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SOLIDARITY FEDERALISM

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Studies of federalism, especially in the United States, have mostly centered on state autonomy and the vertical relationship between the states and the federal government. This Article approaches federalism from a different perspective, one that focuses on state solidarity. We explain how solidarity structures found in constitutional federations—including the United States—generate solidarity obligations, such as duties not to harm other states or their citizens. These duties give rise to principles, such as nondiscrimination, that are vital to federalism. Focusing on interstate relations and relations between states and citizens of other states, we argue that affirming both solidarity and autonomy as crucial—indeed constitutive—elements of federalism enables us to better understand our federation and enriches federalism discourse in general. For example, we show that solidarity works in tandem with state autonomy to generate the traditional values of federalism, such as diversity, efficiency, experimentation, and pluralism.

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INTRODUCTION

During the unprecedented national COVID-19 crisis, states resorted to protectionism and "us versus them" thinking. For example, Florida's governor suggested only Floridians would be allowed to disembark from an infected cruise ship.[1] Other states restricted interstate travel by imposing quarantine orders or border stops for vehicles with out-of-state licenses.[2] Officials even cast other states and their residents as vectors of disease.[3] The pandemic also led to hoarding behavior of

1 David Oliver, Morgan Hines, Chris Woodyard & Andrea Mandell, *Florida Gov. Ron DeSantis to Accept State Residents off Holland America Cruise Ships*, USA TODAY (Apr. 2, 2020, 1:38 PM), https://www.usatoday.com/story/travel/cruises/2020/04/01/coronavirus-thousands-carnival-passengers-sea-holland-america-florida/5101845002/ [https://perma.cc/378U-4XQW].

2 Several states issued quarantine orders. *See, e.g.*, Office of Governor Mike Dunleavy, COVID-19 Health Mandate No. 10.1 (July 14, 2020), https://gov.alaska.gov/wp-content/uploads/sites/2/03232020-SOA-COVID-19-Health-Mandate-010.pdf [https://perma.cc/V3V3-7XKL]; Office of Governor Ned Lamont, Exec. Order No. 7III (July 21, 2020), https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7III.pdf [https://perma.cc/96EE-H58F]; Office of Governor Michelle Lujan Grisham, Exec. Order No. 2020-056 (Aug. 6, 2020), https://cv.nmhealth.org/wp-content/uploads/2020/08/Executive-Order-2020-056.pdf [https://perma.cc/DSS8-4H6Q]; Office of Governor Andrew Cuomo, Exec. Order No. 205 (Jun. 24, 2020), https://www.governor.ny.gov/sites/default/files/atoms/files/EO205.pdf [https://perma.cc/J3TZ-QXPN]. Other states imposed border stops. *See, e.g.*, Office of Governor Ron DeSantis, Exec. Order No. 20-86 (Mar. 27, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-86.pdf [https://perma.cc/W8R7-WMZ8]; Office of Governor Gina M. Raimondo, Exec. Order No. 20-14 (Mar. 28, 2020), https://governor.ri.gov/executive-orders/executive-order-20-14/ [https://perma.cc/LFQ7-ET7R]; Office of Governor Greg Abbot, Exec. Order No. GA-12 (Mar. 29, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-12_roadway_quarantine_for_COVID-19_IMAGE_03-29-2020.pdf [https://perma.cc/WH8H-9YS7].

3 *See, e.g.*, Ben Tobin, *Gov. Andy Beshear to Kentuckians: Do Not Travel to Tennessee*, COURIER-J. (Mar. 27, 2020, 7:08 PM), https://www.courier-journal.com/story/news/2020/03/27/coronavirus-kentucky-beshear-says-not-travel-tennessee/2930456001/ [perma.cc/8FEX-QB5K] (Democratic Governor of Kentucky, Andy Beshear, warned Kentuckians against travelling to Tennessee, stating, "[i]f you ultimately go down over that border and

all kinds—from essential medical equipment to bar-exam seats.[4] In short, states responded to the pandemic in ways that seemed to undermine the federal union.

If such actions were taken by a country against citizens of other countries, we might *morally* condemn them. But when, in a federation, states direct such actions to residents of fellow states, they may trigger *legal* consequences for states.[5] Understanding why states in a federation may not do to one another what independent countries do implicates principles that go to the very core of federalism. Despite its immensity, however, federalism scholarship in the United States does not shed much light on our COVID-19 example. This is for two reasons. First, conventional federalism studies focus disproportionately on the vertical relationship between the states and federal government, typically neglecting the horizontal relationships among the states or among the states and citizens of other states.[6] Second, the study of federalism—especially U.S. federalism—is preoccupied with state autonomy, rather than with duties states owe each other.[7]

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go to a restaurant or something that's not open in Kentucky, what you do is you bring the coronavirus back here in Kentucky."); *Coronavirus Latest: Florida Governor Mandates 14-Day Self-Quarantine for Travelers Coming from New York, New Jersey and Connecticut*, CBS PHILA. (Mar. 24, 2020, 7:14 AM), https://www.cbsnews.com/philadelphia/news/coronavirus-latest-florida-governor-mandates-14-day-self-quarantine-for-travelers-coming-from-new-york-new-jersey-and-connecticut/ [perma.cc/8ET5-CVST] (Republican Governor of Florida Ron DeSantis declared that every flight from New York City to Florida "has somebody on it who's positive for Covid-19.").

4 *New York Gives Priority Registration to Local Law Schools for September Bar Exam*, THE INT'L LAW. (May 11, 2020), https://www.theinternationallawyer.org/2020/05/new-york-bar-exam-priority-to-local-law-schools/ [https://perma.cc/5GUX-34EJ] (indicating that in-state law students would be given priority registration for the New York bar exam).

5 *See* discussion *infra* Sections I.A and II.A.

6 *See* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 529 (2008) (referring to doctrines implicating states' horizontal relationships as "chronically undertheorized and unstable"). *But see infra* note 8.

7 *See* Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1556 (2012) (referring to "champions of sovereignty and process federalis[m]" as "shar[ing] a similar vision of state power, one that emphasizes autonomy over integration, independence over interdependence"); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1082 (2014) (arguing that state autonomy is central to our political order); Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309, 1337 (2000) (defending the *New York-Printz* anti-commandeering rule on the ground that it expresses the importance of state autonomy).

A robust literature also exists on whether and how state autonomy should be protected or advanced. *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426–27 (1987) (arguing that the Framers consciously designed a political structure that promotes state autonomy because that autonomy allows state and federal governments to check each other, which protects the rights retained by the sovereign people); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1404–05 (1997) (arguing that judicial protection of state autonomy, rather than judicial protection of individual rights at

Our COVID-19 example does not, however, fit neatly into a vertical or autonomy analysis. Although the autonomy-federalism account is helpful—it explains why states would see themselves as competitors over scarce resources and as special guardians over their own citizens' welfare—it does not explain our intuition that the states' offenses are not merely of moral, but also of legal, even constitutional, significance. To explain that, we must broaden our focus.

This Article draws on two trends in legal scholarship. One is a nascent literature on horizontal federalism that offers a framework for thinking about interstate dispute resolution.[8] The other is a discussion of "federal solidarity" in comparative and theoretical work,[9] that

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the expense of state autonomy, is the best way to protect liberty); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 123–30 (2004) (arguing that courts should protect state autonomy by emphasizing process-based enforcement, like the anti-commandeering doctrine, instead of relying on substantive enforcement); James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 1 (2013) (describing how political parties function not only to raise state-level issues to the national scene, but also how they serve as a "reverse pathway by which national politics could influence, and in many cases overawe, any independent state-level politics").

8 *See* Erbsen, *supra* note 6, at 495 n.2 (citing horizontal federalism work by Lea Brilmayer, Samuel Issacharoff and Catherine M. Sharkey, Douglas Laycock, Gillian E. Metzger, and Mark D. Rosen); *id.* at 502 n.22 (citing Judith Resnik and Scott Fruehwald for use of the term "horizontal federalism"); Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 263–64 (2005) (describing how states moved from a policy in the 1930s under which they were content to banish people convicted of crimes to sister states to the modern approach under which states "make common enterprise in handling criminal offenders"); Ann O'M. Bowman, *Horizontal Federalism: Exploring Interstate Interactions*, 14 J. PUB. ADMIN. RSCH. & THEORY 535, 539–41 (2004) (collecting data on interstate compacts, multistate lawsuits, and uniform state laws; recognizing that such cooperation generates informal multistate administrative networks; concluding that states are "seldom persistently cooperative or uncooperative"); Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 739–58 (2008) (highlighting the role of organizations such as the U.S. Conference of Mayors and the National Governors Association in policy migration); Noah D. Hall, *Toward A New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 407, 409 (2006) (closely analyzing an instance of "cooperative horizontal federalism," namely a proposed interstate compact to address water management in the Great Lakes region as an alternative to interstate lawsuits and the "vertical federalism [that] has dominated most environmental policies"); JOSEPH F. ZIMMERMAN, HORIZONTAL FEDERALISM: INTERSTATE RELATIONS 1 (2011) (defining various aspects of horizontal federalism, include specific constitutional clauses and doctrines, as well as mechanisms of interstate competition and interstate cooperation).

9 *See, e.g.*, Hugo Cyr, *Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism*, 23 CONST. F. CONSTITUTIONNEL 20, 21, 31 (2014) (Can.) (arguing that federal partners "intend to work collectively for the common good of a shared citizenry," and describing "federal solidarity" as "creat[ing] certain positive duties of assistance" and preventing states from "imposing certain negative externalities on other federal partners"); Erika Arban, *Exploring the Principle of (Federal) Solidarity*, 22 REV. CONST. STUD. 241, 242–43 (2017)

stretches us to think beyond the state autonomy paradigm. The principal insight of the federal solidarity literature is that, in addition to possessing entitlements to act autonomously, the federal government and the states also have obligations to each other,[10] and those obligations arise out of the shared goal to preserve and enhance the benefits of federal union.[11] Such obligations are said to include duties to work

(Can.) (noting that although "no agreement exists on its exact meaning and scope," federal solidarity refers to "duties of reciprocity among the parties involved"); Anna Gamper, *On Loyalty and the (Federal) Constitution*, 4 VIENNA ONLINE J. ON INT'L CONST. L. 157, 160 (2010) (Austria) (defining "federal loyalty" as "a mutual consideration of interests [that] neither favors the federation nor the constituent states"); *id.* at 161 (referring to German constitutional interpretations that require states and the federal government to cooperate with each other to "guarantee as smooth and harmonious a functioning of the federal system as possible"). A similar concept also has been described under other terms, including "federal fidelity" and "federal loyalty." *See* Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 739 (2004); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 283 (2001).

10 Scholars have imported concepts of federal solidarity to analyze vertical federalism in the United States. The most common approach undertaken by U.S. scholars is to compare the U.S. and German systems, with an emphasis on the German concept of *Bundestreue*, which is translated as "federal comity," "federal loyalty," or "federal fidelity." For articles exploring the implications of German *Bundestreue* for the United States, see, for example, Halberstam, *supra* note 9; Jackson, *supra* note 9; Clifford Larsen, *States Federal, Financial, Sovereign and Social. A Critical Inquiry into an Alternative to American Financial Federalism*, 47 AM. J. COMPAR. L. 429 (1999); Mark Tushnet, *What Then Is the American?*, 38 ARIZ. L. REV. 873 (1996). Although Halberstam's account of federal fidelity in the United States was almost entirely vertical, he did consider its implications for Dormant Commerce Clause doctrine, which is in part a horizontal federalism topic, although he reached different conclusions from ours. *See* discussion *infra* Section III.B (explaining our differences with Halberstam). In addition, homegrown conceptions of "cooperative federalism" echo this work on federal solidarity by emphasizing that the vertical relationship between the states and federal government may be characterized more by cooperation than by competition. *See* Gerken, *supra* note 7, at 1557–58. Cooperative federalism scholars are beginning to explore the horizontal dimension of federalism. *See* Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57 (2014) (exploring the political implications of horizontal federalism and discussing the political safeguards of horizontal federalism); Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1703 (2018) (cataloging ways states competed and worked together—even across party lines—to achieve their preferred policy as part of the Affordable Care Act's implementation).

11 Under one recent definition by a Belgian scholar, federal solidarity encompasses: (1) duties to avoid imposing negative externalities on another level of government, (2) duties to involve other levels of government in measures likely to affect them, and (3) duties to assist other levels of government. PATRICIA POPELIER, DYNAMIC FEDERALISM: A NEW THEORY FOR COHESION AND REGIONAL AUTONOMY 153 (2021) (conclusion of literature and qualitative empirical reviews). As Halberstam put it, rather than conceiving of levels of governments as engaged in "arms length relations," under a fidelity approach, each level "must always act to ensure the proper functioning of the system of governance as a whole." Halberstam, *supra* note 9, at 733–34.

toward the common good, duties not to harm, and duties of good faith, reciprocity, cooperation, and trust.

Marrying these two literatures—on horizontal federalism and federal solidarity—allows us to understand that solidarity duties exist not only vertically, but also horizontally between and among states and between states and residents of other states. We use the term "solidarity federalism" to refer to the ways that federal solidarity in both its vertical and horizontal dimensions is promoted and enforced within a federation, including through federal judicial review and federal politics.

In Part I, we discuss the relationship between solidarity and autonomy, and we explain how solidarity values arise from constitutional structures of federation.[12] To do so, we analyze the characteristic structures of federal solidarity, namely, state membership in the federation and nested federal-state citizenship. Analogizing federal membership to a long-term relational contract,[13] we explain that states in a federation have obligations that run to *other states*. We use nested citizenship to derive obligations that run from states to *residents of other states*. These obligations include duties not to harm other states and their residents. These duties, in turn, give rise to federal solidarity's characteristic features, which include cooperation, trust, mutual aid, and nondiscrimination. Part I concludes by observing that autonomy and solidarity together generate the traditional "values" of federalism—including accountability, accommodation of individual choice, efficiency, individual liberty, and voter satisfaction.[14]

Part II identifies solidarity federalism in both U.S. constitutional doctrine and U.S. politics. The main argument of Part II is that, rather than mediating interstate conflicts merely to facilitate state autonomy, the Supreme Court actively enforces affirmative interstate solidarity duties in decisions that identify federal solidarity as an implicit

12 *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (identifying six modalities of constitutional interpretation: historical, textual, structural, doctrinal, ethical, and prudential). We focus here on structural interpretation—which Bobbitt defines as "inferring rules from the relationships that the Constitution mandates among the structures it sets up." *Id.* At a minimum, a federal constitution should be interpreted to maintain the federation as a form of government, which would support maintaining a balance between solidarity and autonomy appropriate to the particular national context.

13 *Cf.* Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998).

14 "Federalism values" is a term of art used in the literature to refer to, variously, outcomes of federalism as a form of government, normatively desirable features of federalism, ideals, and so on. *See* references *infra* note 42.

constitutional value.[15] Using examples from Dormant Commerce Clause and interstate sovereign immunity caselaw, we show that understanding federal solidarity can demystify constitutional doctrine.

Part III considers the implications of solidarity federalism for the study of federalism. Specifically, we show how solidarity federalism adds nuance to preexisting federalism theories, such as competitive federalism, as well as improves our understandings of both horizontal and vertical federalism. Finally, we conclude by discussing constraints on federal solidarity and noting the challenges to federal solidarity that arise in conditions of deep social and political divisions.

In acknowledging federal solidarity, a clear implication emerges: A particular state's self-interest can no longer be said to stop at its own borders. Rather, solidarity expands our understanding of the very notion of state self-interest to include at least some regard for the rest of the union. Although we do not advocate for (or claim to know) the optimal amount of solidarity for our federation, the challenges of COVID-19 suggest that, at least sometimes, solidarity must be enforced, whether by courts or politics.

Unlike in other federations, our public discourse rarely refers to solidarity. But as Justice Cardozo's famous admonishment suggests, "The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[16] Autonomy alone cannot sustain a federation. And despite our lack of solidarity discourse, our federalism encompasses solidarity values, and we should acknowledge and assess the ways that *both* solidarity *and* autonomy support our federation. Recognizing solidarity federalism and acknowledging the essential—indeed constitutive—role it plays in our federation means that, when conflicts arise, autonomy values do not necessarily trump solidarity values, and prioritizing solidarity values is not anathema to our constitutional system.

I. SOLIDARITY STRUCTURES AND FEDERALISM VALUES

This Part provides an affirmative case for federal solidarity by identifying the constitutional structures that give rise to federal solidarity. Before providing our structural account, however, we spend a moment on the term "solidarity."

The concept that we label "solidarity" goes by different terms in theory and doctrine abroad, including "loyalty," "fidelity," and

15 Specifically, we argue that state solidarity exists within a pluralist interpretive approach to the Constitution. *See* BOBBITT, *supra* note 12, at 12–13 (discussing plural modalities of constitutional interpretation).

