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NEGOTIATING FEDERALISM AND THE STRUCTURAL CONSTITUTION: NAVIGATING THE SEPARATION OF POWERS BOTH VERTICALLY AND HORIZONTALLY

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Response to: Aziz Z. Huq, The Negotiated Structural Constitution, 114 Colum. L. Rev. 1595 (2014).

INTRODUCTION

This Essay explores the emerging literature on the negotiation of structural constitutional governance, to which Professor Aziz Huq has made an important contribution in *The Negotiated Structural Constitution.*[1] In the piece, Professor Huq reviews the negotiation of constitutional entitlements and challenges the conventional wisdom about the limits of political bargaining as a means of allocating authority among the three branches of government.[2] Building on his previous structural-governance research,[3] he argues that constitutional ambiguities in the horizontal allocation of power are best resolved through legislative–executive nego-

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1. Aziz Z. Huq, The Negotiated Structural Constitution, 114 Colum. L. Rev. 1595 (2014) [hereinafter Huq, Structural Constitution].

2. Id. at 1602.

3. See Daniel Abebe & Aziz Z. Huq, Foreign Affairs Federalism: A Revisionist Approach, 66 Vand. L. Rev. 723, 741, 791–94 (2013) (addressing allocation of state and federal power in zone of twilight between federalism and foreign-affairs concerns); Aziz Z. Huq, Does the Logic of Collective Action Explain Federalism Doctrine?, 66 Stan. L. Rev. 217, 277–78 (2014) [hereinafter Huq, Logic of Collective Action] (critiquing proposition that judicial federalism constraints are necessary to resolve collective-action problems); Aziz Z. Huq, Removal as a Political Question, 65 Stan. L. Rev. 1, 70–76 (2013) [hereinafter Huq, Removal as Political Question] (arguing removal of agency officials should be considered judicially unreviewable political question); Aziz Z. Huq, Standing for the Structural Constitution, 99 Va. L. Rev. 1435, 1464–75 (2013) [hereinafter Huq, Standing] (critiquing Bond v. United States, 131 S. Ct. 2355 (2011), a Tenth Amendment case, and arguing only disempowered institutions, not individuals, should have standing to litigate alleged structural violations of Constitution); Aziz Z. Huq, Tiers of Scrutiny in Enumerated Powers Jurisprudence, 80 U. Chi. L. Rev. 575, 611–13, 652–55 (2013) (evaluating various doctrinal formulae Court has used to evaluate different enumerated constitutional powers and proposing new system wherein Court adopts uniform standard of review for all enumerated powers).

tiation, just as uncertain grants of constitutional authority are already negotiated between state and federal actors in the vertical-federalism context.[4] Speaking the vocabulary of law and economics, Huq uses Coasean reasoning to show that political bargaining is both an inevitable and comparatively desirable response to the navigation of constitutional uncertainty.[5] In the piece, he painstakingly refutes countervailing arguments by the opponents of interbranch bargaining, even though these arguments have prevailed in much of the Supreme Court's separation-of-powers jurisprudence.[6]

Nevertheless, Huq is not alone in his scholarly recognition of the significance of negotiation in structural governance—even in constitutional realms that appear to hinge on the implementation of nonnegotiable principles of separation.[7] In vertical and horizontal separation-of-powers contexts, the allocation of authority along bright lines of separation may seem to be an intrinsic, if not defining, structural feature. Indeed, one might reasonably ask what is the point of the Constitution's separation-of-powers directives, so purposefully dividing power horizontally (among the three branches of government) and vertically (between the state and federal levels), if it is not to preserve an initial allocation of distinct governing authority? Yet as I have previously shown in the vertical-federalism context, and Huq convincingly shows horizontally, these bright lines of differentiation are not always possible, nor even beneficial—nor necessarily intended by the Framers.[8] At the margins

4. Huq, Structural Constitution, supra note 1, at 1632.

5. Id. at 1646.

6. Id. at 1660–61 (discussing *Bowsher v. Synar* and *INS v. Chadha*).

7. See infra Part II (reviewing literature on negotiated structural governance).

8. For Professor Huq's analysis of the horizontal separation-of-powers dimension, see generally Huq, Structural Constitution, supra note 1. For my analysis of the vertical dimension, see generally Erin Ryan, Federalism and the Tug of War Within (2012) [hereinafter Ryan, Tug of War] (proposing theory of federalism that balances tension among federalism's underlying principles and roles of three branches in implementing it); Erin Ryan, Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area, 66 Md. L. Rev. 503 (2007) [hereinafter Ryan, Seeking Checks and Balance] (exploring inevitable jurisdictional overlap and uncertainty between clearer realms of state and federal authority); Erin Ryan, Federalism at the *Cathedral*: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure, 81 U. Colo. L. Rev. 1 (2010) [hereinafter Ryan, Federalism at the *Cathedral*] (analyzing rules of exchange for constitutional entitlements of authority within state–federal bargaining); Erin Ryan, Negotiating Federalism, 52 B.C. L. Rev. 1 (2011) [hereinafter Ryan, Negotiating Federalism] (analyzing state–federal bargaining in federalism-sensitive governance and proposing limited judicial review of qualifying political bargaining); see also Erin Ryan, Environmental Federalism's Tug of War Within, *in* The Law and Policy of Environmental Federalism: A Comparative Analysis (Kalyani Robbins ed., forthcoming 2015) [hereinafter Ryan, Environmental Federalism's Tug of War Within] (on file with the *Columbia Law Review*) (closing chapter analyzing how environmental law showcases wider conflicts in federalism theory and structures of governance it has evolved to manage them); Erin Ryan, The Once and Future Challenges of American Federalism: The Tug of War Within, *in* 1 The Ways of Federalism in Western

between state and federal authority, executive and legislative authority, and even judicial and political authority, inevitable zones of overlap and spillover emerge where interpretive choices must be made.[9] The operative constitutional question then becomes who is best positioned to make these interpretive choices.[10]

The Supreme Court's preferred answer is usually that uncertain constitutional text requires judicial interpretation, and in contexts involving countermajoritarian rights, there is much to recommend this position.[11] In comparison to the political branches, courts possess a clearly superior capacity to vindicate the Constitution's core promises to individuals, notwithstanding the contrary political preferences of their neighbors.[12] However, interpretive uncertainty regarding separation-of-powers questions involves wholly different constitutional considerations.[13] While different scholars of negotiated governance advocate

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Countries and the Horizons of Territorial Autonomy in Spain 267 (Alberto López-Basaguren & Leire Escajedo San-Epifanio eds., 2013) (analyzing developments in state–federal intergovernmental bargaining); Erin Ryan, A Response to Heather Gerken's "Federalism and Nationalism: Time for a Détente?", 59 St. Louis U. L.J. (forthcoming 2015) (on file with the *Columbia Law Review*) (commenting on Professor Gerken's proposed synthesis of federalism and nationalism); Erin Ryan, The Spending Power and Environmental Law After *Sebelius*, 85 U. Colo. L. Rev. 1003 (2014) [hereinafter Ryan, Spending Power] (analyzing state–federal spending power bargaining).

9. See Ryan, Tug of War, supra note 8, at 145–80 (discussing "interjurisdictional gray area"); see also Huq, Structural Constitution, supra note 1, at 1657 (explaining intermural bargaining caused by spillovers).

10. See Ryan, Tug of War, supra note 8, at xi–xii (identifying fundamental federalism inquiry as "*who gets to decide*?" at levels of both state–federal competition over policy and judicial–political branch competition for interpretive supremacy); see also Huq, Structural Constitution, supra note 1, at 1663 (comparing judicial and political branch capacity for decision).

11. See Ryan, Tug of War, supra note 8, at 348 (discussing why structural and rights-based constitutional features warrant different interpretive tools, including more judicial review for rights-based violations); Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063, 1065–72 (1980) (critiquing process-based constitutional interpretive theory in light of Constitution's substantive commitment to human rights and individual dignity).

12. See, e.g., Erin Ryan, Why Equal Protection Trumps Federalism in the Same-Sex Marriage Cases, The Huffington Post: HuffPost Politics (Apr. 17, 2013, 11:29 AM), http://www.huffingtonpost.com/erin-ryan/gay-marriage-states-rights_b_3100985.html (on file with the *Columbia Law Review*) ("Constitutional individual rights are . . . countermajoritarian. You hold them regardless of what the majority thinks, and they are most dear when the majority is against you . . . . Equal protection is the Constitution's promise that you won't be treated unfairly by the government, even when most Americans really want you to be.").

13. See Jesse H. Choper, Judicial Review and the National Political Process 175–76 (1980) (differentiating constitutional protections for individual rights and structural federalism); Ryan, Tug of War, supra note 8, at 348 ("In contrast to adjudicating rights, a substantive realm in which the Constitution's directions are relatively clear, the adjudication of federalism draws on penumbral implications in the text that leave much more to interpretation.").

different degrees of judicial review in structural contexts,[14] judicial claims for interpretive supremacy on the basis of countermajoritarian capacity inevitably lose much of their force here.[15] The purposefully undemocratic, retrospectively limited, evidentiary-confined federal judiciary is not always best positioned to make marginal structural calls in comparison to the political branches' capacity for prospective, comprehensive, flexible, and adaptive decisionmaking.[16]

Huq's analysis of institutional bargaining along the horizontal separation-of-powers dimension contributes an important piece of the puzzle to the emerging literature on negotiated structural governance. Previously predominated by vertical separation-of-powers analyses in the federalism literature, this new wave of bargaining-literate scholarship emphasizes the usefulness and inevitability of multilateral bargaining as an alternative for allocating constitutional authority in circumstances where unilateral judicial or statutory allocation is suboptimal at best—and counterproductive at worst.[17] Thematic among these new works is the idea that the Constitution does not resolve every structural question and that certain unresolved structural dilemmas are most capably resolved by negotiation among institutional actors. These include legislative and executive actors at the local, state, and national levels (and less directly, even judicial actors).[18] Different authors provide different components of the new theoretical justification for judicial deference to politically negotiated governance, notwithstanding the Supreme Court's simultaneous revival of judicially enforceable constraints in many of these contexts.[19]

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14. See infra Part III.C (reviewing literature skeptical of judicial review of political bargaining).

15. See Ryan, Tug of War, supra note 8, at 339–56 ("The role of the political branches articulated here rounds out the equipoise that Balanced Federalism seeks not only among the competing values of federalism, but in the contributions of these three branches—at all levels of government—in locating the appropriate balance in each instance."); see also Huq, Structural Constitution, supra note 1, at 1674–75 (rejecting arguments for judicial primacy).

16. See Ryan, Tug of War, supra note 8, at 339–56.

17. See infra Part II (reviewing emerging literature on negotiated structural governance).

18. See Ryan, Tug of War, supra note 8, at 314 (analyzing role of state and federal courts in intersystemic signaling negotiations); Ryan, Negotiating Federalism, supra note 8, at 73 (same); see also Frederic M. Bloom, State Courts Unbound, 93 Cornell L. Rev. 501, 503, 509–47 (2008) (showing state judges have occasionally sought to alter binding rulings by Supreme Court through subsequent state court decisions).

