If a state discriminates to favor (or disfavor) its own citizens and businesses, the judiciary might step in to manage horizontal conflict using the “dormant commerce clause” doctrine. Explanations range from theoretical (Congress is too busy, states could block remediation in Congress) to practical (enforceable legal rules generally deter most self-serving by states). But dormant commerce doctrine is much less robust for dealing with spillovers: one state’s regulations may impose externalities on neighbors so long as local benefits exceed those costs ([Pike](#)) and rarely does the Court’s calculus find a “burden” excessive.

Likewise, there is a bit of due process doctrine regulating spillovers. Where local juries go “whole hog” in imposing punitive damages on companies for conduct outside the state, the Court has found that would prevent other states from deciding “what conduct is permitted or prescribed” in the second state ([BMW v. Gore](#) and [State Farm v. Campbell](#)).

The problem Gerken and Holtzblatt systematically confront, to my knowledge for the first time, is whether political or legal models will best handle spillovers not systematically governed by federal law. They take on the problem first by showing that almost any state regulation will cause some level of spillovers onto neighbors. These spillovers are all over the board in how much costs they impose—from the trivial to highly significant. Then they argue that spillovers have beneficial effects politically; for example, state pushback operates as a check on the federal government. Likewise, state spillovers force neighboring states to confront each other concerning matters on which their preferred policies are antagonistic. This provides room for dissension and democratic discussion that might not occur if citizens with polarized policy preferences sorted perfectly into red states and blue states. There are some costs from the friction of spillovers, but no such issues today are even remotely close to splitting the country, as slavery did in the 19th century. Rather, they argue, “when citizens of one state must accommodate the preferences of another’s, they are enlisted in the practice of pluralism ... A vibrant democracy depends not just on choice but on accommodation, compromise, and engagement ... Spillovers force engagement and thereby spur the processes on which our democracy depends.” (Pp. 88-89.) Spillovers help break up enclaves and overcome political inertia. They sometimes lead to a national policy; other times they lead to pluralism and tolerance.

Gerken and Holtzblatt consider arguments opponents might have to their view that spillovers, despite costs, are often best left to political processes. First, they consider sovereignty arguments—that no state should be able to regulate in ways that spill outside its borders. But “silos” of sovereignty bear little relationship to how states interact in the real world. Second, can the courts even deal with spillovers? Courts can end disputes and declare winners, but rarely does victory foster compromise and democratic engagement. Further, Gerken and Holtzblatt argue that both horizontal and vertical conflict push the nation toward compromise: it hoists the “most honorable and least fun [aspect]” of democracy upon the elected, not the appointed.

Finally, the authors look at the institutional methods for safeguarding horizontal federalism. First, Congress can “referee interstate relations” if it will—and it should be encouraged to do so. Second, NGOs, interest groups, and institutions like the ALI have roles to play in mediating such conflict. Third, courts should play a “limited role” in horizontal federalism disputes “when the political process is unlikely to generate a solution.” They suggest that the courts look to Full Faith and Credit doctrine, which requires submission to “hostile policies” of other states “because the practical operation of the federal system ... demand[s] it.” (P. 118.)

Democracy, the authors concede, is about self-rule. Yet, as they (rightly) point out, democracy also requires “interaction, accommodation, and compromise” – the salutary values a functioning account of horizontal federalism requires. To properly balance the countervailing principles of self-rule and compromise, the author’s finally ask states to “work it out.”

What I find appealing about this article is that it takes a concept—spillovers—and it work[s] out potential legal and

nonlegal approaches to dealing with the concept. It cites the fragmentary scholarship touching on the topic and integrates it into a broader pattern. Then, sensibly, while working through a number of core issues connecting the bits of scholarship, it forges a framework even while calling for more specific scholarly attention to its component parts. As they note: “We are plainly at the beginning of the conversation ... [but surely it’s a conversation] worth having.” (P. 120.) Indeed.

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