16 Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

"cooperation."[17] We use "solidarity" for several reasons. First, solidarity is the dominant terminology, and using it will allow us to connect our arguments to the global study of federalism. Although we are aware that the term "solidarity" tends to evoke either interpersonal relationships and feelings or group identification through shared norms and social bonds,[18] neither we, nor other federal theorists, use solidarity in the sense of feelings. Federal solidarity instead refers to the idea that federal partners have a "legally binding duty . . . to collaborate . . . with each other for the common good of the federation."[19] Second, the term "solidarity" is more capacious than terms that have been used in some countries, such as "fidelity" or "cooperation," because "solidarity" also encompasses duties to redistribute, duties not to harm, and duties not to discriminate. As we will explain, these additional duties are integral to federation.[20]

Returning to constitutional structure, we observe that scholars have identified certain constitutional structures of state autonomy, including state equality, enumeration of powers, the reservation to states of powers not delegated to the federal government, and, of course, the very existence of states qua states within a constitution itself.[21] State

17 *See* Cyr, *supra* note 9, at 30–31 (noting that Germany and Belgium refer to "federal loyalty;" Austria to "mutual consideration;" Switzerland to "mutual help," "assistance," and "collaboration;" South Africa to "mutual trust and good faith"); Arban, *supra* note 9, at 251, 255 (referring, in addition to the countries mentioned by Cyr, to "loyal collaboration" in Italy and Spain, and a "mutual duty of genuine cooperation and assistance" in the European Union); Halberstam, *supra* note 9, at 764 (discussing the explicit European Union "duty of [sincere] cooperation," as well as decisions of the Court of Justice of the European Union that invoked "the solidarity which is [sic] the basis . . . of the whole of the Community system" (quoting Joined Cases 6 & 11/69, Comm'n of the Eur. Cmtys. v. French Rep., 1969 E.C.R. 525 para. 16)).

18 *See* Siegwart Lindenberg, *Solidarity: Unpacking the Social Brain*, *in* SOLIDARITY: THEORY AND PRACTICE 30, 36–41 (Arto Laitinen & Anne Birgitta Pessi eds., 2014).

19 Arban, *supra* note 9, at 254.

20 Finally, whereas some commentators use the term "solidarity" to refer exclusively to *fiscal* arrangements, we find that usage too narrow. *See, e.g.*, POPELIER, *supra* note 11, at 178 (reserving the term "solidarity" for the fiscal context and using "cohesion" outside the fiscal context). Associating "solidarity" with particular fiscal arrangements between states—especially fiscal equalization, which is a system of interstate money transfers that is found in many other federations—has led commentators to mistakenly conclude that because the United States lacks explicit fiscal equalization payments, it also lacks federal solidarity. We will return to this point in *infra* Section II.B. Our goal in this Article is to broaden the conception of federal solidarity—not only from the vertical to the horizontal, but also from fiscal to other substantive areas.

21 *See* Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389, 1405–06 (2010) (finding "a commitment to state autonomy and the principle of limited federal government embedded in the Article I enumeration"); Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005) (tracing the history and impact of reserved powers on state autonomy in the Supreme Court); Gillian E. Metzger,

entitlements arise from these structures, such as entitlements to territorial integrity and independent policymaking powers. Constitutional autonomy structures, as well as the state entitlements they generate, have been understood to produce and protect federalism's characteristic features, including competition, diversity, experimentation, and pluralism.

Similarly, we identify two main types of structures that generate and protect federal solidarity obligations: membership in the federal union and nested federal-state citizenship. Whereas federal membership largely creates intergovernmental obligations, obligations arising from nested citizenship run from states to citizens. We discuss federal membership and nested citizenship because we think they are the most important (and universal) structural sources of federal solidarity, but we do not mean to suggest that they are the only ones, and later, when we discuss the United States, we will encounter additional, U.S.-specific, solidarity structures.[22]

In the same way that autonomy structures generate state *entitlements*, solidarity structures can be understood to generate solidarity *duties*, such as duties of good faith, cooperation, and mutual aid, as well as duties not to harm federal partners or federal citizens.[23] State duties arising from solidarity structures, in turn, can be understood to give rise to federalism's more solidaristic, but still characteristic, features, such as free movement, accommodation, mutual trust, nondiscrimination, reciprocity, and self-restraint. We also explain that, although the normatively desirable outcomes of federalism—including accountability, accommodation of individual choice, efficiency, individual liberty, and voter satisfaction—typically have been associated with autonomy, they arise from *both* autonomy and solidarity. Thus, we argue that autonomy and solidarity together produce federalism's values. We conclude this Part by observing that because states may not always satisfy their solidarity obligations, federal institutions—such as legislatures or courts—may be called to enforce those obligations, a process we refer to as "solidarity federalism."

Congress, Article IV, and Interstate Relations, 120 HARV. L. REV. 1468, 1477, 1512 (2007) (identifying protections of state sovereignty in the Constitution).

22 *See* our discussion, *infra* Part II, of the Dormant Commerce Clause and interstate sovereign immunity.

23 *See* Halberstam, *supra* note 9, at 789–817 (making this point with respect to the vertical relationship between states and the federal government). We do not believe it to be controversial to claim that solidarity duties run horizontally as well as vertically. For example, in discussing German *Bundestreue*, Vicki Jackson noted that the described "pro-federal comity" concept "presumably" imposed obligations "among the subnational governments." Jackson, *supra* note 9, at 284. Jackson's tentativeness toward describing the horizontal dimension reflects the traditional German focus on the vertical when discussing solidarity federalism.

A. Structural Account of Solidarity

Relying on prior theoretical and empirical identifications of federalism's most important solidarity structures, this Section explains how the constitutional structures of federal solidarity generate the duties of federal solidarity, including duties of good faith, cooperation, and mutual aid, as well as duties not to harm federal partners or federal citizens. We explain that, together with the autonomy entitlements of federalism, these solidarity duties generate the beneficial outcomes of federalism, which include voter satisfaction and individual liberty. For clarity, we also delineate the ways in which the obligations of federal solidarity go beyond the comity obligations that exist among independent countries.[24]

1. Federal Membership

Just as theorists have associated certain constitutional structures, such as enumeration and reservation of state powers, with state entitlements running against the federal government, federalism theorists have associated a variety of constitutional structures with solidarity obligations running among federal partners, especially those running vertically between the states and federal government.[25] Such solidarity structures include, among others, constitutional features memorializing that the states intend to form a permanent federal union; state participation in federal legislation or constitutional amendment; acceptance of judicial review (or other methods of mediation) to resolve interlevel disputes; and even express constitutional provisions demanding federal loyalty, solidarity, and/or money transfers among the federal members.[26] We refer to such structures—which differ from

24 Independent countries recognize international obligations of trust, comity, and recognition. *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015).

25 *See generally* POPELIER, *supra* note 11.

26 In her recent book, Patricia Popelier comprehensively analyzed theoretical scholarship as well as the world's actual federal constitutions to identify the unique characteristics of what she called federal "cohesion." Popelier used "cohesion" as we use "solidarity." *See id.* at 52 (defining cohesion as "aim[ing] to secure the integrity of the entire system by linking all tiers through mutual respect, common interest, and solidarity"); *see also id.* at 77 (describing her project as developing "indexes [that] seek proxies for solidarity, the shaping of a sense of community, and intergovernmental dialog"). Popelier identified seven structures of federal "cohesion," which we would call solidarity structures. *See id.* at 90–91 (eternity, meaning a perpetual commitment to union); *id.* at 99 (consent, meaning a requirement that states consent to constitutional amendment); *id.* at 103 (homogeneous rights, meaning a requirement that states interpret rights consistently with federal rights); *id.* at 109, 118 (state representation in federal lawmaking); *id.* at 163 (methods to resolve inter-level disputes); *id.* at 151 (explicit or interpreted requirements of federal loyalty); *id.*

federation to federation—collectively as the terms of "federal membership." We introduce this term to allow for easier analysis at a theoretical level, though we acknowledge myriad differences among the world's federal constitutions as to which particular solidarity structures they display.

In this subsection, we argue that membership in a federal union generates obligations in states. To illustrate our argument, we analogize federation to a type of *long-term relational contract*.[27] The relational-contract concept was developed to describe business relationships, and even personal relationships such as marriage, that do not easily fit into the conventional contract mold because they include so many unpredictable and contingent elements. Relational contracts describe situations where the parties make a "long-term commitment to pursue shared goals, the fulfillment of which will enhance [their] joint welfare."[28] Because uncertainty and complexity complicate the achievement of joint goals, the parties' obligations in a relational contract cannot be specified fully in advance.[29] As a result, norms that relate to the achievement of joint goals govern the parties' behavior.[30]

As with relational contracts, in a federation the full set of state obligations that emerge from federal membership cannot be stated with specificity in advance. Instead, states as parties to a federation describe their obligations and entitlements only in very general terms, and they rely, at least to some extent, on shared goals to generate norms to guide behavior. The most important shared goal in any federation is to preserve the union as a source of benefits for its citizens.[31] As a

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at 172 (fiscal arrangements); *see also* Gamper, *supra* note 9, at 169 (deriving what she termed "federal loyalty" from similar structures).

27 Relational contracts are those in which "parties are incapable of reducing important terms of the arrangement to well-defined obligations" due to complexity or uncertainty. Goetz & Scott, *supra* note 13, at 1091; *cf.* MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 220–22 (2006) (analogizing "the constitutional relationships between the sections [North and South]" to a relational contract, and emphasizing, in the context of the South's secession, that relational contracts only survive so long as "cooperation remains mutually beneficial").

28 Scott & Scott, *supra* note 13, at 1229.

29 *See* Goetz & Scott, *supra* note 13, at 1091 (arguing that contracts exist on a continuum from "perfectly contingent" conventional contracts, in which all terms can be specified in advance, to "entirely relational").

30 *See generally* Goetz & Scott, *supra* note 13.

31 The idea that the federation should endure is premised on welfarist arguments that may in turn depend on economic stability or growth, military security, democratic stability, and so forth. *See* STEPHEN TIERNEY, THE FEDERAL CONTRACT: A CONSTITUTIONAL THEORY OF FEDERALISM 177 (2022) (the social contract implies a constitutional commitment, by territorial units, to "the successful functioning of that constitution for the common good of every territory"). Other types of state membership characterized by a common purpose likewise may generate interstate solidarity. For example, a military alliance of states

result, the goal of maintaining the union as an instrument for advancing the welfare of the union's citizens becomes a source of norms for the actions of federal partners. This goal generates in the parties to the federal contract—the states and federal government—obligations to avoid taking actions that undermine the union. We consider these obligations to include duties not to harm federal partners, as well as duties of good faith, cooperation, and mutual aid. Although such duties have been recognized in the vertical dimension, we emphasize that they also exist in the horizontal dimension. Specifically, we argue states have obligations not to harm each other (for example, by imposing costly externalities on each other), and they possess duties to cooperate with and aid each other.

The duties of federal membership, in turn, generate the characteristic features of solidarity, including accommodation, mutual trust, reciprocity, and self-restraint. For example, the duty not to harm fellow federal members removes certain options—including violence—that a state might otherwise use in the realm of international relations, thus forcing states to resolve any disagreements cooperatively. Unlike with independent countries, the states in a federation engage in a mutual project—the maintenance of the union—which endows them with a joint purpose. Thus, whereas independent countries may pick and choose which other countries they will cooperate with and which they will support (with, for example, foreign or military aid), in a federation, expectations of cooperation and support run to all sister states without distinction. Likewise, reflecting their perpetual (or at least open-ended) commitment, states in federations presumably employ longer time horizons in evaluating their interests and interactions vis-à-vis other states (and the federal government) as compared to when they evaluate their interests relative to other parties that are not fellow partners in the federation. Knowing that they will be engaged indefinitely in a large set of repeated interactions counteracts state impulses to act on short-term interests in ways that harm other states or residents of other states. In this way, federal membership both generates and promotes the characteristic features of federal solidarity in both the horizontal and vertical dimensions.

2. Nested Citizenship

Scholarly focus on vertical federalism and vertical solidarity has obscured the importance of nested citizenship as a solidarity

committed to defeat a common enemy may, at least temporarily, generate duties similar to those discussed here. But the permanence of federal membership enhances solidarity in the federal context.

structure,[32] but in our view, nested citizenship is a crucial element of federal solidarity, equal in importance to federal membership. Nested citizenship is the idea that federal citizens are simultaneously citizens of both the federation and their state and that those citizenships are linked.[33] Nested citizenship creates uniform individual liberties throughout the federation. Among the most important rights of federal citizenship are the right to free movement across the federation and the right to be free from discrimination based on state origin.[34] These rights, in turn, give rise to solidarity obligations that run from

32 Perhaps because her account was almost entirely vertical, in her recent comprehensive account of federal solidarity structures, Patricia Popelier did not recognize nested citizenship as a structure of solidarity, although she did recognize an important related structure of solidarity, namely, the degree of harmonization between federal and state rights. *See* POPELIER, *supra* note 11, at 109. Hugo Cyr briefly emphasized the importance of nested citizenship to federal solidarity, noting "the need for *each level* of government to protect and promote the interests of a shared citizenry forming a common body politic." Cyr, *supra* note 9, at 21 (emphasis added). Stephen Tierney went further, explicitly seeing nested citizenship, as we do, as generating obligations running from states to citizens of other states. *See* TIERNEY, *supra* note 31, at 133–52 (viewing the notion of "multiple demoi" as important to establishing obligations of "horizontal reciprocity"). But in Tierney's view, "horizontal reciprocity" consists only of a need to maintain "some level of material parity across territories." *Id.* at 245. Although not explicitly writing about federal solidarity, Allan Erbsen emphasized the importance of nested citizenship for horizontal federalism, observing that "the existence of multiple states limits the power of each when interacting with the others or with the others' citizens." Erbsen, *supra* note 6, at 501. Likewise, although not explicitly writing about federal solidarity, Peter Schuck highlighted the importance of nested citizenship in creating and fostering what we would call solidarity values. *See* Peter H. Schuck, *Citizenship in Federal Systems*, 48 AM. J. COMPAR. L. 195, 215 (2000) ("The nature of citizenship in a federation is influenced not only by these vertical relationships between national and sub-national governments, but also by horizontal ones, including the equality of resources and outcomes within and among the sub-national units. Indeed, the goal of equality among sub-national units is sometimes a major normative and political justification for further centralizing power within an existing federation. Accordingly, the fundamental law usually bars discrimination by one sub-national unit against the citizens of another sub-national unit.").

33 Although this discussion mostly refers to "citizens," we sometimes also use "residents" because the U.S. doctrine focuses on residence rather than citizenship. A fuller analysis of the relationship between citizenship, residence, and presence is needed but beyond the scope of this project. We use "nested citizenship" to refer to a variety of national approaches to, and translations for, the same concept. Vicki C. Jackson, *Citizenship and Federalism*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 127, 130 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001) ("nested citizenship[]"); Schuck, *supra* note 32, at 200 ("dual citizenship"); Cyr, *supra* note 9, at 31 (referring to "shared citizenry"); TIERNEY, *supra* note 31, at 133 ("multiple demoi").

34 *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 499 (1999) ("[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." (quoting Shapiro v. Thompson, 394 U.S. 618, 629 (1969))).

states to citizens of other states, including duties not to harm residents of fellow states and duties not to interfere with federal citizens' entitlement to move across state borders.

In short, nested citizenship is a vital source of obligations that run not only from states to fellow states, but from states *to citizens of other states*. For contrast, compare states in a federation to independent countries: a country's ability to control membership in its polity enables it to draw a sharp distinction between its own citizens and those of other states, and to act on those distinctions in conferring and denying benefits. But states cannot draw such sharp distinctions. Like the obligations of federal membership, the obligations of nested citizenship generate the characteristic features of federal solidarity, such as nondiscrimination on the basis of state residence or citizenship.[35]

3. Solidarity Synergies and Vulnerabilities

Federal membership and nested citizenship generate federal solidarity synergistically. For example, federal membership makes permanent the obligations that arise from nested citizenship. Not only must states permit free movement and avoid harming residents of other states today, they must do so indefinitely into the future.[36] Moreover, as people travel within the federation, they claim uniform national rights and likely expect a certain minimum level of public goods and services as they move from state to state. Such expectations, in turn, generate nondiscrimination claims and increase political demands for mutual aid in the form of interstate redistribution.[37]

Likewise, nested citizenship reinforces duties arising from federal membership, such as duties not to harm other federal members. It does so by expanding a state's conception of its own self-interest and polity beyond its own borders to include not only current residents,

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35 For further discussion, see Section II.A. For examples of such provisions beyond the federation of the United States, see Canadian Charter of Rights and Freedoms § 6(3)(a), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) (permitting application of state laws "other than those that discriminate among persons primarily on the basis of province of present or previous residence"); *Australian Constitution* § 117 (granting a "subject of the Queen" immunity from the application of "disability or discrimination" created by state legislation); LAWS OF MALAY. FED. CONST. art. 8, §§ 3, 4 ("There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State" and "[n]o public authority shall discriminate against any person on the ground that he is resident or carrying on business . . . outside the jurisdiction of the authority.").