19. For a review of judicially enforceable constraints in the horizontal separation-of-powers context, see Huq, Structural Constitution, supra note 1, at 1621–31. For a review of judicially enforceable constraints in the vertical-federalism context, see Ryan, Seeking Checks and Balance, supra note 8, at 539–66; see also Ryan, Tug of War, supra note 8, at 109–44 (discussing Supreme Court's revival of judicially enforceable federalism constraints). The Court's creation in 2012 of new constraints on spending power bargaining represents the newest addition to the set of judicially enforceable structural-governance

This Essay reviews the unfolding literature on the negotiation of structural governance, establishing general points of agreement and issues of ongoing debate. Part II outlines the emerging scholarship, with special attention to the most sustained scholarly treatments of vertical-federalism bargaining (including my own work) and horizontal inter-branch bargaining (focusing on Huq's work). Part III analyzes points of conversion and diversion within the structural bargaining literature. Overall, scholars of negotiated governance find that bargaining is inevitable because the text of the Constitution cannot account for every possible ambiguity. Moreover, they conclude that political bargaining to resolve ambiguity is valuable when the required decisionmaking does not match the circumscribed skillset of judicial interpreters. Most are skeptical about the value of judicial review as current doctrine prescribes it, but—and in contrast with previous scholarship emphasizing political safeguards—many allow for some judicial role to police the most foreseeable harms associated with political bargaining. Part IV concludes with thoughts about issues that warrant further scrutiny in the next iteration of the discourse.

II. THE EMERGING LITERATURE ON NEGOTIATED STRUCTURAL GOVERNANCE

This section provides a snapshot of the emerging literature on negotiated structural governance. It is self-consciously inexhaustive, because new work touching on the significance of negotiated governance continues to arise in many different subdisciplines of regulatory-law scholarship—especially environmental law,[20] but also health law,[21] drug

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constraints. See Ryan, Spending Power, supra note 8, at 1017–33 (discussing *Sebelius* spending limit).

20. See Robin Kundis Craig, The Clean Water Act and the Constitution 7 (2d ed. 2009) (describing cooperative federalism of federal statutory water quality regime dividing regulatory authority between federal government and states); David E. Adelman & Kirsten H. Engel, Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority, 92 Minn. L. Rev. 1796, 1800 (2008) (proposing adaptive-systems model of federalism for environmental regulation); William W. Buzbee, Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons, 57 Emory L.J. 145, 154, 157 (2007) (describing importance of interaction between multiple regulatory actors for effective action); Ann E. Carlson, Iterative Federalism and Climate Change, 103 Nw. U. L. Rev. 1097, 1099 (2009) ("The most innovative state responses to climate change are . . . the results of repeated, sustained, and dynamic lawmaking efforts involving both levels of government—what [the author calls] 'iterative federalism.'"); Kirsten H. Engel, Harnessing the Benefits of Dynamic Federalism in Environmental Law, 56 Emory L.J. 159, 161 (2006) (arguing "static allocation of authority between the state and federal government is inconsistent with the process of policymaking in our federal system, in which multiple levels of government interact in the regulatory process"); Daniel C. Esty, Revitalizing Environmental Federalism, 95 Mich. L. Rev. 570, 570–74 (1996) (opposing pure decentralization and preferring coordinated regulatory structure keyed to nature of particular environmental problems); Robert L. Glicksman & Richard E. Levy, A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change, 102 Nw. U. L. Rev. 579, 582 (2008) (describing federal, state,

law,[22] immigration law,[23] administrative law,[24] and others.[25] While this review gives special attention to Huq's leading work on horizontal

and local regulation in environmental law); Blake Hudson, Dynamic Forest Federalism, 71 Wash. & Lee L. Rev. 1643, 1649–53 (2014) (proposing federal, state, and local governments share authority to combat threats to U.S. forests); Bradley C. Karkkainen, Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism, 21 Va. Envtl. L.J. 189, 217–22 (2002) (describing success of ecosystem management systems involving federal, state, and local governments, independent scientists, and private landowners); Alice Kaswan, A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in a Federal System, 85 Denver U. L. Rev. 791, 792–93 (2008) (promoting state administration and enhancement of baseline federal climate-change standards); Alexandra B. Klass, Common Law and Federalism in the Age of the Regulatory State, 92 Iowa L. Rev. 545, 547 (2007) (arguing for state environmental common law to draw upon federal statutes, regulations, and data); Hari M. Osofsky, Diagonal Federalism and Climate Change: Implications for the Obama Administration, 62 Ala. L. Rev. 237, 241 (2011) (describing "diagonal strategies" that "incorporate key public and private actors at different levels of government (the vertical piece) and within each level of government (the horizontal piece) simultaneously in order to create needed crosscutting interactions"); Hari M. Osofsky and Hannah J. Wiseman, Dynamic Energy Federalism, 72 Md. L. Rev. 773, 778 (2013) (proposing dynamic-federalism model in energy law that "map[s] interactions among different levels of government . . . and key entities at each level of government").

21. See, e.g., Abbe R. Gluck, Federalism from Federal Statutes: Health Reform, Medicaid and the Old-Fashioned Federalists' Gamble, 81 Fordham L. Rev. 1749, 1752 (2013) [hereinafter Gluck, Federal Statutes] (finding federal statutes granting states implementation powers this era's "critical federalism relationships"); Abbe R. Gluck, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 Yale L.J. 534, 542 (2011) [hereinafter Gluck, Intrastatutory Interpretation] (finding traditional federalism values in state interpretation and implementation of federal health-care reform, despite "almost-infinite reach" of federal regulatory power); Abigail R. Moncrieff, Common-Law Constitutionalism, the Constitutional Common Law, and the Validity of the Individual Mandate, 92 B.U. L. Rev. 1245, 1246 (2012) (finding recent judicially crafted constitutional rules susceptible to legislative override); Abigail R. Moncrieff, Cost-Benefit Federalism: Reconciling Collective Action Federalism and Libertarian Federalism in the Obamacare Litigation and Beyond, 38 Am. J.L. & Med. 288, 289 (2012) [hereinafter Moncrieff, Cost–Benefit Federalism] (proposing cost-benefit theory to bridge gap between federalist goals of regulatory efficiency and individual liberty).

22. See, e.g., Jessica Bulman-Pozen, Unbundling Federalism: Colorado's Legalization of Marijuana and Federalism's Many Forms, 85 U. Colo. L. Rev. 1067, 1070 (2014) (describing "unbundling" of federalism, wherein states pursue state interests inside federal administrative schemes or use state lawmaking power to advance federal goals); Erwin Chemerinsky et al., Cooperative Federalism and Marijuana Regulation, 62 UCLA L. Rev. 74, 78–79 (2014) (proposing federal government allow states to opt out of marijuana provisions of federal Controlled Substances Act and apply permissive state law); Robert A. Mikos, On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime, 62 Vand. L. Rev. 1421, 1423–24 (2009) ("States may continue to legalize marijuana because Congress has not preempted—and more importantly, *may not* preempt—state laws that merely permit . . . private conduct the federal government deems objectionable."); Robert A. Mikos, The Populist Safeguards of Federalism, 68 Ohio St. L.J. 1669, 1673 (2007) (finding states' rights survive populist control of Congress because of fragmentation of popular opinion and citizens' inclination to limit federal power).

23. See, e.g., Cristina Rodríguez et al., Legal Limits on Immigration Federalism, *in* Taking Local Control: Immigration Policy Activism in U.S. Cities and States 31, 48 (Monica

separation-of-powers bargaining and mine in vertical-federalism bargaining, it also integrates the contributions of other important authors in the discourse, including Heather Gerken, Jessica Bulman-Pozen, Abbe Gluck, Cristina Rodríguez, Samuel Bagenstos, Bridget Fahey, Ari Holztblatt, Abigail Moncrieff, Jim Rossi, Adrian Vermeule, Mark Rosen, Curtis Bradley, Trevor Morrison, and Enrique Guerra-Pujol. Huq and I offer the most sustained theoretical treatments in which structural bargaining is the principal feature, but each of these scholars contributes to a discourse that understands the Constitution as a potential framework for ongoing negotiation among institutional actors.

Most of this literature begins with the premise, explicitly or implicitly, that just as the Constitution allocates various legal entitlements to individuals (usually in the form of rights against majoritarian utility), it also confers various entitlements to governance institutions (usually as grants of authority to govern). For example, the Bill of Rights confers a famous set of countermajoritarian rights on individuals,[26] while Articles I, II, and III articulate the powers and responsibilities of the three federal branches of government,[27] and the Constitution's various federalism directives distinguish between enumerated federal authority and reserved state authority.[28] Whether conferred as rights on individuals or

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W. Varsanyi ed., 2010) ("[I]mmigration is having a significant impact on state and local budgets and communities and . . . Congress should recognize the states as partners in the management of immigration . . . ."); Juliet P. Stumpf, Preemption and Proportionality in State and Local Crimmigration Law, *in* The Constitution and the Future of Criminal Justice in America 241, 243 (John T. Parry & L. Song Richardson eds., 2013) (discussing intersection of state statutes criminalizing immigration with more permissive federal law).

24. See e.g., Gillian E. Metzger, Administrative Law as the New Federalism, 57 Duke L.J. 2023, 2028–29 (2008) (arguing administrative law protects state interests and advances federalism without unjustifiable judicial intrusion on congressional power); Edward Rubin, The Myth of Accountability and the Anti-Administrative Impulse, 103 Mich. L. Rev. 2073, 2075 (2005) (arguing "true accountability, in the realm of politics and law," is bureaucratic in nature and "involves many of the features that are central to the administrative state"); Catherine M. Sharkey, Preemption as a Judicial End-Run Around the Administrative Process?, 122 Yale L.J. Online 1, 1 (2012), http://www.yalelawjournal.org/forum/preemption-as-a-judicial-end-run-around-the-administrative-process (on file with the *Columbia Law Review*) (noting preemption challenges provide parallel proceedings in courts to determine whether state and federal laws conflict).

25. For a more thorough review of literature engaging many of these issues in different fields of regulatory law, see generally Heather K. Gerken, Federalism and Nationalism: Time for a Détente?, St. Louis L. Rev. (forthcoming 2015) [hereinafter Gerken, Federalism and Nationalism] (on file with the *Columbia Law Review*).

26. See U.S. Const. amends. I–IX (setting forth various individual rights to free speech, religion, equal protection, and others).

27. U.S. Const. arts. I–III (setting forth legislative, executive, and judicial powers, respectively).

28. The Constitution's federalism directives are scattered throughout the document, often cognizable only in relation to one another. Compare U.S. Const. art. I, § 8 (enumerating certain powers to Congress), with U.S. Const. amend. X (reserving to states those powers not enumerated to federal government nor expressly prohibited to them);

authority to institutions of governance, constitutional grants can be understood as allocations of discrete legal entitlements, combining two important components: (1) the substantive component, describing what the right or power is for, and (2) instructions as to whether the substantive component may be shifted away from its initial allocation, or traded with another party.[29] In the text of the Constitution, the substantive component is (usually) relatively clear, but the rules for shifting or trading entitlements are (usually) not—occasionally requiring more challenging interpretation.[30]

Many individual rights have been interpreted as tradable (such as the Sixth Amendment entitlement to jury trial that is routinely negotiated away in plea bargaining with the state), while others have been deemed inalienable (such as the Thirteenth Amendment entitlement against being enslaved).[31] In the context of governing authority, however, instructions on whether a given legal entitlement may become the

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compare U.S. Const., art. III (establishing federal judicial jurisdiction), with U.S. Const. amend. XI (establishing state sovereign immunity in federal court).

