

ARTICLES

DOES THE LOGIC OF COLLECTIVE ACTION EXPLAIN FEDERALISM DOCTRINE?

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Recent federalism scholarship has taken a “collective action” turn. Commentators endorse or criticize the Court’s doctrinal tools for allocating regulatory authority between the states and the federal government by invoking an economic model of collective action. The ensuing corpus of “collective action arguments” has been invoked by both pro-federal and pro-state scholars to underwrite either judicial acquiescence in broad national authority or robust judicial intervention to protect states’ interests. Both strands of argument have also found echoes in recent Supreme Court jurisprudence.

This Article reconsiders the relevance of collective action arguments for federalism doctrine. Without questioning the role of collective action dynamics in descriptive accounts of American federalism, it challenges their normative significance for the purpose of fashioning structural constitutional doctrine. At the Article’s core is a simple claim with plural ramifications: there is no unique logic of collective action that can well explain American federalism. Instead, heterogeneous collections of states will, under different circumstances, follow distinct trajectories that end in divergent end states. Collective action dynamics among the several states can hence produce not only optimal but also highly undesirable equilibria depending on how initial parameters are set. Moreover, the various collective action dynamics animating American federalism are too heterogeneous and empirically contingent to point univocally in one direction toward any simple and stable judicial approach. Absent a single model that works as a reliable rule of thumb, the plural logics of collective action do not provide a stable analytic lodestar to guide judicial intervention. Nor do they provide an accurate proxy for the Framers’ original understanding of federalism. Accordingly, the Article con-

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cludes that judicially enforced federalism cannot be vindicated in terms of collective action arguments. Instead, it suggests that to the extent the case for judicially enforced federalism rests principally on the availability and soundness of collective action explanations, there may be sound reasons for courts to abandon the field.

INTRODUCTION.....	218
I. COLLECTIVE ACTION FOR AND AGAINST FEDERALISM.....	225
A. <i>Collective Action and the Case for National Authority</i>	227
1. <i>Originalism and collective action</i>	227
2. <i>Collective action and the structural argument for national authority</i>	229
B. <i>Collective Action and the Rights of States</i>	233
1. <i>Vindicating federalism through politics</i>	234
2. <i>Collective action and the political safeguards</i>	237
II. THE PLURAL FORMS OF COLLECTIVE ACTION IN PUBLIC LAW: A TYPOLOGY.....	240
A. <i>Heterogeneous Participants</i>	243
B. <i>Step Goods</i>	247
C. <i>Noncoercive Solutions</i>	251
D. <i>Increasing the Number of Iterations and Participants</i>	253
E. <i>Alternative Payoff Structures</i>	255
III. COLLECTIVE ACTION AND THE CASE FOR NATIONAL POWER REVISITED.....	258
A. <i>The Weak Collective Action Case for National Power</i>	259
1. <i>The frequency of interstate cooperation</i>	259
2. <i>Noncoercive solutions to interstate collective action problems</i>	261
3. <i>Comparing state and federal collective action</i>	266
B. <i>Collective Action Arguments as Constitutional Arguments</i>	270
IV. RECONSIDERING THE CASE AGAINST FEDERALISM'S POLITICAL SAFEGUARDS.....	277
A. <i>Questioning the Tragedy of the Federalism Commons</i>	278
B. <i>Federal Legislative Solicitude for State Interests</i>	280
C. <i>Noncoercive Solutions to the States' Collective Action</i>	288
D. <i>Comparative Analysis of States' Collective Action Costs</i>	292
1. <i>Collective action in Congress</i>	292
2. <i>Are courts or Congress a better forum for states?</i>	295
CONCLUSION.....	299

INTRODUCTION

Numbers matter in American public law. There are many states but only one federal government. When the national government acts, it can overcome the states' collective inability to organize and install their own solutions to pressing policy concerns. The observed inability of states to produce a collective good by acting together might therefore be a reliable signal of when federal intervention is needed. Courts might accordingly ratify federal initiatives pro-

vided that they predict a failure of states' collective action. At the same time, a parallel dynamic of collective action can be isolated elsewhere in American federalism. This second dynamic arises from the fact that the federal government is itself a plural composite.¹ Its complex representational structures are arranged not only to channel individual voters' preferences but also to reflect preferences and interests on a state-by-state basis.² Whether or not the ensuing national policy decisions appropriately reflect the constitutional interests of the states qua states, though, may depend on whether the states collaborate effectively to fashion a decisive voice in the national political process.³ In the landmark opinion of *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court suggested that the Constitution relies principally on representative, political mechanisms to vindicate states' interests.⁴ But if *Garcia's* theory of political safeguards overstates the collective ability of states to secure federalism through representative national institutions, and if state collective action in Congress is in fact quite fragile, then judicial intervention on behalf of the states may be warranted to preserve the "federal balance."⁵ Theories of collective action, in short, might be pressed into service on both sides of debates about judicially enforced federalism.

It should be no surprise then that legal scholars increasingly lean upon a social science and economic literature concerning collective action to explain and justify the jurisprudence of federalism—i.e., the body of law that parcels out regulatory authorities between the federal government and the several states.⁶ That literature begins with the simple model of collective action fa-

1. For the locus classicus of this observation with respect to Congress, see Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L. REV. L. & ECON. 239, 244 (1992).

2. The most obvious of these are the Senate and the Electoral College. See U.S. CONST. art. I, § 3, cl. 1 (Senate); *id.* art. II, § 1 (Electoral College). Although less immediately obvious, inferior federal courts have also been structured to reflect state political lines since the Judiciary Act of 1789. See RUSSELL R. WHEELER & CYNTHIA HARRISON, *CREATING THE FEDERAL JUDICIAL SYSTEM* 4 (1994).

3. This formulation raises an important normative question about the nature of representation in a federal government: how can elected institutions, including Congress and the President, simultaneously represent both aggregate populations of electors and also respect institutional commitments, such as federalism or a role fidelity to their respective branches? For the purposes of this Article, I bracket the hard normative question of how to conceptualize representation in a compound democratic republic. For an insightful analysis through a comparative and historical lens, see generally BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* (1997).

4. 469 U.S. 528, 550-51 (1985).

5. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

6. It is common for judges and scholars to align the term "federalism" with claims and outcomes that favor the states over the national government. In this Article, I try to avoid this imprecise and selective usage, except when I am quoting and discussing sources speaking in such terms. Instead, I use the term "federalism" more abstractly to refer to an arrangement of governmental powers across jurisdictions of different sizes that coexist in the

mously applied to contemporary legislative politics by Mancur Olson.⁷ In his path-marking book *The Logic of Collective Action*, Olson identified a negative correlation between the number of participants in a collective enterprise and the likelihood of their success.⁸ Contrary to then-prevailing political science wisdom, Olson tendered the rough prediction that small collectivities would prevail more often in politics than more numerous groups.⁹ The transaction costs of identifying, organizing, and coordinating the large group, Olson explained, would often preclude effective political action.¹⁰ By underscoring the impedimentary force of Coasean transaction costs,¹¹ Olson did not simply reorient understandings of effective political action. He also seeded the fruitful academic pasture of public choice theory. In federalism doctrine and scholarship today, Olson's elegant insight into the likely distribution of coordinated action by groups can be yoked to justify both expansive national authority pursuant to Article I, Section 8 of the Constitution and, in the alternative, aggressive judicial superintendence of federal action for potential infractions of states' constitutional prerogatives.¹² At least in the federalism domain, the logic of collective action is wantonly promiscuous.

Two examples of collective action logic from the Court's recent federalism jurisprudence usefully illustrate how the diagnosis of a collective action shortfall can yield divergent remedies—even though it has been scholars, rather than judges, who have leveraged the insights of collective action theory best.

First, a nationalist logic of collective action loomed large in debates about the Patient Protection and Affordable Care Act.¹³ Academic defenders of the law styled its individual mandate, community rating, and guaranteed issue provisions as necessary federal responses to the several states' inability to act together on health care policy—and in so doing expressly invoked a concern about collective action failures as a justification for national legislation.¹⁴ In the

same geographic territory. For a useful history of the term, see generally S. RUFUS DAVIS, *THE FEDERAL PRINCIPLE: A JOURNEY THROUGH TIME IN QUEST OF A MEANING* (1978).

7. MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

8. *See id.* at 2.

9. *See id.* at 36.

10. *See id.* at 22, 33-36.

11. Coase famously explained that when transaction costs are zero, an efficient result is reached regardless of the initial assignment of a legal entitlement. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8 (1960). For consideration of the Coasean roots of collective action problems, see Elizabeth Hoffman & Matthew L. Spitzer, *The Enduring Power of Coase*, 54 J.L. & ECON. S63, S64 (2011).

12. *See discussion infra* Part I.A-B.

13. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25, 26, and 42 U.S.C.).

14. *See, e.g.,* Neil S. Siegel, *Free Riding on Benevolence: Collective Action and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS. 29, 62-63 (2012) (identifying an "interstate . . . collective action problem" as the justification for federal intervention in the health care market).

ensuing Supreme Court proceedings, Justice Ginsburg filed an opinion echoing some of those arguments. She proposed that individual states place themselves at comparative economic disadvantage by providing health coverage and hence “are unlikely to take the initiative in addressing the problem of the uninsured, even though solving that problem is in all States’ best interests.”¹⁵ While Justice Ginsburg’s argument directly concerned the particulars of the health care market, it also traded on the more general proposition that the perceived inability of states to engage in mutually beneficial collective action provides a general license for federal intervention either under the Commerce Clause or another of Congress’s enumerated powers.¹⁶

Second, a federalism jurisprudence protective of states’ interests can be vindicated by diagnosing collective action deficiencies in what the legal scholar Herbert Wechsler called the “political safeguards of federalism.”¹⁷ On Wechsler’s view, vigorous judicial protection of states’ interests was super-numerary given the extant, robust channels for the transmission of states’ political preferences within national elective institutions.¹⁸ In *Garcia* itself, the Court effectively invoked the same idea of political safeguards of federalism to hold that the “principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”¹⁹

The Court, however, soon edged away from *Garcia*’s reliance on political safeguards—with the unraveling abetted by concerns about the efficacy of states’ collective action in the political realm.²⁰ A decade after *Garcia*, Justice Kennedy starkly rejected that decision’s logic. He justified a renewed judicial solicitude for states’ interests by invoking the “absence of structural mechanisms to require [federal] officials to undertake this principled task [of defend-

15. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2612 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); see also Neil S. Siegel, *Collective Action Federalism and Its Discontents*, 91 TEX. L. REV. 1937, 1939-40 (2013) (“[Justice] Ginsburg’s opinion suggests that four Justices deem the logic of collective action constitutionally pertinent to the scope of Congress’s commerce power.”). Centrally at stake was the individual mandate to maintain health insurance coverage on pain of tax penalties. See *Sebelius*, 132 S. Ct. at 2644-50 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (discussing the constitutionality of I.R.C. § 5000A (2012)).

16. See, e.g., Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 123 (2010). I discuss such theories at greater length in Part I.A below.

17. 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, 552 (1954) (coining and defining the phrase).

18. See *id.* at 553-59.

19. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985).

20. For a succinct history of federalism doctrine in the past three decades, see Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 452-68 (2002).

ing states' rights]" and to resist the lures of "momentary political convenience."²¹ Although not framed explicitly in the idiom of collective action dynamics, Justice Kennedy's repudiation of *Garcia* is best understood in those terms: individual federal legislators may each be alive to federalism concerns, Justice Kennedy suggests, but when they act together, all are tempted to externalize costs onto the states—hence the "absence" of political safeguards.²² Commentators have amplified Justice Kennedy's point by explicitly invoking the logic of collective action against *Garcia*'s political safeguards argument.²³ In this fashion, a diagnosis of collective action pathologies among the several states can underwrite the reorientation of federalism jurisprudence toward more vigorous protection of subnational interests.²⁴

The aim of this Article is to reevaluate such deployments of collective action logic by scholarly partisans of both states and the national government to warrant federalism doctrine.²⁵ Both sides are correct that previously unobserved interactions within and between diverse collectivities play axial roles in setting and producing American federalism's distinctive effects. I demur, however, to the conventional normative and doctrinal entailments of this observation for two reasons, one descriptive and the other normative.

First, I advance the claim that there is no *single* logic of collective action that can explain comprehensively the dynamics of federalism. Instead, there is a plurality of potential dynamics and equilibria that arise in contingent and unpredictable ways.²⁶ Collective action is not "a unitary phenomenon" but rather

21. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

22. Note that unlike Justice Ginsburg's health care-specific argument in *Sebelius*, Justice Kennedy's argument does operate at a wholesale, and not a retail, level. The argument developed in this Article focuses largely on the wholesale, rather than the tailored, use of collective action arguments as templates for the general development of federalism jurisprudence.

23. The most eloquent version of this argument is offered by Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1118 (1997), as part of a larger package of otherwise powerful arguments.

24. Consonant with the body of jurisprudence and literature analyzed here, I bracket the matter of collective action problems among localities within a state. For treatments of spillover effects between local government units, with attention to the problem of defining local boundaries, see, for example, Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1132-44 (1996) (analyzing the relationship between boundary definition and spillover problems); and Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 286 (1993). For a discussion of common-pool problems that arise when plural governmental units serve a common geographic area, see Christopher Berry, *Piling On: Multilevel Government and the Fiscal Common-Pool*, 52 AM. J. POL. SCI. 802, 805-06 (2008) (identifying the common-pool problem and documenting such effects empirically).

25. For an introduction to the diverse lines of doctrine at stake, see Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575, 586-611 (2013).

26. See MIKHAIL FILIPPOV ET AL., *DESIGNING FEDERALISM: A THEORY OF SELF-SUSTAINABLE FEDERAL INSTITUTIONS* 34, 227 (2004) (noting the possibility of multiple

a plurality of mechanisms “too complex and diverse to allow simple generalizations about . . . causes, effects, or dynamics.”²⁷ Previous public law scholarship has not pressed this point as far as is warranted, or examined its consequences. Moreover, public law scholarship has yet to take the full measure of all the “necessary intellectual tools [and] models to understand the array of [collective action] problems”²⁸ in the way private law scholars have. Accordingly, by way of threshold descriptive contribution I knit together lessons from economics, sociology, political science, and game theory to fashion a clear and generalizable vocabulary for distinguishing and modeling the diverse forms of collective action observed in American constitutional law.

Second, the heterogeneity of collective action mechanisms has normative consequences. Specifically, it defeats efforts to derive a unidirectional normative prescription for judicial action. Whether or not a collective action dynamic conduces to undesirable outcomes depends on many factors. For example, an exogenous and fixed feature of the collectivity, such as participants’ heterogeneity or the common observance of a norm, may prevent any suboptimal outcome from arising in the first instance. This bites on both pro-nationalist and pro-state arguments. On the one hand, states do not inevitably fail to cooperate to achieve important shared policy goals. As a result, prevailing arguments in favor of national power require qualification in formal presentation. They also need empirical verification on the ground. On the other hand, states are not doomed to flounder as advocates in the national political process. This observed behavioral variation renders the need for judicial safeguards of federalism unpredictable. In consequence, advocates of such judicial safeguards cannot merely invoke the specter of collective action dysfunction to justify judicial intervention—at least not without empirical proof that states have failed to secure sufficient voice in the federal legislative process.

If the various collective action dynamics animating American federalism are indeed too heterogeneous and empirically contingent to point univocally toward any one simple solution, it is hard to see how they can serve as analytic foundations for judicial intervention. Of course, anecdotal evidence can always be assembled respecting specific instances in which states prevail or flounder. But such evidence tends to be inconclusive, and in any case is too often the product of cherry-picking. There is simply no parsimonious way to weigh com-

potential federalism equilibria). Filippov et al. argue that this premise suggests the necessity of fixed rules that define “the core institutional structure of the federal center and its relationship to federal subjects.” *Id.* at 36. My argument is that those rules cannot be defined by mechanical application of the prisoners’ dilemma.

27. Pamela E. Oliver, *Formal Models of Collective Action*, 19 ANN. REV. SOC. 271, 275 (1993); see also Douglas D. Heckathorn, *The Dynamics and Dilemmas of Collective Action*, 61 AM. SOC. REV. 250, 253-60 (1996) (identifying five distinct formal models within the supposedly unitary category of collective action).

28. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 2 (James E. Alt & Douglass C. North eds., 1990). Ostrom is focused on the problem of managing common-pool resources.

prehensively the available piecemeal evidence to generate global recommendations. To put the matter more crudely, one single model of collective action can serve as a rule of thumb for lawyers and judges only if there is a secure reason to believe it is accurate more often than it misleads. My study here suggests that no such reason has been demonstrated.

Rather than resorting to the inconclusive and open-ended recitation of favorite anecdotes, I suggest that it would be preferable to recognize that univocal models of collective action necessarily operate at too lofty a level of abstraction to generate practical guidance.²⁹ If, as some scholars have powerfully argued, models of collective action are the best available templates for judicially enforceable federalism doctrine—superior, say, to originalist or common law constitutional accounts—then it may well be that judicial modesty, rather than activism, is warranted on questions of federal structure and intergovernmental relations.³⁰

My contribution here partially celebrates and partially resists previous scholarship on collective action federalism. Past work, including path-marking articles published in these pages,³¹ performed yeoman service identifying the possibility of precise and tractable consequentialist models in what previously was an analytically malnourished domain.³² Such cogent specification of collective action dynamics within the complex pathways of American federalism,

29. This tracks Elinor Ostrom's point that there is no one "specific set of rules" that will solve collective action problems in the management of common-pool resources. ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 255 (2005).

30. I should be clear about the limits of the claim advanced here: judicial safeguards for federalism might be justified on terms other than the failure of states' political safeguards, such as the Constitution's original meaning. I do not address such arguments here. Rather, my argument is focused on the interaction between one particular strand of political and economic theory (about collective action) and judicial doctrine. Of course, there have been cogent arguments advanced against other potential foundations for federalism doctrine, such as the inference from an original public understanding of the Constitution's diffuse structure. See, e.g., John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2008 (2009) [hereinafter Manning, *Generality Problem*] (rejecting many other originalist justifications for federalism jurisprudence on the ground that "[w]hen judges enforce freestanding 'federalism,' they ignore the resultant bargains and tradeoffs that made their way into the document"); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1672 (2004) (arguing that "the modern insights of statutory textualism also preclude the application of strong purposivism when interpreting a precise constitutional amendment such as the Eleventh Amendment"). Although I find much to commend in Manning's arguments (and others) against other justifications for federalism doctrine, I do not aim here to canvas the whole waterfront of arguments for federalism doctrine. It suffices to say that my choice to focus on collective action justifications for federalism jurisprudence here reflects an implicit judgment that such arguments are among the most sophisticated and compelling available.

31. See Cooter & Siegel, *supra* note 16.

32. By contrast, courts tend to offer only partially theorized accounts of federalism. In consequence, I focus here largely on scholarship and not judicial opinions.

if not entirely novel within the legal literature,³³ constituted a major clarificatory contribution. I stand in its debt. My (perhaps modest) amendment is that previous work paid insufficient attention to the limits of parsimonious models. Legal scholarship has yet to investigate sufficiently the intricacies within collective action dynamics that have been limned in recent social scientific research. Attention to those complexities undermines some of the specific recommendations proffered in certain earlier scholarship while also casting into doubt any larger project of fashioning a judicially enforced federalism. At the same time, my more granular approach flings wide open new fields of inquiry into specific policy choices at the federal-state frontier using a wider array of more specific tools.

The argument proceeds in four steps. Part I explains how scholars press into service the logic of collective action either to justify or condemn federalism jurisprudence. Part II then develops a detailed taxonomy of divergent collective action dynamics by drawing on both empirical and theoretical studies from economics, sociology, political science, and game theory. The aim here is to refute the implicit assumption that collective action can plausibly be understood as a singular dynamic for the purpose of modeling and recommending constitutional doctrine. Returning to federalism doctrine in Parts III and IV, I show how a plural understanding of collective action undermines specific justifications for judicial ratification of broad federal power or alternatively judicial solicitude for states' rights. A brief Conclusion develops the suggestion intimated in Parts III and IV that American federalism may want for tractable standards amenable to judicial implementation. I tentatively suggest that the Article's analysis, in the aggregate, suggests that federalism questions may better be treated as nonjusticiable.

I. COLLECTIVE ACTION FOR AND AGAINST FEDERALISM

This Part explores the manner in which collective action mechanisms are deployed as hermeneutic instruments to elucidate the meaning of vague constitutional provisions and to generate guidance for courts' specification of "free-standing" federalism principles decoupled from specific textual warrants.³⁴

33. Important earlier works demonstrating the importance of collective action mechanisms include Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1494-96 (1987) (book review) (framing interstate interactions in terms of externalities problems); and Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1, 69-82 (2003) (using an insightful game-theoretic model to gloss dormant Commerce Clause doctrine).