36 Or so long as the federation—and its constitution—endure.

37 *See, e.g.*, Paul Bernd Spahn & Oliver Franz, *Consensus Democracy and Interjurisdictional Fiscal Solidarity in Germany*, *in* MANAGING FISCAL DECENTRALIZATION 122, 126–28 (Ehtisham Ahmad & Vito Tanzi eds., 2002) (explaining the goal of equalization in Germany is to ensure a single minimum standard of living for all citizens across states).

but also future residents that may migrate from fellow states as well as former residents who have emigrated to fellow states, especially those who may someday return. For example, an upstream state considering polluting a river not only has to think about the possibility of retaliation by the downstream state, it also has to recognize that its pollution might encourage migration. The upstream state could not exclude the downstream state's refugees. Solidarity duties not to harm other states or citizens of other states also generate the characteristic feature of federation that states cannot engage in protectionism. Thus, states typically must allow goods moving within the federation to circulate tariff-free, avoid discriminating against the free movement of goods and services within the common market, and avoid discriminating against the commercial activities of citizens of other states.

As another example of the interrelatedness of federal membership and nested citizenship, one reason federations typically bar secession is that secession would alter the body politic, perhaps forcing an unhappy minority of federal citizens (such as the losing voters within a seceding state) to relinquish their membership in the broader polity.[38] Secession could also devalue the shared citizenry of those remaining in the federation.

A solidarity conception of federalism recognizes that states are not merely committed to each other; they are vulnerable to each other in ways that that they cannot unilaterally guard against. Solidarity duties, including duties not to harm, arise out of this relationship of mutual obligation and vulnerability. To reduce their mutual vulnerability, partners in a federation may seek to both share and control risks. States share risks partly through free movement. An economic or environmental shock to one state or one region will generate an exodus that other states must receive. States' vulnerability to each other and to outside shocks, which the whole federation must absorb, gives rise to insurance mechanisms, such as federal-level unemployment, disaster, and health insurance, automatically stabilizing federal taxes, interstate redistribution, and other types of mutual aid.[39] Such mutual aid

38 PRESTON KING, FEDERALISM AND FEDERATION 60 (1982) ("For within a federation, not only does the secession of a locality signify the cancellation of any federal authority over the territory; it equally signifies the cancellation of the central government's authority over its own citizenry within that locality.").

39 Arban, *supra* note 9, at 244–45 (discussing the financial assistance that federations offer to constituent states in the event of "drastic emergencies such as terrorist attacks or natural disasters"); *see also* Alan J. Auerbach & Daniel Feenberg, *The Significance of Federal Taxes as Automatic Stabilizer*s, 14 J. ECON. PERSPS. 37, 37–38 (2000) (discussing federal income taxes as automatic stabilizers); YAIR LISTOKIN, LAW AND MACROECONOMICS: LEGAL REMEDIES TO RECESSIONS 31–32 (2019) (also discussing stabilizers); Albert H. Choi, Quinn Curtis & Andrew T. Hayashi, *Crisis-Driven Tax Law: The Case of Section 382*, 23 FLA. TAX REV.

among states need not take the form of precise quid pro quo arrangements: a state may well be called on to support sister states many times before receiving support in return. But such support is critical to maintaining the federation.

In addition to sharing risks, partners in a federation also may seek to control risks, as when they guarantee free trade across the federation (by disabling states from imposing tariffs and tariff-equivalent measures) or when they place federal limits on pollution or extraction of natural resources. Likewise, states control risk via pledges (or federal requirements) to provide a minimum level of education[40] or to follow budget constraints.[41] States also control risks by acquiescing to federal-level interventions, such as preemptive federal legislation or judicial review. Although such arrangements vary by federation, all federations have methods to curb self-interested state behaviors and to share and control common risks.

B. Federalism Values and Solidarity Federalism

We have provided a stylized discussion of how federal constitutional structures generate solidarity obligations and values, but we would caution against being too reductive about classifying constitutional structures as ensuring *only* autonomy or *only* solidarity. For example, even though we described nested citizenship as a structure of federal solidarity, the importance of nested citizenship to autonomy is equally clear: it provides democratic legitimacy and power to both levels of government, enabling both to act autonomously and directly on their respective citizens.

Similarly, what we have described as the characteristic features of federal solidarity—such as free movement and nondiscrimination—are just as essential as the characteristic features of autonomy—such as competition, diversity, and efficiency—to the production of federalism's benefits. Against the backdrop of free movement and non-discrimination, states are able to compete for federal citizens who can select from among the states their preferred menu of public goods and

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1, 3–9 (2019) (evaluating effect of federal relaxation of post-merger tax loss offsets as a response to the 2008 financial crisis).

40 Kimberly Jenkins Robinson, *Introduction* to A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 16–25 (Kimberly Jenkins Robinson ed., 2019) (examining, among other issues, the importance of a federal role in education).

41 Although states in many federations are bound by federal fiscal and borrowing limits, U.S. states have adopted their own limits. *See* David Gamage, *Preventing State Budget Crises: Managing the Fiscal Volatility Problem*, 98 CALIF. L. REV. 749, 755 (2010) (noting nearly all states except Vermont have balanced budget rules and even Vermont "has generally acted as though so bound"); Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 866 (2012) (noting three-quarters of states have borrowing limits).

services. And the credible threat of exit helps citizens secure their political preferences and discipline state governments. Federal solidarity duties thus dovetail with state autonomy entitlements, and both solidarity and autonomy generate the core benefits—that is, the normatively desirable outcomes—of federation, including accountability, accommodation of individual choice, efficiency, individual liberty, and voter satisfaction.

In short, none of "federalism's values"—which include both the characteristic features of federalism and its outcomes[42]—should be understood to arise exclusively from autonomy or solidarity; rather, federalism values arise from both. And federalism as a process achieves a balance between autonomy and solidarity that is needed to maintain a federal form of government.[43] Autonomy prevents a centralizing rush to a unitary state, while solidarity prevents fragmentation and collapse.[44] The constitutional structures of federalism create a dynamic

42 *See* Robert P. Inman, *Federalism's Values and the Value of Federalism*, 53 CESIFO ECON. STUD. 522, 525 (2007) (emphasizing "federalism values" as outcomes); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 317 (1997) (referring to federalism values variously as: something of worth, a set of ideals or beliefs, and a metric). For more on federalism's values, see Young, *supra* note 7, at 51–65 (discussing autonomy, diversity, experimentation, pluralism, and competition); Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1636–37 (1999) (discussing experimentation, pluralism, and competition); Friedman, *supra*, at 386–404 (discussing accountability, autonomy, diversity, and participation); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 774–84 (1995) (discussing diversity, experimentation, competition, and participation); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 533–39 (1995) (advocating Samuel Beer's additional federalism values—including community, utility, and liberty—to be set alongside the "traditional" ones of anti-tyranny, democracy, and laboratories); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988) (discussing accountability, autonomy, diversity, experimentation, participation); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (discussing autonomy, diversity, and competition); Amar, *supra* note 7, at 1427–28, 1492–1519 (discussing pluralism and competition); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 404 (discussing pluralism).

43 Jackson, *supra* note 9, at 235 (describing how the study of (vertical) federalism in the modern era is all about maintaining a "balance" between the states and center, and how "to a surprising degree [this is] a modern innovation"). For a literature review of various notions of federal balance (or mixture) described in terms of pull and push, autonomy and cohesion, autonomy and solidarity, pluralism and unity, separateness and unity, autonomy and reciprocity, autonomy and association, entitlements and fidelity, and self-rule and shared-rule, see POPELIER, *supra* note 11, at 51–73.

44 *See generally* MICHAEL BURGESS, FEDERALISM AND EUROPEAN UNION: THE BUILDING OF EUROPE, 1950–2000 (2000); IVO D. DUCHACEK, COMPARATIVE FEDERALISM: THE TERRITORIAL DIMENSION OF POLITICS (1970); MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 20 (2008); DANIEL J. ELAZAR, EXPLORING FEDERALISM (1987); KING, *supra* note 38; HANS KELSEN, GENERAL THEORY OF LAW AND

system in which the balance between autonomy and solidarity may shift over time within a single federation and may differ across federations.[45]

Recognizing the need within a federation for a balance between autonomy and solidarity does not mean the two are in equipoise, are self-stabilizing, or that there is only one stable equilibrium. On the contrary, maintaining a balance conducive to the perpetuation of the federation may require enforcement, and different federations will balance autonomy and solidarity differently. Until now, we have focused mainly on voluntary compliance by states with their federal obligations, describing federal membership and nested citizenship as inspiring a virtuous cycle of trust, cooperation, and mutual aid. If certain states refuse to discharge their solidarity duties, however, others may employ retaliation to spur compliance and punish defection. Such defection and retaliation can lead to a vicious cycle, necessitating intervention at the federal level to enforce cooperative norms or to settle interstate disputes.[46]

Although details differ from federation to federation, because state solidarity preserves federation by preventing fragmentation and collapse, federations will find ways to ensure and promote solidarity. These union-forging and union-preserving functions of solidarity are consistent with how solidarity has been viewed abroad, both in cases where solidarity appears explicitly in a federation's constitution and where it has been read into the constitutional order.[47] What we call

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STATE 316 (Anders Wedberg trans., 1945); WILLIAM S. LIVINGSTON, FEDERALISM AND CONSTITUTIONAL CHANGE 1–6 (1956); WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 101 (1964).

45 For federalism as a dynamic system, see Halberstam, *supra* note 9, at 822–23 (attributing to Kalypso Nicolaidis the notion of federalism as a "process" in which "political communities will oscillate endlessly between the poles of unity and autonomy" (quoting Kalypso Nicolaidis, *Conclusion: The Federal Vision Beyond the Federal State*, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 439, 444 (Kalypso Nicolaidis & Robert Howse eds., 2001)); *see also* POPELIER, *supra* note 11; Jenna Bednar, *Federalism Theory: The Boundary Problem, Robustness and Dynamics*, *in* A RESEARCH AGENDA FOR FEDERALISM STUDIES 27 (John Kincaid ed., 2019); James A. Gardner, *The Theory and Practice of Contestatory Federalism*, 60 WM. & MARY L. REV. 507, 587–88 (2018).

46 *See generally* Erbsen, *supra* note 6 (describing, under the rubric "horizontal federalism," the collection of responses of a federation to this scenario—the breach of the federal contract).

47 *See* Gamper, *supra* note 9, at 168 (noting that "very modern federal constitutions, such as the South African Constitution of 1996, the Swiss Federal Constitution of 1999 or the Belgian Constitution (after its transformation into a federal constitution), include provisions that expressly stipulate this principle"); *see also* POPELIER, *supra* note 11, at 152 (noting that the Spanish constitutional court read such duties into the constitutional order, as did the Belgian, Italian, and Swiss, *prior* to the inclusion of explicit constitutional text to that effect); Halberstam, *supra* note 9, at 757 (explaining that, rather than rely on constitutional text, the German constitutional court concluded that the federal form of government by its nature imposed duties of mutual concern and respect from the federal partners).

"solidarity federalism" refers to the process and methods by which a federation generates, promotes, and enforces its solidarity obligations between the states and federal government, among the states, and from states to citizens of fellow states.[48] Methods for enforcing federal solidarity are many and varied: federations may use money and other benefits or privileges to reward state cooperation or punish state defection.[49] Reluctant states may be forced to cooperate via preemptive federal legislation. Or appeal may be had to federal courts for judicial review leading to preclusion of state laws or actions that are inconsistent with federal solidarity obligations.

II. SOLIDARITY IN PRACTICE: LAW AND POLITICS IN THE UNITED STATES

As structures of federation, federal membership and nested citizenship embody and generate federalism's more solidarity-inflected features, including cooperation, restraint, respect, reciprocity, nondiscrimination, and duties not to harm. Depending on a particular federation's constitution, other structures also may embody or bolster federal solidarity. Accordingly, every federation will have its own particular instantiation of solidarity, as it does its own particular instantiation of federalism.

In this Part, we identify solidarity language and solidarity features within law and politics in the United States. In keeping with our goal to draw out the horizontal implications of federal solidarity, we first

48 *Cf.* Jackson, *supra* note 9, at 284 (describing German *Bundestreue* as imposing "obligations that run in three directions—from [the] central government to the subnational governments; from the subnational governments to the central government; and presumably among the subnational governments"). Scholars have not generally recognized that the duties of federal solidarity also run from states to citizens of other states. For exceptions, see references in *supra* note 32.

49 For example, nearly all federations require some manner of fiscal equalization payments, which are monetary transfers between states. *See* ORG. FOR ECON. COOP. & DEV., FISCAL FEDERALISM 2014: MAKING DECENTRALISATION WORK 102–03, 103 fig.5.2 (Hansjörg Blöchliger ed., 2013) [hereinafter OECD, 2014 FISCAL FEDERALISM REPORT] (finding that, of the OECD federations, only the United States lacks equalization). Although it may be impossible to disentangle equalization payments from voter preferences for interpersonal redistribution, as a political matter, fiscal equalization payments have been couched as helping to distribute the federal surplus to states qua states. Interstate redistribution within federations has long been used to assure continued cooperation from dissatisfied states. *See* Kirk J. Stark, *Rich States, Poor States: Assessing the Design and Effect of a U.S. Fiscal Equalization Regime*, 63 TAX L. REV. 957, 958–59 (2010) (describing large federal transfers to Quebec to counteract its separatist movement); *see also* Daniel Béland & André Lecours, *Fiscal Federalism and American Exceptionalism: Why Is There No Federal Equalisation System in the United States?*, 34 J. PUB. POL'Y 303, 313 (2014) (equalization promotes solidarity by compensating poorer states that derive less benefit than do richer states from the federal union, encouraging them to remain in the federation and to remain cooperative).

focus on two horizontal federalism doctrines, the Dormant Commerce Clause and interstate sovereign immunity. We argue that the Supreme Court has long invoked both solidarity language and solidarity features in interpreting these doctrines. Our discussion demonstrates how express acknowledgement of the need to balance both autonomy *and* solidarity can demystify constitutional doctrines, bringing them out of the shadow cast by state autonomy. Because constitutional courts are not the only mediators of solidarity federalism, we also provide a brief discussion of how solidarity manifests in politics, using an example from the tax-and-spend system.

A. Constitutional Doctrine

We use two examples from constitutional interpretation to illustrate how horizontal solidarity works in the United States. We could have used any number of constitutional doctrines to illustrate our argument that solidarity plays a role in horizontal federalism. For example, we might have started with the textual provisions that scholars regard as the most important for horizontal federalism, namely the Full Faith and Credit Clause and the Privileges and Immunities Clause.[50] Instead, we make our points about horizontal solidarity using two *atextual* doctrines: the Dormant Commerce Clause and interstate sovereign immunity. We choose atextual doctrines on the grounds that, if federal solidarity is an "intrinsic trait of federalism,"[51] then horizontal

50 *See* Resnik et al., *supra* note 8, at 727 (describing "'horizontal federalism' . . . as a useful way to characterize exchanges mediated through the Full Faith and Credit Clause, the Dormant Commerce Clause, and the Fourteenth Amendment"). Allan Erbsen identified many textual provisions that reflected his view of horizontal federalism as a dispute-resolution mechanism. Erbsen, *supra* note 6, at 534 (citing, among others, the Compacts Clause and interstate jurisdiction clauses). Likewise, Daniel Halberstam identified many textual provisions that embodied or could be interpreted to promote federal solidarity. Halberstam, *supra* note 9, at 789 n.206, 803, 809 (including the Full Faith and Credit Clause, Privileges and Immunities Clause, the treaty power, and federal commerce and spending powers). In *Franchise Tax Board of California v. Hyatt*, the Supreme Court rooted what we would refer to as solidarity obligations in, among other provisions and doctrines, Article III's implicit provision of federal courts as the exclusive neutral forum for resolving controversies among states; Article I's divestment of the states of military and foreign relations powers, the prohibition of state imposts and duties; Article IV's requirements of Full Faith and Credit and extradition, the Privileges and Immunities Clause, and the Eleventh Amendment. *See* 139 S. Ct. 1485, 1497–98 (2019).