29. By this analysis, the substantive component of the entitlement is attached to a "remedy rule" that governs whether and under what circumstances the entitlement may be shifted. If the entitlement is treated as an item that the initial holder can retain or trade at will (such as the right to a jury trial), we say it is protected under a "property rule." If another party may wrest the entitlement away regardless of the initial holder's wishes, so long as compensation is paid (as eminent domain allows), it is protected by a "liability rule." If the Constitution prohibits any exchange of the entitlement, requiring that it forever rest where it is initially allocated (such as the right against being enslaved), the entitlement is protected by an "inalienability rule." See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the *Cathedral*, 85 Harv. L. Rev. 1089, 1089–93 (1972) (setting forth this vocabulary to analyze private law entitlements). For analysis of constitutional grants of authority as entitlements, see Ryan, Tug of War, supra note 8, at 241–50 (using Calabresi and Melamed *Cathedral* framework to understand constitutional grants of authority as pairing of entitlement with remedy rule for vindication); Huq, Structural Constitution, supra note 1, at 1597 ("Individuals, for example, have familiar rights to due process and equal protection, to free speech and free exercise. But the test of the Constitution makes clear that institutions are also vested with distinct entitlements."); Ryan, Federalism at the *Cathedral*, supra note 8, at 14–28 (analyzing *Cathedral* framework); see also 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, 822–23 (1998) [hereinafter Hills, Political Economy] (analyzing *New York* anticommandeering rule as entitlement to state governments).

30. See Ryan, Tug of War, supra note 8, at 241–50 (discussing Calabresi and Melamed's *Cathedral* framework for analyzing entitlements). For example, the Fifth Amendment clarifies that the entitlement to private property is qualified by the state's power of eminent domain to take it for public use, if just compensation is paid, but both the Sixth Amendment entitlement to jury trial and the Thirteenth Amendment entitlement against being enslaved are textually silent on whether the right-holder may trade it (though right to jury trial is routinely traded in plea bargaining negotiations and right against enslavement is considered inalienable).

31. Id.

legitimate subject of negotiation are especially unclear.[32] For this reason, understanding the rules of engagement between different institutional actors in the negotiation of constitutional allocations remains an important constitutional question, requiring more challenging interpretive skill.

The negotiated-structural-governance literature shows that just as individuals routinely use their constitutional entitlements as bargaining chips, so do governance institutions.[33] Both Huq and I have argued that the private-law vocabulary of legal entitlements commands equal force in the public-law context of constitutional privileges and obligations, notwithstanding points of philosophical friction.[34] Although the Supreme Court has generally disfavored structural-entitlement bargaining,[35] its practice is well established in the vertical-federalism plane of the Constitution's separation of powers,[36] and Huq now pushes the discourse forward by showing that it also exists along the horizontal plane.[37] Together with other authors from the new literature, we argue that this bargaining is not only inevitable, but can sometimes be desirable.

The following review begins with scholarly analysis of the vertical plane of state-federal bargaining, including a smaller pool of work addressing the significance of horizontal bargaining among the states. It then addresses scholarship recognizing the horizontal plane of inter-

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32. See, e.g., U.S. Const. amend. X (providing circular definition of states' reserved powers).

33. See Ryan, Tug of War, supra note 8, at 241–50 (characterizing state–federal bargaining as result of fact that "constitutional entitlements allocate jurisdictional authority to different governmental actors"); Huq, Structural Constitution, supra note 1 at 1598–99 (identifying bourgeoning scholarship exploring possibility of "institutions such as states or federal branches might negotiate over their constitutional entitlements"); Ryan, Federalism at the *Cathedral*, supra note 8, at 14–28 (analyzing application of *Cathedral* framework to federalism bargaining).

34. See Huq, Structural Constitution, supra note 1, at 1598–99 (finding limited study of institutional bargaining "puzzling" given "landmarks of structural constitutionalism often turn on whether institutions such as states and branches can negotiate over institutional interests"); see also Ryan, Tug of War, supra note 8, at 244–50 (describing how private-law vocabulary "proves robust at describing the infrastructure of constitutional rules"); Ryan, Federalism at the *Cathedral*, supra note 8, at 14–28 ("[T]he dynamics of state–federal bargaining approximate marketplace bargaining even more closely than other forms of negotiation in which government is a party."); cf. Adrian Vermeule, The Invisible Hand in Legal and Political Theory, 96 Va. L. Rev. 1417, 1428 (2010) [hereinafter Vermeule, Invisible Hand] (distinguishing structural bargaining from private-law bargaining in Coasean terms).

35. See supra note 19 and accompanying text (discussing judicial constraints on vertical federalism and horizontal separation-of-powers bargaining).

36. See Ryan, Tug of War, supra note 8, at 282, 271–314 (examining "conventional examples, negotiations to reallocate authority, and joint policy-making negotiations" that represent vertical-federal bargaining); Ryan, Negotiating Federalism, supra note 8, at 24–74 (providing taxonomy of "opportunities for federalism bargaining within the structure of specific constitutional and statutory laws").

37. Huq, Structural Constitution, supra note 1, at 1600.

branch bargaining, to which Huq's work makes its most important contributions.

A. *Vertical-Federalism Bargaining*

In recent decades, the Supreme Court's treatment of structural bargaining along the vertical state–federal axis has been unenthusiastic. Beginning with the New Federalism revival of the 1990s, the expansive preemption cases that followed, and extending through the new spending power constraints of 2012, the thrust of the Court's jurisprudence has been to limit the permissible scope of state-federal bargaining in zones of jurisdictional overlap.[38] Nevertheless, while these decisions may have chilled the atmosphere for certain forms of intergovernmental bargaining, they have hardly extinguished the enterprise, which continues to thrive in countless forms and forums.

Because vertical separation-of-powers bargaining is more prevalent in practice, it is accordingly more recognized in the scholarly literature, documented extensively by my own work on state–federal bargaining. After early work documenting inherent structural uncertainty in the vertical allocation of authority,[39] *Federalism at the Cathedral* analyzed the negotiation of structural entitlements in assessing the Supreme Court's invalidation of intergovernmental bargaining to resolve the ongoing nuclear waste management crisis.[40] This work argued that the Court's rejection of vertical structural bargaining undermined its valuable potential to cope with the very problems of jurisdictional overlap that other aspects of the Court's federalism jurisprudence had exacerbated.[41] *Negotiating Federalism* then explored the full enterprise of state–federal bargaining, articulating a taxonomy of ten different ways that state and federal actors negotiate to resolve jurisdictional uncertainty and a theory for identifying when such bargaining qualifies as legitimate constitutional interpretation.[42] More recent work analyzes the impact of the Court's

38. See Ryan, Tug of War, supra note 8, at 121–41 (discussing recent federalism and preemption jurisprudence). See generally Ryan, Spending Power, supra note 8 (discussing new spending power constraint).

39. Ryan, Seeking Checks and Balance, supra note 8, at 539–95.

40. Ryan, Federalism at the *Cathedral*, supra note 8, at 8 ("This Article explores how Calabresi and Melamed's *Cathedral* framework can help us understand the inter-jurisdictional gridlock that has arisen under the New Federalism Tenth Amendment jurisprudence in infrastructural terms—and more importantly, how to resolve it at the infrastructure level.").

41. Id. at 7 (arguing "in an effort to make its own rhetorical point about federalism," Supreme Court denied Congress authority to bind state participation in nuclear waste management plan even where state officials had waived opposition on Tenth Amendment grounds during voluntary bargaining with federal counterparts).

42. Ryan, Negotiating Federalism, supra note 8, at 6 ("Incorporating general bargaining principles of mutual consent and the procedural application of core federalism values, negotiated governance opens possibilities for filling interpretive gaps in the Supreme Court's jurisprudence or congressional legislation. This Article. . . provides the

new spending power constraints on vertical bargaining within discrete programs of cooperative federalism,[43] and the specific forums for negotiation and exchange that have been developed within various statutory programs of environmental law.[44]

Building on much of this early work, my recent book, *Federalism and the Tug of War Within*, sets forth an overarching model of Balanced Federalism that supports many of the structural conclusions that Huq separately reaches in the horizontal plane. Balanced-Federalism theory provides clearer justification for the ways in which the interpretation and allocation of contested constitutional authority is already mediated through various forms of balancing, compromise, and negotiation—among all branches at all levels of government.[45] As described in this book, Balanced Federalism offers a series of innovations to bring judicial, legislative, and executive efforts to manage federalism conflicts into more fully theorized focus, leveraging the functional capacities of the three branches of government to implement structural directives in ways that will most faithfully advance the good-governance values that underlie federalism.[46]

Like Huq, I argue for greater judicial deference to political bargaining—especially bargaining that procedurally advances the good-governance values that federalism is designed to yield.[47] Extrapolating them from the legislative history of the American Constitutional Convention, later Supreme Court interpretations, congressional and executive pronouncements, and the academic literature, this work identifies the foundational federalism values as: (1) checks and balances between opposing centers of power that protect individuals from overreach or abdication by either, (2) transparency and accountability that enables meaningful democratic participation, (3) autonomy to foster diversity and innovation, and (4) the regulatory problem-solving synergy that federalism enables between the unique governance capacities of local and national actors for coping with problems that neither can resolve alone.[48] Limited judicial review is available to police for bargaining

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first recognition that bilateral federalism bargaining is itself a means of interpreting the Constitution.").

43. Ryan, Spending Power, supra note 8, at 1008 (arguing "inquiry sheds light not only on environmental law after *Sebelius*, but also on the many other realms of American governance that engage spending-power bargaining, such as public education partnerships, civil rights law, social service programs, and civic infrastructure").

44. Ryan, Environmental Federalism's Tug of War Within, supra note 8 (manuscript at 23–40) (describing environmental law's mechanisms for dealing with federalism challenges of jurisdictional separation and unstructured overlap).

45. Ryan, Tug of War, supra note 8, at xi–xii, 181–214, 265–70, 339–67.

46. Id. at xi–xii.

47. Id. at 34–67.

48. Id. For more on the foundational good-governance values that American federalism is designed to advance, see generally id. at 7–67 (drawing on work in Ryan, Seeking Checks and Balance, supra note 8, to explain how "polities turn to federalism to

abuses,[49] but if the bargaining process is conducted in a manner that is consistent with the fundamental federalism values, then the results warrant deference as a legitimate means of allocating contested constitutional authority:

> Bargaining that procedurally safeguards rights, enhances participation, fosters innovation, and harnesses interjurisdictional synergy accomplishes what federalism is designed to do—and what federalism interpretation is ultimately for. As such, it warrants interpretive deference from a reviewing court, or any branch actor interrogating the result. Of course, not all federalism bargaining will do so. Bargaining that allocates authority through processes that weaken rights, threaten democratic participation, undermine innovation, and frustrate problem-solving is not consistent with federalism values, and warrants no interpretive deference. The more consistency with these values of good governing process, the more interpretive deference is warranted; the less procedural consistency with these values, the less interpretive deference is warranted.[50]

When they are working properly, the structural constraints that bilateral bargaining impose on state and federal actors enable the negotiating parties to actualize federalism's core principles more faithfully than is often possible through unilateral judicial or legislative interpretation:

> The structural safeguards of bilateral exchange ensure that the negotiated balance reflects the input of both national and local participants. Bargaining that fully satisfies the procedural criteria [of bargaining legitimacy, checks, transparency, autonomy, and synergy] advances federalism by giving expression to its core values as a procedural matter, and by leveraging the unique capacity that all governmental actors bring to federalism

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promote a set of governance values that they hope federalism will help yield"). See also Ryan, Environmental Federalism's Tug of War Within, supra note 8 (manuscript at 7–10 & n.41) (adding more explicit consideration of value of centralized authority, embedded here within value of problem-solving synergy).

49. Ryan, Tug of War, supra note 8, at 353 ("In contrast to previous process-based proposals, judicial oversight of federalism bargaining is available but limited . . . . Outcomes challenged on federalism grounds are assessed for procedure before substance; if the bargaining process satisfies the criteria, then the court defers to the substance of the negotiated result."). This proposal is "designed to prevent the judiciary from invalidating the results of challenged federalism bargaining that is ultimately faithful to federalism values, even if it does so in ways vulnerable to traditional judicial doctrine," but "it does not provide any new grounds for challenging federalism bargaining in court. The proposal thus provides a new defense against negotiated federalism challenges without offering additional sources of doctrinal challenge—reducing the overall impact of judicial constraints while preserving courts' ability to police for abuses." Id.