34. By this, I mean the extrapolation of broad constitutional federalism principles with at best weak links to specific parts of the constitutional text. On the legitimacy of such free-standing claims, compare Manning, *Generality Problem*, *supra* note 30, at 2008 (criticizing deployment of freestanding federalism claims), with Gillian E. Metzger, *The Constitutional*

Such arguments come dressed in both pro-national and pro-state colors. First, arguments for the generous construction of Congress's enumerated powers turn on the first-order question of how to distinguish lawful from unlawful exercises of federal authority pursuant to those provisions. Diagnosis of a breakdown in collective action justifies federal government intervention—and hence a shield against judicial invalidation of federal legislation. Second, arguments in favor of a freestanding principle of state authority concentrate on the second-order question of which institution (federal courts or the national political branches) decides on the division of authority between levels of government.³⁵ Collective action arguments here work as a sword, not a shield—a license for a decentralizing exercise of judicial review.

My aim here is to show that despite their opposing normative entailments, a parallel logic of collective action animates both lines of argument. Both focus on the success vel non of collective action by the *states*. In nationalist accounts, it is the states' failure to produce national public goods in the first instance that licenses federal legislative intervention and hence judicial deference to Congress. In decentralizing accounts of judicial review, it is the states' failure to defend their interests in the national legislative process that provides the platform for aggressive judicial review. The two lines of argument discussed here, in short, are conceptually joined at the hip. Each though focuses upon a distinct moment in the political economy of federal-state relations. From different launching points, each of them weaves a fully formed brocade of federalism jurisprudence.

A threshold definitional caveat is warranted here before I unspool these federalism arguments: there is no standard definition of “collective action logic” or “collective action problem” in the legal literature.³⁶ I will argue below that the term is often employed with some liberality, and even a touch of promiscuity. I accordingly do not offer a threshold definition. Instead, I take observed usage of the term in the literature as the starting point of my analysis. To anticipate one of my conclusions, I will say here that the term “collective action problem” is likely best understood as an umbrella term, a species that encompasses diverse and often conflictive genera.

Legitimacy of Freestanding Federalism, 122 HARV. L. REV. F. 98, 99-107 (2009) (defending the propriety of justiciable federalism principles).

35. Cf. Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 811 (2007) (“Second-order design issues concern the legal institutions that are used to implement the first-order policy goals.”).

36. Siegel defines it as “a situation in which individually rational action by states leads to collectively irrational results,” a definition that suggests a causal relationship between the discrete rational actions and the collectively irrational result. Siegel, *supra* note 15, at 1941. The argument below suggests, however, that the deployment of the term in the literature (including Siegel's own work) does not always specify only those cases in which collectively inefficient outcomes are likely to occur.

A. *Collective Action and the Case for National Authority*

The collective action argument in favor of a relatively expansive gloss on ambiguous textual allocations of national regulatory power comes in both originalist and nonoriginalist garb. I address each version in turn, paying particular heed to the work done by models of collective action in the analysis.

1. *Originalism and collective action*

The originalist case for using collective action as a lodestar to define federal power begins with Resolution VI of the Virginia Plan. James Madison and Edmund Randolph introduced the Virginia Plan at the Philadelphia Convention on May 29, 1787.³⁷ As first drafted, Resolution VI stipulated the new national legislature could “legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.”³⁸ The Convention’s Committee of Detail received the task of turning Resolution VI into constitutional text. It did so by developing the enumeration of congressional powers that is now located in Article I, Section 8. On one view, the Committee’s “ten days of labor [are] better explained as an effort to identify particular areas of governance where there were ‘general Interests of the Union,’ where the states were ‘separately incompetent,’ or where state legislation could disrupt the national ‘Harmony.’”³⁹

Building on this historical account, Jack Balkin has argued that the enumeration of Article I, Section 8 should be construed in light of a simple, unitary “structural principle”: allow federal regulation when Congress seeks to “regulate problems or activities that produce spillover effects between states or generate collective action problems that concern more than one state.”⁴⁰ In developing this claim, Balkin uses the phrase “collective action problems” to signify instances in which “states may be unable or unwilling to act effectively

37. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20 (Max Farrand ed., rev. ed. 1966) (establishing that the Virginia Plan was introduced on May 29, 1787); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 60-64 (1996) (describing the origins of the Virginia Plan).

38. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 37, at 21. The language of Resolution VI was later amended upon a motion by a Delaware delegate, Gunning Bedford, who motioned for the addition of language to grant the new legislature power “to legislate in all cases for the general interests of the Union.” 2 *id.* at 21, 26-27.

39. RAKOVE, *supra* note 37, at 178. This reading of the Convention’s discussions has been disputed. See Kurt T. Lash, “Resolution VI”: *The Virginia Plan and Authority to Resolve Collective Action Problems Under Article I, Section 8*, 87 NOTRE DAME L. REV. 2123, 2134-42 (2012) (providing an alternative view of the Convention’s trajectory).

40. Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 6 (2010). Structural principles “explain how the Constitution works in practice and how it should work.” JACK M. BALKIN, LIVING ORIGINALISM 142 (2011). There is much more to Balkin’s rich analysis, and I focus here on a single, albeit surely a keystone, feature of that analysis.

in ways that promote the general welfare unless other states do so as well.”⁴¹ His term “spillover effects” seems to be employed as a synonym for collective action problems. Both “[s]pillover effects and collective action problems are produced by the sum of many different individual activities.”⁴² Balkin gives the following example of spillover effects:

Suppose some states prohibit substandard conditions, while others do not. In the short run at least, firms in unregulated states will probably face lower production costs, and they can sell their goods more cheaply than firms in regulated states. In a national market, they will underprice goods from regulated firms; in particular they will be cheaper in the regulated states themselves. . . . [I]n the long run firms in regulated states may threaten to relocate to unregulated states to take advantage of lower costs and a friendlier business environment. . . . [T]his will put economic and political pressure on regulated states to allow substandard labor conditions.⁴³

Stated slightly more formally, Balkin’s references to collective action problems and spillovers might be understood to pick out the class of cases in which states’ welfare functions are interdependent in the sense that one state’s choices interact with and influence those of another state. Interdependence leads to a gap between individual rationality and collective good, generating collectively undesirable outcomes, and so provides a warrant for federal intervention. Hence, in the quoted example, the national government usefully supplies “coordinat[ion]” on a “single approach”⁴⁴ via preemptive federal law.

One ambiguity in Balkin’s presentation is worth flagging here. In ordinary parlance, the term “spillover” can just as easily refer to a bilateral situation as well as to a multiparty scenario. Imagine, for example, a confectioner whose drills and machinery vibrate, disturbing the consulting practice of his neighbor the doctor.⁴⁵ In the passages cited above, however, Balkin appears to use the term “spillover” to refer only to situations involving many different individual states. Other collective action scholars, by contrast, seem to include interactions between two actors within the category of collective action.⁴⁶ The distinction is perhaps more significant than it might first seem: it seems intuitive that coordination problems in bilateral contexts will be different in character from the problems that arise with a multiplicity of actors. Indeed, as I develop below, this distinction may have a large significance in practice.⁴⁷

41. Balkin, *supra* note 40, at 13; *see also* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1809 (2010) (“The enumerated powers of Article I, Section 8 allowed Congress to establish national standards to solve collective action problems . . .”).

42. Balkin, *supra* note 40, at 35.

43. *Id.* at 32.

44. BALKIN, *supra* note 40, at 147 (distinguishing “problems that are *federal* by nature [as they] require a federal solution” from “*national* problems that occur in many places but that do not require coordinated action and a single approach”).

45. *See* Coase, *supra* note 11, at 8-10.

46. *See infra* text accompanying notes 57-59.

47. *See infra* text accompanying notes 179-87.

Relevant to my purposes, Balkin does not typologize in more granular fashion the set of interdependent state welfare functions. Instead, he presents the identification of spillovers as a “basic structural principle,”⁴⁸ one that is “designed to be adaptable to changing circumstances,” such that federal power will increase (or diminish) as collective action pathologies between the several states accrete or dwindle.⁴⁹ Treating interdependent welfare functions as a *sufficient* condition for national intervention in this fashion is likely to yield a generous view of how far federal regulatory authority may reach—a substantive outcome that Balkin has endorsed in other work.⁵⁰

2. *Collective action and the structural argument for national authority*

Originalism is not the sole modality of constitutional argument in which collective action arguments underwrite broad national authority. Robert Cooter and Neil Siegel have developed arguments parallel to Balkin’s in favor of broad Article I power in a “structural and consequentialist” register.⁵¹ The connection between federal power and states’ collective action dilemmas is not new to the legal scholarship.⁵² But Cooter and Siegel offer the most cogent and lucid version of the claim on consequentialist terms now available.⁵³ Their admirable work sets a benchmark for future scholarship.

48. Balkin, *supra* note 40, at 6. Elsewhere, Balkin has explained that his argument “does not displace the list of enumerated powers; it merely offers a background structural principle for creating doctrinal constructions that apply the various enumerated powers in concrete cases.” Jack M. Balkin, *Resolution VI as a Principle of Construction*, BALKINIZATION (Aug. 12, 2011, 5:55 AM), <http://balkin.blogspot.com/2011/08/resolution-vi-as-principle-of.html>.

49. BALKIN, *supra* note 40, at 145; *accord* Lash, *supra* note 39, at 2127 (“Under [Balkin’s] approach, all congressionally identified ‘collective action problems’ by definition fall within the constitutional power of Congress, regardless of subject matter and regardless of the intrusion into matters traditionally left to state control.”).

50. Balkin is admirably candid about his substantive commitments. *See, e.g.*, Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 867 (“I am a liberal defending the modern state . . .”).

51. *See* Cooter & Siegel, *supra* note 16, at 120 (characterizing their approach as “structural and consequentialist”). For parallel analyses, see Neil S. Siegel, *Distinguishing the “Truly National” from the “Truly Local”*: Customary Allocation, Commercial Activity, and Collective Action, 62 DUKE L.J. 797, 803-05 (2012); and Siegel, *supra* note 14, at 43-50.

52. *See, e.g.*, Richard E. Levy, *Federalism and Collective Action*, 45 U. KAN. L. REV. 1241, 1268 (1997) (arguing that “the enumerated federal powers encompass areas where collective action problems such as public goods, externalities, and the prisoner’s dilemma prevented effective collective decision making”).

53. *See, e.g.*, Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 B.U. L. REV. 1723, 1737 (2011); Ernest A. Young, *Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law*, 75 LAW & CONTEMP. PROBS. 157, 171 (2012).

Cooter and Siegel frame their “theory of collective action federalism” as explicitly singular and unitary.⁵⁴ Like Balkin, they begin by postulating a gap between states’ rational individual choices⁵⁵ and collectively desirable outcomes: “[T]he Framers recognized that the actions of individually rational states produced irrational results for the nation as a whole By internalizing the effects, the federal government is more likely than the states to solve the problem of interstate spillovers [and coordination problems].”⁵⁶ Also in harmony with Balkin, Cooter and Siegel identify negative externalities, or spillovers, arising between states as the cause of the undesirable gap between individual preferences and the collective good.⁵⁷ Unlike Balkin, however, they seem to count interactions between only two states as potential collective action problems. For instance, they point out that highway construction requires coordination between two states “so that the roads meet in the same place,” and they predict that highway funding without national coordination will lead to holdout problems as each state tries “to shift most of the construction costs onto the other states.”⁵⁸ Writing separately in a subsequent, solo-authored piece, Siegel confirms his view that a spillover between “two . . . states” can be fairly ranked as a collective action problem.⁵⁹

It appears from their account that Cooter and Siegel, like Balkin, view spillovers as a *sufficient* condition for a collective action problem, and hence national intervention.⁶⁰ They gloss the legislative powers enumerated in Article I, Section 8 of the Constitution as an enumeration of spillover-based collective action problems arising between the states.⁶¹ And a further supportive claim

54. For references to a singular “theory of collective action,” see Cooter & Siegel, *supra* note 16 *passim*. In a subsequent paper, Siegel acknowledges and cogently dissects the internal heterogeneity of the term “externality,” which he and Cooter on occasion use as a proxy for a collective action problem. Siegel, *supra* note 15, at 1961-67.

55. Note that this argument is distinct from the claim that *individuals’* actions will generate collectively suboptimal outcomes due to free riding, as has been argued in the context of the individual mandate provision. For a critical view of that claim, see Douglas A. Kahn & Jeffrey H. Kahn, *Free Rider: A Justification for Mandatory Medical Insurance Under Health Care Reform?*, 109 MICH. L. REV. FIRST IMPRESSIONS 78 (2011), <http://www.michiganlawreview.org/assets/fi/109/kahn.pdf>. The argument considered here focuses on states, not natural persons.

56. Cooter & Siegel, *supra* note 16, at 117.

57. *Id.* at 144 (“[B]enefits and costs that spill across state lines create an incentive for each state to free ride on the efforts of other states.”); Siegel, *supra* note 15, at 1941 (“A collective action problem may also arise in cases of interstate spillovers”); accord ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 106-07 (2000) (discussing spillovers and arguing for the use of “special districts”).

58. Cooter & Siegel, *supra* note 16, at 140.

59. Siegel, *supra* note 15, at 1940 (“[A] collective action approach . . . maintains that the existence of a significant problem of collective action facing two or more states is both necessary and sufficient for Congress [to lawfully act].”).

60. See, e.g., *id.* at 1940-41, 1946.

61. Cooter & Siegel, *supra* note 16, at 147-51; see also Siegel, *supra* note 14, at 45-46 (“The various clauses of Section 8 form a coherent set Coherence comes from the con-

appears in their work: Cooter and Siegel consider and reject alternative voluntaristic solutions to collective action problems, at least when more than a handful of states are involved.⁶² Nor do they discuss at any length other potential solutions to collective action problems that do not rely on federal intervention. On their view, it therefore seems, the existence of interstate spillovers does not simply create a collective action problem between states that *suffices* to warrant federal intervention, such spillovers render a nationalist legislative nudge *necessary* because no voluntaristic solution will suffice and no other nonvoluntary solution is at hand.

Cooter and Siegel deepen the sophistication of their “collective action federalism” by linking it to two distinct political economy traditions. First, they predict that collective action problems will arise when states endeavor to supply “public goods,” which they define as nonexcludable (i.e., it is not feasible to exclude anyone from their enjoyment) and nonrivalrous (i.e., one person’s enjoyment does not reduce the amount available for others).⁶³ According to Cooter and Siegel, collective goods are best produced by the “smallest unit of government that internalizes the effects of [a power’s] exercise.”⁶⁴ On this point, Cooter and Siegel implicitly draw on Russell Hardin’s equation of public goods problems with the “rational incentive [of] an individual . . . not to contribute to the group’s provision of its collective good to itself.”⁶⁵

Second, moved by the concern that game-theoretic analysis can have “indeterminate results,” Cooter and Siegel invoke Coasean terminology, conjuring “the encompassing term ‘transaction costs’” to specify instances in which spillovers result in suboptimal results.⁶⁶ Rather than grappling with an open-ended panoply of transaction costs, they identify one particular friction as especially

nection that the specific powers have to collective action problems that the federal government can address more effectively than the states can address by acting alone.”)

62. Cooter & Siegel, *supra* note 16, at 140-41 (discussing and rejecting the possibility of state compacts as “unpromising”); *see also* Siegel, *supra* note 14, at 45-46 (“The states cannot achieve an end when doing so requires multiple states to cooperate—that is, when doing so requires collective action.”). Elsewhere they note that “[s]ometimes state cooperation is likely to succeed,” as when only two states are involved. Cooter & Siegel, *supra* note 16, at 159.

63. Cooter & Siegel, *supra* note 16, at 135-36. Others offer different definitions of public goods. *See, e.g.*, RUSSELL HARDIN, COLLECTIVE ACTION 17 (1982) (“Public goods are defined by two properties: jointness of supply and impossibility of exclusion.” (emphases omitted)). Cooter and Siegel also identify “spillovers” as a central collective action problem. *See, e.g.*, Cooter & Siegel, *supra* note 16, at 158, 163-64. It is not clear that spillovers are analytically distinct from other collective action problems, because what is at issue in addressing an interstate spillover is the production of yet another public good—regulatory cooperation.

64. Cooter & Siegel, *supra* note 16, at 137 (emphasis omitted).

65. HARDIN, *supra* note 63, at 20 (emphasis omitted). To be clear, Cooter and Siegel do not cite Hardin’s work: the linkage to his work is thus my inference, not part of their claim.

66. Cooter & Siegel, *supra* note 16, at 139.

significant: on my reading of their work, it seems that the numerosity of participants is the key variable in determining the scale of transaction costs. The more states there are that must work together, they assert, the larger the costs of cooperation, and the greater the chance of failure.⁶⁷ Hence, with a larger collection of states, there is more reason to switch from what Cooter and Siegel characterize as the unanimity decision rule that applies to most dispersed action over to the majority decision rule employed in national legislative action.⁶⁸ Their emphasis on numerosity tracks an element of Olson's pioneering work.⁶⁹ Olson, however, did not rest his analysis on numerosity alone. He cautioned that collective action dilemmas are not solely a function of group size but rather "depend[] on whether the individual actions of any one of more members in a group are noticeable to any other individuals in the group."⁷⁰

Cooter and Siegel equivocate a touch on the question whether their account of collective action federalism can appropriately guide the federal courts. On the one hand, they say plainly that their theory does *not* speak to questions of the scope of judicial review.⁷¹ On the other hand, it is hard to read their work as wholly agnostic on the operation of judicial intervention. Rather, like Balkin's work, Cooter and Siegel's theory of collective action federalism is quite plausibly read as a "guide" to "interpretation" of Congress's Article I, Section 8 enumerated powers, an activity that typically includes the development of "judicial doctrine."⁷² Indeed, Cooter and Siegel expressly say their account should "discourage courts from construing federal statutes narrowly in ways that exacerbate collective action problems."⁷³ They further endorse "[a] deferential approach to judicial review" in order to "address the objection that the theory of collective action federalism tasks judges with making determinations ill-suited for them."⁷⁴ In a later article, Siegel adds that their theory provides

67. *Id.* at 143; *see also id.* at 139-40 (using the Coase Theorem to underscore the relevance of transaction costs).

68. *Id.* at 142.

69. *See* OLSON, *supra* note 7, at 2 (arguing that "unless the number of individuals in a group is quite small . . . rational, self-interested individuals will not act to achieve their common or group interests" (emphasis omitted)); *id.* at 20-21 (same).

70. *Id.* at 45.

71. Cooter & Siegel, *supra* note 16, at 154 ("We further note that the theory of collective action federalism addresses the substantive meaning of Article I, Section 8, not the institutional roles of Congress and the Court in constitutional interpretation and implementation.").

72. *Id.* at 151, 159. In the cited passage, Cooter and Siegel expressly disclaim any intent to offer a "guide" in respect to the Reconstruction Amendments. A plausible negative inference from this comment is that their work *does* offer guidance in respect to Article I's enumerated powers. This observation also precedes an extended critical discussion of the Court's Commerce Clause case law. *Id.* at 159-68. Given that context, it is hard to read their remark as wholly sidestepping any judgment about the appropriate forms of judicial action.

73. *Id.* at 175.

74. *Id.* at 181. In later work, Siegel has made more explicit claims about federalism doctrine. *See* Siegel, *supra* note 14, at 48-50 (critically appraising doctrine in light of collec-

“resources” for a bounded definition of federal power “in the context of judicial review.”⁷⁵ Given these comments, a fair reading of their work certainly suggests something other than mere agnosticism about judicial review of federalism questions. Furthermore, it is at least plausible to understand their effort to develop a parsimonious account of collective action problems based on a single variable (numerosity)⁷⁶ as a concession to federal judges’ limited institutional capabilities (which, as noted above, they elsewhere recognize). Despite its caveats, therefore, the Cooter and Siegel account of collective action can be understood as directed at federal courts as much as to other scholars.

* * *

Balkin, Cooter, and Siegel offer a common account of “collective action” as an analytic key to understanding the bounds of federal power. All three scholars identify a rupture between individual and collective rationality as defining a collective action problem. In subsequent Parts of this Article, I will interrogate more closely when this chasm will likely arise, and suggest that the answer is more complex and less amenable to parsimonious modeling than Balkin, Cooter, and Siegel might allow.

B. *Collective Action and the Rights of States*

In contrast to collective action arguments in favor of national power, collective action justifications in favor of states’ interests focus upon the second-order question of *which institution* should settle federal-state boundary disputes. Such arguments arose first in response to the *Garcia* Court’s reliance upon a concept of federalism’s political safeguards drawn from Wechsler’s

tive action federalism theory). Another recent essay by Siegel addresses “methods of defining the expanse and limits of the Commerce Clause” largely in terms of judicial doctrine. Siegel, *supra* note 51, at 801. This latter article also reads, to this reader at least, as a critique of the doctrine.

75. Siegel, *supra* note 15, at 1966; *see also id.* at 1942 (offering “resources” to generate a limited reading of the Commerce Clause “[i]n the context of judicial review”).