51 *See* Arban, *supra* note 9, at 246–47 (attributing this view to some scholars); Cyr, *supra* note 9, at 31 (claiming federal solidarity is "inherent to all federations"); Gamper, *supra* note 9, at 169 (referring to "the need for federal loyalty in every federal system"); *see also* Halberstam, *supra* note 9, at 756–57 (giving history of federal solidarity (*Bundestreue*) in Germany and observing that, rather than citing constitutional text, the German constitutional court concluded that "the norm of *Bundestreue* was inherent in the idea of federalism itself"); Jean-François Gaudreault-DesBiens, *Cooperative Federalism in Search of a Normative*

federal solidarity should emerge from structural interpretations of constitutions even in the absence of explicit text.

The first doctrine we analyze—the Dormant Commerce Clause—primarily governs how states treat *residents of other states*. The second doctrine—interstate sovereign immunity—primarily governs how states treat *other states*. It is no surprise that we would find solidarity features at work in these doctrines that describe core state-to-federal-citizen and interstate relationships. These doctrines support our claim that horizontal solidarity is already part of our constitutional schema.[52] We do more, however, than provide a descriptive account. By specifically identifying and acknowledging the solidarity features at work in these doctrines, we can better justify and evaluate them and the Supreme Court's caselaw.

1. The Dormant Commerce Clause

Dormant Commerce Clause doctrine has generated some of the Supreme Court's most familiar statements of federal solidarity. Consider Justice Cardozo's famous words that began this Article, "The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[53] Similarly, Justice Jackson explained that the Court's Dormant Commerce Clause jurisprudence sought to "advance[] the solidarity and prosperity of this Nation."[54] And Justice Kennedy saw Dormant Commerce Clause doctrine as promoting the national market which "has been a singular force in shaping the consciousness and creating the reality that we are one in purpose and destiny."[55]

Justification: Considering the Principle of Federal Loyalty, 23 CONST. F. CONSTITUTIONNEL 1, 6 (2014) (Can.) (noting that when Belgium added "federal loyalty" as a principle to its 1993 constitution, "some commentators opined that constitutionally enshrining this principle was redundant because it is inherent to federalism").

52 Indeed, others have understood that these doctrines work as the glue of federalism. Joseph Zimmerman noted that they create a "web holding the economic union and the political union." ZIMMERMAN, *supra* note 8, at 1; *see* Halberstam, *supra* note 9, at 794–95 (considering, before *Hyatt* was decided, comity as an area in which the Supreme Court did not impose solidarity obligations). Halberstam likewise discussed the Dormant Commerce Clause, but he came to different conclusions than we do. *See id.* at 809–11. We discuss developments post-*Hyatt infra* subsection II.A.2. We distinguish Halberstam's views on the dormant Commerce Clause from our own in *infra* Section III.B. For extensive treatment of Fourteenth Amendment Privileges and Immunities from the perspective of interstate relations, see generally Metzger, *supra* note 20. For our view of how solidarity federalism deepens Metzger's account, see *infra* Section III.C.

53 Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

54 H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949).

55 Dep't of Revenue v. Davis, 553 U.S. 328, 362–63 (2008) (Kennedy, J., dissenting).

The tenuous textual basis for the doctrine is the affirmative grant to Congress in the Commerce Clause of the power to regulate interstate commerce.[56] Under the Supreme Court's interpretation, this affirmative grant precludes states from enacting laws that would discriminate against or unduly burden interstate commerce.[57] The motivation undergirding Dormant Commerce Clause doctrine can be stated by rote: forging an economic union from a collection of disparate states required not only the prohibition of state tariffs but also of state taxes and regulations that functioned equivalently to tariffs.[58] If left unchecked, tax and regulatory tariffs would reduce not only the prosperity but also the unity of the nation.[59] Thus, notwithstanding that the Constitution expressly forbids only import and export taxes, early in the history of the nation, the Supreme Court read an implicit ban on discriminatory taxation and regulation into the Commerce Clause.[60]

Also well understood is that this interpretation represents a crucial limit on state autonomy. Indeed, by preventing states from imposing discriminatory taxes and regulations on interstate commerce and on residents of other states, the Dormant Commerce Clause straightforwardly reinforces federal membership and nested citizenship as solidarity structures, with their implied duties not to harm other states or each other's residents. In Dormant Commerce Clause doctrine, solidarity features take the form of a nondiscrimination rule; states must treat nonresidents as residents.[61] Moreover, unlike other aspects of solidarity federalism, the state solidarity enhancing effects of the Dormant Commerce Clause need not be unearthed—they are present on the surface, as the quotations above from Justices Cardozo, Jackson, and Kennedy clearly indicate.

But a fuller statement of the myriad values of federalism further illuminates the Dormant Commerce Clause, including how the doctrine mediates state autonomy and state solidarity. Most jurists and commentators accept that the Supreme Court may preclude

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56 *See* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 479–81 (2008).

57 *See id.* at 421–22 (describing the modern test derived from Supreme Court decisions interpreting the Commerce Clause).

58 *See generally* Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 VA. L. REV. 309 (2017).

59 Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 180 (1995) (noting that the Dormant Commerce Clause "prevent[s] a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders").

60 *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 14, 24 (1824).

61 *See* Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008) (noting that facially discriminatory taxes are "virtually *per se* invalid" (quoting Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 99 (1994))).

discriminatory state regulations.[62] In our terms, such discriminatory regulation would abridge states' solidarity duties not to harm other states and residents of other states. But the Supreme Court goes beyond discrimination to also preclude undue burdens on interstate commerce.[63] For example, the Supreme Court has precluded facially neutral state legislation that inhibits interstate commerce by conflicting with rules applicable in other states.[64] In the view of critics, such undue burden cases encroach on state autonomy and substitute judicial for legislative decisions.[65]

Consider *Kassel v. Consolidated Freightways Corporation of Delaware*.[66] In *Kassel*, the Supreme Court held that Iowa violated the Dormant Commerce Clause when it imposed on commercial trucks operating in interstate commerce a truck-length limit that was shorter than the limit applicable in neighboring states.[67] *Kassel* championed the free

62 *See, e.g.*, Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1150, 1149–51 (10th Cir. 2016) (Gorsuch, J., concurring) ("[T]o the extent that there's anything that's uncontroversial about dormant commerce clause jurisprudence it may be this anti-discrimination principle, for even critics of dormant commerce clause doctrine often endorse it even as they suggest it might find a more textually comfortable home in other constitutional provisions.").

63 *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

64 See Michael S. Knoll & Ruth Mason, Bibb *Balancing: Regulatory Mismatches and the Dormant Commerce Clause*, 91 GEO. WASH. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4178514 [https://perma.cc/MV57-CQDB] (discussing the federalism implications of regulatory conflicts).

65 For judicial criticism of the Dormant Commerce Clause, see, for example, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 636 (1997) (Thomas, J., dissenting) ("[O]ur negative Commerce Clause has gone far afield of its core—and we have yet to articulate either a coherent rationale for permitting the courts effectively to legislate in this field, or a workable test for assessing which state laws pass negative Commerce Clause muster."); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in the judgment) (arguing that the balancing required by undue-burden analysis is "ill suited to the judicial function"). For scholarly criticism of the undue-burdens doctrine, see, for example, Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 442 n.89 (1982) (arguing against undue-burdens analysis because "the choice between competing substantive political values must be made by representatives of the people rather than by unelected judges"); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1104, 1103–04 (1986) ("[T]here is no place for national interest balancing in movement-of-goods cases."); Jack L. Goldsmith & Alan O. Sykes, Essay, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 813 (2001) ("Congress might be better suited than the federal judiciary to perform this cost-benefit analysis.").

66 Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662 (1981).

67 *See id.* at 671, 674; *see also* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 523, 529 (1959) (invalidating a nondiscriminatory state mudguard regulation that differed from the mudguard regulation of forty-five other states).

movement of commercial actors and a well-functioning national market without barriers at state borders, a result that resonates with the solidarity structures of federal membership and nested citizenship. The case has been condemned, however, for subverting state autonomy, and specifically for constraining Iowa's ability to choose how to regulate trucks.[68]

That view, however, misses that *Kassel* involved a contest of autonomy *among states*, specifically between Iowa and its neighbors. If we focus only on state autonomy interests, we arrive at an impasse. Each state would like to regulate truck lengths, but to accommodate a national interest—in this case the national interest in a smoothly functioning national market—trucks traveling between the states ideally should not be subject to conflicting state regulations. At the same time that each state has autonomy interests, we would also say that each has solidarity obligations. Such obligations include the duty not to discriminate against commercial actors from neighboring states and the duty to avoid harming other states and their residents by imposing costly externalities on them.

The Constitution does not provide an explicit answer as to how to resolve these conflicting interests; it does not say whether the origin state's or the destination state's regulation should prevail. In such cases, the Supreme Court employs a balancing test. Specifically, it compares the challenged state's interest in its facially neutral regulation to the federal interests, including the regulation's burden on interstate commerce and other states' regulatory interests.[69] Under the doctrine, nondiscriminatory regulations will be upheld unless the burden is "clearly excessive in relation to the putative local benefits."[70]

Although such balancing has been criticized as unpredictable and open-ended,[71] solidarity federalism helps us understand it. Balancing allows the Court to accommodate multiple constitutional values—here, state autonomy interests and state solidarity interests. Balancing federalism interests as part of a determination of how a federal constitution allocates power among constituent governments is hardly an improper usurpation by the Court of a state legislative function. On the contrary, such power allocation constitutes a central function of constitutional courts, and self-interested states obviously cannot decide such disputes for themselves.

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68 In dissent, Justice Rehnquist criticized the decision "[f]orcing Iowa to yield to the policy choices of neighboring States" as "pervert[ing] the primary purpose of the Commerce Clause." *Kassel*, 450 U.S. at 699 (Rehnquist, J., dissenting).

69 Pike v. Bruce Church, Inc., 397 U.S. 137, 142–44 (1970).

70 *Id.* at 142.

71 *See, e.g.*, references cited in *supra* note 65.

Delving more deeply into *Kassel* reveals consideration of state solidarity. In the case, Iowa defended its variant fifty-five-foot truck-length regulation by arguing that it would promote safety, but the Supreme Court rejected this reasoning, concluding that it was not supported by evidence.[72] In doing so, the Court took a nationwide view of the safety concerns, noting that Iowa's rule would increase the risk of accidents, and "shift the incidence of them from Iowa to other States" because drivers of sixty-five-foot trucks would have to drive around Iowa to avoid Iowa's divergent regulation.[73] The Court thus expressly invoked a solidarity interest, specifically, the notion that states must avoid harming each other and each other's residents. In their concurrence, Justices Brennan and Marshall were explicit. They stated that "Iowa may not shunt off its fair share of the burden of maintaining interstate truck routes, nor may it create increased hazards on the highways of neighboring States in order to decrease the hazards on Iowa highways."[74] The concurring Justices described Iowa as engaged in "protectionism;"[75] in our terms, the Iowa legislation failed to discharge Iowa's solidarity obligation to not to harm other states and their residents by imposing costly externalities on them.

In addition to clarifying that the Dormant Commerce Clause promotes and protects state solidarity, it is also worth noting that solidarity federalism provides a powerful response to the doctrine's critics. Critics on and off the bench argue that because of its tenuous connection to the text of the Constitution, the Dormant Commerce Clause is "[s]ynthetic"[76] and "makes little sense."[77] Justice Scalia called it "ad hocery,"[78] and countless commentators have argued that the doctrine amounts to judges imposing their personal tastes for free trade on the states.[79] This narrow perspective has been persuasive precisely because it pits *state autonomy as a structural constitutional value* against *some*

72 *Kassel*, 450 U.S. at 672–73.

73 *Id.* at 675, 674–75.

74 *Id.* at 686 (Brennan, J., concurring in the judgment).

75 *Id.* (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

76 Comptroller of the Treasury v. Wynne, 575 U.S. 542, 576 (2015) (Scalia, J., dissenting).

77 Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).

78 *Wynne*, 575 U.S. at 574 (Scalia, J., dissenting).

79 *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 352 (2007) (Thomas, J., concurring in the judgment) ("In the face of congressional silence, the States are free to set the balance between protectionism and the free market. Instead of accepting this constitutional reality, the Court's negative Commerce Clause jurisprudence gives nine Justices of this Court the power to decide the appropriate balance."); Eule, *supra* note 65, at 435 ("Because the Constitution does not protect free trade or a national market, the Court's current role as the trumpeter of these values can only be viewed as that of congressional spokesman.").

Justices' personal policy views. In contrast, solidarity federalism allows us to put the Dormant Commerce Clause into proper context; it pits state autonomy as a structural constitutional value against state solidarity as *another* structural constitutional value.

When a state uses its autonomy to harm other states and their residents, it threatens not merely judicial policy preferences for free trade, but federal solidarity itself. Imposing costly externalities—for example, by shunting dangerous and costly traffic to other states—contradicts states' duties not to harm each other or each other's residents. Creating regulatory mismatches to bar residents of other states access to a state's market undermines federal solidarity by obstructing the national marketplace.[80] And discriminating against other states' citizens threatens nested citizenship, with its embedded guarantee of free movement.

When viewed in this sense, Dormant Commerce Clause doctrine appears to be a relatively modest intervention in favor of solidarity—certainly less intrusive than the federal harmonization that could be required if the Supreme Court did not preclude discrimination and undue burdens. Indeed, Justices have perceived Dormant Commerce Clause doctrine as state-autonomy *preserving* precisely because judicial oversight "eliminate[s] the demand and necessity for sweeping national legislation."[81] Of course, critics of Dormant Commerce Clause jurisprudence may argue that, even if solidarity is important, the correct institutional actor to ensure it is Congress, not the Supreme Court. That is, even if federation requires both state autonomy and state solidarity, the Constitution clearly does not indicate how much of each is needed, and that question might best be resolved by Congress. Justice Rehnquist and two other Justices dissented from *Kassel* on similar grounds.[82]

We do not seek to resolve the debate about how interstate regulatory conflicts of the type seen in *Kassel* (or other costly interstate externalities) should be resolved and by whom. Instead, our purpose is to show that solidarity federalism is overtly present in Dormant Commerce Clause analysis. Its features are present more obviously in

80 *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88 (1987) ("This Court's recent Commerce Clause cases also have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations."). *See generally* Knoll & Mason, *supra* note 64.

81 Dep't of Revenue v. Davis, 553 U.S. 328, 365 (2008) (Kennedy, J., dissenting).

82 *See* Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 687–92 (1981) (Rehnquist, J., dissenting) (arguing that if harmonized regulation of trucks were needed, it should be Congress, not the courts, that provides it).

discrimination cases, but they are also present in undue-burden cases.[83] The vital role that it plays in mediating between state solidarity and state autonomy helps explains why Dormant Commerce Clause doctrine has endured for over 150 years, despite harsh criticism that it lacks a firm textual basis and involves improper judicial legislation.[84] The doctrine thrives because it functions as an important safeguard of state solidarity, and therefore as a bulwark of federation itself.

Proper framing of the Dormant Commerce Clause in terms of solidarity federalism also disposes of one of Justice Scalia's biting criticisms of the doctrine. According to Justice Scalia, "[t]he clearest sign

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83 *Kassel* does not represent an isolated discussion of solidarity values in Dormant Commerce Clause cases. *See, e.g.*, H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538 (1949) ("[T]he established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions."). Another interesting example of solidarity involves *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008). The case involved a Dormant Commerce Clause challenge to a Kentucky tax exemption for interest earned on bonds issued by the state of Kentucky. *Id.* at 332–33. Kentucky denied the exemption for bonds issued by other states. *Id.* Kentucky's tax regime was facially discriminatory, but not unusual. Nearly every other state with an income tax had the same rule preferring interest earned on its own debt. *See id.* at 332–33, 335. Although the Supreme Court usually condemns facially discriminatory rules, it upheld the rule in *Davis*. *Id.* at 332. The *Davis* majority shoe-horned its decision into the market-participation exception and (what has been called) the state-self-promotion exception to the Dormant Commerce Clause. *See id.* at 339. But solidarity federalism suggests an alternative rationale for the rule in *Davis*. Because only Kentucky residents could take advantage of the tax exemption for interest on Kentucky bonds, the exemption encouraged ownership of Kentucky bonds *by Kentuckians*. In other words, the effect of the tax exemption was to incentive Kentuckians, *rather than residents of other states*, to buy Kentucky bonds. When Kentuckians own Kentucky bonds, they can influence Kentucky spending not only as creditors—which all bondholders may do—but also as voters. This additional accountability, in turn, may be expected to reduce default risks associated with state debt. The challenged state tax preference for domestic bonds thus could be understood as reducing moral hazards associated with state bonds; it indirectly minimizes externalities associated with Kentucky debt. By reducing risks of default on their own bonds, states reduce the likelihood that their own borrowing will adversely affect *other states* and *residents of other states*. A default by one state could impact other states and their residents, by, for example, increasing other states' borrowing costs or necessitating that federal taxpayers contribute funds for a bailout. Although the *Davis* Court did not reason in such solidarity terms explicitly, it did note that bonds generally "place the cost of a project on the citizens who benefit from it," which is an internalization rationale. *Id.* at 342.