50. Id. at 349; see also id. at 347 ("Constitutional federalism sets the structural baselines through which good governance values will be realized in practice, but controversial substantive outcomes are ultimately debated in policy spheres beyond the reach of the federalism project. For that reason, this inquiry stops short of deciphering between rightly and wrongly decided outcomes in individual cases. Instead, it deciphers between rightly and wrongly conducted *processes*." (emphasis added)).

> interpretation and implementation . . . . In contrast to the judicial interpretive supremacy implied by [most federalism doctrine], the proposal demonstrates instances in which the very process of intergovernmental bargaining proves more able to preserve constitutional values than judicial or legislative decisions alone.[51]

Balanced Federalism recognizes the primary role of vertical bargaining to allocate contested authority in the conduct of federalism-sensitive governance,[52] and it advocates for horizontal bargaining among the three branches to appropriately shift authority for resolving distinct interpretive dilemmas to the branch possessing the institutional capacity best suited for the task.[53]

Together with other work providing theoretical support for fuller analysis of negotiated governance, this research has fueled a new wave of scholarship acknowledging the importance of bargaining in state–federal relations. The new phalanx of bargaining-literate federalism work builds on the early political-safeguards literature of Herbert Wechsler,[54] Jesse Choper,[55] and, more recently, Larry Kramer.[56] It advances on earlier state–federal integration work by Morton Grodzins,[57] Daniel Elazar,[58] and others, including the insights from more recent dynamic-federalism

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51. Id. at 367.

52. See generally id. at 265–338 (exploring enterprise of state–federal bargaining as means of allocating contested authority).

53. See id. at 368–72 (encouraging horizontal bargaining as means of "draw[ing] on the specialized capacity of each branch of government"); see also id. at 181–214 (exploring potential for judicial capacity to resolve federalism dilemmas); id. at 215–65 (discussing circumstances in which legislative capacity outperforms judicial capacity); id. at 339–67 (proposing differentiated interpretive responsibilities among political and judicial branches).

54. See 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, 548 (1954) (arguing judicially enforceable federalism constraints are unnecessary because state-elected congressional representatives will protect state interests within federal political process).

55. See Choper, supra note 13, at 175–76 (1980) (differentiating constitutional protections for individual rights and structural federalism).

56. See Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 290 (2000) (concluding "[a]ctive judicial intervention to protect the states from Congress is consistent with neither the original understanding nor with more than two centuries of practice").

57. See Morton Grodzins, The American System 8, 60–68 (Daniel J. Elazar ed., 2d ed. 1984) (describing cooperative federalism model of integrated state–federal governance in realms of jurisdictional overlap).

58. See Daniel J. Elazar, Cooperative Federalism, *in* Competition Among States and Local Governments 65, 67–68 (Daphne A. Kenyon & John Kincaid eds., 1991) (providing comprehensive analysis of state–federal relations within cooperative federalism model). See generally Daniel J. Elazar, American Federalism: A View From the States 1–2 (3d ed. 1966) (arguing essence of federalism is sharing of governance responsibilities among various levels through political partnerships that make it impossible to speak of fully separated regulatory roles).

scholarship by Erwin Chemerinsky,[59] Robert Schapiro,[60] Ed Rubin and Malcolm Feeley,[61] Gillian Metzger,[62] Judith Resnik,[63] Alison LaCroix,[64] Edward Purcell,[65] and John Nugent.[66]

In the vanguard, Heather Gerken argues that negotiation and exchange among local, state, and federal actors is the critical means by which the American federal system fosters a strong national democracy.[67] Her work addresses the transformative dynamics of state and local

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59. See generally Erwin Chemerinsky, Enhancing Government: Federalism for the 21st Century (2008) (challenging traditional conception of federalism as limit on federal power and arguing for alternative version of federalism as empowerment of government at all levels).

60. See generally Robert A. Schapiro, Polyphonic Federalism: Toward the Protection of Fundamental Rights (2009) (discussing contemporary federalism and arguing rights are best protected by promoting dynamic interaction of state and federal governments).

61. See generally Malcolm Feeley & Edward Rubin, Federalism: Political Identity and Tragic Compromise (2008) (exploring historic and modern ambiguities of federalism and its salience to political identity).

62. See Gillian E. Metzger, Federalism and Federal Agency Reform, 111 Colum. L. Rev. 1, 6–7 (2011) (explaining federalism factors in three Supreme Court preemption decisions as mechanisms for enhancing federal agency performance rather than as principle worth pursuing in its own right).

63. See Judith Resnik, Categorical Federalism: Jurisdiction, Gender, and the Globe, 111 Yale L.J. 619, 619–25 (2001) (critiquing categorical federalism in light of empirical and normative perspectives and proposing "multi-faceted federalism" alternative).

64. See generally Alison L. Lacroix, The Ideological Origins of American Federalism (2010) (arguing paradigm-shifting idea of federalism—that multiple independent levels of government could exist fruitfully within a single polity—was a foundational principle and core aspiration of American political enterprise).

65. See generally Edward A. Purcell, Jr., Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry (2007) (arguing Constitution created essential core structure of interrelated elements that allows for ongoing dynamic change).

66. See generally John Nugent, Safeguarding Federalism: How States Protect Their Interests in National Policymaking (2009) (exploring how states successfully exert influence over federal action within cooperative federalism).

67. See Heather K. Gerken, Federalism as the New Nationalism: An Overview, 123 Yale L.J 1889, 1892–93 (2014) [hereinafter Gerken, New Nationalism] ("It is possible to imagine federalism integrating rather than dividing national policy."); Heather K. Gerken, The Federalis(m) Society, 36 Harv. J.L. & Pub. Pol'y 941, 942–45 (2013) (arguing "[c]ooperative federalism is where the action is" and "role that states play in so-called 'cooperative federalism' regimes gives them a great of influence to interpret, influence, even resist federal mandates"); Heather K. Gerken, The Loyal Opposition, 123 Yale L.J. 1958, 1977–78 (2014) (arguing federalism is powerful means with which to integrate dissenters and minorities into national democratic system); Heather K. Gerken, The Supreme Court 2009 Term—Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4, 33–44 (2010) [hereinafter Gerken, Foreword] (discussing benefits of "uncooperative dimensions of 'cooperative federalism'"); see also Jessica Bulman-Pozen & Heather K. Gerken, Uncooperative Federalism, 118 Yale L.J. 1256, 1258–60 (2009) (explaining frequent and useful dynamics of "uncooperative federalism," in which state and local actors resist federal preferences).

resistance within federalism relationships,[68] the significance of multijurisdictional governance dynamics throughout the jurisdictional spectrum,[69] and the increasingly outmoded rhetorical struggle between proponents of more centralized and devolved governance.[70] Jessica Bulman-Pozen's work similarly emphasizes contested and negotiated integration between state and federal authority as a means of enhancing interests on both sides.[71] She argues that the states' notably non-passive role in coadministering federal statutes renders them tantamount to a fourth executive branch, merging horizontal and vertical separation-of-powers perspectives.[72]

Other scholars have explored the significance of intergovernmental bargaining and negotiated federalism with even greater specificity. Abbe Gluck argues that intergovernmental negotiation within cooperative federalism regimes is where the business of federalism is principally conducted in the modern era, although federalism doctrine has yet to recognize this.[73] Cristina Rodríguez's scholarship recognizes federalism as the framework through which essential intergovernmental relations are negotiated, with critical significance for resolving divisive national

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68. See Bulman-Pozen & Gerken, supra note 67, at 1258–60 (arguing "sensible account of federalism ought to recognize that uncooperative federalism occurs in practice and to acknowledge that there are values associated with the phenomenon").

69. Gerken, Foreword, supra note 67, at 21–25.

70. Gerken, New Nationalism, supra note 67, at 1892–94.

71. See Jessica Bulman-Pozen, Federalism as a Safeguard of the Separation of Powers, 112 Colum. L. Rev. 459, 460–64 (2012) (arguing states may check federal executive in era of expansive executive power and do so as champions of Congress, both relying on congressionally conferred authority and casting themselves as Congress's faithful agents); Jessica Bulman-Pozen, From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism, 123 Yale L.J. 1920, 1922–23 (2014) [hereinafter Bulman-Pozen, From Sovereignty and Process] (arguing state–federal integration paradoxically advances state autonomy and "administration and politics" should be embraced as "transformative, rather than preservative, of American federalism"); Jessica Bulman-Pozen, Partisan Federalism, 127 Harv. L. Rev. 1077, 1078–82 (2014) (arguing states check federal government by channeling political conflict through federalism's institutional framework); Bulman-Pozen & Gerken, supra note 67, at 1258–60 (analyzing "uncooperative federalism").

72. Bulman-Pozen, From Sovereignty and Process, supra note 71, at 1922, 1934–35.

73. See Abbe R. Gluck, Our [National] Federalism, 123 Yale L.J. 1996, 1998–2002 (2014) [hereinafter, Gluck, Our [National] Federalism] (criticizing law governing state–federal interactions in cooperative federalism programs as "doctrinal muddle," in part because Supreme Court has failed to recognize these interactions as epicenter of modern federalism); see also Gluck, Federal Statutes, supra note 21, at 1749–1752 (presenting health-reform legislation as example of intergovernmental negotiation and cooperative federalism); Abbe R. Gluck, Intersystemic Statutory Interpretation: Methodology as "Law" and the *Erie* Doctrine, 120 Yale L.J. 1898, 1901–06 (2011) (analyzing state–federal interactions in context of *Erie* doctrine); Gluck, Intrastatutory Federalism, supra note 21, at 537–45 (analyzing interplay between state and federal governments applying federal laws through lens of Affordable Care Act).

policy debates.[74] Samuel Bagenstos has especially focused on spending power bargaining as a tool of federalism-sensitive governance, including state–federal negotiation of executive waivers of federal statutory provisions that might otherwise bind states.[75] New work by Bridget Fahey explores how the technical mechanics of negotiated governance can influence the allocation of state and federal power, arguing that consent procedures within programs of cooperative federalism can meaningfully influence state choices.[76]

Some federalism scholars have also addressed the significance of horizontal bargaining among state actors. For example, Heather Gerken and Ari Holtzblatt explore federalism-significant relationships among the states, arguing that spillovers in the horizontal-federalism context can be just as important as they are in the vertical context in prodding political actors to negotiate acceptable interjurisdictional compromises.[77] Meanwhile, Abigail Moncrieff draws on the vocabulary of law and economics in her proposed hybrid system of "cost–benefit federalism," in which states enter Coasean compacts with one another to maximize both regulatory efficiency and individual liberty.[78] Jim Rossi discusses government-relations bargaining in the context of deregulation, emphasizing the role of private bargaining with governmental bodies, but also observing the dynamics of state–federal bargaining in zones of regulatory overlap.[79]

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74. See Cristina M. Rodríguez, Negotiating Conflict Through Federalism: Institutional and Popular Perspectives, 123 Yale L.J. 2094, 2099 (2014) (noting previous work has explored how "overlapping political communities in our body politic negotiate with one another to address matters of national concern"); Cristina M. Rodríguez, The Significance of the Local in Immigration Regulation, 106 Mich. L. Rev. 567, 571–73 (2008) (discussing federal–state–local dynamic through lens of immigration regulation).