76. *See, e.g.,* Cooter & Siegel, *supra* note 16, at 159 (noting that “state cooperation is unlikely to succeed . . . [inter alia] when the need for cooperation involves numerous states”). There are elements of the argument that hint at greater complexity. For example, Cooter and Siegel say that they mean to draw attention to “congressional judgments about the existence and seriousness of collective action problems, and about the adequacy of Congress’s response,” rather than reaching conclusions about whether those judgments are correct. *Id.* at 180. But these hints are, on my reading, lost amidst the larger claims of the article. Nevertheless, to the extent that Cooter and Siegel can be read to recommend federal intervention whenever a discrete failure of collective action as between the states is *observed*, rather than a general blueprint for *predicting* when federal intervention is warranted, I should be understood as offering a friendly amendment to their theory by way of a further specification of the plural forms of collective action.

seminal article.⁷⁷ In setting forth those arguments, I draw together work by several different scholars that rests upon a logic of collective action. To begin, though, I summarize the political safeguards claim associated with Wechsler and *Garcia*.

1. *Vindicating federalism through politics*

The notion that federalism is vindicated by political compromise, not judicial enforcement, goes back to the Constitution's drafting and ratification. Framers such as James Madison were famously skeptical of mere "parchment" demarcations of institutional interests.⁷⁸ Rather than law, they looked to politics to sustain the equilibrium between the diverse elements of government. In their view, political action by the states would likely prove pivotal to the Union's survival. Writing in *The Federalist No. 45*, James Madison explained that state governments were to be "constituent and essential parts of the federal government," with "each of the principal branches of the federal government [owing] its existence more or less to the favor of the State governments."⁷⁹ Indeed, *The Federalist Papers* warned, states were so powerful that they could also pose a threat to national unity. In *The Federalist No. 17*, Alexander Hamilton predicted that although federal officials would not be tempted to seize state power, "[i]t will always be . . . easy for the State governments to encroach upon the national authorities."⁸⁰ On this view, states' political power not only would

77. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."); Wechsler, *supra* note 17.

78. THE FEDERALIST NO. 48, at 308-09 (James Madison) (Clinton Rossiter ed., 1961) (denying the proposition that it is "sufficient to mark, with precision, the boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power").

79. THE FEDERALIST NO. 45 (James Madison), *supra* note 78, at 291. Unlike Hamilton, Madison saw the states as inevitably the most powerful side of the federalism dyad. See Troy E. Smith, *Divided Publius: Democracy, Federalism, and the Cultivation of Public Sentiment*, 69 REV. POL. 568, 574-78 (2007) (comparing Madison's and Hamilton's views).

80. THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 78, at 118-19 ("I confess I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition."). The same thought was expressed by Madison:

The State governments will have the advantage of the federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other.

THE FEDERALIST NO. 45 (James Madison), *supra* note 78, at 290-91.

shape the actions of the national government, but also would persistently risk overwhelming fragile federal institutions.⁸¹

Rehabilitating scraps of this Founding-era logic in a famous 1954 article, Herbert Wechsler posited that “Congress, from its composition and the mode of its selection, tends to reflect the ‘local spirit.’”⁸² Examples of Wechsler’s political safeguards include the Senate (the sole element in the Constitution permanently insulated from Article V change), the Electoral College, the states’ power to draw House district lines, and state legislators’ (pre-Seventeenth Amendment) power to select senators.⁸³ As subsequently glossed by a sympathetic commentator, Wechsler’s argument centered on the possibility that the federal “political process might more effectively promote the . . . substantive values federalism is supposed to serve than any attempt to enforce those values directly.”⁸⁴ Later theorists also supplemented Wechsler’s account by pointing out that the national party system (which emerged against general expectations in the Republic’s first decade) conduces to a healthy “political dependency” between state and federal officials, and thus functions as a conduit for states’ interests into national politics.⁸⁵ Consistent with such arguments, the *Garcia*

81. Contemporary economic analysis suggests that a national entity can dominate through a strategy of “divide-and-rule.” See Daron Acemoglu et al., *Kleptocracy and Divide-and-Rule: A Model of Personal Rule*, 2 J. EUR. ECON. ASS’N 162, 164 (2004) (“The logic of the divide-and-rule strategy is to enable a ruler to bribe politically pivotal groups . . . , ensuring that he can remain in power against challenges.”). Article I, Section 9 of the Constitution, however, limits Congress’s ability to engage in economic preferences. See, e.g., U.S. CONST. art. I, § 9, cl. 6 (barring any “Preference . . . to the Ports of one State over those of another”). That is, the Framers formulated an effective solution to the most important form of strategic action by the national government.

82. Wechsler, *supra* note 17, at 552.

83. *Id.* at 546-52. What if the understanding at the time of the Framing of Constitution was that political mechanisms would ensure the vindication of federalism values, but subsequent institutional development (including, but not limited to, the Seventeenth Amendment) has undermined that assumption? Much of the literature on the judicial safeguards of federalism seems to view the latter amendment as a catastrophe, rather than an exercise of popular sovereignty to be honored and respected. Cf. Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1, 18 (2011) (calling the Seventeenth Amendment a “crippling blow to the states”). But it is far from clear that this should be so absent some nonoriginalist commitment to federalism values for their own sake.

84. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 373.

85. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 282 & n.267 (2000). But see Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977, 985-89 (2002) (disputing this claim). Another possible channel of influence is the states’ use of their power to define the federal electorate. In *Arizona v. Inter Tribal Council of Arizona, Inc.*, the Court divided over the scope of state authority necessary to define the electorate free of federal direction. 133 S. Ct. 2247, 2257-58 (2013) (emphasizing states’ power to define the electorate, and the corresponding limitation on national authority under the Elections Clause).

Court “observe[d] that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.”⁸⁶ It reasoned that “the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action.”⁸⁷

Hamilton and Madison furthermore assumed these political mechanisms would be supplemented by populist ones. They hence anticipated ongoing “competition for the political allegiance and affections” of the people between the states and the federal government.⁸⁸ At its acme, they hypothesized that this populist competition might bubble over into insurrection. In this vein, Madison anticipated that federal incursions onto state authority would be met with a “general alarm” as “[p]lans of resistance [were] concerted,” and an “appeal to a trial of force” issued.⁸⁹ Only through “the visionary [i.e., implausible] supposition that the federal government may . . . accumulate a military force for the projects of ambition” could the downfall of the states be imagined.⁹⁰

The Framers’ emphasis on political institutions and the people as the primary mechanisms for calibrating the federal balance does not necessarily exclude by negative implication the federal courts in a “backup”⁹¹ role. Indeed, “Publius” twice fleetingly suggests that political safeguards need not exclude the possibility of judicial protection for the several states’ distinctive role in American federalism.⁹² Yet these mere hints might also plausibly be read to

86. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985).

87. *Id.* at 556.

88. Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1042 (1997); see also Todd E. Pettys, *Competing for the People’s Affection: Federalism’s Forgotten Marketplace*, 56 VAND. L. REV. 329, 333 (2003) (“With two separate governments vying to win their trust, the Framers reasoned, the people would be free continually to assess the sovereigns’ conduct and capabilities, and to confer or withdraw regulatory power as they deemed appropriate.”).

89. THE FEDERALIST NO. 46 (James Madison), *supra* note 78, at 298

90. *Id.* Lest this all seem far-fetched, we might recall the role that Madison, along with Thomas Jefferson, played in organizing state resistance to the Alien and Sedition Acts. For a capsule account of the relevant historical context, see GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME 29-44* (2004).

91. Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1479 (2001) (“[T]he federal courts must play backup to Congress, to ensure that any unconstitutional legislation that emerges from the political process . . . will not survive.”).

92. In *The Federalist No. 44*, Madison predicts “the success of the usurpation [by Congress] will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts.” THE FEDERALIST NO. 44 (James Madison), *supra* note 78, at 286. This passage is reasonably read to include federalism values. Moreover, in *The Federalist No. 39*, Madison speaks of courts as the tribunal that will ultimately decide “controversies relating to the boundary between the two [federal and state] jurisdictions” so as “to prevent an appeal to the sword.” THE FEDERALIST NO. 39 (James Madison), *supra* note 78, at 245-46; accord Prakash & Yoo, *supra* note 91, at 1462-71 (praising judicial review of federalism questions). This passage is in some tension with the more rousing peroration of *The*

suggest that federal courts act as last-ditch complements to, and not plenary substitutes for, federalism's political safeguards. *The Federalist Papers* nowhere explain what the reserved judicial role would be, or how strong it should be in comparison to the judicial enforcement of other constitutional values.⁹³ On that point, the contrast between Publius's extended treatment of federalism's political safeguards and his relative neglect of its judicial safeguards counts perhaps in *Garcia*'s favor.

2. *Collective action and the political safeguards*

Enter the logic of collective action—now not as justification for congressional action but instead as a device for undermining *Garcia*'s political safeguards argument. The basic intuition is that just as there is a collective action friction between the several states warranting national intervention to produce primary public goods, so too there is a “classic collective action problem” impeding national legislators from adequately considering or vindicating federalism values within the representational structures of the federal government.⁹⁴ The lacuna is theorized to arise from agency slack as a consequence of the infidelity of elected federal representatives. Focusing on the fiscal effect of federal law on the states, for example, Elizabeth Garrett notes that “legislators who believe that the public interest is best served by reduced federal spending” are nonetheless tempted to promulgate “unfunded mandates” as means of “liability-shifting”⁹⁵ to the several states.⁹⁶ She posits that the “temptation to use unfunded federal mandates to shift political liability for higher taxes will frequently overcome any predisposition of national legislators to protect states’ interests, leading to systemic political failures.”⁹⁷

In other words, Garrett identifies what might be termed a tragedy of the federalism commons. Her shortsighted legislators each pursue their own narrow self-interest. In so doing, they together deplete a shared resource—the fiscal

Federalist No. 45 (also by Madison). Courts might also figure in federalism debates in another way. Alison LaCroix has argued that fights over federal court jurisdiction were a forum in which the first generation of American politicians “hammered out their own working understandings of federalism.” ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 179 (2010).

93. The availability of political safeguards for federalism might justify a deflationary recalibration of judicial review's intensity. See, e.g., Jeffrey Goldsworthy, *Structural Judicial Review and the Objection from Democracy*, 60 U. TORONTO L.J. 137, 142 (2010) (“[I]t can be argued that if the national parliament is structured so as to represent both national and state majorities, judges have good reason to adopt a more deferential approach . . .”).

94. Garrett, *supra* note 23, at 1133.

95. Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1065 (1995).

96. Garrett, *supra* note 23, at 1133-35 (“[T]he ability to shift some or all of the costs of a national program to states or localities may cause national lawmakers to underestimate the costs relative to the benefits and enact unnecessary or unwise programs.”).

97. *Id.* at 1135-36.

and regulatory capacity of the several states—that each legislator would like to preserve.⁹⁸ Ringing a variation on the same theme, Roderick Hills argues that “federalism . . . places its [legislative] advocates in a prisoners’ dilemma.”⁹⁹ Garrett and Hills hence furnish an admirably sophisticated gloss on Justice Kennedy’s inchoate worry that “momentary political convenience” will impede national legislators’ respect for federalism values.¹⁰⁰

Garrett’s and Hills’s accounts are amplified by other scholars. John McGinnis and Ilya Somin hypothesize a “tendency of both liberal and conservative politicians and activists to subordinate federalism considerations to the pursuit of political advantage on specific issues.”¹⁰¹ In Neal Devins’s precise and pithy formulation of substantially the same point, “[t]here is no federalism constituency within Congress.”¹⁰² And Lynn Baker and Ernest Young argue that myopic incentives might lead narrow coalitions of states to seek to limit generally beneficial interstate competition with preemptive federal regulation—a problem they label “horizontal aggrandizement.”¹⁰³ Baker and Young further suggest that federal legislators will tend to intervene for the sole purpose of claiming credit after states have expended effort in achieving policy ends.¹⁰⁴

All these arguments can be retooled in the public choice idiom of interest group competition. In the contest over national legislation, that is, states will

98. For an excellent introduction to the tragedy of the commons problem, see Lee Anne Fennell, *Commons, Anticommons, Semicommons*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 35 (Kenneth Ayotte & Henry E. Smith eds., 2010).

99. Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1244 (2001) (“State autonomy . . . is a collective good analogous to balanced budgets.”).

100. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

101. John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 99 (2004); see also Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1194-200 (2001) [hereinafter Devins, *Congressional Factfinding*] (doubting whether the political economy of the federal legislative process conduces to serious consideration of federal concerns); Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131, 134 (2004) [hereinafter Devins, *The Judicial Safeguards*] (extending this claim to voters); William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 455-69 (1955) (arguing that the Senate has protected states’ interests only sporadically, with the Seventeenth Amendment proving the culmination of a long process of centralization).

102. Devins, *The Judicial Safeguards*, *supra* note 101, at 131 (concurring with McGinnis & Somin, *supra* note 101).

103. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 117-24 (2001) (arguing that “some states will harness the federal lawmaking power to impose their policy preferences on other states to the former states’ own advantage” (emphases omitted)); see also Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 961-72 (2001) (same).

104. See Baker & Young, *supra* note 103, at 114-15 (discussing the Gun-Free School Zones Act at issue in *United States v. Lopez*, 514 U.S. 549 (1995)).

persistently face defeat by concentrated, powerful interest groups that wield large influence over the national legislative process and that can therefore lure legislators far from the public good of federalism ideals.¹⁰⁵ This is a collective action argument to the extent it focuses on the states' high cost of collective action, in comparison at least to the low transaction costs of other lobbies.

These arguments hence lead uniformly to the conclusion that "collective action problems undermine responsible decisionmaking" in the federal legislative process.¹⁰⁶ Legislators' rational incentives do not lead to the production of a well-tempered federalism architecture as a useful collective good, but rather to a socially undesirable Nash equilibrium that shortchanges states' interests and hence ill serves the nation. The cure for such collective pathologies is once again intervention from a party other than the initial participants to the collective dynamic. In contrast to nationalist invocations of collective action arguments, when states' rights are the foundation for such claims, it is a federal court that is the hoped-for intervening party.¹⁰⁷ Without robust judicial enforcement, McGinnis and Somin emblematically argue, "federalism . . . can wither" much as "a collectively owned tree that no single owner has sufficient incentive to water" will fail.¹⁰⁸ Notwithstanding their centrifugal and localizing slant, these arguments rely on much the same logic of collective action as the pro-national arguments adumbrated above. More ironically, despite their decentralizing tilt, they too can easily issue in a renewed call for action by a national institution—the federal courts, rather than the political branches.

* * *

Worries about the perverse and socially undesirable consequences of failed collective action by states, in sum, animate both sides of the federalism debate. Partisans of both greater and lesser national power alike purport to identify a troublesome gap between states' individual incentives and the attainment of a collective good. For nationalist scholars and judges, identification of a collective action dynamic—or, in Coasean terms, an interstate spillover—justifies

105. See McGinnis & Somin, *supra* note 101, at 103 ("National lobbying groups of special interests are sometimes more effective than lobbying groups on behalf of the states and thus federal officials are likely to ignore state interests."); cf. Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 33-34 (2007) (analyzing interest group competition in Congress that may be relevant to federalism outcomes).

106. See Garrett, *supra* note 23, at 1118.

107. Cf. Baker & Young, *supra* note 103, at 163 (questioning "the longstanding assumption that states' rights are somehow importantly different from other areas of constitutional [sic] law in which the necessity and value of judicial review are taken for granted"); Garrett, *supra* note 23, at 1179-83 (discussing judicial review of federalism values in the context of statutory interpretation); McGinnis & Somin, *supra* note 101, at 93 ("[C]ourts should vigorously protect constitutional federalism . . .").

108. McGinnis & Somin, *supra* note 101, at 99-100.

federal legislative intervention and judicial deference. By contrast, advocates of decentralization focus on the aggregate action of states as “constituents” of the federal government unable to obtain due regard in the course of national policymaking. On this view, identification of a collective action shortfall warrants judicial intervention and the elaboration of a more robust federalism jurisprudence.¹⁰⁹

The balance of this Article aims to think more precisely about these collective action arguments. Rather than a resolving diagnosis, I will argue, the logic of collective action is a complex and plural pathology—one that warrants rather more unpacking than the current public law literature endeavors. It is that taxonomical labor I undertake in Part II before looping back to reconsider current doctrinal deployment in Parts III and IV.

II. THE PLURAL FORMS OF COLLECTIVE ACTION IN PUBLIC LAW: A TYPOLOGY

Both lines of federalism scholarship described in Part I focus on the possibility of a rupture emerging between individual rationality and the collective good. This counterintuitive possibility can be illustrated by a simple game-theoretic model—the oft-invoked prisoners’ dilemma.¹¹⁰ Consider two prisoners separately detained incommunicado, each offered the choice between remaining silent or incriminating the other. If both remain silent, both receive a light sentence. If both mutually incriminate the other, both receive heavier sentences. If only one incriminates the other, the latter receives a harsh punishment while the former goes free. Payoffs from the two players’ possible options of cooperation (i.e., remain silent) or defection (i.e., incriminate the other) can be represented in a two-by-two matrix with the row player’s payoff being followed by the column player’s payoff.¹¹¹

109. Both sides in the federalism debate are thus focused on a single, specific moment in the political economy of federalism—either the threshold government responses to a policy problem, or the ensuing national legislative and regulatory process that generates federal responses. Each side identifies a specific dynamic at play in that moment, and then draws general conclusions from that observation. Neither side, however, offers an integrated account of the entire policymaking process—from identification to resolution—that accounts for diverse kinds of collective action problems along the way.

110. The literature is divided on where the apostrophe goes in that phrase; since the core of the game is the plurality of prisoners, it makes more sense to speak of it in the plural. See HARDIN, *supra* note 63, at 24 (describing emergence and identification of the prisoners’ dilemma).

111. A negative payoff here can be imagined as a prison term of years; a zero result reflects being set free. The row player’s options are represented on the vertical axis while the column player’s options are represented on the horizontal axis.

	Cooperate	Defect
Cooperate	-1, -1	-7, 0
Defect	0, -7	-5, -5

Comparing cells within each row, or within each column, reveals that each prisoner will incriminate the other, leading to the worst possible outcome from the prisoners' perspectives. In this way, the prisoners' dilemma illustrates how individually rational actions can yield collectively undesirable outcomes.¹¹² Indeed, when played just once, the prisoners' dilemma is one of the few games with a single equilibrium,¹¹³ or Nash equilibrium,¹¹⁴ from which no participant has an incentive to deviate. These two characteristics in tandem make "the case for a legal solution . . . unusually strong."¹¹⁵ Identification of a prisoners' dilemma is accordingly often taken as "a *prima facie* case for [external] activity."¹¹⁶ In the public law context, prisoners' dilemmas can be discerned in claims about the tragedy of the commons, which is a multiplayer version of that simple game-theoretic dynamic.¹¹⁷

So far, so good. Identification of a collective effort by the states to attain some good indeed seems a sound proxy for federal intervention. Yet the federalism scholarship canvassed in Part I rarely stops to analyze whether the assumptions necessary to warrant external intervention (by the federal government or by a court) are indeed satisfied. It contains no recognition of the quotidian observation that collective efforts plainly sometimes succeed. And singularly wanting from the current public law literature is any more abstract account of when the observation of collective action should provoke concern

112. Cf. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 9 (1984) ("The Prisoner's Dilemma is simply an abstract formulation of some very common and interesting situations in which what is best for each person individually leads to mutual defection, whereas everyone would have been better off with mutual cooperation.").

113. See MICHAEL TAYLOR, *ANARCHY AND COOPERATION* 6-7 (1976) (exploring the emergence of a single dominant strategy in two-person and multi-person prisoners' dilemmas).

114. The Nash equilibrium is

[t]he central solution concept in game theory. It is based on the principle that the combination of strategies that players are likely to choose is one in which no player could do better by choosing a different strategy given the ones the others choose. A pair of strategies will form a Nash equilibrium if each strategy is one that cannot be improved upon given the other strategy. We establish whether a particular strategy combination forms a Nash equilibrium by asking if either player has an incentive to deviate from it.

DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 310 (1994) (italics omitted).

115. Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 212 (2009).

116. TAYLOR, *supra* note 113, at 10; accord DENNIS C. MUELLER, *PUBLIC CHOICE III*, at 9-14 (2003); OSTROM, *supra* note 28, at 10; see also OLSON, *supra* note 7, at 15 (defining a state as "first of all an organization that provides public goods for its members, the citizens" and linking the problem of public goods to collective action).

117. BAIRD ET AL., *supra* note 114, at 34.

about collectively undesirable outcomes—that is, a *general* typology of good and bad collective action.

This Part fills that descriptive gap. It draws on game-theoretic, sociological, economic, and political science studies to show that “collective action” is not unitary, but an unruly and diverse *collection* of dynamics. Less a single skeleton key, I contend, collective action is a heterogeneous category of differently shaped and sized keys for understanding political action. Each species is crafted to resolve a different puzzle. To invoke collective action is thus not to end conversation. It is rather to invite a messy and complex inquiry into precisely what *species* of collective action is at stake.