84 *See United Haulers Ass'n*, 550 U.S. at 349 (Thomas, J., concurring) ("I would discard the Court's negative Commerce Clause jurisprudence."); *see, e.g.*, Eule, *supra* note 65 (arguing to curtail the doctrine). Despite stinging criticism, a solid majority of the sitting Justices endorse at least the nondiscrimination strand of the Dormant Commerce Clause doctrine. The naysayers and potential naysayers are Justice Thomas, who has made his opposition to the Dormant Commerce Clause clear, Justice Gorsuch, who has indicated that the doctrine may need to be reconsidered, even as he has voted with other Justices to apply the doctrine in recent cases, and Justices Barrett and Jackson, who have not yet opined on the doctrine. Knoll & Mason, *supra* note 64 (manuscript at 4 n.18)

that the negative Commerce Clause is a judicial fraud is the utterly illogical holding that congressional consent enables States to enact laws that would otherwise constitute impermissible burdens upon interstate commerce."[85] But on our account of solidarity federalism, *both* judicial review *and* national politics represent acceptable, even fundamental, ways to mediate conflicts between state autonomy and state solidarity. Thus, the notion that national legislation could represent a viable form of consent to relieve states of certain solidarity obligations is in no way surprising.[86]

2. Interstate Sovereign Immunity

We now turn to the second constitutional doctrine: interstate sovereign immunity. We review how autonomy and solidarity values have informed Supreme Court decisions on whether states are immune to suit in the courts of sister states.[87] Specifically, we show that the Supreme Court uses solidarity reasoning to reach and justify its decisions in immunity cases.

Decided in 1979, *Nevada v. Hall* raised a question of first impression: "whether a State may claim immunity from suit in the courts of another State."[88] The underlying facts involved a suit in California brought by residents of California against Nevada for injuries related to an auto accident that occurred in California but involved a driver who was a Nevada employee driving a Nevada-owned vehicle while on official business for Nevada.[89] Nevada wanted the California court to apply the same liability limits that Nevada courts, following Nevada statutes partially waiving sovereign immunity, would have applied had the

85 Comptroller of the Treasury v. Wynne, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting).

86 In this sense, solidarity federalism provides independent support for Gillian Metzger's account of federal regulation of interstate relations, and it also provides independent support for collective-action federalism, a theory of *vertical* federalism that holds that Article I, Section 8 should be understood to empower Congress to resolve interstate externalities. We discuss these implications in *infra* Section III.C.

87 For discussion of interstate sovereign immunity, see Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002); Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 SUP. CT. REV. 249; James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 581–88 (1994). We are operating within the current doctrine of the Court and thus set aside the question of whether sovereign immunity can ever be justified. *See, e.g.*, Louise Weinberg, *Sovereign Immunity and Interstate Government Tort*, 54 U. MICH. J.L. REFORM 1 (2020) (criticizing sovereign immunity as ahistorical, unaccountable, and illiberal).

88 440 U.S. 410, 414 (1979), *overruled by* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 (2019).

89 *Id.* at 411–12.

suit been brought in Nevada court.[90] The California court refused, and after a large money judgment was awarded in the case, Nevada successfully petitioned for certiorari.

Like interstate regulatory conflicts under the Dormant Commerce Clause, on the surface, interstate sovereign immunity involves dueling state autonomy concerns. The defendant state raises an autonomy prerogative to be immune from suit in another state's courts (as it would be in its own courts). The forum state, however, has an autonomy interest in adjudicating disputes that involve its own residents or that otherwise affect in-state interests. In making its argument to the Supreme Court, Nevada appealed to both autonomy and solidarity values: it asked the Court to hold that "the Constitution *implicitly* establishes a Union in which the States are not free to treat each other as unfriendly sovereigns, but must respect the sovereignty of one another."[91]

A six-Justice majority of the Supreme Court rejected Nevada's claim for immunity. Although acknowledging that certain constitutional provisions, such as Full Faith and Credit, "place[d] a specific limitation on the sovereignty of the several States," the Court held that nothing in the Constitution required "enforced respect" for state sovereign immunity.[92] In short, the majority saw *Hall* as a battle between two states' legitimate autonomy interests, and it decided that the forum state's autonomy interest in determining a sister state's immunity was stronger than the defendant state's own autonomy interest in being immune.[93] The majority concluded that interstate sovereign immunity was not required, but rather it could be granted at the forum state's option, that is, as a matter of courtesy, similar to principles of comity under international law.[94]

Like Nevada, the dissenters in *Hall* emphasized solidarity. Justice Blackmun, joined by Chief Justice Burger and Justice Rehnquist, would have found an "implied" guarantee of state sovereign immunity "as an essential component of federalism."[95] Likewise, although he joined Justice Blackmun's dissent, Justice Rehnquist (also joined by Chief

90 *Id.* at 412–13 (seeking a $25,000 limit on liability).

91 *Id.* at 424–25 (emphasis added).

92 *Id.* at 425–26.

93 *Id.* at 416 (noting that the case "implicate[d] the power and authority of a second sovereign"); *see id.* at 424 (citing California's interest in providing "full protection to those who are injured on its highways through the negligence of both residents and nonresidents" and noting that California had waived its own immunity in this regard (quoting Application to Petition for Certiorari at vii, Nevada v. Hall, 440 U.S. 410 (1979) (No. 77-1337))).

94 *See* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1492 (2019) (characterizing *Hall* this way). For comity under international law, see, for example, Dodge, *supra* note 24.

95 *Hall*, 440 U.S. at 430 (Blackmun, J., dissenting).

Justice Burger) wrote separately to decry the majority's "literalism."[96] Rehnquist cited "the logic of the constitutional plan" and "the implicit ordering of relationships within the federal system"[97] as supporting a requirement that states recognize each other's immunity. In addition to pointing to constitutional structure and historical understandings, both dissenting opinions raised prudential concerns, including whether allowing the forum state to hear suits against other states could inspire "interstate retaliation."[98] The dissenters recognized that the states' membership in the federal union generated special obligations: Unlike countries operating in the international sphere, the states have heightened obligations to each other, even in the absence of explicit constitutional text.[99] Thus, Justice Blackmun admonished the majority for allowing California to treat Nevada, "a sister State, . . . as any other litigant."[100]

The gestures toward solidarity federalism in the *Nevada v. Hall* dissents became law when the Supreme Court overturned *Hall* in 2019 in *Franchise Tax Board v. Hyatt*.[101] In *Hyatt*, the tables were turned: California now sought immunity in Nevada's courts. The *Hyatt* majority used solidarity-based reasoning to conclude that the forum state was obliged to recognize the defendant state's prerogative to invoke sovereign immunity. In addition to citing the historical record, the majority derived an obligation to recognize sister-state immunity from a disparate collection of textual provisions and constitutional solidarity structures.[102]

An avowed textualist, Justice Thomas, wrote the majority opinion in *Hyatt*. He strove mightily to find a textual home for mandatory recognition of state sovereign immunity. His decision reads as a list of horizontal solidarity structures found in or implied by provisions of the U.S. Constitution. He noted Article III's implicit provision of federal

96 *Id.* at 434 (Rehnquist, J., dissenting).

97 *Id.* at 433; *see id.* at 441 (referring to "the logic of the Framers' careful allocation of responsibility among the state and federal judiciaries" and arguing that the majority "makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity").

98 *Id.* at 427 (Blackmun, J., dissenting); *see id.* at 427–30 (expressing various concerns about the majority's decision, including that it would generate retaliation, require states to defend suits in all other states, trigger state actions to evade sister states' personal jurisdiction over their instrumentalities, and potentially lead to a refusal to enforce sister-state judgments). Although he joined Blackmun's dissent, Justice Rehnquist wrote separately to express concerns about whether state courts would be impartial toward sister states. *See id.* at 434–35 (Rehnquist, J., dissenting).

99 *See id.* at 431 (Blackmun, J., dissenting); *id.* at 443 (Rehnquist J., dissenting).

100 *Id.* at 427 (Blackmun, J., dissenting).

101 139 S. Ct. 1485, 1499 (2019).

102 *See id.* at 1497–98.

courts as the exclusive neutral forum for resolving controversies among states and to Article I's divestment of the states "of the traditional diplomatic and military tools that foreign sovereigns possess."[103] He highlighted constitutional provisions reflecting reciprocal duties, such as the prohibition of state imposts and duties and Article IV's requirements of Full Faith and Credit and extradition.[104] Justice Thomas also referred to nested citizenship, citing the Privileges and Immunities Clause.[105] And he also pointed to the adoption of the Eleventh Amendment that expressly precluded states from being sued in their own courts by residents of other states.[106] Referring to these structures and constitutional provisions as distinguishing sister states from independent nations, Justice Thomas's majority opinion emphasized that "[f]oreign sovereigns cannot demand these kinds of reciprocal responsibilities."[107]

Four dissenting Justices would have upheld *Hall* for a variety of reasons, including stare decisis, the lack of an explicit textual basis in the Constitution for interstate sovereign immunity, and concerns about state autonomy, including that "overruling *Hall* would harm States seeking to control their own courts."[108] Additionally, the dissenters criticized the type of structural analysis applied by the majority as "highly abstract" and "difficult to apply."[109] The dissenters argued that instead of imposing a uniform rule of immunity, the Supreme Court should leave states to their own devices to resolve immunity issues, by compact if necessary.[110]

As with the Dormant Commerce Clause example, the interstate sovereign immunity example involves competing autonomy interests—those of the forum state and those of the defendant state—and the Court resolved the competition in part by appealing to solidarity values. In both *Hall* and *Hyatt*, states and the Supreme Court expressly invoked solidarity arguments to resolve constitutional disputes about federalism and interstate relations. Recognition of sister-state immunity, even at the sacrifice of a state's own (autonomy) interest as a judicial forum, would—in the view of the states and Justices that advocated it—give expression to solidarity features, such as interstate trust and

103 *Id.* at 1495, 1497.

104 *Id.* at 1497.

105 *See id.*

106 *Id.* at 1498.

107 *Id.* at 1497; *see also id.* ("Article IV also imposes duties on the States not required by international law.").

108 *Id.* at 1506 (Breyer, J., dissenting).

109 *Id.* at 1503 (quoting Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 778 (2002)).

110 *See id.*

cooperation. Justices favoring mandatory recognition of sovereign immunity referred expressly to "respect,"[111] "reciprocal responsibilities"[112] and the prudential concern to prevent "interstate retaliation."[113] Prior attempts have been made to justify interstate sovereign immunity, but none fully captures what would become the majority's reasoning in *Hyatt*.[114] Solidarity, in contrast, explains *Hyatt*.

At the same time, however, federal judicial mandates are not the only way to promote solidarity federalism, and they certainly will not always be the *best* way to do so. For example, discussion by the *Hyatt* dissent about events during the forty years since *Hall* provides an opportunity to consider what happened at the state level after the *Hall* Court refused to mandate that states recognize sister states' immunity. The *Hyatt* dissenters noted that states had only been successfully sued fourteen times by private citizens in other states' courts since *Hall*, which the dissenters interpreted to mean that the problem of states being hauled into sister state courts was not endemic.

On the contrary, according to the *Hyatt* dissenters, in most cases between *Hall* and *Hyatt*, state courts in fact extended immunity, typically on a reciprocal basis, even though states were under no mandate to do so.[115] In the terms of this Article, such reciprocal recognition of

111 Nevada v. Hall, 440 U.S. 410, 426 (1979) (denying the dissent's assertion that the Constitution required "enforced respect" among states).

112 *Hyatt*, 139 S. Ct. at 1497.

113 *Hall*, 440 U.S. at 427 (Blackmun, J., dissenting).

114 Bellia & Clark argue that such immunity derives from international law. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 917 (2020). But this approach can explain only comity-based immunity, not *Hyatt*'s mandate for immunity. Along similar lines, Hoffheimer would ground a limited immunity in territorial restrictions on judicial power. Michael H. Hoffheimer, *The New Sister-State Sovereign Immunity*, 92 WASH. L. REV. 1771, 1771 (2017). But this justification would not extend to *Hyatt*'s immunity for acts that state agents commit within the defendant state's territory. State solidarity, by contrast, lends support to arguments that the Constitution requires recognition of interstate immunity. *Cf.* Woolhandler, *supra* note 87, at 296 (advancing a historical and structural argument that any preconstitutional ability the states had to hold each other liable was abrogated by the combination of Article III's diversity jurisdiction plus the Eleventh Amendment). *But see* William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 28 (2017) (arguing that *Hall* should be upheld because, although state sovereign immunity is a constitutional background rule, the Constitution does not prevent states from abrogating it).

115 *Hyatt*, 139 S. Ct. at 1505–06 (Breyer, J., dissenting) (describing the events between *Hall* and *Hyatt*); *see, e.g.*, Reed v. Univ. of N.D., 543 N.W.2d 106, 110–11 (Minn. Ct. App. 1996) (dismissing a case by applying North Dakota sovereign immunity law); Levert v. Univ. of Ill., 857 So. 2d 611, 613, 622 (La. Ct. App. 2003) (granting immunity to Illinois on the basis of comity, citing, in part, the fact that Illinois applied sister-state immunity). *But see* Woolhandler, *supra* note 87, at 289 ("Results in the states post-*Hall*, while mixed, indicate that states cannot uniformly expect fair treatment, much less recognition of immunity, as defendants in the courts of other states.").

immunity discharges and reinforces solidarity duties. For example, recognition by a forum state of a sister state's sovereign immunity acknowledges and accommodates the defendant state's preference for being sued in its own courts, not only for reasons of potential bias, but also for mere convenience.[116] It thus defers to the preferences of the sister state, which is a cooperative act. Extending immunity also reinforces trust; it signals that the forum state trusts the defendant state to handle the matter properly in the defendant state's courts; in a sense, the forum state places its own resident (as plaintiff) in the care of the defendant state.

Interestingly, although states generally extended immunity in the period between the two cases, states typically did not adopt the *defendant* state's notion of immunity. Rather, the forum state typically extended *its own conception* of sovereign immunity to the sister state, an approach that Chief Justice Roberts disparaged as "a new hybrid rule."[117] But this hybrid approach represents a middle path between *Hall*'s pronouncement that a forum state can treat a sister state however it wants, and *Hyatt*'s "enforced respect" approach that required the forum state to recognize the defendant state's own conception of its immunity, no matter what its content. Under the hybrid approach, a state treats a sister state as it treats itself. The approach the states chose—when left to their own devices—was one of nondiscrimination. There is more than one way to express solidarity obligations in a federation, and such obligations need not be judicially enforced when states follow them. Framing the dispute in both cases as disagreement over whether the states were already discharging their implicit solidarity obligations may help explain the close decisions.[118] Perhaps the real lesson from *Hall* and *Hyatt* is that the federal judiciary was not needed to intervene because the states were already discharging their solidarity duties.

Our goal in this Article is not to advocate a particular balance between autonomy and solidarity or to pick a side in the long-running scholarly debate over interstate sovereign immunity. Rather, we offer this set of cases principally to demonstrate how identifying and

116 *See* Woolhandler, *supra* note 87, at 287. *But see id.* at 289 (arguing that after *Hall*, forum states routinely ignored such defendant-state interests).

117 Franchise Tax Bd. v. Hyatt, 578 U.S. 171, 188 (2016) (Roberts, C.J., dissenting). In an earlier decision involving the same parties, the Supreme Court had held that the Full Faith and Credit Clause required Nevada to extend to California the benefit of the same money damages cap that Nevada applied to its own agencies, a requirement that Chief Justice Roberts criticized in dissent as a "hybrid rule" that was neither California's law (full immunity) nor Nevada's law (no sister-state immunity and therefore full liability for California). *Id.*

118 The Court split 6–3 in *Hall*, and 5–4 in *Hyatt*. *Hall*, 440 U.S. at 411; *Hyatt*, 139 S. Ct. at 1490.

acknowledging solidarity federalism allows for a better understanding of how autonomy and solidarity values may operate in support of or in tension with one another, and to see them *both* as something at stake in federalism doctrine.