75. See Samuel R. Bagenstos, The Anti-Leveraging Principle and the Spending Clause After *NFIB*, 101 Geo. L.J. 861, 864–65 (2013) [hereinafter Bagenstos, Anti-Leveraging] (analyzing Court's new judicially enforceable constraint on spending power bargaining); Samuel R. Bagenstos, Federalism by Waiver After the Health Care Case, *in* The Health Care Case: The Supreme Court's Decision and its Implications 227, 227–44 (Gillian Metzger et al. eds., 2013) [hereinafter, Bagenstos, Federalism by Waiver] (arguing increased state leverage after new spending power doctrine will likely encourage negotiation of more executive waivers of statutory requirements).

76. See Bridget Fahey, Consent Procedures and American Federalism, 128 Harv. L. Rev. (forthcoming 2015) (manuscript at 4) (on file with the *Columbia Law Review*) (arguing consent procedures "do more than operate as processes for registering state consent; many also shape how states internally discuss, deliberate, and decide whether to join federal programs").

77. Heather K. Gerken & Ari Holtzblatt, The Political Safeguards of Horizontal Federalism, 113 Mich. L. Rev. 57, 63 (2014).

78. See Moncrieff, supra note 21, at 308 (advocating formula for allocating authority that "optimizes the benefits of regulatory efficiency within the constraint of libertarian costs").

79. See Jim Rossi, Regulatory Bargaining and Public Law 172–232 (2005) ("A government relations bargaining approach to economic regulation recognizes how public law is important for state and local regulation, especially in deregulated markets.").

It is important to note that this new wave of scholarship on vertical integration stands in contrast to a canon of older federalism scholarship that generally follows from one of two competing premises, the first more committed to the ideals of jurisdictional separation as a means of protecting state sovereignty, and the second emphasizing the importance of unencumbered central authority to advance important national goals.[80] The traditional schools advocating for more devolution and centralization continue to produce important scholarly perspectives.[81] Nevertheless, it is no longer possible to discuss the vertical allocation of constitutional authority without considering the extent to which it is already characterized by negotiation around the uncertain boundaries that have always complicated federalism.

B. *Horizontal Interbranch Bargaining*

The Supreme Court's treatment of horizontal separation-of-powers bargaining has been even less enthusiastic than its treatment of vertical structural bargaining.[82] The zones of jurisdictional overlap between the three branches of government are also probably smaller than the vast interjurisdictional gray area spanning recognized areas of state and federal regulatory concern. For these reasons, the extent of horizontal separation-of-powers bargaining appears smaller than its vertical

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80. See, e.g., Ryan, Tug of War, supra note 8, at xxvi (discussing two traditional schools of federalism theory); Gerken, Federalism and Nationalism, supra note 25 (manuscript at 1–2) (discussing conflict among different federalism schools of thought); Gerken, Foreword, supra note 67, at 11–21 (providing contemporary intellectual history of federalism debates).

81. For works advocating for greater decentralization, see, e.g., Michael S. Greve, The Upside-Down Constitution 5 (2012) ("[O]ur federalism of cartels and consociation is disconnected from, and indeed antithetical to, the Constitution's competitive structure and logic."); Roderick M. Hills, Jr., Federalism in Constitutional Context, 22 Harv. J.L. & Pub. Pol'y 181, 181–82 (1998) (advocating for competitive federalism and stressing importance of executive-branch insulation to federalism ideals); Hills, Political Economy, supra note 29, at 850–51 (rejecting "notion of dual federalism or separate and distinct spheres" as incompatible with "intergovernmental reality of the United States"); Ilya Somin, Foot Voting, Federalism, and Political Freedom, *in* NOMOS LV: Federalism and Subsidiarity 83, 92–93 (James E. Fleming & Jacob T. Levy eds., 2014) (arguing decentralization has advantage of letting jurisdictions compete for individuals by offering attractive policy regimes); Ernest Young, The Rehnquist Court's Two Federalisms, 83 Tex. L. Rev. 1, 163–65 (2004) (arguing Court should "reorient federal doctrine toward concerns about state autonomy" and "de-emphasize state sovereign immunity"). Others scholars remain unpersuaded about decentralization. See, e.g., Malcolm M. Feeley & Edward Rubin, Federalism: Political Identity and Tragic Compromise 17–18 (2008) (noting decentralization is "distinctly different from federalism"); Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903, 908–14 (1994) ("The notion that an admittedly valid national policy is best implemented by decentralizing its administration cannot support either the rhetoric of federalism or the remedy of judicial intervention.").

82. See Huq, Structural Constitution, supra note 1, at 1657–63 (discussing *Chadha*, *Bowsher*, and other judicial hostility to horizontal separation-of-powers bargaining).

counterpart, and the corresponding literature is correspondingly smaller, newer, and less harmonious.

Reflecting the federalism literature's focus on institutional capacity, Mark Rosen argues that the Full Faith and Credit Clause is better implemented by legislative action than judicial interpretation because legislative institutions possess institutional advantages for negotiating interstate conflict prospectively and comprehensively.[83] Enrique Guerra-Pujol proposes structural bargaining that even Huq finds unrealistic, controversially proposing that federal, state, and even private actors compete for unclaimed powers through decentralized auction mechanisms and secondary markets.[84] Meanwhile, Adrian Vermeule acknowledges the reality and inevitability of horizontal structural bargaining, but argues that it is bad for governance, creating unique transaction costs in the public sphere that lead to undesirable and inefficient outcomes.[85] Similarly, Curtis Bradley and Trevor Morrison argue that the judiciary should police interbranch boundaries against bargaining, critiquing the Madisonian assertion that the political branches will effectively check one another by vying for power.[86]

Nevertheless, while crediting earlier analysis by John McGinnis,[87] Huq's new work, *Negotiating the Structural Constitution*, is the first sustained

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83. Mark D. Rosen, Congress's Primary Role in Determining What Full Faith and Credit Requires: An Additional Argument, 41 Cal. W. Int'l L.J. 7, 22 (2010) ("[L]egislatures are better structured than courts to undertake the decision making process that informs intelligent multilateralist solutions.").

84. See F.E. Guerra-Pujol, Coase and the Constitution: A New Approach to Federalism, 14 Rich. J.L. & Pub. Int. 593, 602 (2011) (proposing "federalism markets" that would not require institutions to auction "existing powers or functions" but which would allocate "[a]ll new powers . . . through decentralized auction mechanisms").

85. See Eric A. Posner & Adrian Vermeule, Constitutional Showdowns, 156 U. Pa. L. Rev. 991, 1010–15 (2008) (addressing social costs and benefits to "showdowns"—protracted and costly battle to assert constitutional authority); Vermeule, Invisible Hand, supra note 34, at 1428 (noting horizontal structural bargaining does not occur in Coasean vacuum); Adrian Vermeule, The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution, 123 Harv. L. Rev. 4, 24–28 (2009) ("Institutions will bear costs and enjoy benefits from checking the ambitions of other institutions, but nothing necessarily aligns those institutional costs and benefits of checking with social costs and benefits."); see also Adrian Vermeule, The System of the Constitution 38–64 (2011) (discussing structural Constitution).

86. See Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 436–38 (2012) (arguing in favor of judicial review of separation-of-powers questions though acknowledging courts cannot unilaterally defend powers of political branches that acquiesce); see also Vermeule, Invisible Hand, supra note 34, at 1427–28 (arguing Madisonian competition cannot regulate separation of powers because it fails to "align[] the 'private' costs and benefits to institutions with social costs and benefits").

87. John O. McGinnis, Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers, Law & Contemp. Probs., Autumn 1993, at 293, 295–99 (describing "model premised on the idea

treatment of horizontal structural bargaining as a legitimate institutional enterprise. The article builds on Huq's prior scholarly focus on horizontal and vertical separation-of-powers issues, with special interest in horizontal conflicts between the executive branch and the legislative and judicial branches.[88] In earlier work, he generally advocates for more limited judicial review of structural constitutional questions,[89] while acknowledging that limited review may be appropriate for separation-of-powers challenges brought by harmed institutional actors.[90] His new article demonstrates that horizontal structural bargaining (or "intramural bargaining") is not only unavoidable but potentially beneficial, and that it should be allowed to proceed with minimal judicial review except as needed to curtail a select set of foreseeable harms:

> Intermural bargaining of some sort is both inevitable and desirable for two reasons. First, spillover effects and the absence of complete specification of constitutional entitlements both make some mechanism to resolve boundary disputes unavoidable. Bargaining is the obvious solution, at least given a judicial-review regime that requires concrete cases and controversies. Second, the Constitution is not a homeostatic system, but an evolutionary one. The inevitable translation of constitutional concepts forward in time—against the backdrop of shifting institutional, social, and economic circumstances—necessarily generates intermural conflicts, even when the initial text has been completely specified. Bargaining is needed to resolve these conflicts in the first instance. [91]

Huq explains that the negotiation of entitlements among governing institutions is inevitable because the text of the Constitution leaves gaps of uncertainty and that it is desirable as a means of resolving spillover areas between clearer realms of executive and legislative authority.[92] Taking on the conventional arguments against horizontal bargaining, he argues that the political branches are better positioned than the courts to resolve boundary disputes because they possess superior tools of prospective, comprehensive, and adaptive governing capacity.[93] He refutes the

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that branches may shape separation of powers doctrine through bargains and accommodation to advance their mutual institutional interests").

88. See supra note 3 (citing Huq's previous work).

89. E.g., Huq, Logic of Collective Action, supra note 3, at 223 (arguing heterogeneity of collective-action dynamics in American federalism may deter judicial intervention); Huq, Removal as Political Question, supra note 3, at 6 ("[J]udicial enforcement of presidential removal authority will not reliably promote presidential control or democratic accountability."); Huq, Standing, supra note 3, at 1440 (arguing federal courts should not permit individual litigants who seek to enforce certain constitutional principles to obtain relief on federalism grounds).

90. See Huq, Standing, supra note 3, at 1440 (arguing institutions should seek to enforce institutional principles themselves rather than relying on individual litigants).

91. Huq, Structural Constitution, supra note 1, at 1656–57.

92. Id. at 1657–63.

93. Id. at 1683–86.

assertion that political bargaining will create more undesirable instability in comparison with judicial review, convincingly pointing to the notorious instability of the Court's own separation-of-powers jurisprudence over time.[94] Among his most provocative claims is that separation-of-powers doctrines have been exaggerated as a means of preventing tyranny, and should be rejected as a formalistic basis on which to oppose intramural bargaining.[95]

Huq draws compellingly on pre-ratification legislative history to advance his argument, noting that James Madison had famously proposed that the Constitution's allocation of power among the three branches be explicitly defined as exclusive.[96] He suggests that the Framers' rejection of Madison's proposal provides evidence that the default entitlements conferred in the Constitution should be considered nonexclusive, and therefore open to later negotiation through intramural bargaining:

> It may be tempting to assume that the textual vesting of entitlements should be read as inviolate, so that Congress could never bargain away a sliver of legislative power, the executive could not trade on its veto, and the states could not negotiate away fragments of their sovereignty. But the text of the Constitution contains no rule barring any and all bargaining over institutional powers . . . . Nor is there a negative implication to be drawn from the absence of positive authorization of intermural bargaining. To the contrary, the immediate historical context of ratification supports a favorable view of negotiation over the structural constitution. Madison's proposal to the first Congress that the Constitution's distribution of power among the branches be read as exclusive, precluding any innovations by later generations, was passed by the House but failed in the Senate for now-unknown reasons. The fact that Madison saw a need for such a proposal suggests that the distribution of regulatory allotments between the branches was not exclusive or immutable. The rejection of Madison's proposal to fix those entitlements powerfully suggests that the Constitution's then-extant textual distribution of institutional authorities now should be read as a set of default entitlements subject to alteration by later political-branch negotiation.[97]

He shows how the decline of the nondelegation doctrine has facilitated a fuller breadth of intramural bargaining, and argues that the doctrinal rules constraining structural bargaining along the horizontal axis should

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94. Id. at 1676.