To that end, I identify five significant parameters of collective action that take diverse values in public law problems. Starting from a baseline of the prisoners’ dilemma, I show how variation in any one of the five parameters can derail a normative prescription in favor of intervention. The first two parameters concern the nature of individual interests and payoffs at stake. The third focuses on potential voluntaristic solutions. The fourth considers how collective action dynamics play out when there are many players and many rounds of interaction. Finally, I consider wholly distinct payoff structures. These, to be clear, are not the sole parameters identified in the game-theoretic literature, and it is certainly possible to imagine many other ways of slicing up the universe of collective action theories.¹¹⁸ For example, there is an extensive technical literature on situations in which interacting parties have incomplete and potentially asymmetrical information.¹¹⁹ But the parameters that I examine are, in my view, the most useful for capturing the collective action problems of public law.¹²⁰ And the presentation here proceeds in such a way as to build from relatively simple caveats to more complex objections to the most elementary models of collective action.

The typology developed here yields two overarching lessons. First, it is hazardous to treat any one dynamic (e.g., the prisoners’ dilemma) as a “Pro-

118. The literature also contains a highly technical strand, which allows for the creation of highly particularized formal models of collective action. For a technical overview, see generally DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* (1991). For excellent and somewhat more accessible introductions, see generally DAVID M. KREPS, *GAME THEORY AND ECONOMIC MODELLING* (1990); and STEVEN TADELIS, *GAME THEORY: AN INTRODUCTION* (2013).

119. See TADELIS, *supra* note 118, at 241-368. Introducing concepts of incomplete information into the analysis might add verisimilitude, but would also render it resilient to tractable nontechnical summary. To the extent my underlying aim here is destabilizing in nature, that constraint on the analysis is not ultimately debilitating.

120. My analysis, however, remains within a relatively narrow rational choice framework, and does not address the argument that “perceptions of efficacy . . . ideology, feelings of responsibility, social pressures, and other purposive/solidary dimensions of motivation” also change collective action dynamics. Terry M. Moe, *A Calculus of Group Membership*, 24 AM. J. POL. SCI. 593, 629 (1980). In modeling states’ (as opposed to individuals’) incentives, narrow rationality may well be the better simplification.

crustean bed[]”¹²¹ for collective action dynamics.¹²² Second, the precise dynamics of collective action can impeach quick normative prescriptions. Often, variances in any one of these parameters mean that there is no gap between individual and collective rationality. This means third-party intervention (either by a court or by the federal government writ large) is superfluous because of the availability of voluntaristic solutions. In such cases, the rush to external intervention is not plainly justified. Because observed variation in collective action parameters leads to such divergent prescriptions, I conclude that some effort to account for game theory’s “indeterminate results”¹²³ is warranted once it is conceded that collective action is a distinctive feature of American federalism.

A. *Heterogeneous Participants*

Simple models of collective action of a kind often invoked in public law implicitly assume symmetrical participants with identical interests in the collective good.¹²⁴ In many contexts, including the political environment of federalism, such symmetry often breaks down. On the one hand, contributions can differ in kind and magnitude. States, for example, not only have to decide whether to participate in, but also how much to contribute to, a collective project such as lobbying Congress.¹²⁵ On the other hand, a collective good may yield different benefits for different members of a group. Heterogeneity in benefits also arises, for example, when the national government selects between investments in naval and aerial defenses, with different participants having preferences with respect to the varying investment portfolios based on their geography and industrial base.¹²⁶

121. BAIRD ET AL., *supra* note 114, at 45 (“[W]ell-known paradigm[s] such as the prisoner’s dilemma . . . can become Procrustean beds, and, by rushing to one or another too quickly, one may miss important parts of a problem.”). Most commonly, it is assumed that there is a prisoners’ dilemma at work. See McAdams, *supra* note 115, at 211 (“Having learned one tool very well, legal scholars either shoehorn situations that are not Prisoners’ Dilemmas into that framework or, recognizing that the problem is not a Prisoners’ Dilemma, give up on game theory.”).

122. My argument tracks Elinor Ostrom’s concern about the failure to employ “the necessary intellectual tools or models to understand the array of [ensuing] problems” related to collective action. OSTROM, *supra* note 28, at 2; *id.* at 22 (criticizing the use of “oversimplified, idealized institutions—paradoxically, almost ‘institution-free’ institutions”). Ostrom here is discussing the problem of managing common-pool resources, but her point applies with some force to the public law context.

123. Cooter & Siegel, *supra* note 16, at 139.

124. HARDIN, *supra* note 63, at 67.

125. See Russell Hardin, *Acting Together, Contributing Together*, 3 RATIONALITY & SOC’Y 365, 366-68, 377 (1991) (identifying and exploring the difference).

126. In addition to inequality of benefits and heterogeneity of benefits, which are discussed in the text, there is also the possibility of asymmetries between contributions and

Heterogeneities in contributions and benefits can prevent suboptimal outcomes from emerging and thereby undermine the case for external intervention.¹²⁷ To see this, consider a case in which there is a subset of “highly interested and highly resourceful” large contributors.¹²⁸ This *critical mass* of well-resourced participants may have sufficient motivation to act regardless of other group members’ free riding because it has a disproportionate interest in seeing the collective project succeed. Its members may hence be more inclined to “play special roles in collective action.”¹²⁹

Such critical-mass effects bite hardest when a collective good is characterized by what is called pure jointness of supply—i.e., that there is no diminishment or exhaustion of the good through use.¹³⁰ After a purely joint good is supplied, the number of persons using that good is irrelevant. For example, a tariff on a foreign good is a joint good if each of the domestic producers that benefits from the diminished foreign competition serves its own unique market.¹³¹ Economic theory suggests that when a collective good is purely joint, a larger group is more likely to contain the critical mass needed to supply the good even if others free ride.¹³² In the tariff example, for instance, one large

benefits. I do not address this possibility because it is not clearly of importance in the context being addressed here.

127. See GERALD MARWELL & PAMELA OLIVER, *THE CRITICAL MASS IN COLLECTIVE ACTION: A MICRO-SOCIAL THEORY* 10 (1993) (“Homogenous groups yield very different results from heterogeneous groups.”). Empirical work on business lobbying generates mixed results. Compare Wendy L. Hansen et al., *The Logic of Private and Collective Action*, 49 AM. J. POL. SCI. 150, 151, 163 (2005) (suggesting that firms engaged in lobbying “are motivated as much by private goods as by public goods”), with David Lowery et al., *Collective Action and the Mobilization of Institutions*, 66 J. POL. 684, 693 (2004) (identifying free riding effects in large populations of manufacturing firms that inhibit effective lobbying).

128. MARWELL & OLIVER, *supra* note 127, at 10.

129. *Id.* Heterogeneity of participants’ interests and heterogeneity of participants’ resources are distinct and not necessarily correlated. Nonetheless, they can have the same effect on collective action dynamics. See Douglas D. Heckathorn, *Collective Action and Group Heterogeneity: Voluntary Provision Versus Selective Incentives*, 58 AM. SOC. REV. 329, 329-30 (1993) (distinguishing heterogeneity of resources and heterogeneity of interest, but noting similar effects).

130. For slightly different, if overlapping definitions of jointness, see MUELLER, *supra* note 116, at 11 (“The extreme case of jointness of supply is a good whose production costs are all fixed, and thus whose marginal production costs are zero For such a good, the addition of more consumers . . . does not detract from the benefits enjoyed by others.”); and TAYLOR, *supra* note 113, at 14 (“A good is said to exhibit indivisibility or jointness of supply (with respect to a given set of individuals, or public) if, once produced, any given unit of the good can be made available to every member of the public.” (emphases omitted)). Note that jointness is distinct from whether the use of a good involves a discrete cost to users (e.g., an access fee or an opportunity cost). Further, the cost of a jointly supplied good such as national security may vary (say, as external threats increase or diminish), but will do so in a way that is not necessarily correlated with the number of users.

131. *But cf.* HARDIN, *supra* note 63, at 76 (noting the possibility of tailoring a tariff so it only benefits those who lobbied for it).

132. Pamela E. Oliver & Gerald Marwell, *The Paradox of Group Size in Collective Action: A Theory of the Critical Mass. II*, 53 AM. SOC. REV. 1, 3 (1988); see also Rene

producer may have a sufficient stake in the trade barrier to finance the necessary lobbying regardless of what other small producers do. The collective good of concerted political action will therefore be produced despite free riding.¹³³ Furthermore, the more a collective good is characterized by jointness of supply, “the more likely group size is to have a positive effect on the provision of the good.”¹³⁴

Of particular relevance here, critical-mass effects provide an important constraint on the conventional dictum, conjured and alluded to, for example, by Cooter and Siegel, that group size inversely correlates with group efficacy.¹³⁵ The conventional wisdom about the impotence of large groups is at least complicated by the possibility of critical-mass effects because the larger the group, the greater the possibility it contains a critical mass—and hence the more likely (*ceteris paribus*) that a collective good will be produced.¹³⁶

Under some conditions, a larger, heterogeneous group may also succeed in collective action better than a smaller group because it can engage in internal logrolling. Within a diverse group, internal heterogeneity of interests and resources “allows different kinds of people [or states], with different priorities, to join together in collective action” in which each person’s particular priority is separately addressed.¹³⁷ Even though creation of a lobbying institution to rep-

Cortazar, *Non-Redundant Groups, the Assurance Game and the Origins of Collective Action*, 92 *PUB. CHOICE* 41, 45-50 (1997) (modeling the incentives of the critical masses’ members as an assurance game, which does lead to collective action). Larger groups are also more likely to act than smaller groups even when free riders cannot be excluded from a collective good “if the marginal cost of effort rises sufficiently quickly with respect to resources contributed.” Joan Esteban & Debraj Ray, *Collective Action and the Group Size Paradox*, 95 *AM. POL. SCI. REV.* 663, 664 (2001).

133. Critical mass effects have been invoked to explain why trade associations are effective lobbies even when their members are numerous and therefore would be expected to face severe collective action hurdles. See Esteban & Ray, *supra* note 132, at 664 (“[W]hen the collective good is public . . . Olson’s result is reversed: The larger the group, the higher is the level of the collective good it will be able to produce.”). This was also a conclusion of an important early paper in the economics literature on collective action. See George J. Stigler, *Free Riders and Collective Action: An Appendix to Theories of Economic Regulation*, 5 *BELL J. ECON. & MGMT. SCI.* 359, 364-65 (1974).

134. Oliver & Marwell, *supra* note 132, at 4.

135. See, e.g., Cooter & Siegel, *supra* note 16, at 159; see also MUELLER, *supra* note 116, at 12-13 (distinguishing small and large groups for collective action purposes). Moreover, “[h]eterogeneity augments collective action when that action’s success is most problematic, e.g., when the temptation to free-ride is great” and “impedes collective action when social cooperation is least problematic.” Heckathorn, *supra* note 129, at 347; accord Oliver, *supra* note 27, at 293 (discussing further the “critical mass” phenomenon). Moreover, when there is a single organizer seeking to catalyze collective action, she will typically “approach those individuals whose contributions seem likely to be largest” first, and in this way rapidly secure the necessary critical mass. Gerald Marwell et al., *Social Networks and Collective Action: A Theory of the Critical Mass. III*, 94 *AM. J. SOC.* 502, 528 (1988).

136. See Oliver & Marwell, *supra* note 132, at 1-8.

137. MARWELL & OLIVER, *supra* note 127, at 29; accord HARDIN, *supra* note 63, at 76 (arguing that the likelihood of voluntary cooperative action is enhanced when “members of a

resent states' interests on one specific policy issue may be inefficient, states may find it worthwhile to create an institution with jurisdiction over several issues. That joint lobbying institution is likely to be a product of logrolling across several issues of interest to states. The social welfare effects of such logrolling, however, are a priori ambiguous, since they can conduce either to the collectively desirable (if all relevant, affected interests are reflected in the ensuing bargain) or harmful (if there are absent parties to the deal).¹³⁸

On the other hand, under different conditions a group's internal heterogeneity of interests can also undermine effective collective action. This happens in three circumstances of relevance to the present federalism-focused inquiry. First, when there are private substitutes for the collective good, heterogeneity may increase the possibility of exit in lieu of contribution.¹³⁹ To see this possibility, imagine a neighborhood lobbying for better policing. If neighbors are economically diverse, the better-off members may opt for private security measures (e.g., fences and alarms), and depart from the lobbying effort.¹⁴⁰ Heterogeneity thus conduces to fragmentation and a failure of collective effort.

Second, collective goods may generate sharply different levels of benefits depending on the number of defectors. In the canonical free rider problem, for example, the defection of one person from a status quo of universal cooperation may make little or no difference to the production of the public good. By contrast, in some circumstances, the defection of one person from universal cooperation may have a large adverse impact because "the very fact of cooperating creates the opportunity for a defector, or at least for a lone defector, to take advantage of cooperators."¹⁴¹ Imagine here the move from a Hobbesian state of nature to a situation characterized by a strong rule of law.¹⁴² Once all are cooperating, a defector, or "foul dealer,"¹⁴³ can take advantage of the mutual peace. The possibility of exploitation by a foul dealer strengthens the case for an external enforcer able to ensure an agreement is subject to no violations, one that is even more powerful than in the canonical free rider case.

group . . . want a group good for various reasons, some of them especially valuing one attribute, others another"). Note that this requires the group to solve a separate collective action problem of stopping defections from the group by those whose interests are satisfied first. This possibility may be most relevant and most substantial in situations of indefinitely repeated strategic interactions.

138. I am grateful to Lee Fennell for underscoring this last point to me.

139. Cf. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 37 (1970) (connecting the availability of voice to the desirability of exit).

140. See HARDIN, *supra* note 63, at 73.

141. Philip Pettit, *Free Riding and Foul Dealing*, 83 J. PHIL. 361, 373 (1986).

142. A Hobbesian state of nature is one in which the absence of centralized authority means "continual fear and danger of violent death," such that "the life of man [is] solitary, poor, nasty, brutish, and short." THOMAS HOBBS, *LEVIATHAN* 76 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651).

143. Pettit, *supra* note 141, at 374.

Finally, when there are multiple potential subgroups, uncertainty about which will step in to provide a good may vitiate the provision of the good.¹⁴⁴ Where search costs are sufficiently high, moreover, it may be more costly for like-minded individuals to find each other and thus for the requisite subgroup to coalesce.¹⁴⁵ These three possibilities merit attention because they undermine any linear equality between the heterogeneity of contributions and benefits on the one hand, and the ease of collective action on the other.

The interaction between participant heterogeneity (whether in relation to contributions or to benefits) and collective action, in short, is complex and scarcely monotonic.¹⁴⁶ One lesson from attention to heterogeneity is that group size provides no satisfactory proxy for the difficulty of collective action. Large groups, in other words, do not always fail in practice. Nor do small groups inevitably prevail.

B. *Step Goods*

A second wrinkle concerns the good itself. Most public law discussions of collective action assume a production function in which incremental increases in contributions smoothly and linearly generate incremental increases in the collective good. But there is a class of *step goods* for which the relationship between contributions and benefits is monotonic but also discontinuous.¹⁴⁷ For example, imagine a bridge that requires a fixed number of inputs in terms of girders and concrete. Anything less than the necessary level of inputs generates no collective good (i.e., an insufficient span). Anything more is superfluous. Pass/fail exams (such as most states' bar exams) have the same quality. Collective step goods can be discerned in electoral politics. In a plurality-vote election, a candidate needs a particular number of votes to win. Anything less yields nothing. Any more votes are technically superfluous.¹⁴⁸ In each of these

144. This occurs through a "chicken"-game dynamic. See *infra* text accompanying notes 189-91 (defining and discussing the chicken game).

145. Moving beyond the constraints of a rational actor model, it is also possible to posit that the larger the group, the more free riders there will be, and the greater the resentment felt by members of the operative subgroup.

146. Oliver, *supra* note 27, at 275 ("Put simply, in some situations the group size effect will be negative, and in others positive.").

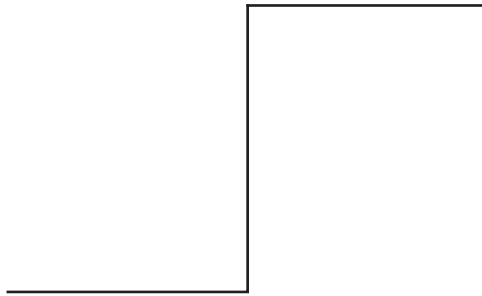
147. See Michael Taylor & Hugh Ward, *Chickens, Whales, and Lumpy Goods: Alternative Models of Public-Goods Provision*, 30 POL. STUD. 350, 352, 363-64 (1982) (associating lumpiness with nonexcludable public goods). I have chosen to characterize the dynamic here in terms of the character of the relevant good. Of course, one might also frame it in terms of payoffs. It seems to me that focusing on the nature of the good is a more useful heuristic for explanatory purposes.

148. HARDIN, *supra* note 63, at 59-61.

three examples, contributions are incremental,¹⁴⁹ but the final good has a binary, all or nothing, character.¹⁵⁰

Pure step goods may be rare. But “equally rare are perfectly linear goods—those with a smooth, continuous production function in which each infinitesimally fine unit of input is matched by a similar adjustment in output or utility.”¹⁵¹ Graphically, a simple step good can be represented as follows (with the *x*-axis in both Figure 1 and Figure 2 representing the marginal cost of inputs and the *y*-axis the marginal change in output):

FIGURE 1
Step Good



The step quality of a given collective good matters when it allows a subset of the group to produce it without external aid:

[C]onsider . . . profitable subgroups which are just large enough to provide the minimum amount (i.e., the smallest possible “lump”) of the public good. If any member withdrew, the public good would not be provided at all, so that, by assumption, every member of the subgroup, including the member who withdrew, would suffer a loss. Thus, because of the discontinuous nature of the public good, such a subgroup is stable, and the game is therefore not a [prisoners’ dilemma].¹⁵²

This dynamic, however, can be fragile in large groups, although the precise sequences of play and outcomes here will be complex and unpredictable. Say that *k* of *n* supporters of a candidate need to vote for the candidate to secure her

149. Contributions tend to have “strongly complementary elements”—as is the case with parts of a bridge or the walls that make up a house. See Anne Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955, 1957 (2012).

150. It is also possible to have a “step (especially binary) contribution.” HARDIN, *supra* note 63, at 51.

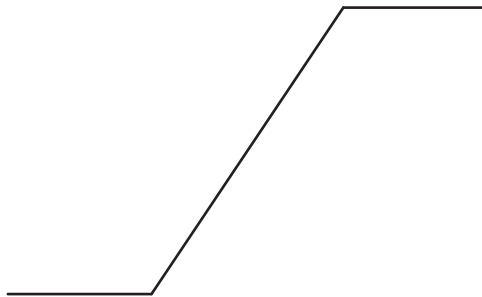
151. Fennell, *supra* note 149, at 1959; see also THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 221 (1978) (noting the possibility of stable cooperating subgroups).

152. Taylor & Ward, *supra* note 147, at 355.

victory. If, and only if, a participant believes that $k - 1$ supporters intend to vote for the candidate, would she have reason to expend effort in order to exercise the franchise.¹⁵³ Any lesser or greater expectation renders her contribution nugatory or superfluous. The participant must also reckon with the possibility of strategic behavior by different subgroups seeking to induce other subgroups to move first and provide a good. Under these conditions, “the strategy of not paying dominates the strategy of paying” and rational players anticipate the non-participation of others and thus decline to cooperate.¹⁵⁴ Again, it is not at all clear that generalizations about the relative competence of small and large groups have predictive traction.

Nevertheless, this “knife-edge” problem can sometimes be blunted. If a step good’s production function lacks a sharply cornered step, and instead takes the form of a smooth S-shaped curve (or, for the home improvement inclined, a sloping riser), there is a *domain* of effective contributions and not just one. Consider, for example, a collective effort to get a voluntary advocacy organization off the ground: the first few inklings of effort may seem hopeless, but once a sufficient number of individuals get involved, each may think that greater contribution is warranted to give the organization extended life. Here is another, more au courant example: consider what it takes to make a blog post or video go viral online: The first few posts matter little. At some point though, each new link has large, cascading effects until some saturation point is reached. Again, initial efforts may have minimal effects, but there will likely be some domain in which each increment of dissemination has outsized repercussions. Figure 2 presents a simple graphical representation of this possibility.

FIGURE 2
Step Good with “Sloping Riser”



153. This point was first developed in ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 49-50 (1957), which offers the path-marking account of voting from a rational actor perspective.

154. HARDIN, *supra* note 63, at 56.

In such cases of a “sloping riser” production function, individual contribution can still be a rational strategy. To see why, notice that although initial contributions will increase the production of the collective good very little, at a certain point it is possible (although not certain) that the marginal gain from contribution starts to increase, leading to a steeply inclined output curve for the collective good. At this point, contributions may pay off despite free riding problems.¹⁵⁵ But then there is a deceleration in the yield from new contributions as the curve flattens out.¹⁵⁶ It is thus at least possible that the move from step good to sloping riser will be beneficial in terms of encouraging production of a collective good since, under some conditions, there is a larger range in which contributions do buy *something*.

At the same time, that same move can have a deleterious consequence along another margin. The cooperation-inducing effect of any marginal contribution is diluted because each contribution still purchases less than the single pivotal contribution to a step good would, and so is less likely to be individually worthwhile. Which set of background payoffs from marginal contributions is most likely to result in the achievement of a collective good accordingly hinges on a complex interaction between those exogenously given conditions and individual participants’ welfare functions. No logical or necessary relationship determines outcomes, or the corresponding need *vel non* for external intervention of some sort. Rather, a complex, contingent, and empirically testable cluster of predictions emerges, requiring further and more intensive analysis of a whole range of parameters.