B. Politics

The federal judiciary is not the only institution that enforces federal solidarity obligations as part of solidarity federalism. Federal politics also balances state autonomy and state solidarity.[119] In this Section, we argue that federal fiscal politics reflects state solidarity obligations. Although we could have chosen many other examples to argue that solidarity plays a role in national politics in the United States, we chose fiscal politics advisedly. The study of federal solidarity abroad focuses on the *vertical* relationship between the states and the federal government.[120] Typically the only example federal solidarity scholars provide in horizontal terms is fiscal equalization.[121] Fiscal equalization involves direct or indirect money transfers among states, typically from richer to poorer states.[122] Because fiscal equalization has long been considered the *sine qua non* of federal solidarity,[123] the lack of explicit fiscal equalization in the United States could lead commentators to conclude that the United States likewise lacks federal solidarity.[124] To

119 One might describe the fiscal politics we discuss below as part of the "political safeguards" of solidarity federalism. *See generally* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

120 In this way, it is similar to ideas in the vertical plane of "cooperative federalism." *See* Gerken, *supra* note 7.

121 *See, e.g.*, Arban, *supra* note 9, at 257 (providing a conception of horizontal solidarity limited exclusively to fiscal relations); *see also* Halberstam, *supra* note 9, at 755–56 (discussing fiscal equalization among German states); *id.* at 767–70 (discussing the "duties of assistance" among European Union member states). Likewise, Stephen Tierney recently advocated for a state-to-state conception of "horizontal reciprocity" in federalism, but his discussion exclusively concerned redistribution. *See* TIERNEY, *supra* note 31, at 245–46; *id.* at 245 (regarding horizontal obligations as consisting primarily of a need to maintain "some level of material parity across territories").

122 *See* Hansjörg Blöchliger & Jaroslaw Kantorowicz, *Fiscal Constitutions: An Empirical Assessment* 14 (Org. for Econ. Coop. & Dev., Working Paper No. 1248, 2015). Of the OECD federations, only the United States lacks fiscal equalization. *Id.* at 33.

123 *See* Arban, *supra* note 9, at 257 ("[F]ederal solidarity—both in the vertical and horizontal components—is most often associated with economic and financial issues, as well as with the redistribution of resources.").

124 *Cf., e.g.*, Maria Cubel, *Fiscal Equalization and Political Conflict*, *in* THE ECONOMICS OF CONFLICT: THEORY AND EMPIRICAL EVIDENCE 23, 23 (Karl Wärneryd ed., 2014) ("The level

forestall such erroneous conclusions, we argue that although the United States lacks *formal* fiscal equalization, politicians have harnessed the massive interstate transfers effectuated by our tax-and-spend system to enforce solidarity obligations.[125]

Federal taxing and spending are the powerful engines not only of interpersonal, but also interstate, redistribution. No U.S. federal agency or institution keeps track of the federal-state balance of payments by comparing federal tax collections by state to federal spending by state. But researchers track this information, and a recent report concluded that, on a per-capita basis, eight states paid more in federal tax than they received in federal spending.[126] Forty states are net-receiving states, and the mean receiving state received $1.22 in federal spending per capita for every dollar paid in federal tax.[127] Of course, that Americans accept the transfer of taxes raised in their own state for spending in other states may reflect a general solicitude towards residents of fellow states. That is, it could reflect *social* solidarity among Americans that may have nothing to do with federalism. Most notably, those transfers could be understood to reflect voters' commitments to progressive taxation and redistribution.[128]

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of fiscal equalization determines the degree of solidarity among regional governments."); Sean Mueller & Soeren Keil, *The Territoriality of Fiscal Solidarity: Comparing Swiss Equalisation with European Union Structural Funding*, 5 PERSPS. ON FEDERALISM, no. 1, 2013, at E-122, E-123, E-128 ("Both the extent and the very existence of fiscal equalisation constitute the ultimate test of inter-territorial solidarity."); Stark, *supra* note 49, at 958–60 (noting that fiscal equalization often functions as the "political 'glue' holding the country together" and that the U.S. lacks such a system); Bernard Dafflon, *Solidarity and the Design of Equalization: Setting out the Issues*, 10 EJOURNAL TAX RSCH. 138, 159 (2012) (noting that "[e]qualisation is about solidarity" in federal systems).

125 Equalization formulas are typically tied either to a fixed sum or a share of total revenue, leading to significant political wrangling over calculations. *See* OECD, 2014 FISCAL FEDERALISM REPORT, *supra* note 49, at 112.

126 *See* LAURA SCHULTZ & MICHELLE CUMMINGS, ROCKEFELLER INST. OF GOV'T, GIVING OR GETTING? NEW YORK'S BALANCE OF PAYMENTS WITH THE FEDERAL GOVERNMENT 3, 25–41 (2020) (aggregating federal personal-income, payroll, excise, and corporate-income taxes of state residents and comparing them to federal outlays, including salaries of federal employees who reside in the state, social welfare programs, other federal grants, and so on). Under this methodology, the largest net-paying state was Connecticut, followed by Massachusetts, New Jersey, New York, Colorado, Nebraska, Utah, and Minnesota; the largest net-receiving states were Virginia, Kentucky, Alaska, New Mexico, and Maryland. *Id.* at 14 tbl.4. The method used by the Rockefeller Institute researchers is very similar to that used by the Canadian federal government to calculate Canadian balance-of-payments figures. *See* SIRINA KERIM-DIKENI, LIBR. OF PARLIAMENT, DISTRIBUTION OF FEDERAL REVENUES AND EXPENDITURES BY PROVINCE (2020).

127 *See* SCHULTZ & CUMMINGS, *supra* note 126, at 9. Two states, Illinois and California, were neither net payers nor net receivers. *Id.* at 14.

128 Social solidarity is best reflected in the progressivity of the income tax and certain federal spending programs. Whereas every state has individual residents that are net payers into the federal tax-and-transfer system and individual residents that are net recipients, to

But those asymmetrical payments and receipts, as well as the social solidaristic commitments they represent, have been harnessed politically. A recent dispute between then-Senate Majority Leader Mitch McConnell and then-Governor of New York Andrew Cuomo highlighted the connection between interstate fiscal transfers and federal solidarity, in particular the expectation of reciprocity over time. In the throes of New York's COVID-19 surge, Governor Cuomo announced that his state would require federal funding to overcome the crisis caused by the virus.[129] Senator McConnell's response was that, rather than bail out states, Congress should amend federal law to allow states to declare bankruptcy. Governor Cuomo reacted indignantly. Expressly comparing the balance of payments of Kentucky, the state McConnell represents, to that of New York, Cuomo said:

> When it comes to fairness, New York state puts much more money into the federal pot than it takes out . . . . At the end of the year, we put into that federal pot $116 billion more than we take out. His state, the state of Kentucky, takes out $140 billion more than they put in. . . . Senator McConnell[,] who is getting bailed out here? It's your state that is living on the money that we generate. Your state is getting bailed out. Not my state.[130]

In other words, even if interstate fiscal imbalances mainly reflect national preferences for interpersonal redistribution, in times of crisis, politicians may point to asymmetries in interstate transfers to invoke *state-to-state* solidarity, with its expectation of mutual aid and reciprocity over time. Cuomo intended his comment about the net balance of payments as a rebuke to McConnell for his failure to discharge the implicit obligations of solidarity federalism within the realm of national politics. Prominent commentators echoed Governor Cuomo's complaint, suggesting that it was improper for net-recipient states and their representatives to fail to come to the aid of states that were in current crisis.[131] Politicians and civil society point to asymmetries in interstate

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the extent that state-to-state balance-of-payments differences reflect something other than differences in means and ability to pay across states, that residents tolerate them suggests the presence of federal solidarity.

129 *See* Berkeley Lovelace Jr. & Noah Higgins-Dunn, *New York Gov. Cuomo Says 'States Are Broke' and Need Federal Funding to Distribute Covid Vaccine*, CNBC (Nov. 25, 2020, 12:43 PM), https://www.cnbc.com/2020/11/25/covid-vaccine-new-york-gov-cuomo-says-states-are-broke-and-need-federal-funding-to-distribute.html [https://perma.cc/C5S8-TH67].

130 *Murphy, Cuomo Fire Back at Mitch McConnell for Floating State Bankruptcy Idea*, NBC N.Y. (Apr. 24, 2020, 2:00 AM), https://www.nbcnewyork.com/news/local/murphy-cuomo-fire-back-at-mitch-mcconnell-for-floating-state-bankruptcy-idea/2386429/ [https://perma.cc/UX7K-97SX].

131 *See, e.g.*, Paul Krugman, *McConnell to Every State: Drop Dead*, N.Y. TIMES (Apr. 23, 2020), https://www.nytimes.com/2020/04/23/opinion/mcconnell-coronavirus-states.html [https://perma.cc/P5QU-APEM] ("True, relatively rich states like New York, New Jersey and

transfers to invoke *state-to-state* solidarity, thereby harnessing federal solidarity's moral claims to mutual aid and reciprocity over time, with the expectation that pointing out fiscal imbalances will resonate with voters and policymakers.

Of course, we do not mean to suggest that taxes and spending are the only ways that federal solidarity—and in particular horizontal solidarity—affects politics.[132] Nor do we even suggest that the federal-state balance of payments is the only place that our federation enforces interstate duties of material support.[133] We chose to illustrate our point about federal solidarity in politics using the federal-state balance of payments because it is often pointed out that the United States "stands alone amongst the federations of the advanced economies" in lacking fiscal equalization.[134] Indeed, the United States has been called an "outlier"[135] and "peculiar[]"[136] for its lack of equalization payments.[137] But this Section argues that, although we lack explicit equalization payments, our federal tax-and-spend system effectuates significant and persistent indirect state-to-state transfers, and politicians and the press cite those asymmetrical payments with the expectation that doing so will enforce solidarity norms in federal politics.

Connecticut probably should be helping out their poorer neighbors—but those neighbors don't then get the right to complain about 'blue state bailouts' in the face of a national disaster.").

132 *See, e.g.*, Gerken & Holtzblatt, *supra* note 10, at 88–89 (discussing interstate politics).

133 Interestingly, the state and local tax (SALT) deduction, which provides a federal deduction for the payment of SALT, reduces interstate fiscal transfers in the United States by reducing federal tax contributions from the richer states, which tend to be the higher-tax states that receive more benefit from the SALT deduction. *See* Daniel Hemel, *The Death and Life of the State and Local Tax Deduction*, 72 TAX L. REV. 151, 165 (2019) (noting that states that benefit more from the SALT deduction are also more likely to pay more in federal taxes than they receive in federal spending). Viewed in light of horizontal solidarity, the SALT deduction is thus a politically salient tool to *dampen* interstate redistribution. Solidarity federalism would predict that clear, politically salient, interstate payments would tend to flow when federal solidarity otherwise *ebbs* because only then are such payments needed to assuage dissatisfied states. Thus, it is not especially surprising that, as interstate tensions have ramped up in recent years, the political system has required rich U.S. states to pay more, specifically in the form of limitations to the SALT deduction. Solidarity federalism thus provides a more neutral "rich and poor state" valence to policy choices to expand or cap the SALT deduction. But, of course, there is also a highly politicized "blue and red state" explanation for the 2017 SALT cap. *See generally id.* The SALT deduction reflects the ways partisan federalism may interact with solidarity federalism. *See generally* Bulman-Pozen, *supra* note 7.

134 Michael Keen, *Peculiar Institutions: A British Perspective on Tax Policy in the United States*, 18 FISCAL STUD. 371, 384 (1997) (Eng.).

135 Stark, *supra* note 49, at 957.

136 Keen, *supra* note 134, at 384.

137 Béland & Lecours, *supra* note 49, at 311 ("[E]qualisation is largely a non-issue in the United States, which is quite puzzling considering the presence of this type of programme in all of the other advanced industrial federal systems.").

* * *

To conclude our brief discussion of solidarity in practice in the United States, we return to the COVID-19 example that began this Article. Out of concern for the welfare and safety of their own citizens during the pandemic, states discriminated against residents of other states and otherwise lashed out at other states, casting them as vectors of disease. We can now understand these actions as undermining federal solidarity. For some of the state actions—such as New York's discrimination against out-of-state residents in awarding seats at the bar exam—legal remedies exist.[138] In these cases, private citizens would enforce formal solidarity obligations. To resolve such challenges, under the Dormant Commerce Clause, for example, the Supreme Court would balance the state interest in, say, reducing transmission of COVID-19, against the asymmetrical burden that the state restriction placed on interstate commerce as compared to in-state commerce. Experience tells us that when states expressly discriminate against interstate commerce, the state's autonomy interest rarely prevails over what we may now characterize as the solidarity duties not to obstruct the interstate market and not to harm other states and their residents.[139] For other actions we described in the Introduction—including the comments by state officials characterizing nonresidents as vectors of disease, or the suggestion by Senator McConnell that, rather than aid New York, Congress should allow it to declare bankruptcy—there is no legal recourse, and instead solidarity norms are enforced politically and with public shaming. We observe, however, that Governor Cuomo's solidaristic view ultimately prevailed over Senator McConnell's, in the form of significant federal COVID-19 relief for states.[140]

In the United States, state solidarity and state autonomy as constitutional structures together operationalize the Founders' goal to "[r]eject[] both pure confederation and consolidation."[141] As we noted at the outset, we do not take a normative view in this Article on

138 Vikram David Amar, *Why It Is Unconstitutional for State Bars, When Doling out Bar-Exam Seats, to Favor In-State Law Schools*, VERDICT (May 21, 2020), https://verdict.justia.com/2020/05/21/why-it-is-unconstitutional-for-state-bars-when-doling-out-bar-exam-seats-to-favor-in-state-law-schools [https://perma.cc/3J3R-B57Q] (evaluating the constitutionality of discriminatory bar-exam administrations in Connecticut, Maine, Massachusetts, Missouri, New York, North Dakota, and Tennessee).

139 *See* Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 100 (1994) (describing facially discriminatory laws as subject to a "virtually *per se* rule of invalidity").

140 American Rescue Plan Act of 2021, Pub. L. No. 117–2, 135 Stat. 4. The plan ultimately provided $350 billion in federal assistance to states. Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4338 (Jan. 27, 2022) (to be codified at 31 C.F.R. pt. 35).

141 McConnell, *supra* note 42, at 1493.

how federal solidarity should be enforced or what the optimal solidarity-autonomy balance might be for our federation. Rather, in this Part we have sought to demonstrate that solidarity—not only autonomy—animates our federation in both law and politics.

III. SOLIDARITY IN THEORY: RETHINKING FEDERALISM(S)

We readily acknowledge that the precise contours of the solidarity obligations and features that arise from federal membership, nested citizenship, and other structures of federal solidarity will vary from federation to federation. And solidarity federalism—the process by which a federation generates, promotes, and enforces its solidarity obligations—will therefore be distinct to each system. To that end, in this Part, we identify some of the implications of solidarity federalism for different areas of federal theory.

We first turn to the major inspirations for this Article. One was recent work—especially by Allan Erbsen—that identified horizontal federalism as an important area for independent study. The other was comparative scholarship that recognized and sought to establish that federal solidarity (or similar notions) were not merely foreign notions; instead, they could be found in vertical federalism in the United States. In this discussion, we emphasize that putting together horizontal federalism and federal solidarity produces new insights and helps to resolve some puzzles in the scholarship. Next, we draw out some of the implications of solidarity federalism for pre-existing theories of federalism, including collective-action federalism, cooperative federalism, and competitive federalism.

A. Horizontal Federalism

In his impressive account of horizontal federalism in the United States, Allan Erbsen argued that seemingly disparate constitutional provisions and doctrines—among them Congress's interstate commerce power, the Privileges and Immunities Clause, and the Full Faith and Credit Clause—share a common purpose to resolve conflicts among states. Further, he proposed that such structures should be studied systematically and across constitutional doctrines.[142] Erbsen's contributions have broadened the study of federalism, but so far horizontal federalism studies have been rooted in autonomy.

Erbsen emphasized state autonomy in horizontal federalism by, for example, locating its structural foundations in the equal footing doctrine (the notion that states are "equal in power, dignity, and authority") and in what he called "aggregat[ion]," which is the allocation

142 Erbsen, *supra* note 6, at 580–83.

and reservation of power to the states in the aggregate, without specifying how to adjudicate conflicts among states as to the exercise of those powers in cases of conflict or interaction.[143] Erbsen cast horizontal federalism in terms of what happens when things go wrong—when states "undermine and antagonize each other."[144] In these ways, Erbsen's horizontal federalism emphasized the divisions of power among the states, just as vertical federalism long was understood as a zero-sum division of power between the federal and state governments.[145]

Such a focus on autonomy is no surprise; it draws on a long tradition in the United States of emphasizing state autonomy. But Erbsen's account of horizontal federalism is not—we would submit—limited to autonomy. On the contrary, although Erbsen uses neither the language of federal solidarity nor the comparative literature on federal solidarity, and although he understands the Constitution to erect a power struggle between the states, he also—and crucially—explains that the Constitution provides methods to mediate destructive interstate conflicts.[146] Among these mediation methods, Erbsen identified mechanisms such as federal preemption, federal judicial review, and interstate compacts.[147] To a scholar steeped in the comparative federalism literature, these are mechanisms of federal solidarity transposed to the horizontal dimension, nothwithstanding that Erbsen did not frame them as such. When read through a federal solidarity lens, Erbsen's account serves as a useful roadmap of the constitutional

143 *Id.* at 507 (quoting Coyle v. Smith, 221 U.S. 559, 567 (1911)); *id.* at 496 (identifying the problem to which horizontal federalism was the solution as that "the Constitution invites interstate friction by empowering coequal states in the aggregate without developing clear rules to allocate power between states").