95. Id. at 1681–82.

96. Id. at 1649.

97. Id. He then points to other examples in which the Constitution creates default rules open to later alternation, including Article III's default rule on federal courts, requiring the existence of the Supreme Court at a minimum but allowing for other inferior federal courts by subsequent congressional establishment. Id. at 1649–51.

be relaxed to allow the kind of bargaining that has become more commonplace along the vertical-federalism axis. He acknowledges that political bargaining may enable troubling externalities and "paternalism-warranting internalities" that might accompany the overaccumulation of power in the executive branch, but concludes that these problems are still best managed through the political process, rather than judicial review.[98]

III. POINTS OF CONVERGENCE AND DIVERGENCE

Scholars within the discourse are all arriving at their understanding of negotiated structural governance through different disciplinary prisms, often using different analytical tools. For example, whereas Professor Huq writes from the law-and-economics perspective, my work relies more on the vocabulary of negotiation theory, while Gerken's work is grounded in political theory, and so on. Nevertheless, much of the work is groping toward similar underlying ideas. Overall, three general themes emerge from the new literature: (1) structural bargaining is inevitable in realms of constitutional ambiguity, (2) bargaining is desirable to fill interpretive gaps poorly suited to judicial capacity, (3) judicial review should be limited except where necessary to prevent bargaining abuses that undermine the legitimacy of the process. Differences include the means by which scholars evaluate structural bargaining, and related scholarly dissensus over process- and principle-oriented constitutional analyses.

A. *Structural Bargaining Is Inevitable*

Scholars of negotiated structural governance generally agree that institutional bargaining is inevitable in the absence of clear constitutional entitlements. All of the authors previously cited acknowledge that structural bargaining takes place among the major institutions of governance, usually in response to uncertainty about which institutional actor is constitutionally privileged in a given context.[99] For example, Professor

98. Id. at 1615.

99. See supra Part II (citing various authors who acknowledge structural bargaining takes place). For a snapshot of the literature discussing state–federal bargaining as a fact of American governance, see, e.g., Bagenstos, Anti-Leveraging, supra note 75, at 876, 921 (reviewing bargaining under Affordable Care Act); Bagenstos, Federalism by Waiver, supra note 75, at 1 (same); Bradley & Morrison, supra note 86, at 414, 432 (examining institutional acquiescence and reality of how political branches actually interact); Fahey, supra note 76 (manuscript at 5) (discussing how consent procedures defining manner in which states may elect to participate within programs of cooperative federalism channel deliberation and formation of state preferences); Gerken & Holtzblatt, supra note 77, at 68–69 (arguing judicial review is more practical than political solutions in state-versus-state disputes); Gluck, Our [National] Federalism, supra note 73, at 1999 (discussing judicial federalism and bargaining concerns); Moncrieff, supra note 21, at 302 (discussing states' ability to enter into regulatory compacts); Rodríguez, supra note 74, at 1 (arguing

Rodríguez argues that the framework the Constitution creates for negotiation is the very thing that makes it possible to surmount the formidable obstacles to good structural governance.[100] She observes that "[t]he contours of our federal system are under constant negotiation, as governments construct the scope of one another's interests and powers while pursuing their agendas."[101] Even Professor Vermeule, who disfavors horizontal structural bargaining, openly acknowledges it: "The legislature, President, and judiciary do bargain repeatedly over similar issues, and this produces something that vaguely resembles a marketplace for policies."[102] Bradley and Morrison, who are similarly dubious of structural negotiation, acknowledge the fact of interbranch agreements to shift authority beyond constitutional defaults.[103]

In the vertical context, my own work presents a thickly descriptive account of intergovernmental bargaining as a pragmatic response to vertical jurisdictional uncertainty, beginning with the observation that:

> [I]ntergovernmental bargaining offer[s] a means of understanding the relationship between state and federal power that differs from the stylized model of zero-sum federalism that has dominated the discourse to this point, emphasizing winner-takes-all antagonism within bitter jurisdictional competition . . . . But countless real-world examples show that the boundary between state and federal authority is actually negotiated on scales large and small, and on a continual basis. Working in a dizzying array of regulatory contexts, state and federal actors negotiate over both the allocation of policy-making entitlements and the substantive terms of the mandates policy making will impose. [Bargaining] takes place both in realms plagued by legal uncertainty about whose jurisdiction trumps, and in realms unsettled by uncertainty over whose decision *should* trump, regardless of legal supremacy. Reconceptualizing the relationship between state and federal power as one heavily mediated by negotiation demonstrates how federalism practice departs from the rhetoric, and offers hope for moving beyond the paralyzing features of the zero-sum discourse.[104]

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federalism does not consist of fixed relationships but instead has its parameters subject to negotiation by relevant actors), Rosen, supra note 83, at 34 (discussing implicit bargaining inherent in DOMA context).

100. Rodríguez, supra note 74, at 2114.

101. Id. at 2094.

102. Vermeuele, Invisible Hand, supra note 34, at 1428.

103. Bradley & Morrison, supra note 86, at 414, 432 ("[A] practice by one branch of government that implicates the prerogatives of another branch gains constitutional legitimacy only if the other branch can be deemed to have 'acquiesced' in the practice over time.").

104. Ryan, Tug of War, supra note 8, at 267–68; Ryan, Negotiating Federalism, supra note 8, at 4–5. The work goes on to demonstrate ten different forms of state–federal bargaining, some of which respond directly to constitutional uncertainty and others to

As theorists became mired in debate over how to resolve intergovernmental regulatory competition, I explain, the actual regulators working in vertically contested contexts "learned to confront jurisdictional uncertainty simply by negotiating through it."[105]

Negotiated-governance scholars further agree that the constitutional vagueness that engenders structural bargaining is equally inevitable, because the text of the Constitution cannot account for every possible ambiguity. Borrowing from the vocabulary of property law, Professor Huq explains the resulting problem as one of constitutional "spillovers", or realms of law in which the exercise of constitutionally legitimate authority by one institutional actor nevertheless encroaches upon the exercise of legitimate authority by another institutional actor.[106] He analogizes to real property law, which often wrestles with the question of where to assign the costs of mitigating spillover effects, but notes that the constitutional context differs because there is usually no "natural or intuitive answer."[107]

Demonstrating spillovers among the jurisdictional boundaries between the three branches of government, Huq identifies the horizontal ambiguity implied by the Court's removal jurisprudence, which seeks to resolve overlap between the President's power to take care that the laws are enforced and Congress's Necessary and Proper power to structure the executive branch.[108] The Court's separation-of-powers jurisprudence showcases constitutional spillovers even more directly, requiring judicial distinctions between legislative and executive function in cases

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political uncertainty in the shadow of constitutional uncertainty. Ryan, Tug of War, supra note 8, at 282; see also Ryan, Negotiating Federalism, supra note 8, at 26–27 (organizing ten identified ways state and federal actors negotiate into "three overarching categories of conventional examples, negotiations to allocate authority, and joint policy-making negotiations").

105. Ryan, Tug of War, supra note 8, at 266–67; Ryan, Negotiating Federalism, supra note 8, at 5.

106. Huq, Structural Constitution, supra note 1, at 1657 (explaining boundaries of institutional entitlements are unclear, and "Constitution . . . does not resolve all potential questions concerning the allocation of endogenously defined entitlements").

107. Id. ("As in real property, questions about how to assign the costs of mitigating spillover effects arise. Unlike in the real-property context, however, the allocation of spillover-related costs will often lack a natural and intuitive answer. Instead, the resolution of such costs is best achieved through intermural bargaining . . . ."). Citing Coasean bargaining theory, he observes that sometimes when "the use of one entitlement has a spillover effect on the use of another entitlement, there is no obvious, natural, or inevitable way to parcel out the entitlements. It is simply 'not useful to speak of one party to an externality as being the cause of any problem of incompatible demands.'" Id. at 1658 (quoting Thomas W. Merrill & Henry E. Smith, Making Coasean Property More Coasean, 54 J.L. & Econ. S77, S95 (2011)).

108. Id. at 1660 ("To analyze removal disputes as raising solely the powers of one or the other elected branch is to gloss over the question of how institutional borders are to be drawn when the text engenders overlap.").

interpreting the legislative veto, line-item veto, lockbox rules, and sequester.[109] Yet, as Huq explains,

> The concepts of "legislative" and "executive" cannot be applied to the complexities of observed governance in ways that yield resolving clarity. As Justice Stevens recognized in his *Bowsher* concurrence, "governmental power cannot always be readily characterized with only one of . . . three labels." . . . Efforts by the Court to determine whether and how to separate government functions have dominated debates in constitutional theory since the Founding. Indeed, for all the weaknesses of his separation-of-powers theory, Madison must be credited with anticipating the pervasiveness of spillovers between branches. In a flash of gloomy candor, Madison in The Federalist No. 37 observed that "no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, [the] three great provinces—the legislative, executive, and judiciary." Anti-Federalist opponents of ratification concurred, but took exception to the "vague and inexplicit" boundaries between branches.[110]

As Huq concludes, "[a]bsent some novel theoretical account of how to decompose the Constitution into clear and distinct elementary particles—an account that eluded the Founders—boundary disputes between branches and between governments recognized in the Constitution will remain pervasive."[111]

My own work characterizes the problem of vertical constitutional uncertainty as one of regulatory overlap in a "gray area" of interjurisdictional concern, where both state and federal actors have simultaneously legitimate regulatory interests or obligations. *Federalism and the Tug of War Within* derives this problem from the three grammatical clauses of the Tenth Amendment,[112] which effectively establish that the Constitution (1) delegates some powers to the national government, (2) prohibits some to the states, and (3) reserves those that fit in neither of these two categories to the states (or perhaps the people).[113] However, it explains, "neither the Tenth Amendment nor the Supremacy Clause nor any other provision in the Constitution decisively resolves whether there may also be regulatory spaces in which *both* the states and the federal government may operate," if they have not been otherwise assigned by unambiguous limitation or preemption.[114] It is this realm of jurisdictional overlap that generates so much uncertainty in federalism, but the Constitution itself provides no answer:

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109. Id. at 1661.

110. Id. at 1661–62 (citations omitted).

111. Id. at 1662.

112. U.S. Const. amend. X.

113. Ryan, Tug of War, supra note 8, at 10–11.

114. Id.

> Drawing the conclusion that the Constitution allows for overlapping regulatory space requires an interpretive leap, but so does the extrapolation of mutually exclusive spheres of authority. Either conclusion demands application of some exogenous theory about what American federalism means, or what, in essence, federalism is *for*. The fact that we have relied on one theory or another to resolve the matter—in ways that may eventually come to seem obvious if only by virtue of their repetition—does not negate the role of federalism theory in getting us to that interpretive point. And when the Constitution leaves open multiple possibilities, interpretive choices are inevitable.[115]

Federalism theory is therefore critical to the interpretive enterprise; without it, there is simply no way forward. And for this reason, the unfolding literature rightly demands that we revisit the conclusory analyses of previous federalism theory with tempered skepticism.

B. *Structural Bargaining Can Be Desirable*

A second emerging theme among the literature is that such bargaining is not only inevitable, it can also be desirable—or at least the best choice among alternatives. With some dissenters, most authors argue that structural bargaining by the political branches is especially valuable when the decisionmaking called for is better matched to political-governance capacity than the more limited judicial skillset. As Professor Rosen observes in the interbranch context, the primary institutional advantage of legislative action is that, unlike the Supreme Court, Congress can "address multiple related issues simultaneously, thereby allowing negotiated compromises across related topics."[116] In the vertical-federalism context, Professor Bagenstos notes that negotiations in which the federal executive grants state exemptions to congressional statutes offers benefits to all institutional actors that can only be achieved by political bargaining.[117] In the horizontal-federalism context, Gerken and Holtzblatt argue that even the friction caused by judicially unresolved horizontal spillovers among the states is beneficial for prodding political actors "to do what they are supposed to do: politic, find common ground, negotiate a compromise."[118]

Professor Huq similarly contends that political bargaining is desirable because the political branches can act prospectively to resolve boundary disputes, creating less deadweight loss and greater predictability of process for the future. He adds that elected officials also have better democratic credentials than federal judicial actors.[119] In contrast,

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115. Id.