When a collective good’s production function takes this S-shaped form, adaptive expectations may resolve the collective action problem in a socially desirable manner. That is, “[i]f one expected that others’ contributions would fall short of the cost of providing a step good, one might then calculate that one’s benefit from one’s own contribution would exceed that contribution.”¹⁵⁷

155. See Pamela Oliver et al., *A Theory of the Critical Mass. I. Interdependence, Group Heterogeneity, and the Production of Collective Action*, 91 AM. J. SOC. 522, 533-34 (1985) (explaining that, depending on the gradient of the relevant slope, a linear production function will induce every player to “contribute either everything possible or nothing”). The point can be illustrated by imagining a multiplying pot. Imagine ten players, each of whom has the chance to contribute, have their contribution tripled, and get back one-tenth of the total. The result is a prisoners’ dilemma, in which it is always better not to contribute. If contributions are multiplied by eleven, however, it is always worth contributing. I am again grateful to Lee Fennell for this example.

156. Heckathorn, *supra* note 27, at 251. This S-shaped production function can arise because of positive feedback loops. Initially, efforts to elicit collective action may be tentative, since it will be unclear whether enough others will join. As others do join, “adaptive expectations” spread, and the likelihood the good will be created rises sharply, only to level off when it is clear the good will be produced. PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 33 (2004).

157. HARDIN, *supra* note 63, at 58. For support based on simulations of interdependent action, see Michael W. Macy, *Chains of Cooperation: Threshold Effects in Collective Action*, 56 AM. SOC. REV. 730, 734, 745-46 (1991) (using computer simulations to model situa-

Given such expectations, a contribution to the collective enterprise can be rational even under a narrow, individualistic definition of rationality. To resort to adaptive expectations in order to dissolve a collective action problem, however, raises the further question of how such expectations came to be held in the first place—a matter to which I now turn.¹⁵⁸

C. *Noncoercive Solutions*

The third important parameter is the availability of voluntaristic responses to suboptimal Nash equilibria. Confronted by dysfunctional collective action, public law commentators tend to reach first for external, third-party solutions such as federal government intervention or judicial review. But there are many naturally occurring collective goods in the absence of analog exogenous interventions. Studies of these common-pool resources find that those involved tend to “organize themselves to devise and enforce some of their own basic rules.”¹⁵⁹ Not every example of collective action—even absent heterogeneity or step goods—ends in tragedy in the absence of centralized intervention.

Key to voluntaristic collective action solutions is frequently the development of a social convention or norm respecting the resource’s management. Writing in the 1730s, the Scottish philosopher David Hume perceived that conventions can foster “a general sense of common interest” and serve as a platform for successful collective action.¹⁶⁰ As Cooter usefully explained in one of his early pieces, “a norm exists when almost everyone in a community agrees that they ought to behave in a particular way in specific circumstances, and this agreement affects what people actually do.”¹⁶¹ “[A] large part of the group-oriented collective action in advanced, diffuse nations [can be explained as] contract by convention [i.e., norms].”¹⁶²

tions in which “participation may be directly triggered by the actions of others, and . . . thresholds need not correspond to the point at which an individual investment becomes cost-effective” and finding that “interdependence facilitates the coordination of responses needed to escape a noncooperative equilibrium”).

158. Cf. BRIAN BARRY, *SOCIOLOGISTS, ECONOMISTS AND DEMOCRACY* 16 (1970) (noting this problem in the parallel context of voting).

159. Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 *J. ECON. PERSP.* 137, 148 (2000); accord OSTROM, *supra* note 28, at 14; Heckathorn, *supra* note 27, at 250.

160. TAYLOR, *supra* note 113, at 122 (quoting HUME, *A TREATISE OF HUMAN NATURE* 490 (L.A. Selby-Bigge ed., London, Oxford Univ. Press 1888)) (internal quotation mark omitted).

161. Robert Cooter, *Expressive Law and Economics*, 27 *J. LEGAL STUD.* 585, 587 (1998). For the standard definition of conventions, see DAVID K. LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* 78 (1969).

162. HARDIN, *supra* note 63, at 155; see also OSTROM, *supra* note 28, at 14-15, 34-37 (discussing a broad range of potential solutions to collective action problems, including norms). For applications in the legal scholarship, see Richard H. McAdams & Eric B.

Consistent with this view, Thomas Schelling famously suggested that many two-person coordination problems are resolved when the historical or social context “provide[s] some clue for coordinating behavior, some focal point for each person’s expectation of what the other expects him to expect to be expected to do.”¹⁶³ A focal point “makes mutually salient a particular way of coordinating behavior” in a way that creates “self-fulfilling expectations” and thus enables mutually beneficial coordination.¹⁶⁴ Schelling’s famous example of a focal point involves asking two people where in New York City they would meet if they knew only that they had to rendezvous at a certain time. Notice that this is not a prisoners’ dilemma, since neither participant has a dominant strategy that they will play regardless of the other player’s actions. To provide a solution to a prisoners’ dilemma, a norm must alter the participants’ payoffs (tangible or intangible) from defection and cooperation.¹⁶⁵ There is no reason, though, to think norms cannot play this role.

It is important to see that invoking norms as a solution for collective action problems is, in an important sense, begging the question in causal terms. Norms must come from somewhere. The creation and enforcement of conventions thus poses a “second-order” collective action problem because of individuals’ ability to free ride on the norm-enforcement efforts of others.¹⁶⁶ Under rational choice assumptions,¹⁶⁷ a norm may arise when a “norm entrepreneur” has the necessary incentives¹⁶⁸ or through another costly procedure.¹⁶⁹ Norms also work best in “tightly-knit and relatively small groups.”¹⁷⁰

Rasmusen, *Norms and the Law*, in 2 HANDBOOK OF LAW AND ECONOMICS 1573, 1573-618 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

163. THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* 57 (paperback ed. 1980).

164. Richard H. McAdams, *The Focal Point Theory of Expressive Law*, in 7 ENCYCLOPEDIA OF LAW AND ECONOMICS 167, 167 (Francesco Parisi ed., 2d ed. 2011).

165. This may happen, for example, through third-party enforcement. See Paul G. Mahoney & Chris William Sanchirico, *Norms, Repeated Games, and the Role of Law*, 91 CALIF. L. REV. 1281, 1295-99 (2003) (modeling a “defect-for-deviate” strategy that can underpin rational community enforcement of norms).

166. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 352 (1997) (emphasis omitted). The same is true for Mancur Olson’s theory of “selective incentives” as a way of accounting for the existence of large associations. Compare OLSON, *supra* note 7, at 132-35 (arguing that organizations facing high collective action costs can “provide noncollective or private benefits which can be offered to any potential supporter who will bear his share of the cost of the lobbying for the collective good”), with JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* 40 (1989) (“The provision of selective incentives cannot be the general solution to the collective action problem. To assume there is a central authority offering incentives often requires another collective action problem to have been solved already.”).

167. Ostrom argues that “a more eclectic (and classical) view of human behavior” provides a larger and more illuminating set of tools for understanding how collective action problems are, in fact, solved in practice. Ostrom, *supra* note 159, at 141.

168. For a useful model of norm entrepreneurship, see Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 773 (1998).

Finally, even without the enabling scaffolding of conventions or institutions, groups trying to create collective goods can still sometimes succeed. A group's success turns not only on the size of its collective action problems but also on the collective action costs of its opponents. Especially in legislative contestation, that is, the logic of collective action has a comparative dimension. In legislative politics, collective action dilemmas arise for groups on both sides of an issue.¹⁷¹ Whether or not one group (say, the states) achieves its legislative goals requires analysis of both legislative "demand and supply,"¹⁷² i.e., a comparison of the collective action costs of both sides. In some instances, therefore, a group obtains a collective good simply because its opponents had a steeper hill to climb.¹⁷³

D. *Increasing the Number of Iterations and Participants*

My fourth point concerns two important parameters in models of collective action: the number of iterative interactions and the number of members in a group. The collective action dilemmas at the heart of federalism are not one-shot affairs. States instead interact repeatedly.¹⁷⁴ The two prisoners in the familiar prisoners' dilemma by contrast lack any expectation of future interaction. They have no future-oriented reason to work together. By contrast, in repeated play, participants evolve strategies to sustain cooperation even absent external coercion with an eye to capturing future surpluses.¹⁷⁵ Even without an ability to communicate, repeat players may have a "tacit opportunity for making [their] choices contingent on those of [their] adversary-partner, that is, of threatening the partner with defection in return for defection."¹⁷⁶ Iteration thereby can induce a level of cooperation that is absent in one-shot games.

Experimental evidence confirms this thesis. Even in finite sequences of interactions, experiments find surprisingly high incidences of cooperation (albeit

169. See Ann E. Carlson, *Recycling Norms*, 89 CALIF. L. REV. 1231, 1239-41 (2001) (canvassing debates about the origins of norms).

170. *Id.* at 1246-50 (reviewing scholarship).

171. See Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 402-06 (1992) (adapting models introduced by Michael T. Hayes and James Q. Wilson in developing a framework for understanding supply and demand in legislation); see also MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 68-72 (2009).

172. STEARNS & ZYWICKI, *supra* note 171, at 71.

173. Beyond norms, recent work shows that some games may be solved by novel mechanisms such as money-back guarantees. See Julia Y. Lee, *Gaining Assurances*, 2012 WIS. L. REV. 1137, 1139-40. How such a mechanism might translate to the public law context is an interesting question beyond the scope of my current inquiry.

174. This is known as a supergame in game theory. TAYLOR, *supra* note 113, at 85.

175. See AXELROD, *supra* note 112, at 54. The most important of these is tit-for-tat, which "starts with a cooperative choice, and thereafter does what the other player did on the previous move." *Id.* at 31.

176. HARDIN, *supra* note 63, at 145.

with decay over time).¹⁷⁷ For example, there are numerous experimental studies of what is called the “centipede game,” in which two players iteratively choose to continue or terminate a game in which their payoffs rise with each round, and also in which it would be rational for each player to terminate and reap an asymmetrically large share of gains in each round. Many empirical studies find that individual players do not adopt the rational strategy of early termination, but coordinate despite the temptation to backwardly induce their way to defection.¹⁷⁸ Studies of iterative play, that is, suggest limits not only to the solutions observed in one-shot games, but also to standard accounts of economic rationality.

Additionally, binary and multiplayer groups are not alike. If we move from a case in which there are two prisoners to one in which there are twenty, the distribution of likely end states can change dramatically. The analysis of iterated multiplayer collective action presents special challenges because there are many more than two potential strategies¹⁷⁹ and often no single equilibrium. Confident predictions about outcomes are frequently infeasible absent complex modeling tools.¹⁸⁰ Instead, “mutual [c]ooperation is sometimes rational but depends on precarious arrangements.”¹⁸¹ Conditional cooperation within a subgroup (i.e., where a subset of the group cooperates if, and only if, other members of the subset do too) is most likely to emerge in smaller groups.¹⁸² In larger groups, by contrast, a cooperating subgroup “cannot punish other players who are defecting without hurting themselves at least in the short run,” but nevertheless might resort to strategies such as bluffing and external commitments to secure universal cooperation.¹⁸³ Further, “conventions that cover substantial groups or populations [can be] built up out of dyadic or very small

177. Ostrom, *supra* note 159, at 139-41 (summarizing evidence). Indeed, there is a good argument that cooperation even in a finite sequence of games is rational. See HARDIN, *supra* note 63, at 146-47. In one fascinating natural experiment of one-shot prisoners’ dilemma dynamics in the context of the game show *Friend or Foe?*, about a quarter of participants cooperated, leaving a substantial amount of money unclaimed. John A. List, *Friend or Foe? A Natural Experiment of the Prisoner’s Dilemma*, 88 REV. ECON. & STAT. 463, 463, 470 (2006). Interestingly, this study finds that the magnitude of the stakes does not change strategic choices.

178. TADELIS, *supra* note 118, at 159-60 (describing the centipede game, summarizing empirical results, and noting exceptions to the cooperation result).

179. Taylor organizes his analysis into four general classes of strategies. TAYLOR, *supra* note 113, at 44. But these do not seem to be intended by Taylor to be treated as exhaustive.

180. ELSTER, *supra* note 166, at 44 (noting the “highly precarious” nature of uniform cooperation in an *n*-person prisoners’ dilemma).

181. TAYLOR, *supra* note 113, at 45, 92.

182. *Id.* at 92-93. Because cooperation may be contingent on what everyone else does, a game with a large *n* of players is more likely to have a defector in any given round. Moreover, behavior is more observable with small numbers.

183. HARDIN, *supra* note 63, at 194.

number interactions.”¹⁸⁴ The game-theory literature suggests that in general increasing the number of players will diminish the likelihood of cooperation, whereas increasing the number of iterations increases that likelihood.

A further complication is worth flagging. There is now a vast technical literature about so-called evolutionary game theory. This work models “how behavioral regularities arise and spread through populations,” inter alia through “learning and imitation” to harden into stable conventions or norms.¹⁸⁵ The literature is emphatic, however, in concluding that not all the norms or conventions that emerge through cooperation evolution will be efficient.¹⁸⁶ Indeed, whether it is an efficient or an inefficient end state that emerges is again hard to predict in advance without the application of sophisticated technical methods.

In summary, expanding simultaneously the number of players and iterations undermines strong predictions of a single, unique Nash equilibrium because of the wide range of potential strategies and outcomes that might be observed.¹⁸⁷ The elegant and parsimonious prediction derived from the prisoners’ dilemma gives way to chaotic, unstable distribution of equilibria, some involving successful cooperation to secure collective action, some not. An important lesson from the most sophisticated models of such dynamics is that observed equilibria may or may not be efficient.¹⁸⁸ This has obvious significance for public law since almost all collective action dynamics relevant to federalism involve multiple players and multiple iterations.

E. *Alternative Payoff Structures*

The final parameter that warrants attention bears on the structure and distribution of payoffs. In many instances, payoffs from cooperation and defection

184. *Id.* at 196. Hardin gives the example of a liar who enters a community of truth tellers. He argues the liar would soon find the reputational costs of lying so great that she would switch to the community norm of truth telling. *Id.*

185. Eric A. Posner, *Constitutional Possibility and Constitutional Evolution*, in LAW, ECONOMICS AND EVOLUTIONARY THEORY 131, 134 (Peer Zumbansen & Graf-Peter Calliess eds., 2011). Evolutionary game theory is often concerned with “the genesis of . . . common understanding of strategic intent,” which is assumed by the standard account of a Nash equilibrium. Paul G. Mahoney & Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U. PA. L. REV. 2027, 2039-40 (2001).

186. DREW FUDENBERG & DAVID K. LEVINE, *THE THEORY OF LEARNING IN GAMES* 138 (1998) (“[I]n general games, risk-dominant equilibria may fail to be Pareto efficient. The conclusion from the study of stochastic adjustment models is that learning procedures tend to select equilibria that are relatively robust to mutations (risk-dominant equilibria), and this is a different criterion than Pareto efficiency.”).

187. Where there are multiple equilibria, a final result may be the product of adaptive expectations, asymmetries of power, or instability. See ELSTER, *supra* note 166, at 10-11 (discussing the analyses of multiple equilibria problems in rational choice theory).

188. Mahoney & Sanchirico, *supra* note 185, at 2051 (noting that evolutionary “models that restore efficiency rely on perfect information, the absence of friction, and location availability that runs counter to common experience and practical application”).

will point away from collectively irrational outcomes, or engender quite different puzzles.¹⁸⁹ Out of the many possible simple games with “two players, two discrete strategies, complete information, and simultaneous moves,”¹⁹⁰ I single out here only one alternative because it may be especially important in the federalism context. It is often labeled the “chicken game.”¹⁹¹ The intuition of this game is encapsulated in the story of two teenagers driving cars headlong toward one another. Each hopes to gain in status when the other one swerves first. If neither swerves, their vehicles collide with grievous injuries all around.¹⁹² The ensuing payoffs are as follows:

	Don't Swerve	Swerve
Don't Swerve	-5, -5	2, -2
Swerve	-2, 2	0, 0

Here, participants' decisions necessarily have a strategic dimension because their welfare is not solely a function of their own actions but also is influenced by others' decisions.¹⁹³ As in the prisoners' dilemma, interdependencies in welfare functions yield the potential for socially undesirable outcomes.¹⁹⁴ But, unlike the prisoners' dilemma, analysis of the payoffs suggests there is no one stable equilibrium outcome.¹⁹⁵ Rather, the optimal strate-

189. See MUELLER, *supra* note 116, at 16 (noting that while the prisoners' dilemma “is the most frequently used characterization of the situations to which public goods give rise,” the latter can “generate other kinds of strategic interactions”); see also McAdams, *supra* note 115, at 211-12 (reaching the same conclusion).

190. McAdams, *supra* note 115, at 211. McAdams goes on to provide an excellent guide to other games, such as the “assurance game” and the (unfortunately named) “battle of the sexes game.” See *id.* at 218-23. These dynamics, although important in some legal contexts, are not salient to my analysis in Parts III and IV below, and so I do not discuss them.

191. States' collective action dynamics can be modeled with several other games. See Leslie Meltzer Henry & Maxwell L. Stearns, *Commerce Games and the Individual Mandate*, 100 GEO. L.J. 1117, 1140-53 (2012) (using plural game-theoretic models to model interstate interactions). The problem of institution creation can also be modeled as an assurance game. See Carlisle Ford Runge, *Institutions and the Free Rider: The Assurance Problem in Collective Action*, 46 J. POL. 154, 162-63 (1984).

192. See BAIRD ET AL., *supra* note 114, at 44; see also Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 946-47 (2004) (explaining and providing a matrix for chicken game). Baird et al. have the two drivers dying; it is not clear how best to represent that outcome numerically.

193. Cf. TAYLOR, *supra* note 113, at 8 (noting that in a prisoners' dilemma, “each individual finds it in his interest to exploit the commons . . . no matter what the others do”).

194. Cf. RICHARD TUCK, *FREE RIDING* 22 (2008) (explaining why “the causal efficacy of the participants' actions [on each other] is a key feature of a standard prisoners' dilemma”).

195. The best response is a “mixed” strategy in which one randomizes between options (rather like the best approach to a game of rock-paper-scissors). ROBERT GIBBONS, *GAME THEORY FOR APPLIED ECONOMISTS* 30 (1992) (“In any game in which each player would like to outguess the other(s), there is no Nash equilibrium [with pure strategies] because the solution to such a game necessarily involves uncertainty about what the players will do.”). Under conditions in which each person can secure some part of the collective good, but where only

gy depends on what one expects the other player to do. One possible result is the volunteers' dilemma, in which both participants hold out in the hope that the other provides the relevant good.¹⁹⁶ As its name suggests, the "chicken" dynamic produces outcomes that turn on beliefs about the other player—and his nerves—rather than mere calculation of expected outcomes. Exogenous beliefs, not backward induction, determine outcomes.

Two forms of the chicken game are relevant here. First, imagine two participants in a game, each of whom would find it cost-effective to generate the good without the other's contribution. Each participant hopes (and will strategize to ensure) that the other moves first, and thus expends the costs of providing the good.¹⁹⁷ The result is a chicken dynamic. The outcome may depend upon participants' beliefs and expectations.¹⁹⁸ For example, there is an "incentive for each player to attempt to bind himself irrevocably to non-cooperation . . . , an incentive deriving from his expectation that such a commitment will compel some or all of the other players to choose co-operation (on which he is then able to free-ride)."¹⁹⁹ This leads to a rush to precommit and potentially suboptimal outcomes.²⁰⁰ Alternatively, cooperative equilibria can emerge.²⁰¹

Second, collective action problems involving the assembly of a set of entitlements into a useable whole can be modeled as a chicken game.²⁰² In such "anticommons" situations, barriers to collective action arise when one entitlement holder strategically sets her price high in order to secure a disproportionate share of the surplus gained via collective action.²⁰³ The resulting competition between potential holdouts has the structure of a chicken dynamic.²⁰⁴

unified action will generate the whole good, an assurance game arises. Taylor & Ward, *supra* note 147, at 354.

196. McAdams, *supra* note 115, at 224 & n.54.

197. ELSTER, *supra* note 166, at 26, 27 & n.15. In a multi-person version of this dynamic, there is a coalition containing several large contributors, each of whom could independently supply the good, yet each of whom would stay her hand in the hope that others will step into the breach.

198. See Fennell, *supra* note 192, at 948 ("Each party's best move depends on what she or he expects the other party to do").

199. Taylor & Ward, *supra* note 147, at 355.

200. *See id.* at 357.

201. *Id.* at 366-67.

202. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998) (defining an "anticommons" problem as one in which "multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use").

203. See Fennell, *supra* note 192, at 927, 932-33. The "holdout" creates a collective action problem because "the opportunity cost associated with unfulfilled gains from trade are not wholly internalized to the holdout." *Id.* at 928-29; see also James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1, 3 (2000) (emphasizing both commons and anticommons tragedies as a consequence of partially externalized costs).