144 *Id.* at 511.

145 For example, "dual federalism" posits that maintaining separate spheres of power between the states and the federal government is the best way to check government power and secure individual liberty. *See* Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, *in* FEDERALISM AND SUBSIDIARITY 34, 35–36 (James E. Fleming & Jacob T. Levy eds., 2014) ("'[D]ual federalism' connotes separate and exclusive spheres of state and federal authority; it thus exists in contrast to other models of federalism, such as 'cooperative' federalism, 'collective action' federalism, and 'process' federalism."); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 816 (1998) ("[T]here must be a limit to federal power and a corresponding reservoir of state power if federalism is to have any meaning at all.").

146 Erbsen, *supra* note 6, at 510 (defining horizontal federalism as a "typology of constitutionally significant interstate friction"); *see id.* at 512–29 (identifying eight methods by which "interstate maneuvering could create destabilizing friction," namely, dominion, havens, exclusions, favoritism, externalities, rogues, competition, and overreaching).

147 *See id.* at 503, 524 (identifying a "set of constitutional mechanisms for preventing or mitigating interstate friction"); *id.* at 497, 531–60 (identifying, then explaining, five methods the Constitution provides to mediate such friction: codependence and disability, coordination, first-in-time rules, empowering individuals, and enabling federal legislative and common law).

structures of federal—and in particular, horizontal—solidarity in the United States.[148]

Of course, an affirmative acknowledgment of federal solidarity in the horizontal dimension would result in emphasis different from Erbsen's. Erbsen saw horizontal federalism mainly as a way to reduce interstate frictions.[149] But solidarity federalism would focus on generating and promoting federal unity. Thus, rather than delineating how states compete, solidarity would focus on how states cooperate. And rather than emphasizing states' entitlements to be free of interference from each other, solidarity would focus on states' affirmative obligations to one another and each other's residents. As a concrete example, Erbsen pointed to private rights of action under constitutional provisions such as the Dormant Commerce Clause as means to *enforce* the Constitution's dispute-resolution mechanisms.[150] But a solidarity framing would go further—it would embrace nested citizenship not only for providing private rights of action to enforce solidarity obligations or to resolve ad hoc horizontal federalism disputes, but also for its role in *creating* cross-cutting federal rights that forge both interpersonal and interstate unity.[151] For example, federal citizenship and attendant rights—in particular free movement—may generate political demands for the provision of a (national) minimum level of public goods, which in turn may be satisfied by other structures of solidarity federalism, such as fiscal equalization.

At bottom, there is no denying that states have conflicts and that law provides mechanisms to resolve such conflicts, but *federation* affects how sister states resolve such conflicts. Solidarity structures heighten states' obligations to each other and to each other's citizens and strip states of certain alternatives to cooperation.[152] Fundamental structures of solidarity federalism—at a minimum, federal membership and nested citizenship—generate relational obligations that are more powerful than those seen in the international context. In short, whereas

148 For example, in another paper, Erbsen declared that the main question that horizontal federalism asks is "how the existence of multiple states with equivalent powers *limits the authority* of each." *See* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 62 (2010) (emphasis added).

149 Erbsen, *supra* note 6, at 503.

150 *See id.* at 547–49 (referring also to "individual empowerment" under the Privileges and Immunities and Double Jeopardy Clauses); *id.* at 497 (identifying individual empowerment as one of five methods to mediate interstate frictions).

151 Although Erbsen recognizes that what we call nested citizenship "helps establish a national identity that might override or mitigate regional parochialism," he does not center it the way a fully-fledged conception of federal solidarity would. *See id.* at 549–50.

152 For example, limitations on secession force states to prioritize voice and loyalty over exit. *See supra* subsection I.A.3. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

horizontal federalism, as articulated by Erbsen, can be understood to describe the *enforcement* of solidarity obligations, solidarity federalism also emphasizes the *genesis* and *performance* of solidarity, which can be seen not only in constitutional interpretation, but also in everyday politics.[153]

B. Comparative Federal Solidarity

Our account also deepens comparative assessments of federal solidarity. First, although scholars abroad have not wholly neglected horizontal solidarity, they have mostly limited their consideration to the narrow—albeit important—phenomenon of overt fiscal equalization payments. We, by contrast, argue that horizontal solidarity goes well beyond the fiscal realm. To this end, a critical lesson from our account concerns the centrality of nested citizenship. Although discussions of nested citizenship in the literature are not totally unknown,[154] nested citizenship was absent from the most comprehensive recent account of the constitutional structures of federal solidarity.[155] That absence might be explained by federal solidarity's focus on *vertical* solidarity. But nested citizenship is important both for horizontal and vertical federalism.[156] Thus, in our view, no account of solidarity that does not center nested citizenship can be definitive.

Second, due to its relevance for U.S. scholarship, we spend some time distinguishing our account from Daniel Halberstam's enlightening discussion of the presence in U.S. constitutional law of what he translated as "federal fidelity," but we have been calling "federal solidarity."[157] Drawing from comparative law and theory in Germany and the European Union, Halberstam advanced U.S. federalism scholarship beyond its traditional focus on autonomy.[158] He argued that federal fidelity was present in the United States in constitutional doctrines governing federal commandeering, the treaty power, and limits on the

153 *Cf.* Gerken & Holtzblatt, *supra* note 10, at 62 (characterizing horizontal federalism scholars as being overly concerned about state sovereignty, and insufficiently concerned with the benefits that arise from political conflicts).

154 *See* sources cited *supra* note 33.

155 *See* discussion of the work of Patricia Popelier, *supra* notes 26 and 32.

156 *See supra* note 32 and accompanying text.

157 Halberstam translates the German constitutional doctrine "*Bundestreue*" as "federal fidelity" to emphasize that "each level or unit of government must always act to ensure the proper functioning of the system of governance as a whole" and "promote the well-being of the entire political system." Halberstam, *supra* note 9, at 734, 739. Other scholars translate *Bundestreue* as "federal loyalty" or "federal comity." *See, e.g.*, Jackson, *supra* note 9, at 283. Halberstam prefers "fidelity" for its closely associated Latin roots—*foedus* ("covenant") and *fides* ("faith")—and because unlike "comity," it evokes duty, not friendship. *See* Halberstam, *supra* note 9, at 739 n.15.

158 *See* Halberstam, *supra* note 9, at 739.

affirmative commerce and spending powers (among other topics). He also showed that the Supreme Court has read into the Constitution "specific duties of mutual cooperation and respect" among the partners in our federal union.[159] As one example, Halberstam explains that although Congress's spending power appears to be plenary, and Congress can use it to undertake regulatory goals outside of its enumerated powers, Congress cannot use spending to coerce states.[160] Although Halberstam's account was mainly vertical, our own discussions of the Dormant Commerce Clause and interstate sovereign immunity provide support—in the horizontal dimension—for his claims that U.S. federalism is characterized by federal fidelity.

But Halberstam's deeply historical account led him—erroneously in our view—to argue that federal fidelity should emphasize policy diversity over harmonization. Analyzing the development of federalism in Germany, Halberstam distinguished between what he termed conservative and liberal visions of fidelity.[161] Halberstam characterized German fidelity as conservative because the federal government of Germany invoked fidelity to gain substantive policy harmonization. This harmonization was designed to squelch interlevel disputes and genuine policy differences among voters in different states. Such conservative fidelity, argued Halberstam, was both antidemocratic and antifederal, because, in his terms, harmonization "mimics . . . a unitary system of governance."[162] Halberstam's vision of liberal fidelity, in contrast, emphasized diversity as a means to protect liberty and improve government responsiveness.[163] In other words, Halberstam wanted a thumb on the scale—even in a solidarity setting—for policy diversity over harmonization.[164]

Halberstam's distinction between conservative and liberal fidelity colored his analysis of the one horizontal solidarity issue he discussed at length, the Dormant Commerce Clause. Halberstam approved of the Dormant Commerce Clause's nondiscrimination doctrine; he

159 *Id.* at 789. In Halberstam's view, fulsome recognition of federal fidelity in the U.S. system should lead in federalism cases to judicial consideration of "whether the various powers are being exercised for their proper purpose" and that purpose would not be proper if it tended to undermine the functioning of the system of governance as a whole. *Id.* at 825.

160 *See id.* at 809.

161 *Id.* at 736.

162 *See id.* at 736–37 (noting that, in Germany, the conservative approach is "rooted in . . . fear of democracy"); *id.* at 758 (explaining that in Germany, a harmonizing federal fidelity in the post-reunification era "specifically assisted in suppressing democratic debate"); *id.* at 762 (explaining that the modern conservative conception of fidelity in Germany "views federalism and democracy as being in tension with one another").

163 *See id.* at 737.

164 *See id.* at 762; *see also id.* at 821–27.

understood it to uphold the *liberal* conception of federal fidelity because it did not undermine interstate regulatory diversity.[165] In contrast, Halberstam understood the undue-burdens doctrine to uphold the *conservative* conception of federal fidelity; to Halberstam, it represented "a naked effort to contain democratic politics by harmoniz[ation]."[166] The undue-burdens doctrine of the Dormant Commerce Clause is pro-harmonization, and therefore conservative in Halberstam's sense, in the following way: judicial preclusion under the doctrine often leads to policy harmonization.[167] Consider *Kassel*, the truck-length case we discussed in Part II. When the Supreme Court precluded Iowa's shorter truck-length limits, it implicitly endorsed a longer uniform national truck-length limit.[168] Such judicially imposed harmonization could be seen as undermining democratic choice and as undermining policy pluralism as a federalism value.

Even if we agreed with Halberstam that judicial review in Dormant Commerce Clause cases is undemocratic, we disagree with his conclusion that such review is *antifederalism*. First, consider the alternatives to preclusion in a case like *Kassel*: one possibility is that the interstate regulatory conflict becomes so significant that Congress intervenes, applying a uniform federal rule. Although such an outcome would be more democratic than judicial preclusion, it would not preserve state regulatory diversity. Another potential resolution to the problem in *Kassel* might be that the states conform their regulations to each other (perhaps nudged in this direction by interest groups); again, the result is harmonization. Only in the last scenario—where none of the Supreme Court, Congress, nor the states intervene—would state regulatory diversity persist. But this scenario would be characterized by meaningful inhibitions on interstate commerce.[169] As we explained above, because

165 *See id.* at 809–10.

166 *Id.* at 810. Halberstam does not explain why undue burdens, but not discrimination, cases lead to harmonization. One possibility involves remedy. When the Supreme Court precludes in a discrimination case, the state can remove the constitutional infirmity via equal treatment—the state merely has to treat the interstate case like the in-state case. Therefore, it does not have to give up its own law. In contrast, when the Supreme Court precludes in an undue-burdens case (like *Kassel*), the implication of preclusion is that the challenged state must conform its law with that of the other states. Thus, the nondiscrimination doctrine does not lead to harmonization, but the undue burden doctrine does. *See* Knoll & Mason, *supra* note 64 (manuscript at 7) (referring to this phenomenon as "harmonization by preclusion").

167 *See* Knoll & Mason, *supra* note 64 (manuscript at 47–49).

168 *See id.* (manuscript at 45).

169 Specifically, interstate truckers would have to make adjustments to comply with Illinois law. For other examples, besides *Kassel*, that involve judicial intervention to prevent regulatory mismatches, see Hunt v. Wash. Apple Advert. Comm'n, 432 U.S. 333, 350–54 (1977) (precluding a state's mismatched apple-labeling rule because it stripped out-of-state apple producers of comparative advantages); Bibb v. Navajo Freight Lines, Inc., 359 U.S.

state autonomy and state solidarity are *both* critical to constitutional federation, when they conflict, solidarity may sometimes win over autonomy, including via policy harmonization. And this fact in itself is unobjectionable.

In our view, solidarity federalism makes no special demands regarding the content of state law or its degree of uniformity with that of other states. Put differently, neither diversity nor harmonization should be seen as normatively desirable for its own sake in a federation; rather both are instruments for achieving other goals, including federalism's ultimate goal: the ongoing viability of the federation as a form of government that advances the welfare of its inhabitants. Thus, neither federalism generally, nor solidarity as an aspect of federalism, forces us into a dichotomy between diversity and harmonization—or, we would add, autonomy or solidarity.[170] On the contrary, in some cases, federalism may best be advanced through harmonization, as with the federal preclusion exemplified by *Kassel*, but in others, it may best be advanced by diversity, as exemplified by the states' diverse, but cooperative, responses to the Supreme Court's refusal to mandate uniform comity in *Nevada v. Hall*.[171]

C. Vertical Federalism

As Daniel Halberstam showed, federal fidelity has significant implications for vertical federalism. Here, we highlight the possible implications of our concept of solidarity federalism for other scholars of vertical federalism.

Consider Gillian Metzger's account of Congress's power to regulate interstate relationships.[172] Metzger argued that, when it is in the national interest, Congress as "national umpire over interstate relations" can authorize states to discriminate against each other or against residents of other states (subject to an overall limit provided by individual rights).[173] In particular, she argued that Congress may authorize

520 (1959) (precluding a state from requiring curved mudflaps on trucks at a time when all other states either permitted or required straight mudflaps because the need to switch mudflaps at the state border created an undue burden on interstate commerce). *See generally* Knoll & Mason, *supra* note 64.

170 *Cf.* Halberstam, *supra* note 9, at 790 (presenting harmonization and diversity as "coherent alternatives").

171 *See generally* cases cited *supra* note 115.

172 *See* Metzger, *supra* note 20.

173 *Id.* at 1478, 1478–79. Metzger argued that the congressional prerogative to authorize interstate discrimination is subject to the limit that Congress cannot give states permission to take actions that would violate the Fourteenth Amendment. *See id.* at 1526. Solidarity federalism supports this conclusion as well; like that of the states, congressional power is bounded by the fundamental solidarity structure of nested citizenship and the rights

the states to discriminate notwithstanding the "union-forging"[174] nondiscrimination obligations that the Constitution imposes on the states through the Privileges and Immunities Clause of Article IV.[175] Deploying as an example a congressional authorization for a state to ban the importation of toxic waste, Metzger defined the national interest to include "protecting states against exploitation" by other states and "limiting harmful externalities."[176] On our account, the toxic-waste-import scenario presented by Metzger involves two potential breaches of state solidarity duties. The toxic waste exporter seeks to violate its duty to avoid harm by dumping its waste on its neighbor, while the importing state seeks to violate its duty of nondiscrimination by barring entry of the waste on the grounds of its state of origin. Although the Constitution does not provide a clear path to resolving such disputes—it does not tell us which state should be permitted to jettison its solidarity obligation—empowering Congress at its option to resolve such disputes in favor of the national interest, rather than leaving the resolution of such issues to the states, is consistent with solidarity federalism and our constitutional order.

Solidarity federalism likewise provides independent support for collective-action federalism. Advocates of collective-action federalism argue that Congress should be understood as empowered to legislate to minimize cross-border spillovers, such as pollution, and to prevent the type of interstate regulatory conflicts at issue in cases like *Kassel*.[177] Specifically, when presented with a question of whether Congress has the power to regulate, tax, or spend in a particular area, collective-action federalists would ask whether the proposed regulation, tax, or spending would address an interstate externality. If the answer is yes, then the Supreme Court should interpret Article 1, Section 8 to empower Congress to act.[178] Solidarity federalism provides additional

pertaining to nested citizenship. We can thus reframe Metzger's argument in terms of solidarity federalism as follows: although states' solidarity obligations to each other are mutable through a federal lawmaking process in which they have indirect representation, certain of their solidarity obligations to federal *citizens*, as enumerated in the Fourteenth Amendment, are not so mutable.

174 *Id.* at 1508.

175 *See id.* at 1507–08.

176 *Id.* at 1501.

177 *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 144, 172–73 (2010); *see also* Richard E. Levy, *Federalism and Collective Action*, 45 KAN. L. REV. 1241, 1241 (1997) (conceiving of the federal system as a "pragmatic response to collective action problems"); Metzger, *supra* note 20, at 1478–501 (arguing that Congress can intervene, including by authorizing states to discriminate, to eliminate cross-border externalities). *But see* Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217, 298 (2014) (concluding that Supreme Court doctrine is not justified by collective-action federalism).

178 Cooter & Seigel, *supra* note 177.

support for this analysis. At stake in interstate collective-action problems are *solidarity* duties—including the duties not to harm and to cooperate. Solidarity federalism views federal legislation, as it views judicial review, as a valid intervention to enforce solidarity duties, including, at times, against countervailing claims to state autonomy.