116. Rosen, supra note 83, at 34.

117. Bagenstos, Federalism by Waiver, supra note 75, at 1.

118. Gerken & Holtzblatt, supra note 77, at 63.

119. Huq, Structural Constitution, supra note 1, at 1683.

the judiciary can respond only retrospectively, after a conflict has arisen and the institutional actors have already committed to some course of action, and with tools that are "clumsy, costly, and prone to manipulation."[120] Moreover, he argues that judicial review of structural dilemmas is more likely to destabilize the field than political bargaining:

> [M]any institutional border disputes arise when neither constitutional text nor original understanding provides univocal answers. As a result, judicial resolution of intermural border disputes tends to pivot on contentious, highly controverted theories of constitutional interpretation . . . . It is by no means clear that recourse to grand constitutional theory is a superior decisional procedure to bargaining. Disputes that turn on historical evidence and constitutional theory will tend to be expensive to litigate. Ex ante, they produce uncertainty. There is also no guarantee that dueling grand theories of constitutional design yield anything other than a "draw." On the contrary, observed patterns of ideological voting on the Supreme Court may raise a concern that the wide array of historical, theoretical, and precedential material from which answers can be derived leaves large free rein for judges' priorities. As a result, reliance on grand theory to settle institutional-border disputes might undermine the predictability of dispute resolution. Judicial resolution, in short, is not necessarily a stabilizing force.[121]

Huq further notes that judicial review usually only occurs when an aggrieved party (a "disgruntled defector") invokes it, which may not be the best means of selecting cases for review on the basis of the overall public interest.[122]

Critically, Huq's support for political bargaining is not only rooted in the failures of judicial capacity to cope with structural uncertainty at the margins of textual directives. He further argues that this marginal constitutional indeterminacy is itself desirable, because the structural framework itself is constructed in anticipation of the needs for change and adaptation over time. As he explains, "the Constitution is not a homeostatic system, but an evolutionary one." He continues, "[t]he inevitable translation of constitutional concepts forward in time—against the backdrop of shifting institutional, social, and economic circumstances—necessarily generates intermural conflicts, even when the initial text has been completely specified. Bargaining is needed to resolve these conflicts in the first instance."[123] He argues that the political branches possess the best capacity for negotiating the needed adaptation, and he observes that bargaining has grown especially important because the

120. Id. at 1676.

121. Id.

122. See id. at 1677 (suggesting parties who challenge intermural settlements in court may have ulterior agendas).

123. Id. at 1656–57.

Article V amendment process is notoriously preclusive of change.[124] For Huq, the possibility of structural bargaining thus stabilizes the system against economic and social crisis.[125]

My work in the vertical context shares Huq's assessment of the comparable capacity of judicial and political actors for coping with uncertain structural boundaries.[126] Troubling governance paralysis after famous instances of judicial intervention in federalism bargaining give us reason to question the value of these judicially enforceable constraints in comparison to the judicially invalidated results of political bargaining.[127] Still, my own claim extends beyond the suggestion that political bargaining deserves deference because it will produce more socially desirable results than judicial review. In addition, my claim makes the more ambitious proposal that political bargaining can sometimes perform the task of constitutional interpretation better than judicial review.

Indeed, this is the critical normative claim of *Negotiating Federalism* and *Federalism and the Tug of War Within*: that federalism bargaining is not only a pragmatic solution to a problem of doctrinal uncertainty; it can also become, itself, a legitimate way of *interpreting* the Constitution's federalism directives, and more faithfully than is possible by unitary judicial review.[128] When we understand constitutional interpretation as any means of constraining public institutions to act consistently with constitutional directives, then:

> Federalism bargaining achieves interpretive status when it procedurally incorporates not only the consent principles that legitimize bargaining in general, but also the fundamental federalism values that should guide federalism interpretation in any forum. After all, the core federalism values are essentially

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124. See Huq, Structural Constitution, supra note 1, at 1665 (arguing preclusive difficulty of constitutional change through Article V renders intermural bargaining "exceptionally salient channel" for institutional dispute resolution); supra notes 119–122 (summarizing Huq's arguments in favor of political branch resolution of intermural conflicts).

125. Id. Huq further elaborates that:

> Unable to adjust the text through Article V without exorbitant transaction costs, institutional actors have strong incentives to bargain among themselves to reach stable outcomes. Entrenchment at the level of specific politicians and factions, as opposed to at the constitutional level, creates a motivation to fashion workable governance arrangements and to find adaptations to new circumstances. Paradoxically, negotiated change may stabilize the overall constitutional dispensation by staving off economic or social crisis. On this view, stability under conditions of social, economic, and geopolitical flux is not obtained by resisting new institutional arrangements.

Id.

126. E.g., Ryan, Tug of War, supra note 8, at 230, 296–300, 329–33, 366–67.

127. See id. at 226–30 (describing failed radioactive-waste management policies after Supreme Court's partial invalidation of Low Level Radioactive Waste Policy Act).

128. Ryan, Tug of War, supra note 8, at 269–70; Ryan, Negotiating Federalism, supra note 8, at 9–10.

> realized through good governance procedure . . . . Incorporating these values into the bargaining process allows negotiators to interpret federalism directives procedurally when consensus on the substance is unavailable . . . . Bargaining that procedurally safeguards rights, enhances participation, fosters innovation, and harnesses interjurisdictional synergy accomplishes what federalism is designed to do—and what federalism interpretation is ultimately for. As such, it warrants interpretive deference from a reviewing court, or any branch actor interrogating the result. Of course, not all federalism bargaining will do so. Bargaining that allocates authority through processes that weaken rights, threaten democratic participation, undermine innovation, and frustrate problem solving is not consistent with federalism values, and warrants no interpretive deference. The more consistency with these values of good governing process, the more interpretive deference is warranted; the less procedural consistency with these values, the less interpretive deference is warranted.[129]

By this view, political bargaining is desirable not only because political institutions possess the capacity to produce socially optimal results in comparison with judicially mediated allocation.[130] It is also desirable because, at least in the federalism context, the process of bilaterally negotiated agreement is more consistent with the underlying principles of good governance that the constitutional separation-of-powers is intended to foster. As I observe, "[d]rawing on the procedural application of fair bargaining and core federalism values, bilaterally negotiated governance opens possibilities for filling inevitable interpretive gaps left by judicial and legislative mandates. Indeed, it has been doing so all along."[131]

Nevertheless, a few authors are less convinced that structural bargaining is ever useful, especially in the horizontal context. For example, Professor Vermeule argues that "[t]here is no systematic reason to think that this sort of bargaining will produce efficient outcomes . . . or other benefits such as the protection of liberty."[132] He notes that the Coase theorem is inapplicable to the separation-of-powers context due to "externalities that cannot always be internalized through bargaining" and significant transaction costs, including "all manner of posturing,

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129. Ryan, Tug of War, supra note 8, at 349; Ryan, Negotiating Federalism, supra note 8, at 113.

130. See supra notes 67–78 (citing new wave of scholarship examining importance of bargaining in federalism context).

131. Ryan, Tug of War, supra note 8, at 270.

132. Vermeule, Invisible Hand, supra note 34, at 1428.

pandering, bluffing, brinkmanship, and holdouts."[133] Bradley and Morrison are similarly concerned.[134]

C. *Judicial Review Should be Limited, but Potentially Available*

Reflecting the majority view among negotiated-governance scholars that structural bargaining can be useful, most of the literature is skeptical of the role of judicial review of political bargaining.[135] In the vertical context, Moncrieff argues that "federalism enforcement should be left primarily to the more democratically legitimate branch: the legislature."[136] Bulman-Pozen notes that dual federalism has always insisted on judicial review as a means of retaining state power, but that "integration of state and federal actors safeguards the separation of state and federal action."[137] In the horizontal context, Rosen argues that the institutional limitations of the judiciary lead to both under- and over-enforcement of the Full Faith and Credit Clause and that Congress should thus provide primary supervision.[138] Most of these scholars agree that while courts are good at interpreting legal rules retrospectively to resolve a specific dispute, they lack the institutional capacity to proactively manage institutional boundary disputes in vague and evolving constitutional contexts.

However, and in contrast to the previous literature emphasizing structural safeguards by the political process, many authors in the new negotiated governance literature allow for some degree of judicial intervention to police the most foreseeable harms of political bargaining. Unsurprisingly, Bradley and Morrison openly favor judicial review of separation-of-powers disputes,[139] but even authors more tolerant of political bargaining see a role for the judiciary. Moncrieff argues that while the judiciary should mostly defer to Congress, it should provide review for "extreme violations" of cost–benefit federalism.[140] Fahey assumes that judicial review of consent procedures is appropriate and argues that the Court should clarify its test for policing procedural bargaining harms.[141] Gluck queries the extent to which state and federal

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133. Id.

134. See Bradley & Morrison, supra note 86, at 415–16 (arguing dynamics of modern congressional–executive relations undermine claims that institutional acquiescence reflects interbranch agreements).

135. See id. at 457 (suggesting courts are uniquely ill-equipped to meddle with practices emerging from interbranch bargains).

136. Moncrieff, supra note 21, at 311.

137. Bulman-Pozen, From Sovereignty and Process, supra note 71, at 2014.

138. Rosen, supra note 83, at 8, 18.

139. See Bradley & Morrison, supra note 86, at 415 (acknowledging judicial review may not be realistic in some circumstances but nevertheless attempting to justify greater judicial review of separation-of-powers disputes).

140. Moncrieff, supra note 21, at 316.

141. Fahey, supra note 76 (manuscript at 33, 43, 55) (acknowledging "litigation may be less effective at policing inappropriate acts of omission by the designated consenter,"

courts should review cooperative federalism regimes, while noting that many have yet to recognize the issues raised there as legitimate questions for federalism doctrine.[142] Gerken and Holtzblatt observe that, while political safeguards are the best spillover corrective in horizontal federalism, judicial review "provides a level of finality and certitude that the rough and chaotic realm of politics cannot."[143] Rossi advocates for judicial deference to regulatory bargaining in general, but supports judicial safeguards when "private behavior influences the regulatory forum."[144]

Similarly, although the thrust of my proposal is to reduce judicial interference with federalism bargaining, the proposal nevertheless preserves a limited role for judicial review to police for bargaining abuses and scrutinize processes that are not consistent with federalism's values. Observing that the interpretive value of vertical political bargaining is enhanced by the horizontal check of judicial review, I argue:

> The availability of limited judicial review strengthens the institution of federalism bargaining in a variety of ways. The potential for neutral judicial oversight smooths leverage imbalances and due process problems that could otherwise frustrate mutual consent, compromise checks and balances, and hinder local participation. Judicial review gives procedural requirements for accountability and transparency enforceable bite. Just as parties to a contract bargain more efficiently when secure in the knowledge that fair bargaining norms are protected by contract law, so too will federalism bargaining parties negotiate more productively when secure that the process must be consistent with constitutional and fairness norms. Contrasted with pure political safeguards, interpretive work by the political branches that is made falsifiable by judicial review will command greater political respect. Moreover, to the extent that the carrot of judicial deference provides meaningful incentive to engineers and participants, the proposal will encourage intergovernmental bargaining that better harmonizes with federalism values, advancing the goals of federalism itself.[145]

Nevertheless, the proposal notes that judicial review of federalism-based challenges to the products of structural bargaining should be limited by a threshold inquiry for interpretive integrity, sheltering instances where

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and "consent procedures represent a failure of the federal political process [also] ripe for a political solution" (emphasis omitted)).