204. See Fennell, *supra* note 192, at 946-49.

Several important justifications for national intervention concern anticommons problems. For example, consider again Cooter and Siegel's example of different segments of road being assembled into an interstate highway.²⁰⁵ This might reflect a chicken dynamic rather than a prisoners' dilemma because it turns on a holdout problem. A holdout in an anticommons situation also differs from a free rider. The former does not gain anything if cooperation fails, whereas the latter may.²⁰⁶ If the holdout stands to lose all from noncooperation, bargaining may be more likely to succeed than if she can free ride and still gain something.

* * *

When jurists and scholars invoke the term "collective action," they are not in fact pointing to a single phenomenon. Rather, they should be understood to be gesturing toward a plurality of mechanisms and social dynamics. This Part has developed a detailed (but still woefully partial) taxonomy of those mechanisms to allow more precise analysis of the forms of collective action observed in public law. At minimum, this abbreviated typology points toward the need to engage in more retail analysis of specific institutional parameters and dynamics within the institutional forms of federalism.

III. COLLECTIVE ACTION AND THE CASE FOR NATIONAL POWER REVISITED

In the next two Parts, I reevaluate the collective action arguments in federalism scholarship summarized in Part I. I begin by reexamining the collective action arguments developed by Balkin, Cooter, and Siegel in favor of expansive congressional power. Drawing on conceptual tools developed in Part II, I conclude that the mere invocation of states' need to act collectively or an interstate spillover effect cannot alone justify national government intervention. The identification of collective action dynamics instead should play a more chastened, retail role in the federal courts' efforts to describe Congress's enumerated powers.

The argument in this Part has two elements. First, I offer three reasons to conclude that collective action arguments in favor of national authority provide no single "unifying principle"²⁰⁷ or "purpose[]"²⁰⁸ to liquidate the meaning of opaque textual commitments concerning federal power. Second, I situate collective action arguments of a nationalist hue in the context of constitutional in-

205. See Cooter & Siegel, *supra* note 16, at 140.

206. See Lloyd Cohen, *Holdouts and Free Riders*, 20 J. LEGAL STUD. 351, 354-56 (1991). If the rational anticipation of free riding means no collective action occurs, then the potential free rider gains nothing.

207. Cooter & Siegel, *supra* note 16, at 150.

208. Balkin, *supra* note 40, at 4.

terpretation more generally, with particular attention to originalist arguments of the kind that Balkin refines, in order to show why they cannot play an ambitious role in liquidating constitutional ambiguities.

A. *The Weak Collective Action Case for National Power*

I begin by developing three reasons why states' collective action problems may not justify national intervention. In so doing, I demonstrate how the parameters identified in Part II (in particular, participant heterogeneity, critical mass effects, and the step nature of a collective good) can function in the federalism context to vitiate the need for federal intervention. By showing that states' need for collective action may not justify federal intervention, I aim to weaken the conventional link between any simple observation of a potential collective action dynamic and a prescriptive claim on behalf of legitimate national power. Previous invocations of collective action logic have been pitched, in my view, at too high a level of abstraction. Because not all collective action problems are identical, and because there are many ways in which such problems can be solved, the successful conjuring of collective action's specter needs to be accomplished on a retail, and not a global, level.

1. *The frequency of interstate cooperation*

As a threshold matter, one simple reason to resist a simple model of collective action is its failure to explain observed patterns of state contributions toward collective goods. Preratification historical practice demonstrates that states were capable of *some* cooperation even without federal coercion. Between 1777 and 1783, states provided fifty-three percent of the men levied for the Continental Army, and between 1782 and 1789, states handed over forty percent of the funds requisitioned by the federal government.²⁰⁹ Consistent with the arguments about participant heterogeneity developed in Part II, different states benefitted differentially from levies of troops and funds in a way that may explain their differential levels of cooperation.²¹⁰ An even more striking piece of evidence of fiscal sacrifice is the Northwest Ordinance. That agreement resolved states' competing claims to the western lands and limited Southern states' abilities to extend slavery westward—outcomes that “[do] not immediately suggest state self-interest.”²¹¹ Even more strikingly, the Continental Congress enacted the Northwest Ordinance by unanimous vote of the states

209. Donald S. Lutz, *Why Federalism?*, 61 WM. & MARY Q. 582, 583 (2004) (book review); see also KEITH L. DOUGHERTY, COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION 78, 89 (2001) (providing a similar figure for number of men). Lutz persuasively explains why Dougherty's self-interest-focused account of this data is not compelling. Lutz, *supra*, at 583-84.

210. See DOUGHERTY, *supra* note 209, at 78-89.

211. Lutz, *supra* note 209, at 585.

present.²¹² Wholly outside the shadow of any feasible congressional coercion then, state collective action turns out to be hardly unknown—even in the wholesale absence of a supervening national entity capable of enforcing deals.

Nor is successful state collective action outside the shadow of national intervention limited to the preratification period. Consider a recent example from environmental law. The Cooter-Siegel strategy for identifying the appropriate regulatory unit—i.e., ask which one is large enough to encompass all relevant externalities—might seem to suggest a national (if not an international) solution for many environmental problems affecting large-scale aquatic and atmospheric ecosystems.²¹³ But the historical path of U.S. policies on air pollution and climate change illustrates a different dynamic. It has been individual large states, in particular California, that have developed both the technical capacity and political will to act against environmental harms.²¹⁴ For four decades, California has effectively set national regulatory standards for automotive emissions by dint of its large market and preference for strict consumer and environmental regulations.²¹⁵ This “ratcheting upward of regulatory standards in competing political jurisdictions” has been labeled the “California effect.”²¹⁶ Rather than displacing state law, the federal government has ratified California’s role by endowing its regulation with an exemption from preemption under the Clean Air Act (CAA).²¹⁷ The same dynamic operates in other policy domains, such as drinking water regulation, without any federal imprimatur.²¹⁸

212. Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 937 (1995). An earlier version of the Northwest Ordinance, drafted by Thomas Jefferson in 1784, was never implemented because of perceived risks of conflict between the new settler communities and its lack of conformity to geographic realities. *Id.* at 935-36.

213. *Cf.* California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156, 12,156-57 (Mar. 6, 2008) (invoking this reasoning in order to reject a request by the State of California to impose a higher standard on automobile emissions).

214. *See, e.g.*, Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1097-98 (2009) (discussing history of federal inaction on greenhouse gases).

215. *Id.* at 1128 (“With very few exceptions, California has led the way in pushing increasingly strict mobile source emissions standards . . . over the past forty years . . .”).

216. DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 6, 259-60, 268 (1995) (introducing phrase and describing process by which California has “helped make American mobile emissions standards steadily stronger”).

217. *See* 42 U.S.C. § 7543(b)(1), (e)(2)(A) (2011). The Clean Air Act allows the federal government to step in when the state declines to implement certain provisions. But, as Roderick Hills has explained, when California exercised its right to opt out in the 1970s in the context of a transportation plan, the “EPA immediately backed down because there was no conceivable way it could implement the plan without California’s assistance and cooperation.” Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL’Y 181, 185 n.13 (1998).

218. Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 5 & n.19 (2012) (discussing national emulation of CAL. HEALTH & SAFETY CODE §§ 25249.5-.13). Nor is Cali-

The California effect illustrates how heterogeneities and a good's step quality can mitigate collective action problems.²¹⁹ California's disproportionately large benefits from air pollution regulation conduce to a national solution. States produce the public good of regulation discontinuously. Hence, one state (California) can play a disproportionate role even if others free ride. Moreover, the resulting intermeshing of federal and state environmental regimes shows that the simple logic of collective action can fail to capture how complex "real-world environmental problems" are addressed by "interagency coordination, not regulation by one level of government or the other."²²⁰ Any simple inference from an observed need for collective action to a normative claim for federal intervention here falls analytically short.

2. *Noncoercive solutions to interstate collective action problems*

The second reason to reject a single logic of collective action turns on the existence of *noncoercive* solutions to states' collective action problems of the kind intimated in Part II.C. As Cooter and Siegel rightly observe, one such tool is the interstate compact.²²¹ They dismiss the utility of such agreements, however, citing the putative difficulty of securing unanimity among any numerically large number of participants.²²² They also decline to discuss other possible modalities of cooperation. Yet both compacts and other non-national-government-based forms of state-to-state cooperation merit more than passing attention as potential solutions to collective action problems.

There are three ways in which states voluntarily coordinate without federal coercion. *First*, states can align their regulatory policies to yield collective goods without any formal mechanism via an informal process of learning or policy diffusion. Empirical studies of smoking bans, welfare programs, teacher qualification rules, same-sex marriage laws, and other regulations identify "robust patterns of policies and institutions spreading from . . . state to

fornia the only state to have such an external effect. Baylen J. Linnekin, *The "California Effect" and the Future of American Food: How California's Growing Crackdown on Food and Agriculture Harms the State and the Nation*, 13 CHAP. L. REV. 357, 377-78 (2010) (noting same effect in the context of Pennsylvania bread regulation).

219. Notice also that the CAA's safe harbor from preemption implicitly reflects a comparative judgment: it both reflects California's superior political capacity to identify and enact environmental regulation and at the same time gestures toward the weakness of the national political process in that same regard. It thus suggests a need to make *comparative* judgments about collective action costs.

220. Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 809 (2005); see also Paul Posner, *The Politics of Coercive Federalism in the Bush Era*, 37 PUBLIUS 390, 409 (2007) (criticizing "coercive" federalism tools and advocating "marbleized, networked approaches to governance").

221. See U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . .").

222. Cooter & Siegel, *supra* note 16, at 140-41 ("The probability of cooperation approaches zero as the number of states that must unanimously agree exceeds, say, ten.").

state.”²²³ Diffusion of this sort can generate legal uniformity, eliminating externalities and ensuring wide adoption of successful policies.²²⁴ Diffusion overcomes a collective action dilemma because the production of new state-level policies is not costless. Rational states have an incentive to refrain from innovation because they will not be able to capture all its benefits. Instead, they prefer to free ride on the innovation of others. Despite this free riding problem, a significant amount of diffusion is observed in practice. Like many other collective action-related norms, the diffusion mechanism operates through observation, imitation, or economic pressure—and not federal coercion.²²⁵

Second, intergovernmental organizations such as the Uniform Law Commission (ULC) can serve as institutional loci for the development of “rules and procedures that are consistent from state to state” in areas where “new technology wears away geographical borders and matters of law implicate more than one state.”²²⁶ The ULC itself defies collective action expectations. Despite being voluntary (such that any state could free ride on its efforts), every state is a member.²²⁷ The ULC “has proposed uniform laws in virtually every area of state law,” some of which—e.g., the Uniform Commercial Code—have been adopted “in nearly every jurisdiction.”²²⁸ Nor is the ULC unique. The Multi-state Tax Commission (MTC) also operates free of national governmental

223. Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 853 (2008); see also Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174, 1179-80 (1973) (welfare legislation and teachers’ qualifications); Donald P. Haider-Markel, *Policy Diffusion as a Geographic Expansion of the Scope of Political Conflict: Same-Sex Marriage Bans in the 1990s*, 1 ST. POL. & POL’Y Q. 5, 16-20 (2001) (same-sex marriage laws); Shipan & Volden, *supra*, at 850 tbl.1 (smoking bans).

224. See Craig Volden, *States as Policy Laboratories: Emulating Success in the Children’s Health Insurance Program*, 50 AM. J. POL. SCI. 294, 294-95 (2006) (finding that more successful state children’s health insurance programs tended to be emulated). Federal intervention through the imposition of a uniform standard may also have socially undesirable effects in the long term. When a state emulates another state’s effective policy, and in turn improves it, it can foster a “virtuous circle . . . creating new knowledge spillovers.” Brett M. Frishmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 269 (2007).

225. These mechanisms are distinct from “horizontal coercion across states or localities in the American federal system,” which remains “limited” in scope. Shipan & Volden, *supra* note 223, at 841-43.

226. *Frequently Asked Questions*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions> (last visited Feb. 1, 2014). The ULC is also called the National Conference of Commissioners on Uniform State Laws. *About the ULC*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Feb. 1, 2014).

227. Nim Razook, *Uniform Private Laws, National Conference of Commissioners for Uniform State Laws Signaling and Federal Preemption*, 38 AM. BUS. L.J. 41, 54 (2000); see also JOHN D. NUGENT, *SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING* 82-88 (2009) (explaining how the intergovernmental lobby is a central source for proposed uniform laws).

228. Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 132 (1996).

imprimatur and yet counts forty-seven states as members.²²⁹ Its function is to issue fiscally consequential rules for apportioning and allocating tax receipts from multistate taxpayers—hardly a matter with low stakes for states.

Yet another example is the national organization formed by state attorneys general, which has overcome collective action hurdles to effectively deploy federal court litigation as a policy tool.²³⁰ The National Association of Attorneys General has run a Supreme Court project since 1982 to coordinate state litigation efforts and to supply technical aid to litigators.²³¹ In addition, it “play[s] an important networking and lobbying role” and in that way has increased the volume of state participation in federal court litigation.²³² Seeking injunctive relief in a federal court of appeals—or, better yet, the U.S. Supreme Court—is a way for a subset of states to secure a policy benefit for most or all states that would otherwise be beyond the reach of states operating within the metes and bounds of the national political process.

Recent, high-profile constitutional cases demonstrate the potency of legal action in this vein by a minority of state attorneys general. It is thus worth recalling that one of the first legal challenges to the health care law was filed by a state attorney general, and many state attorneys general remained deeply involved in the case until its finale.²³³ In the ultimate Supreme Court judgment, a minority of states secured a better deal on Medicaid funding than they were able to during the negotiating process in Congress.²³⁴ The following Term, a different coalition of states was able to secure release from a key element of the

229. See *About the Multistate Tax Commission*, MULTISTATE TAX COMMISSION, <http://www.mtc.gov/About.aspx?id=40> (last visited Feb. 1, 2014). The Supreme Court has rejected constitutional challenges to the MTC partly on the ground that its proposed rules are not binding. See *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 479 (1978).

230. One example is tobacco regulation. See Susan Borreson, *Texas Firms May Collect Millions in Florida Tobacco Suit*, TEX. LAW., Dec. 15, 1997, at 4 (describing multistate suit against the tobacco companies); Alison Frankel, *After the Smoke Cleared: The Inside Story of the Big Tobacco \$206 Billion Settlement*, AM. LAW., Jan./Feb. 1999, at 48 (noting settlement reached by the National Association of Attorneys General with tobacco companies).

231. Colin Provost, *When to Befriend the Court? Examining State Amici Curiae Participation Before the U.S. Supreme Court*, 11 ST. POL. & POL’Y Q. 4, 5-6 (2011).

232. *Id.* at 6. It is not the only organization to play this role. The State and Local Legal Center also files amicus briefs on behalf of the major state and local government organizations. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1501 & n.68 (2008) (discussing the important role that state solicitors general have recently played in Supreme Court litigation).

233. See *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010), vacated, 656 F.3d 253 (4th Cir. 2011), cert. denied, 133 S. Ct. 59 (2012).

234. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2576, 2601-09 (2012). As of this writing, fourteen states have exercised the option created by the Court. See Carter C. Price & Christine Eibner, *For States That Opt Out of Medicaid Expansion: 3.6 Million Fewer Insured and \$8.6 Billion Less in Federal Payments*, 32 HEALTH AFF. 1030, 1030 (2013).

Voting Rights Act of 1965, a boon that had been denied by large, bipartisan margins in Congress in 2006.²³⁵

Of course, in the absence of a federal statute that vests states with the right to sue, the expected value of cooperation among state attorneys general is often a function of the Court's federalism jurisprudence—and one of the ultimate goals of this study is to interrogate the latter's generosity. I thus invoke the state attorneys general example here solely to illustrate the existence of voluntary collective action. If federalism jurisprudence were scaled back, that value might diminish. It would not vanish entirely, however, because of the likely continued existence of statutory causes of action for states to leverage.

To be sure, these voluntary organizations and ad hoc coalitions of states are no panacea for those concerned about excessive centralization by the national government. They do not impose binding constraints on participants. In consequence, it may be costly for participants to detect or punish infractions, as Cooter and Siegel rightly observe. Nevertheless, such organizations might still valuably diminish the frictions of collective action in three ways. First, by reducing interstate variance in legal regimes, they lower the epistemic costs of interstate commerce, thereby fostering the national free market (itself a public good). Second, they mitigate the risk of conflicting or inconsistent regulation that also might impede commerce. Third, uniform laws can mitigate the prisoners' dilemma mechanism implicit in interstate competition that induces a race to the bottom.²³⁶

Finally, formal interstate compacts themselves provide a surprisingly robust alternative to national legislative action due to critical mass effects.²³⁷ Cooter and Siegel identify their unanimity rules as a crippling constraint on the expansion of interstate compacts, suggesting that “[t]he probability of coopera-

235. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2621, 2631 (2013). The Court invalidated the coverage formula for section 5 of the Voting Rights Act. *Id.* at 2631. Since the likelihood of congressional reenactment of a new coverage formula consistent with the *Shelby County* ruling seems remote, the practical effect of the ruling is to free states from compliance with the dictates of section 5 for the foreseeable future.

236. Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 7 (1997) (“[U]niform standards are a clear means of addressing prisoner’s dilemmas in which the perceived threat of interstate competition leaves all states worse off, with policies they otherwise would reject as contrary to the public interest.”). *But see* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211-12 (1992) (questioning operation of race-to-the-bottom dynamics in the environmental context).

237. Not all interstate compacts require congressional approval. *See Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) (requiring congressional approval only for compacts “tending to the increase of the political power in the States, which may encroach upon or interfere with the just supremacy of the United States”); *see also* U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 473 (1978) (explaining that the legal standard for whether an interstate compact is constitutional rests on whether the compact “enhances state power *quoad* the National Government”).

tion approaches zero as the number of states that must agree unanimously exceeds, say, ten.²³⁸ This, however, may be excessively pessimistic, even without accounting for the far higher participation rates in the ULC and the MTC. There has been a “sharp increase in the number of [interstate] agreements during the past six decades,” albeit “with little attendant public visibility.”²³⁹ Some of these accomplish policy change without any approving congressional imprimatur. The Regional Greenhouse Gas Initiative (RGGI), for example, was initially proposed by New York Governor George Pataki in April 2003 and weaves nine northeastern states into a regional cap-and-trade program designed to mitigate carbon dioxide emissions from regional power plants.²⁴⁰ The RGGI operates without congressional authorization,²⁴¹ even though interstate compacts of its ilk generally displace state law.²⁴² Viewed narrowly through the lens of collective action federalism, “[p]recisely why the states want to participate in RGGI is unclear—because greenhouse gases do not have localized effects, the states do not seem to receive any tangible benefit from this program even though they bear the costs.”²⁴³ Yet the RGGI might be parsimoniously explained by the heterogeneous political payoffs to the leaders of participating states with significant voting blocs of environmentally conscientious constituents. Other interstate compacts wanting national authorization include interstate taxation, oil and gas extraction, and mining.²⁴⁴

To be clear, my claim here is not that either informal policy diffusion or institutions (i.e., multistate commissions and informal compacts) provide comprehensive solutions to all of the states’ collective action dilemmas. In some cases, diffusion surely causes rather than cures collective action problems. Diffusion might even precipitate a “foul dealer” problem if one state can exploit an equilibrium created by otherwise unanimous concert.²⁴⁵ The salience of volun-

238. Cooter & Siegel, *supra* note 16, at 141.

239. JOSEPH F. ZIMMERMAN, *INTERSTATE COOPERATION: COMPACT AND ADMINISTRATIVE AGREEMENTS* 3 (2d ed. 2012). To be clear, Zimmerman here is referring to both compacts that have and compacts that lack congressional support.

240. *See* REG’L GREENHOUSE GAS INITIATIVE, ABOUT THE REGIONAL GREENHOUSE GAS INITIATIVE (RGGI) (2012), available at http://www.rggi.org/docs/Documents/RGGI_Fact_Sheet_2012_09_28.pdf; Kirk Johnson, *10 States to Discuss Curbs on Power-Plant Emissions*, N.Y. TIMES (July 25, 2003), <http://www.nytimes.com/2003/07/25/nyregion/10-states-to-discuss-curbs-on-power-plant-emissions.html>.

241. For an argument that no such approval is needed under current precedent, see Note, *The Compact Clause and RGGI*, 120 HARV. L. REV. 1958, 1962-67 (2007).

242. ZIMMERMAN, *supra* note 239, at 35.

243. Note, *State Collective Action*, 119 HARV. L. REV. 1855, 1863 (2006).

244. ZIMMERMAN, *supra* note 239, at 53.

245. An example of such a foul dealer problem is Nevada’s recent creation of “a no-liability corporate law” that may shelter “[f]irms that suffer from weak internal controls [and] need regulation the most.” Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 940, 945 (2012). Nevada, in effect, exploits the compliance of other states with generally accepted norms of corporate government in a way that imposes potentially significant externalities.

tary solutions lies not in their comprehensiveness but rather in this: they demonstrate that mere identification of a barrier to states' collective action is inadequate guidance respecting the need for federal regulation. It is also necessary to consider the availability of one of several potential noncoercive alternatives that are observed arising in practice among the several states.