Finally, solidarity can help motivate vertical accounts of cooperative federalism (as well as encouraging its further expansion to horizontal federalism). Cooperative federalists argue that states and the federal governments can be partners.[179] By emphasizing obligation and cooperation, cooperative federalism scholars have moved beyond an understanding of federalism rooted principally in entitlement and autonomy. Solidarity federalism bolsters these accounts in various ways, including by noting that the removal of certain alternatives to cooperation possessed by independent countries, such as war powers, encourages both interstate and inter-level cooperation.[180]

D. Competitive Federalism

Competitive federalism is perhaps the federalism theory most deeply rooted in autonomy, and it has always been understood to operate in both the vertical and horizontal planes. It posits that competition among the states (as well as between the states and federal government) is the best method to foster values such as liberty, efficiency, and regulatory diversity.[181] Competitive federalism perceives the states as antagonists and competitors; each seeks to maximize its own

179 *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 428 (1998) (arguing that the federal government should see states as "partners in policy formulation and implementation" rather than purely as "instruments of its national will"); Hills, *supra* note 145, at 883 & n.241 (discussing features of U.S. cooperative federalism); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001) (arguing that it is a mistake to "view[] each jurisdiction as a separate entity that regulates in its own distinct sphere of authority"); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1273 n.46, 1285 (2009) (referring to it as "uncooperative federalism" and as "the administrative safeguards of federalism" when states act as unfaithful agents, that is, when they use their power as agents to try to "change federal policy" beyond ordinary cooperative bargaining); Gerken, *supra* note 7, at 1556–58 (arguing that the federal government's inability to implement federal policy without the help of the states lends states what Gerken calls the "power of the servant").

180 Justice Thomas made analogous points in *Hyatt*. *See* discussion in *supra* subsection II.A.2.

181 *See* MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 2 (1999) (Competitive federalism "aims to provide citizens with *choices* among different sovereigns, regulatory regimes, and packages of government services."); John Shannon & James Edwin Kee, *The Rise of Competitive Federalism*, 9 PUB. BUDGETING & FIN., Winter 1989, at 5 (state governments compete for taxpayers).

interests.[182] On this view, regulatory diversity is a normative good—regulatory diversity not only expresses state autonomy; it facilitates productive interstate competition, allowing federal citizens to vote with their feet to obtain their preferred combination of taxes and government benefits and regulations.[183] Prizing competition as an instrument for promoting the traditional benefits of federalism, competitive federalists therefore tend to oppose policies that dampen competition, including policies that harmonize regulations across states (or between the states and federal government) or that redistribute resources across state lines.[184]

But a key implication of solidarity federalism is that some harmonization may be *necessary* in federations to protect the structures of solidarity, even if that harmonization reduces state autonomy and interstate competition.[185] For example, to discharge their obligations not to harm other states and citizens of other states, states must avoid discrimination and certain types of regulatory mismatches. These nondiscrimination and harmonization obligations reflect the states' obligations to respect federal citizens' personal rights, but they also reflect states' *federalism* obligations.[186] Hence, certain types of regulatory

182 *Cf.* MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION (2012) (criticizing the Court's federalism jurisprudence because it fails to recognize that only competitive federalism, and not all forms of state power, is consistent with the Constitution); Calabresi, *supra* note 42, at 830 (arguing that the Supreme Court's federalism jurisprudence, including its interpretation of the Commerce Clause, should preserve competitive federalism).

183 *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) (implying that federalism prizes regulatory diversity on grounds of efficiency, pluralism, accountability, experimentation, and preservation of liberty); *see also* Edward A. Purcell, Jr., *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 N.Y. L. SCH. L. REV. 635, 687 (2005–2006); Calabresi, *supra* note 42, at 775–78.

184 *See* Shannon & Kee, *supra* note 181, at 7–9, 11 (noting the negative consequences of federal aid to states); THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS xv (1990) (defining the underlying theory of competitive federalism as "the encouragement of rivalry among state and local governments to offer citizen-taxpayers the best array of public services at the lowest costs"); GREVE, *supra* note 181, at 5 (noting the dangers of redistribution and special-interest groups); GREVE, *supra* note 182, at 251 (warning against the negative consequences for federalism of redistribution). Not all methods of regulatory harmonization are the same from the perspective of state autonomy. For example, federal preemption is autonomy-reducing compared to reaching a common state standard through either interstate negotiation or market-like regulatory competition. *See* Gerken & Holtzblatt, *supra* note 10, at 63 (discussing the Uniform Commercial Code).

185 *But cf.* Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 573–74, 578 (2000) (arguing that cooperative federalism erodes state autonomy and identifying Germany's conception of federal solidarity as an influence in the U.S. adoption of cooperative federalism).

186 For example, the Dormant Commerce Clause protects the national marketplace as a matter of federalism, whereas other parts of the Constitution prevent discrimination or protect free movement as a matter of personal rights. Additionally, the Dormant Commerce Clause generates causes of action for corporations, not merely for natural persons.

harmonization—including that seen in *Kassel*—should be seen for what they are: modest interventions to promote, rather than obstruct, the federal marketplace.

Likewise, solidarity federalism provides a retort to competitive federalists who see redistribution among states—including via the federal tax-and-spend system—as undesirable because it disassociates public benefits from their tax costs, thereby dampening tax competition.[187] Redistribution promotes solidarity by compensating poorer states that derive less benefit than do richer states from the federal union, encouraging poorer states to remain in the federation and to remain cooperative.[188] But fiscal equalization simultaneously promotes autonomy by giving poorer states the money they need to effectively exercise their regulatory powers.[189] States cannot compete with each other without a baseline level of financing to do so, and the nature of a federation, with its guarantees of freedom of movement, implies that no state should be allowed to drop out of the marketplace for residents. In these ways, fiscal equalization promotes both solidarity and autonomy.[190]

See, e.g., Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 595–96 (1839) (holding that Alabama could not exclude out-of-state banks from its market); S. Pac. Co. v. Ariz. *ex rel.* Sullivan, 325 U.S. 761, 781–82 (1945) (precluding Arizona from imposing a maximum train-car limit that differed from the limits in other states); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 530 (1959) (precluding Illinois from imposing a curved mudflap requirement at a time when all other states required or permitted straight mudflaps); Edgar v. MITE Corp., 457 U.S. 624, 642 (1982) (precluding a state's anticorporate takeover rule because the state regulated on the basis of residence of the shareholders, rather than following the dominant practice of regulating on the basis of state of incorporation); *cf.* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding the right to travel freely among the states, because it affects interstate commerce, requires uniformity among the states with respect to nondiscrimination in public accommodations). Just as the Supreme Court may enforce solidarity duties by precluding regulatory conflicts that inhibit the national marketplace, under the affirmative Commerce Clause, Congress may enact uniform rules to protect that marketplace, thereby protecting and promoting federal solidarity.

187 *See* sources cited *supra* note 186.

188 Béland & Lecours, *supra* note 49, at 313.

189 *Cf.* Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2556–61 (2006) (arguing that formal legal autonomy for local governments is often inconsistent with actual capacity, including fiscal capacity).

190 Similarly, other fiscal constraints imposed at the state level, such as self-imposed budget and borrowing constraints, promote both solidarity and autonomy. Budget and borrowing constraints promote solidarity by lowering the risks to other states from one state's fiscal irresponsibility. If one state defaulted on its debt, the default might impact other states in various ways, including that residents of other states might own the bad debt, the default could increase interest rates for nondefaulting states, lead to contagion, or trigger a federal bailout that would be funded in part by residents of other states. But self-imposed budget constraints also preserve state autonomy by forestalling federal intervention to impose *federal* borrowing limits on states. The Constitution neither requires nor

Solidarity federalism thus changes how we think about competitive federalism. The competitive federalists view the states as akin to market rivals; much as market competitors win customers, states win residents from each other, and they win control of policy areas from the federal government. One way to understand the solidarity structures of federalism is that they *regulate* the competition among the states similarly to how government regulates actors in a marketplace. The Constitution facilitates regulation of federal competition by, for example, empowering the federal government to nationalize areas of competition through mechanisms such as federal preemption and by enabling the federal courts to moderate unfair state competition through judicial doctrines such as the Dormant Commerce Clause.

CONCLUSION: THE LIMITS OF SOLIDARITY

We have argued that solidarity and autonomy jointly produce federalism's values, including safeguarding liberty and democracy. Recognition of solidarity federalism advances our understanding of our own Constitution, as well as federalism more generally. And, as we have shown, when conflicts arise between state autonomy and state solidarity, autonomy need not always prevail. Of course, solidarity need not always win either.

We began this Article with an example of states discriminating against residents of other states during the COVID-19 pandemic, and we discussed how states and people could invoke and have invoked the law and politics of federal solidarity to remediate such discrimination. Only recently has an even more charged example emerged. The decision in *Dobbs v. Jackson Women's Health Organization*,[191] which eliminated the federal right to abortion, ushered in a new set of highly contentious federalism issues.[192] Some states quickly acted to restrict their citizens'

prohibits federal bailouts of states, nor does federal law provide clear direction for handling states in fiscal distress. For history, see James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1276–80 (1998); JONATHAN A. RODDEN, HAMILTON'S PARADOX: THE PROMISE AND PERIL OF FISCAL FEDERALISM 57–64 (2006) (tracing lack of a federal bailout obligation in the United States). A no-bailouts policy adopted by the federal government can be understood in the context of solidarity federalism as encouraging states to mitigate moral hazards associated with excessive borrowing and spending by exposing them to market discipline. At the same time, by not imposing federal budget and borrowing limits on states, Congress also can be seen as rewarding states for adopting their own budget constraints. *Cf.* Darien Shanske, *States Can and Should Respond Strategically to Federal Tax Law*, 45 OHIO N.U. L. REV. 543, 551–52 (2019) (arguing that balanced-budget requirements promote state autonomy).

191 142 S. Ct. 2228 (2022).

192 See generally David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023); Richard H. Fallon, Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L.J. 611 (2007).

access to abortions, and some advocates are pushing restrictions on abortion-related travel.[193] At the same time, other states are positioning themselves as safe havens for nonresidents seeking abortions; they have promised to refuse to cooperate with fellow states that would punish women who travel to seek abortions.[194] *Dobbs* thus may unleash new legal contests between state autonomy and state solidarity. The coming legal battles will involve conflicts of law, the right to travel, extradition, aid in enforcement of fellow states' laws, extraterritorial applications of law, the limits of Congress's powers to regulate commerce, and more.[195]

In answering the many questions *Dobbs* has raised and will raise—which go to the very core of federalism—the Supreme Court will have to consider not only autonomy but also solidarity. Given our federalism's typical overemphasis of state autonomy, we would expect the issues to be framed as autonomy contests: e.g., does one state's autonomy interest in providing abortion services within its territory prevail over another state's autonomy interest in controlling its citizens'

193 Legislative innovation in extraterritorial efforts to restrict abortion access is nascent; there are no laws in effect that explicitly authorize prosecution for out-of-state abortions. In March 2022, a Missouri legislator introduced a bill creating civil liability for anyone who performs an abortion on a Missouri resident, regardless of location, or who helps a Missouri resident travel outside the state to get an abortion. H.B. 2012, 102d Gen. Assemb., 2d Reg. Sess. (Mo. 2022). The legislation was not adopted, Tessa Weinberg, *Missouri House Blocks Effort to Limit Access to Out-of-State Abortions*, MO. INDEP. (Mar. 29, 2022, 8:58 PM), https://missouriindependent.com/2022/03/29/missouri-house-blocks-effort-to-limit-access-to-out-of-state-abortions/ [https://perma.cc/B5AF-3FZU], but it has inspired state representatives in Arkansas, Texas, and South Dakota to consider proposing similar actions. Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (June 30, 2022, 8:30 AM), https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/ [https://perma.cc/J9JU-JVPJ]; Yuna Lee & Adam Roberts, *Arkansas State Senator Calls for Law Targeting Companies That Pay for Abortion Travel*, 4029 TV (July 4, 2022, 3:09 PM), https://www.4029tv.com/article/arkansas-abortion-travel-law-rapert/40486335# [https://perma.cc/2ZJL-H8BK]. Legislation banning medically induced abortions could have extraterritorial application if a state were to target an out-of-state prescriber. Cohen et al., *supra* note 192 (manuscript at 33–38).

194 *See Abortion Ruling Prompts Variety of Reactions from States*, ASSOCIATED PRESS (July 21, 2022), https://apnews.com/article/supreme-court-abortion-ruling-states-a767801145ad01617100e57410a0a21d [https://perma.cc/W2KT-PSRB] (state-by-state review of abortion-related laws, including recent responses to the *Dobbs* decision, indicating that many states already have or plan to enact measures to shield people from abortion-restrictive states). As of November 2022, seventeen states have enacted "shield laws," forbidding state employees from cooperating or assisting in investigations of legal abortions in the state, prohibiting disciplinary action against providers, and declining extradition requests. *State Legislation Tracker: Major Developments in Sexual & Reproductive Health*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/ [https://perma.cc/2NT7-JB6B].

195 *See* Cohen et al., *supra* note 192; Fallon, *supra* note 192.

behavior when they cross state lines?[196] But recasting the tensions in solidarity terms reveals additional considerations.

First, in the state-to-state dimension, does one state have an obligation to aid a fellow state in enforcing the fellow state's law? Should Massachusetts apply Texas's law to a Texas citizen, even in Massachusetts? Are state laws promising "not to cooperate" themselves solidarity violations? Next, what responsibilities do states have to the *citizens of other states* in this context? Can Massachusetts, consistent with its solidarity obligation to citizens of Texas as federal citizens, deny Texans access to commercial services available to Massachusetts residents? And similarly, would it be a solidarity violation for Texas to deny its citizens the opportunity to purchase abortion services in other states where the purchase of such services is legal?

Under the *Roe/Casey* regime that recognized a federal constitutional right to abortion, the Supreme Court quieted the battle among the states by selecting a particular federal balance between autonomy and solidarity. *Dobbs* undid this federal settlement, leaving to the states, at least temporarily, the messy work of reaching a new compromise between solidarity and autonomy. Federal intervention—in the form of federal legislation guaranteeing abortion access or a new decision by the Supreme Court (hinted at in *Dobbs* by Justice Kavanaugh)[197] that confirms women's constitutional right to travel to other states to obtain abortions—could resettle some of the emerging federalism disputes. Such federal intervention—like *Roe* before it—would represent an instantiation of solidarity federalism; it would represent a balance between solidarity and autonomy. We reiterate our view that solidarity federalism does not call for the absolute vindication of solidarity over autonomy.

These questions regarding abortion echo some of the painful history of the Fugitive Slave Clause and the debate between Justices Story and Taney in *Prigg v. Pennsylvania*.[198] In *Prigg*, the Court (per Justice Story) *avoided* questions of state-to-state solidarity by finding exclusive federal authority over rendition of enslaved people. But Chief Justice Taney argued in a concurrence that the free states had an obligation

196 Recent oral argument in another key solidarity federalism case, *National Pork Producers v. Ross*, suggests that some Justices are beginning to pay more attention to the limits of the autonomy vs. autonomy framework. *See, e.g.*, Transcript of Oral Argument at 95, Nat'l Pork Producers Council v. Ross (2022) (No. 21-468) (Kagan, J.) ("Do we want to live in a world where [states are] constantly . . . at war with [one another]?"); *id.* at 116 (Alito, J.) ("Is California unconcerned about all this because it is such a giant . . . [?] You can bully the other states, and so you're not really that concerned about retaliation?").

197 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

198 41 U.S. (16 Pet.) 539, 622 (1842).

to support their sister states, including through rendition.[199] Such highly charged moral issues show the limits of solidarity. Specifically, it must be the case that a state can refuse to enforce the laws of other states or to aid other states in enforcing their laws when those refusals are sufficiently justified. The notion that solidarity has limits finds support in modern interpretations of the Constitution; we know that a state may harm another state or discriminate against residents of another state, provided the state has good reasons for doing so. For instance, the Supreme Court will refuse to preclude even overt state discrimination against residents of other states when the reasons for that discrimination are sufficiently compelling.[200]

States' obligations to respect and accommodate each other do not and cannot always trump their own autonomy interests or their solidarity obligations to avoid harming federal citizens who reside in other states, lest solidarity accommodate tyranny. When the political and moral disagreements that divide states and their residents are fundamental, the ability of constitutional structures of solidarity to maintain union may erode. Such fundamental differences may threaten federation itself.

199 *See id.* at 627–28 (Taney, C.J., concurring).

200 Maine v. Taylor, 477 U.S. 131 (1986) (holding that a U.S. state did not violate the Dormant Commerce Clause when it banned importation of baitfish from other states, since the ban protected native fisheries from parasitic infection and adulteration by non-native species, goals that could not be accomplished by less discriminatory means).