142. See Gluck, Federal Statutes, supra note 21, at 1750–52 (suggesting federal–state statutory implementation relationships are "the critical federal relationships of the statutory era" and criticizing judicial review for "inject[ing] significant uncertainty" into these regimes).

143. Gerken & Holtzblatt, supra note 77, at 68.

144. Rossi, supra note 79, at 239.

145. Ryan, Tug of War, supra note 8, at 350–51; Ryan, Negotiating Federalism, supra note 8, at 114–15 (same).

the bargaining process itself offers the best realization of federalism values.[146]

Huq is even more protective of judicial deference to political bargaining, concluding that the default rule should be nonjusticiability.[147] He argues that courts should treat the products of horizontal bargaining with the same kind of deference they apply to all political action, and for the same reason—judicial recognition of the primacy of elected officials in making political decisions.[148] However, he acknowledges that the unique properties of interbranch bargaining may prevent it from operating as the "well-functioning market" he would prefer, and he recognizes a few categories of foreseeable harms that warrant some kind of oversight.[149]

These harms include problems of negative externalities, or circumstances in which bargaining causes substantial third-party impacts,[150] and paternalism-warranting "internalities," in which institutional collective-action problems lead to errant decisionmaking in bargaining.[151] Indeed, it is the potential for these negative internalities, including the historic tendency of congressional acquiescence to unilateral executive encroachment, that underlies Bradley and Morrison's mistrust and corresponding advocacy for judicial review of political bargaining.[152] Huq also recognizes the problems of interbranch asymmetry that may favor the executive branch in intramural bargaining contexts and ack-

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146. Ryan, Negotiating Federalism, supra note 8, at 114–15. The proposal further discusses the proposed standard of review:

> The reviewing court's first task should be to scrutinize the bargaining process for consistency with the procedural principles of fair bargaining and federalism values. If it passes, then the outcome warrants deference as a legitimate way of determining who gets to decide . . . . Of course, if the threshold inquiry shows that the bargaining process is not consistent with the requisite criteria, then the reviewing court should be free to assess the substance of the negotiated outcome de novo under whatever judicial federalism doctrine is raised. Negotiations that, on balance, violate federalism values should be rejected as interpretive devices . . . . Bargaining that strains the consensual nature of agreement, that excludes relevant stakeholders, or in which participants may not fully understand implicated interests all require more careful scrutiny.

Id.; see also Ryan, Tug of War, supra note 8, at 350–51.

147. Huq, Structural Constitution, supra note 1, at 1683.

148. See id. at 1685 ("Courts should treat the outcomes of such negotiation with at least their traditional measure of deference in recognition of elected actors' primacy . . . .").

149. Id. at 1666.

150. Id. at 1667.

151. Id. at 1669.

152. See Bradley & Morrison, supra note 86, at 448–49 (discussing legislative acquiescence in this context).

nowledges cause to be more suspicious of bargains that reflect inattentive institutional drift (acquiescence) rather than purposeful negotiation.[153]

For that reason, Huq appears resigned to the possibility that the presumption of nonjusticiability may be overcome in extreme circumstances:

> At the very least, there is no reason to think that courts should *always* be preferred fora for the resolution of intermural boundary disputes: Courts should treat the outcomes of such negotiation with at least their traditional measure of deference in recognition of elected actors' primacy—as they have done for much of American history. Read aggressively, the arguments presented in this Part suggest that it is elected actors who should bear primary and perhaps sole responsibility for determining when third-party effects or internality-like limitations on an institution's capabilities warrant withdrawal from the wide and pervasive sphere of intermural bargaining.[154]

He does not present a clear picture of the mechanics for rebutting that presumption, or according to what standards such judicial review should proceed. The omission of more detail here suggests that he may be imagining application of the current judicial separation-of-powers doctrine in these extreme cases, suggesting that his proposal merely operates to increase the threshold for when horizontal branch bargaining becomes subject to review. It would be useful to know more about Huq's thoughts on this. But in the meanwhile, he clearly concludes that "[t]he structural constitution should be negotiated—and not litigated."[155]

D. *Points of Divergence*

In addition to these themes of agreement, the negotiated-structural-governance literature reveals interesting points of dissensus. Many scholars focus exclusively on vertical or horizontal structural bargaining, and not every argument in one camp applies as forcefully to the other (as Huq, who addresses both, is careful to recognize[156]). Other differences reflect the impacts of diverging theoretical vocabulary more than clear normative disagreement, such as scholars' various appeals to law and economics, negotiation theory, political theory, market theory, minority participation, and other distinctive frames of reference.

However, these diverging frames of reference occasionally lead to important differences in analysis. For example, authors like Huq, Vermeule, and Moncrieff analyze political bargaining by metrics of social

153. See Huq, Structural Constitution, supra note 1, at 1671–73 (acknowledging "skepticism about courts' ability to untangle different motivations and assess the bona fides of any given institutional action").

154. Id. at 1685–86.

155. Id. at 1686.

156. Id. at 1598–99.

utility, measuring various alternatives in terms of their foreseeable costs and benefits. My work does this to some extent as well, but more like the work of Bulman-Pozen, ultimately grounds its support in the relationship between well-crafted bargaining and constitutional good-governance principles. For me, structural bargaining that warrants deference is bargaining that procedurally advances the values of governance that underlie the separation of powers to begin with. Indeed, Huq and I may especially disagree on this particular point, given that I include checks and balances to protect individuals among these principles, and Huq asserts that "there is no necessary linkage between separated powers and liberty."[157] Vermeule appears to disagree with Huq on this point as well, though they both write from the perspective of law and economics.[158]

A related point of dissensus is the different approaches various scholars take toward the question of whether accomplishing good structural governance is a matter of process or principle, or whether we should focus on means or ends. Rodríguez emphasizes the intrinsic value of procedure, noting that she "ultimately believe[s] we can still express proceduralist preferences for decentralized decision-making, regardless of the perspective adopted."[159] However, Bulman-Pozen argues that process-federalism scholars have "unmoored federalism from constitutionally fixed spheres of state and federal action" and criticizes them for mistakenly believing "that national political parties and the administrative state [will] preserve autonomous state governance and distinctive state interests."[160]

Nevertheless, taken together, the work in the collection bridges this gap by considering the relationship between process and principle. Gerken frames the issue in terms of the dialectic between the means and ends of structural governance. She considers federalism a means toward a well-functioning democracy, rather than an end in itself.[161] Yet my own work explores the functional relationship between process and principle in structural governance. Gerken and I agree that structural governance is a means to the end of a well-functioning democracy, and I argue that, at least in the vertical context, the measure of a well-functioning federalism are the good governance values that we turn to federalism to help us

157. Id. at 1667 n.382.

158. Cf. Vermeule, Invisible Hand, supra note 34, at 1428 ("There is no systematic reason to think that this sort of bargaining will produce efficient outcomes . . . or other benefits such as the protection of liberty.").

159. Rodríguez, supra note 74, at 2099.

160. Bulman-Pozen, From Sovereignty and Process, supra note 71, at 1928, 1932.

161. See Gerken, Federalism and Nationalism, supra note 25 (manuscript at 27) (arguing work of new nationalists "suggest[] that the relationship between means and ends isn't as clean or as linear as many have assumed").

accomplish. Which are, themselves, procedural values.[162] Process and principle are thus inextricably intertwined. The means and ends are one.

CONCLUSION

The new literature on negotiated structural governance reveals important points of convergence and divergence, some of them departing markedly from the scholarship on which it develops. Themes include the inevitability of political bargaining as a means of allocating contested authority, the potential desirability of political bargaining as an alternative to judicial allocation, and the potential for limited judicial review for extreme bargaining abuses. Differences among scholars include the varying frameworks of analysis they apply, the diverging metrics by which they evaluate the worthiness of political bargaining, and their conceptions of structural-governance bargaining in relationship to constitutional processes and principles.

Core questions remain that warrant additional scrutiny in the next iteration of the discourse, especially in the horizontal interbranch context. For example, Huq advocates for nonjusticiable bargaining, while (grudgingly) allowing for the possibility of judicial review in some cases. But according to what standard should judicial review of interbranch bargaining be withheld or granted?[163] If limited judicial review is allowed, how should the doctrine of standing function in that context? In both the vertical and horizontal contexts, who should and should not be entitled to litigate separation-of-powers harms? How can the courts guard against the "disgruntled defector" problem that Huq warns of?[164]

In particular, more research is needed to assess the fascinating significance of the fact that federalism bargaining has garnered more acceptance than interbranch bargaining. As Professor Huq observes, the Court's horizontal separation-of-powers jurisprudence is "spackled with inalienability rules that formalistically limit the forms of permissible interbranch bargaining."[165] He argues that horizontal bargaining should be allowed to proceed more like vertical bargaining. Indeed, vertical bargaining is also constrained by important judicial precedent (like the anticommandeering and spending power doctrines), but it nevertheless continues to a much larger extent. Prompted by Huq's initial foray, it will be valuable to further consider why vertical-federalism bargaining outpaces horizontal interbranch bargaining, and whether they should proceed on equal footing. Are the structural constitutional entitlements

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162. See supra note 129 and accompanying text (discussing procedural content of fundamental federalism values).

163. Cf. Ryan, Tug of War, supra note 8, at 349–53 (articulating standard of review for vertical-federalism bargaining); Ryan, Negotiating Federalism, supra note 8, at 113–18 (same).

164. See supra note 122 and accompanying text.

165. Huq, Structural Constitution, supra note 1, at 1645.

used in vertical bargaining somehow different in kind from the entitlements used in horizontal bargaining? Does interbranch bargaining threaten the values that underlie separation-of-powers constraints in some more meaningful way?

Alternatively, is there simply less constitutional ambiguity in the horizontal than vertical context and a smaller zone of jurisdictional overlap? Is the difference an artifact of institutional asymmetry between the primary legislative and executive bargainers? Or is it just that there are fewer parties available to bargain in the horizontal context? Is there a greater threat of collusion in the horizontal context, where there are fewer bargaining parties? Or, as some critics of federalism bargaining have suggested, is state–federal collusion ultimately the bigger threat?[166]

Finally, it will be important to consider the role of noninstitutional actors in structural-governance bargaining, both directly and indirectly. In the vertical context, governance processes increasingly include stakeholder inputs that enable private parties, organizations, and others to participate in the deliberation of federalism-sensitive governance. In the horizontal context, the political branches reach out for private partnerships in governance implementation. Are these significant points of contact for the purpose of evaluating structural bargaining? Are there ramifications of transitioning campaign finance laws for the debate over structural bargaining? Does the participation or influence of noninstitutional actors change the calculus on judicial review of structural bargaining? Should it?

Each new question raises others, indicating that we still have much to look forward to from the emerging structural-bargaining literature. As the challenges confronted by governance increase in complexity, the demands we place on government will intensify accordingly. The dynamics between institutions of government will encounter new pressures and possibilities within our elaborate constitutional system of rules and relationships, checks and balances, invitations to compete and to collaborate. The Constitution provides a remarkably robust framework in which to navigate these challenges, but it does not resolve every question about the permissible scope of structural bargaining. For this, we must rely on the best collective wisdom of the leaders, jurists, theorists, and citizens that negotiate within the constraints of the Structural Constitution every day. Important questions remain as the discourse continues to unfold.

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166. For the argument that it is, see Greve, The Upside Down Constitution, supra note 81, at 5 (critiquing cooperative federalism as state–federal collusion).