3. *Comparing state and federal collective action*

Arguments for greater national power based on states' inability to act collectively are essentially comparative in nature.²⁴⁶ More specifically, they rest on an assumption that collective action barriers confronting states will, at least as a general matter, tend to be lower inside the national political process than outside. But it is not at all clear that this assumption always holds true, or even represents a generalization that captures the empirical realities of states' promotion of federal values. It is well known that a federal bill must pass through at least three vetogates (bicameralism and the veto), and perhaps five (including two supermajority votes when the President opposes a law), to become law. Running this gauntlet requires that a bill appeal to diverse constituencies. On the one hand, the floor votes empower median legislators.²⁴⁷ On the other hand, both Houses have committees, which not only resolve interbranch informational asymmetries and cycling problems²⁴⁸ but also play an agenda-setting role, and decide the issues that reach a floor vote.²⁴⁹ The crucial committee members' preferences are likely to be distinct and distant from those of median legislators. Once a bill makes it out of committee, moreover, its fate is of course hardly assured. It can fail due to logrolling with another bill. Or it can run afoul of one or another of the minority vetogates that is erected by intracameral rules of procedure. In the Senate, deployment of filibusters to block proposals has grown dramatically since the 1950s.²⁵⁰ Individual senators' ability to place "holds" on bills can even impose a de facto unanimity rule on

246. See *supra* text accompanying notes 171-73 (discussing the comparative nature of collective action arguments in public law scholarship).

247. See CHARLES STEWART III, *ANALYZING CONGRESS* 15-22 (2001) (providing a formal proof of this proposition).

248. See Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 *PUB. CHOICE* 503, 507 (1981) (arguing that "institutional restrictions on the domain of exchange induce stability, not legislative exchange per se" (emphasis omitted)). See generally KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* 14 (1998).

249. See generally Barbara Sinclair, *The Role of Committees in Agenda Setting in the U.S. Congress*, 11 *LEGIS. STUD. Q.* 35 (1986).

250. SARAH A. BINDER & STEVEN S. SMITH, *BROOKINGS INST., POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE* 11 (1997) (finding that filibusters had gone from around an average of one per Congress in the 1950s to thirty-five in the 102d Congress (1991-1992) alone).

some legislative action.²⁵¹ In short, the federal legislative process is a convoluted, costly obstacle course of “pivotal points”²⁵² that will not always generate national law even when such law is plainly warranted.

Cast in this light, it is hardly obvious that the federal legislative process will necessarily yield the optimal solution to a specific collective action problem more readily than independent action by the states. To make that assumption is to succumb to a nirvana fallacy about the national political process.²⁵³ There are likely many cases in which national legislative action is both desirable and feasible, and yet Congress fails to act. By contrast, as institutions such as the RGGI, the MTC, and the UCL show, states are not infrequently capable of effectual collective action in response to perceived collective action problems.²⁵⁴ Indeed, current practice is likely to understate states’ capacity in this regard because both doctrine and historical practice have favored national action.²⁵⁵ For if expectations of future political action are endogenous products of past distributions of political action, it may be that the observed desuetude of state-to-state initiatives may be partially explained as an enervating consequence of national traditions.

This criticism would have little bite if federal legislative action tended to correlate with the need for national action. That is, if the federal government

251. As defined by the Senate itself, a “hold” is “[a]n informal practice by which a senator informs his or her floor leader that he or she does not wish a particular bill or other measure to reach the floor for consideration.” *Glossary*, U.S. SENATE, http://www.senate.gov/reference/glossary_term/hold.htm (last visited Feb. 1, 2014). “The majority leader need not follow the senator’s wishes, but is on notice that the opposing senator may filibuster any motion to proceed to consider the measure.” *Id.* An alternative method of delay is tracking, in which “the majority leader—with the unanimous consent of the Senate or the approval of the minority leader—[can] set aside whatever [is] being debated on the Senate floor and move immediately to another item on the agenda.” Barry Friedman & Andrew D. Martin, Op-Ed., *A One-Track Senate*, N.Y. TIMES (Mar. 9, 2010), <http://www.nytimes.com/2010/03/10/opinion/10martin.html> (discussing examples).

252. For a crisp account of the basic intuition, see KREHBIEL, *supra* note 248, at 23-24. Krehbiel’s initial presentation of his model omits committees for the sake of expository clarity.

253. See STEARNS & ZYWICKI, *supra* note 171, at 112 (“Scholars commit the nirvana fallacy when they identify a defect in a given institution and then, based upon the perceived defect, propose fixing the problem by shifting decisional responsibility somewhere else.”).

254. There is also some reason to believe enactment costs of environmental legislation in the states will be lower because of reduced interest group pressure. See Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 156-57 (2005) (“Empirical studies of state regulatory activity generally fail to support the claim that state governments are more susceptible to interest group pressure than the federal government.”).

255. Hasday, *supra* note 236, at 4 (noting the rarity of interstate compacts). Uncertainty about the extent to which a compact can survive without congressional approval is likely another source of friction interfering with state collective action. The current doctrinal test is framed in vague terms that provide little practical guidance. See *id.* at 39-40 (“[N]either the courts nor the scholarly literature has produced a coherent explanation of the status of noncompact interstate agreements under the contract impairment clause.”).

acts if and only if the need for policy change is acute, then the underinclusivity of national policy reach may not be a large cause for concern. There is no reason, however, to think that national legislative gridlock arises only when there is no need for federal intervention. In tax policy, for example, installation of centralized control might in theory be a desirable response to state efforts at strategically exporting taxes.²⁵⁶ But both theoretical and empirical evidence demonstrate that national intervention might lead to similarly suboptimal outcomes as a consequence of free riding by state delegates within the federal legislature.²⁵⁷

Similar dynamics can be observed with respect to substantive policy domains. In the context of health policy, for instance, Congress has long faced hurdles to legislative action because of the complexity and density of interest group dynamics.²⁵⁸ Yet it is not clear that health policy implicates a lesser need for federal intervention than other areas in which Congress dabbles, such as industrial development or environmental policy. To the contrary, even the dissenting Justices in *National Federation of Independent Business v. Sebelius* stated that Congress “can assuredly” set out to “remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it,” in spite of their disagreement with the tools that Congress employed.²⁵⁹

Federal action is further impeded by uncertainty as to whether a problem should be addressed nationally or locally. In some policy domains, there is persistent empirical uncertainty about the appropriate division of authorities between different levels of government for optimizing policy results. For example, there is an ongoing debate about how policing against terrorism should be organized and whether it is more desirable to have local control over investigative strategies or national leadership.²⁶⁰ The debate is animated by uncertainty about the precise social and governmental mechanisms that produce security against homegrown terrorism in the first instance, an epistemic gap unlikely to be bridged completely anytime soon.²⁶¹ In consequence, observed distributions of policy-related authority are as likely to reflect path-dependent historical processes as any sensible allocation of powers. The frequent absence of any clear guidance for dividing regulatory authority between the state and

256. See Robert P. Inman & Daniel L. Rubinfeld, *Designing Tax Policy in Federalist Economies: An Overview*, 60 J. PUB. ECON. 307, 318 (1996).

257. *Id.* at 328-29 (developing the theoretical point and collecting empirical evidence).

258. For evidence that legislative gridlock is unusually constrictive in the health care domain, see Craig Volden & Alan E. Wiseman, *Breaking Gridlock: The Determinants of Health Policy Change in Congress*, 36 J. HEALTH POL. POL'Y & L. 227, 236-43 (2011) (presenting evidence from both the context of committee processes and plenary consideration of bills).

259. 132 S. Ct. 2566, 2642 (2012) (joint dissent).

260. See Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 293-94 (2012) (identifying uncertainty).

261. For a critical review and reconsideration of potential causal theories, see generally Aziz Z. Huq, *The Social Production of National Security*, 98 CORNELL L. REV. 637 (2013).

national levels is likely to compound the cost to Congress of ascertaining when precisely to intervene and when to stay its hand.²⁶²

The necessary comparisons between national and state policy solutions are further scrambled by dynamic interaction between the two regulatory spheres. Federal intervention, for example, might sap incentives for state collective action, thereby creating the need for external intervention. Alternatively, persistent federal inaction in domains of overlapping regulatory jurisdiction can prompt state regulatory interventions.²⁶³ Hence, state antitrust actions have increased at times when the federal government has reduced enforcement rates.²⁶⁴ On the other hand, states' nascent efforts may induce federal legislative action. State regulatory action might propel the national political process into overcoming impediments at pivotal points when interest groups are motivated to secure preemptive federal legislation to counteract states' regulatory efforts.²⁶⁵ And within the framework of temporally enduring cooperative federalism programs, states and the federal government engage in "iterative shared policymaking . . . and intersystemic signaling negotiations."²⁶⁶ The probabilities of state and federal action are, in short, not independent but entangled in

262. In fact, the problem of deciding on the propriety of federal action is even more difficult. Consider Siegel's assertion that the imposition of Jim Crow policies by Southern states "caused" a "collective action problem" because it "created a significant burden on commerce with those states that did not practice racial discrimination." Siegel, *supra* note 15, at 1946. As Siegel quite rightly notes, the characterization of Jim Crow as imposing externalities requires a normative judgment. *Id.* at 1961 ("There is no neutral or objective way to limit the kinds of interstate externalities that are admissible in a collective action analysis of the Commerce Clause."). Southern politicians of the era no doubt viewed Northern interference as an undesirable spillover causing negative externalities. The theory of collective action tells us nothing about what kind of externalities should count in this regard. We need a separate normative theory to accomplish that task, and it is not clear that collective action federalism, as currently formalized, has the necessary normative resources to achieve that goal.

263. See, e.g., Brooke A. Masters, *States Flex Prosecutorial Muscle*, WASH. POST (Jan. 12, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A2107-2005Jan11.html> ("[S]tate regulators and attorneys general are bringing legal action and launching investigations in . . . areas where they say federal regulators have fallen down on the job.").

264. See Ralph H. Folsom, *State Antitrust Remedies: Lessons from the Laboratories*, 35 ANTITRUST BULL. 941, 955 (1991) ("The state attorneys general committed themselves to 'filling the gap' created by Reagan administration antitrust policies by increasing their state antitrust prosecutions.").

265. See E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326 (1985) ("When faced with the threat of inconsistent and increasingly rigorous state laws, [interest groups use] their superior organizational capacities in Washington [to seek federal legislation]."); see also J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1500 (2007) (predicting a similar dynamic for climate change legislation).

266. Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 8 (2011); see *id.* at 14 ("[F]ederalism bargaining helps bridge pockets of uncertainty that remain after exhausting the more conventionally understood forms of federalism interpretation, to help allocate contested authority and shepherd interjurisdictional collaboration.").

complex ways. Simple models grounded in the prisoners' dilemma or any other parsimonious collective action model are unlikely to accurately predict the end result.

* * *

Leading accounts of national power, in my view, obscure the need for "extensive factfinding" and "contestable normative judgments"²⁶⁷ in properly identifying collective action dynamics in public law and then generating predictions on that basis. There are several ways in which the sheer *plurality* of collective action mechanisms might defeat the aim of fashioning a doctrinal tool that is not only parsimonious but also predictively sound. Heterogeneities in participants' contributions to and benefits from collective goods, as well as the step nature of those goods, confound simple predictions. The availability of noncoercive alternatives to federal intervention creates further complications. And a comparison of the transaction costs of national lawmaking with those of states' collective action without federal guidance yields ambiguous results. In sum, no simple principle of collective action in theory or in practice explains the observed plural forms of collective action mechanisms of our system of federalism. And because these variations in collective action parameters lead to dramatically different outcomes, they underwrite quite distinct normative prescriptions.

I am not of the view that it is possible to suppress this complexity through reliance on a parsimonious account of one species of transaction costs (e.g., the single parameter of numerosity). Parsimony in modeling is a virtue warranted if and only if the extraneous details cleaved from the analysis wreak no large alterations to predicted outcomes. Where, as here, significantly different normative recommendations fall out once details are added back in, the case for parsimony loses its luster.

B. *Collective Action Arguments as Constitutional Arguments*

Legal theorists of Congress's enumerated powers, such as Balkin, Cooter, and Siegel, invoke the logic of collective action as a generally applicable lodestar for ascertaining the bounds of the federal regulatory domain. Writing in this vein, Balkin applies a "method of text and principle," to conclude that Congress's enumerated powers were "designed" to give the new national government power to address "problems that require a federal solution, . . . coordinated action[,] and a single approach."²⁶⁸ By contrast, Cooter and Siegel adopt a "structural and consequentialist" approach in which "modern economic theory" and "analytical tools" are employed "to assign meaning to the language of

267. Cooter & Siegel, *supra* note 16, at 154.

268. Balkin, *supra* note 40, at 4, 12.

Article I, Section 8.”²⁶⁹ They too explain the enumerated powers of Article I, Section 8 as “illuminating instances” of a single, unitary “principle.”²⁷⁰ This principle turns on the “modern economic theory” of collective action and is “the substantive meaning of Article I, Section 8.”²⁷¹ Both of these arguments operate at a high level of abstraction, slotting the logic of collective action into a general account of constitutional meaning. This general account might then provide a guiding framework for judicial inquiry.

My aim in this Subpart is to query whether the logic of collective action can be consistently employed at such a high level of abstraction consistent with accepted tenets of constitutional interpretation. For two reasons, I argue that it cannot. First, both Balkin and Cooter & Siegel imply that the Framers and present day scholars share a single conception of collective action. I suggest that no such conceptual plumb line exists. Just as collective action is a plural phenomenon today, so is its history more complex and multifarious than first might appear. Second, there is no close conceptual match between the heterogeneous mechanisms of collective action limned in Part II and the miscellany of federal powers enumerated in Article I. Given this mismatch, it is hard to discern how fair-minded readers of the Constitution, at least those who wish to evince some meaningful measure of fidelity to the Founding era, can reasonably employ a single “principle” of collective action as a heuristic for resolving textual ambiguities. Hence, not only is collective action an implausible source of simple heuristics for doctrinal application, it is also a poor fit with other methodological presuppositions of constitutional interpretation.

Consider first the point that there is no single “principle” or logic of collective action to knit together 1787 and the present day. This follows closely from the claim, developed in Part II, that collective action comprises a diversity of mechanisms. Of course, if each of these strands reliably generated a similar suboptimal Nash equilibrium, a normative lesson might be drawn unscathed despite mechanistic plurality. But no such uniformity of outcomes obtains. To speak of a unitary “principle” of collective action instead elides as much as it illuminates.

This last observation carries a special charge within an originalist frame of analysis. Even if there were a single “principle” of collective action, it is by no means clear that the Framers either perceived it or used it as a lodestar when designing the new national government. The absence of precise historical analogs means that collective action is not a sound guide to either original intent or original understandings.

269. Cooter & Siegel, *supra* note 16, at 156. “Structural arguments are inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures.” PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 74 (1982); *see id.* at 89 (“[S]tructural approaches are very powerful for some kinds of questions, particularly intergovernmental issues . . .”).

270. Cooter & Siegel, *supra* note 16, at 146-50.

271. *Id.* at 154, 156.

It is certainly true that Madison's pre-Philadelphia Convention notes reflected an acute awareness of the states' failure to create collective goods and a belief that this failure justified more centralized intervention.²⁷² But Madison's identification of a rising tide of dangerous state inaction does not support the further inference that he possessed a single, systematized, and coherent conception of collective action of the kind theorists seek to deploy today. To the contrary, it is quite possible that Madison (and the members of the Committee of Detail that drafted Article I, Section 8) proceeded inductively from particulars rather than working deductively from generalities.

Where, in any case, would that abstract, general principle of collective action have come from at the time of the Founding? To assign Madison and his Convention confreres an understanding of even the basic lineaments of collective action as understood today is to indulge in prochronic transposition. The Framers, to be sure, were well versed in the writings of David Hume,²⁷³ who had identified en passant one free riding problem.²⁷⁴ (And they were also familiar with the writings of Jean-Jacques Rousseau, who had also alighted upon another form of collective action mechanism, which is now known as the "stag hunt game.")²⁷⁵ But even if Madison and his colleagues had indeed homed in

272. See, e.g., James Madison, *Vices of the Political System of the United States* (1787), in *WRITINGS* 69, 71 (Jack N. Rakove ed., 1999) (framing flaws in the Articles of Confederation by identifying among the several newly independent states an undesirable "want of concert in matters where common interest requires it"); see also Cooter & Siegel, *supra* note 16, at 122-23 (discussing Madison's *Vices* memo).

273. See GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST 13-23* (1981) (describing Madison's education in Hume's works and tracing their influence in *The Federalist Papers*); Douglass Adair, "That Politics May Be Reduced to a Science": *David Hume, James Madison, and the Tenth Federalist*, 20 HUNTINGTON LIBR. Q. 343, 345 (1957) (noting that the work of David Hume and other "prominent . . . Scottish philosophers . . . had become the standard textbooks of the colleges of the late colonial period"); James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1634-35 (2011) (noting the impact of Hume's *A Treatise of Human Nature* on the Framers' generation).

274. Hume's example involved a common interest in draining a meadow:

Two neighbours may agree to drain a meadow, which they possess in common; because 'tis easy for them to know each others mind; and each must perceive, that the immediate consequence of his failing in his part, is, the abandoning the whole project. But 'tis very difficult, and indeed impossible, that a thousand persons shou'd agree in any such action; it being difficult for them to concert so complicated a design, and still more difficult for them to execute it; while each seeks a pretext to free himself of the trouble and expence, and wou'd lay the whole burden on others.

DAVID HUME, *A TREATISE OF HUMAN NATURE* 590 (Ernest C. Mossner ed., 1969) (1739-1740). Even before Hume, Aristotle had en passant conjured the tragedy of the commons. See ARISTOTLE, *POLITICS* bk. II, at 77 (H. Rackham trans., Harvard Univ. Press rev. ed. 1944) (c. 350 B.C.E.) ("Property that is common to the greatest number of owners receives the least attention . . .").

275. See Brian Skymys, *The Stag Hunt*, 75 PROC. & ADDRESSES OF AM. PHIL. ASS'N 31, 31 (2001) (noting that Rousseau identified the assurance game in the *Discourse on Inequality*); see also Alison L. LaCroix, *The Lawyer's Library in the Early American Republic*, in *SUBVERSION AND SYMPATHY: GENDER, LAW, AND THE BRITISH NOVEL* 251, 256 (Martha C. Nussbaum & Alison L. LaCroix eds., 2013) (noting that early American lawyers were "avid

upon the relevant passages in Hume's *A Treatise of Human Nature*—and originalist accounts of collective action federalism supply no reason to believe they did—we cannot assume that those passages would be read as we read them today.²⁷⁶ Rather, the Framers are more likely to have grasped the problem in the same manner as Hume did: a dilemma of individual pathology, not a signal-flare warning of the fissure between individual rationality and the collective good.

Hume's critique in the critical passage of *A Treatise of Human Nature* was not the same as the logic of collective action with which we are familiar. Of course, Hume saw the possibility of valuable human cooperation as welfare improving, just as modern economists do. The difference between Hume's account and contemporary economic theory lies elsewhere: whereas the standard economic theory predicts that cooperation between rational actors will break down under normal circumstances, Hume perceived cooperation to be the ordinary state of affairs, and noncooperation to be the exceptional and unnatural event. To explain the aberrant emergence of noncooperation, Hume focused on the possibility that hyperbolic discounting would yield an irrational failure to cooperate.²⁷⁷ In Hume's account, the consequent failure to collaborate was not a product of ordinary, reasonable conduct, but instead a *breakdown* in the expected processes of individual-level ratiocination—a failure, that is, to act in harmony with “shared moral sense, acting uniformly to pursue and promote happiness.”²⁷⁸ Accordingly, Hume and his intellectual heirs “almost invariably assumed that if [a] collaboration secured beneficial outcomes for the individu-

consumers” of Rousseau's ideas). I do not focus on Rousseau, since Balkin's argument does not depend on the Founders' identification of the assurance game.

276. This cannot be taken for granted. Cf. Iain McLean & Arnold B. Urkin, *Did Jefferson or Madison Understand Condorcet's Theory of Social Choice?*, 73 *PUB. CHOICE* 445, 455 (1992) (noting that while Jefferson and Madison might have read the relevant passages in Condorcet about the voting paradox, there is no evidence they understood his theory of social choice).

277. HUME, *supra* note 274, at 586-87 (complaining that men tend to prefer a “trivial advantage,” when present, rather than a “very remote” but larger gain).

278. WILLS, *supra* note 273, at 31; see JOHN RAWLS, *LECTURES ON THE HISTORY OF MORAL PHILOSOPHY* 59-61 (Barbara Herman ed., 2000) (explaining Hume's idea of a convention, and identifying it as a solution to collection action problems); see also ANNETTE C. BAIER, *THE PURSUITS OF PHILOSOPHY: AN INTRODUCTION TO THE LIFE AND THOUGHT OF DAVID HUME* 40-44 (2011) (same); DAVID HUME, *Of the Original Contract* (1748), in *SELECTED ESSAYS* 274, 288 (Stephen Copley & Andrew Edgar eds., 1996) (deriving an “obligation of allegiance” to obey the law, and in effect to refrain from free riding on society, from the fact “that men could not live at all in society . . . without laws, and magistrates, and judges, to prevent the encroachments of the strong upon the weak, of the violent upon the just and equitable”). Hume's work, in short, is not the place to root a Founding-era belief in a general warrant for external government action to resolve collective action problems.

als concerned . . . in principle [there was] a good reason for the individuals to contribute voluntarily to the enterprise.”²⁷⁹

Hume thus viewed collective action through a wholly different model of human rationality than the one typically employed in modern rational choice economics.²⁸⁰ Merely identifying the need for collective action under conditions in which there are incentives to defect was *not* a reason for Hume to call for third-party (or state) intervention. This understanding of the rationality of collective action endured long past Hume’s time. Even up to “the 1930s . . . the idea that we should *not* collaborate where the outcome would clearly be beneficial to all of us would have seemed very far-fetched.”²⁸¹ To ascribe to the Framers the modern conception of collective action as a justification for third-party intervention—as opposed to Hume’s belief that in the ordinary course of things, individuals’ “moral sense” would induce cooperation—may risk anachronism.

For these reasons, the mere reference to a perceived “lack of concert”²⁸² among the states in Madison’s pre-Convention notes (assuming arguing that those notes are probative as to the meaning of the subsequently drafted and collectively enacted Constitution) cannot be assumed to encompass the more complex post-Olsonian conception of collective action.²⁸³ The anachronism is especially jarring because, in other aspects of Madison’s thinking, the likely dynamics of collective action constitute an important blind spot that works to the detriment of his larger institutional ambitions. In limning the separation of powers, for example, “Madison in essence overlooked the logic of collective action, assuming instead that within a given institution each official would do

279. TUCK, *supra* note 194, at 127; *see also id.* at 207 (noting the “acceptance of the rationality of large-scale collaboration continued all through the heyday of mass politics in the nineteenth century”).

280. In more contemporary terms, we might understand Hume to be talking about Rawlsian reasonableness, rather than Rawlsian rationality. *See* JOHN RAWLS, *POLITICAL LIBERALISM* 50-51 (1993) (distinguishing in the course of a larger account of political liberalism the concept of rationality, which is understood in terms of maximizing self-interest, from reasonableness, which is framed as “fair social cooperation”).

281. TUCK, *supra* note 194, at 15; *id.* at 192, 194.

282. Madison, *supra* note 272, at 71.

283. To be clear, I do not doubt that Madison saw “too little authority in the center to control the jealousies and animosities of the peripheries” as a problem, or that he believed that “[h]istory and experience . . . conjoined to produce a new theoretical understanding that a robust and independent central authority was indispensable if the Union (and so the states) were to survive.” Larry D. Kramer, *Madison’s Audience*, 112 *HARV. L. REV.* 611, 626-27 (1999). But, as Kramer rightly emphasizes, Madison was much more leery of federal power than commentators tend to assume today. *Id.* at 624 & n.55. His objections to federal authority, and most importantly his famous reluctance to support the First Bank of the United States, show Madison’s understanding of the normative justifications of national power to be much more fine grained, cautious, and particularistic than mere invocation of the *Vices* memo would make it seem. *Id.*

what is in the interest of all.”²⁸⁴ Closer to the federalist bone, Publius’s famous account of legislative politics in the course of defending the extended republic missed the very same logic of collective action that today’s collective action federalists attribute to the Founders by envisaging a government designed to counteract large majority factions, but not minority factions.²⁸⁵

My second point concerns the mismatch between the heterogeneous mechanisms of collective action limned in Part II and the miscellany of federal powers enumerated in Article I of the Constitution. Simply put, it is difficult to see how these two varied catalogs can be aligned without doing some violence to one or the other. In consequence, I do not see how collective action can be fairly extracted as an immanent general principle from Congress’s enumerated powers. Rather, Article I, Section 8’s enumeration is both underinclusive and overinclusive in collective action terms. It is seriously underinclusive because it does not include federal policy goals warranted by collective action logics that were disfavored at the time of the Founding but are more favored today. Economic redistribution, for example, is best achieved by a national government,²⁸⁶ yet is not squarely within the text of Article I.²⁸⁷

Interpreters of the Constitution through the first few decades of the early Republic recognized the incompleteness of Article I’s enumeration. They did not think to gloss Congress’s power in terms of the need for collective goods. And when a demand for such a public good emerged, many believed that Article I required an amendment before it could be provided. Consider in this regard the example of internal improvements—such as interstate roads and canals—in the early Republic. Rather obviously, governmental investments in such infrastructure are likely to boost internal trade and hence increase social welfare in more than one state. Often, the resulting transportation links will have the characteristics of public goods. It would therefore be expected that their provision would fall squarely within the reach of Congress’s Article I powers. But it was not always thought that they did. Recent historical scholarship by Alison LaCroix powerfully demonstrates that it is simply not true that

284. Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 26 (2009).

285. THE FEDERALIST NO. 10 (James Madison), *supra* note 78, at 80 (“If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote.”); *see also* Edward Rubin, *The Conceptual Explanation for Legislative Failure*, 30 LAW & SOC. INQUIRY 583, 586 (2005) (“Legislative failure, in Madison’s view, occurs when one faction, which may even be a majority of voting citizens, dominates the political process and takes control of government[.]”).

286. *See* Charles C. Brown & Wallace E. Oates, *Assistance to the Poor in a Federal System*, 32 J. PUB. ECON. 307, 308-09 (1987) (showing that “the potential migration of poor households seriously undermines the case for a decentralized system of poor relief”).

287. The conventional modern view—which I do not mean to dispute—is that the General Welfare Clause allows federal action with an economic redistribution effect. Although there is no Supreme Court precedent precisely on point, it suffices here to say that large parts of the federal tax code would be unconstitutional otherwise.

the second and third generations of American politicians believed that these types of projects lay within Congress's power.²⁸⁸ Instead, Presidents such as James Madison and James Monroe vetoed internal improvements measures.²⁸⁹ Neither Madison nor Monroe opposed internal improvements on policy grounds. To the contrary, both suggested that the Constitution should be amended via Article V to allow for such federal measures.²⁹⁰ Internal improvements such as roads and canals connecting the several states might seem heartland examples of the public goods that the 1787 Constitution could facilitate. If there indeed was a single, unitary "principle"²⁹¹ of collective action organizing constitutional thought in this period, the debate about internal improvements, along with presidential promotion of Article V amendments, would have been considerably easier. LaCroix's evidence thus cuts strongly against the originalist pedigree of collective action federalism.

The Article I enumeration is also substantially overinclusive in ways that cannot be mitigated by aggressive penumbral construction of the constitutional text. Consider, by way of example, the United States Postal Service, which arguably now exists "to deliver the maximum amount of unwanted mail at the minimum cost to businesses."²⁹² What may have been a plausible textual hook for new institutions to secure positive externalities from national networks is now arguably redundant. Or think about the scope of the Commerce Clause: it is not the case that all instances of interstate regulation of commerce are Pareto-superior moves away from state regulation. The poor fit between the Constitution's text and the assumption that a unitary principle of collective action can act as a lodestar in the interpretation of Article I, in short, provides yet further reason to doubt that the possibility of intermodal interfacing between constitutional ambiguities from the eighteenth century and the deployment of abstract, parsimonious models derived from mid-twentieth-century economic theorizing.

* * *

The logic of collective action, in short, cannot serve as a faithful proxy for original understandings when resolving ambiguities in the scope of congressional regulatory power. Perusal of the observed varieties of collective action between the states illuminates many instances in which states collaborate suc-

288. Alison L. LaCroix, *The Interbellum Constitution and the Spending Power* 7-15 (Univ. of Chi. Law Sch., Pub. Law & Legal Theory Working Paper No. 420, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2228335.

289. *Id.* at 12, 15.

290. *Id.* at 13, 16-17. Madison was offering such proposals as late as 1826, by which time the internal improvement debate had taken on a different cast. *Id.* at 29-30.

291. Cooter & Siegel, *supra* note 16, at 146-50.

292. James Meek, *In the Sorting Office*, 33 LONDON REV. BOOKS 3, 3 (2011). Meek here is talking centrally about European post offices, but his quite perceptive piece can be understood in more general terms.

cessfully to harvest larger collective goods. Reliance on the national political process as a panacea, by contrast, may be chancy given Congress's sclerotic and unpredictable working. Under originalist, structural, or consequentialist approaches to the Constitution, moreover, it is hard to discern a puissant nexus between one single collective action principle and the whole text. Absent such a connection, ambitious claims about the resolving power of collective action in constitutional interpretation have blunted force.

The complexity of collective action has further implications for the second-order question of which institution should be tasked with drawing boundaries between domains of federal and state regulatory authority. Although collective action provides no crisp template for sorting powers between sovereigns, it is surely not implausible that governmental power should be divided between the federal government and the several states according to their respective competencies, as Cooter and Siegel lucidly suggest.²⁹³ If this consequentialist principle of institutional design were endorsed—and some interpretative approaches to the Constitution, such as originalism and textualism, do not obviously yield that conclusion—then a more granular understanding of collective action suggests that, at least as a purely epistemic matter, courts are ill positioned to draw boundary lines.²⁹⁴ In short, this analysis suggests that treating collective action dynamics as key to federalism doctrine presses toward either judicial deference to federal action (as Cooter and Siegel suggest, albeit for different reasons) or toward the wholesale nonjusticiability of federalism questions.

IV. RECONSIDERING THE CASE AGAINST FEDERALISM'S POLITICAL SAFEGUARDS

What then of the collective action case against *Garcia's* political safeguards? This Part argues that the logic of collective action fares no better when pressed into the service of states' interests. Recall that such arguments rest on the claim there is a "classic collective action problem" impeding federal legislators from adequately vindicating states' interests, hence licensing federal court intervention.²⁹⁵ Homing in on the troublesome claim that there is such a thing as a "classic" collective action problem in light of Part II's more complex typology, I offer four points in response.

293. See, e.g., Cooter & Siegel, *supra* note 16, at 158 (suggesting that the Article I enumerated powers correspond to specific collective action problems).

294. This brackets the question whether the epistemic gains from assignment of enumerated powers questions to the elected branches are overwhelmed by the costs of assigning those decisions to actors with shorter time horizons and the potential distortion of electoral incentives. In this regard, I should note that it is hardly self-evident that matters of constitutional law should always and inevitably be free of short-term, populist influence. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

295. Garrett, *supra* note 23, at 1133.

First, collective action arguments do not necessarily predict an underproduction of federalism-related advocacy and representation in Congress. Second, historical and contemporary evidence give reason to doubt confident claims that states' interests are systematically slighted in the national political process. Third, states have refined robust noncoercive solutions to collective action problems they face in the national political process even without courts' interventions. Judicial intervention risks double counting states' interests. Fourth, the argument against federalism's political safeguards rests again on a nirvana fallacy. Pro-federalism judicial review will not necessarily substitute for deficiencies in the national political process. It may instead tend to operate only when states' interests are already protected. These arguments in net conduce to skepticism about the collective action case against *Garcia* and the political safeguards of federalism.

A. *Questioning the Tragedy of the Federalism Commons*

One of the most powerful arguments marshaled on behalf of federalism's judicial safeguards hinges on the observation that federalism—understood for the purposes of this Part as the adequate consideration of states' interests—is a collective good that will be undervalued by most national legislators.²⁹⁶ Rather than preserving the “commons” of state regulatory and fiscal autonomy, this argument suggests, each legislator will tend to overuse that shared resource as they pursue their interests in reelection and interest group satisfaction. This tragedy of the federalism commons—which has the structure of a multiplayer prisoners' dilemma—is linked to a public choice argument developed by Hills, McGinnis, and Somin,²⁹⁷ but also stands on its own. I begin by bracketing the public choice argument so as to consider first a simple version of the tragedy of the federalism commons argument.

That argument hinges upon an alleged asymmetry in federal legislators' incentives respecting states' interests. Legislators are thought to externalize the costs of excessively nationalistic federal legislation that improperly infringes on states' interests. The failure to internalize these costs then drives the tragic prediction. By contrast, the argument assumes that Congress internalizes all of the benefits from national legislative action. Only if costs are externalized onto the states, while benefits are captured by the national legislature, do socially undesirable outcomes arise.

But it is not clear that either element of the argument holds. Consider the assertion that the federal government, and in particular Congress, internalizes all the benefits of federal legislation. Many national public goods, such as economic infrastructure and national defense, do not benefit only Congress: they also benefit the several states in addition to the people. Governors and state leg-

296. See *supra* text accompanying notes 94-100.

297. See *supra* note 105 and accompanying text.

isulators, after all, need not set aside the same level of resources to defend their borders, maintain their roads, run their schools, pay off their political supporters, or protect their poor. States also capture some of the economic surplus from growing economic activity fostered through the national transportation infrastructure and the promise of peace through their tax systems.²⁹⁸ Rather than being distorted in one direction by asymmetric incentives, therefore, the national political process potentially creates both the risk of an underproduction of national collective goods that benefit the states and also the risk of an overproduction of laws that trench unduly upon states' interests.²⁹⁹ There are, in other words, countervailing risks at stake: both overreaching and exploitation by the federal government, and also shirking, shading, and cost shifting by the states.³⁰⁰ Nor can these risks be avoided, since "mechanisms to mitigate one dilemma typically exacerbate the other. Too weak a national government will exhibit free riding,"³⁰¹ while too powerful a national government conduces to excessive central extractions.³⁰² Predictions about bias in federal legislative behavior must therefore incorporate estimates of *both* sorts of distortions, and cannot simply account for one while ignoring the other.³⁰³

Bringing this insight to bear on doctrine requires a prediction as to whether, either in the case of a specific bill or across the spectrum of legislation, pro-federalism and antifederalism biases are likely to offset each other. It is impos-

298. For an account of how the collective nature of a good can lead to underproduction in this fashion, see Richard H. McAdams, *Relative Preferences*, 102 *YALE L.J.* 1, 60 (1992).

299. This is separate from, but complements, Jonathan Macey's insight that at times "Congress will delegate to local regulators" in cases when "the political support it obtains from deferring to the states is greater than the political support it obtains from [federal legislators doing the] regulating [themselves]." Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 *VA. L. REV.* 265, 267 (1990).

300. See Rui J.P. de Figueiredo, Jr. & Barry R. Weingast, *Self-Enforcing Federalism*, 21 *J.L. ECON. & ORG.* 103, 104, 123-24 (2005) (describing the "twin dilemmas" of federalism); see also Rui J.P. de Figueiredo, Jr. et al., *Constructing Self-Enforcing Federalism in the Early United States and Modern Russia*, 37 *PUBLIUS* 160, 161 (2007) (same). In her important and illuminating book, Jenna Bednar identifies "three types of transgressions": shirking by states, burden shifting among states, and encroachment by the national government. See JENNA BEDNAR, *THE ROBUST FEDERATION: PRINCIPLES OF DESIGN* 68-69 (2009). Bednar notes the possibility of authority shifting and cost shifting both to and from the federal government, and also between states. *Id.* Her identification of vectors in multiple directions demonstrates the inference that predicting which actor will net the most benefits in a given federalist interaction is not easy.

301. Figueiredo & Weingast, *supra* note 300, at 104. This claim rests on the plausible assumption that "the center's ability to provide central goods, including monitoring of the states, is correlated with its ability to extract rents [from the states]." Figueiredo et al., *supra* note 300, at 165 (emphasis omitted).

302. See, e.g., Figueiredo et al., *supra* note 300, at 178-81 (describing the problem of excessive extractions by a centralized power as it has played out in Russia under President Vladimir Putin); see also BEDNAR, *supra* note 300, at 69 ("[F]ederal encroachment most closely resembles tyranny . . .").

303. I am grateful to Eric Posner for helpful discussion on this point.

sible, however, to assess offsetting effects without a theory of “framing” that determines when legislative offsets “count.”³⁰⁴ Potential frames include a single provision, a specific bill, a particular session of Congress, a given Congress, and even a slice of calendar years. There is no obvious way to pick between these widely divergent possibilities. Further, the interactions between federal and state law implicate empirically intractable problems. For instance, there is ongoing debate about the effect of federal taxation measures on state efforts to raise revenue, with different scholars arguing that either “crowd out” or “crowd in” effects dominate in practice.³⁰⁵ Depending on which side of this empirical debate proves to be correct, over- or underproduction of “federalism” as a public good might prove to be the much more serious concern.

In sum, claims about a tragedy of the federalism commons in the legal scholarship tend to ignore the possibility that Congress might fail to internalize benefits that accrue to the states even as they emphasize the opposite risk.³⁰⁶ Given this piebald analytic approach, it is fair to doubt whether such accounts can provide a sound basis to assume federal representatives and senators will systematically err on one side more than the other.

B. *Federal Legislative Solicitude for State Interests*

If the argument for federalism’s judicial safeguards cannot be made when framed at a high level of abstraction, can it succeed when pitched in the public choice argot of interest group dynamics? Critics of *Garcia* contend that federal legislation is, in fact, persistently biased against states’ interests. Garrett thus

304. Cf. Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1313 (2002) (pointing out that “constitutional law has no criteria for isolating transactions from the background relationship between government and citizens”). Levinson’s argument concerns government-individual interactions, but his basic insight into the importance of framing can be easily transposed into the intergovernmental relations context.

305. See Ruth Mason, *Federalism and the Taxing Power*, 99 CALIF. L. REV. 975, 977 & nn.3-6 (2011) (presenting several of the perspectives on this debate). For a useful recent empirical perspective, see generally Brian Galle, *The Politics of Federalism: Self-Interest or Safeguards? Evidence from Congressional Control of State Taxation* (Bos. Coll. Law Sch. Legal Studies, Research Paper No. 220, 2011), available at <http://ssrn.com/abstract=1759510>.

306. What of the argument that legislators will act systematically to advance the institutional interests of Congress at the cost of states’ regulatory domains? As a threshold matter, arguments based on the claim that officials have an incentive of this kind have been comprehensively criticized as wanting in support. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 920 (2005) (arguing that officials often act based on personal and political incentives that do not entail defending institutional powers and prerogatives of the branch that employs them). But see Aziz Z. Huq, *Enforcing (But Not Defending) “Unconstitutional” Laws*, 98 VA. L. REV. 1001, 1075-76 (2012) (collecting evidence that Levinson’s claim does not hold in respect to executive action). In the federalism context, there is no reason to expect systematic empire building. Rather, as Neal Devins argued, history reveals a “pattern of shifting constitutional positions on federalism.” Devins, *The Judicial Safeguards*, *supra* note 101, at 134.

identifies a “temptation to use unfunded federal mandates to shift political liability for higher taxes [that] will frequently overcome any predisposition of national legislators to protect states’ interests.”³⁰⁷ McGinnis and Somin complain that both legislators and political parties are, in fact, “more responsive to the demands of national special interests than those of state governments.”³⁰⁸ Hills dismisses the political safeguards argument out of hand with a blanket statement that “[t]he recent history of intergovernmental relations does not suggest optimism that the national political process will correctly weigh the costs to federal and non-federal policy goals.”³⁰⁹ And Baker and Young assert that Congress is, in fact, more often responsive to “interest groups geographically concentrated in particular states” and hence will consistently enact legislation that “minimizes the benefits of federalism by creating a federally imposed homogenization of preferences.”³¹⁰ These accounts eschew the abstract tragedy of the federalism commons argument in favor of an empirical claim that in fact federalism values lose out to other local political forces, principally due to pernicious interest groups.

This argument from empirics is no more persuasive than its more abstract, theoretically infused cousin. To begin with, as Garrett carefully explains, the assertion that Congress underprotects states’ interests implies a “baseline” of optimal legislative action.³¹¹ The baseline cannot be one in which states prevail uniformly. It seems implausible to posit that states’ interests should *always* win out in the federal legislative process. This is so not least because in many instances state interests will be arrayed on either side of a legislative issue. Nor can it be one in which states inevitably lose. If the states should prevail sometimes, but lose on other occasions, how is the appropriate proportion of states’ victories to be assessed? Counting the rate of successful enactments seems unsatisfactory because of the endogeneity of a bill’s introduction to its likely success. Absent any means of describing the baseline of appropriate national legislative action, though, empirical claims about the inadequacy of the federal political process are fatally underspecified and unfalsifiable.³¹²

307. Garrett, *supra* note 23, at 1135.

308. McGinnis & Somin, *supra* note 101, at 103.

309. Hills, *supra* note 99, at 1242.

310. Baker & Young, *supra* note 103, at 118.

311. Garrett, *supra* note 23, at 1119-20. Garrett “accept[s] the proposition that whatever the baseline, the political process falls short.” *Id.* at 1120. Many of the normative claims in her article stand or fall with this wholly undefended assumption.

312. The baseline problem is exacerbated by the tendency of scholars to use the term “federalism” imprecisely to encompass a plural set of normative values—including sovereignty, democracy, and efficiency-related concepts—that lack any clear metric and are associated with a range of institutional actors. See Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures’ Control*, 97 MICH. L. REV. 1201, 1201 (1999) (commenting that it is common, yet misleading, to think of a “state” as speaking with a single voice when a state government encompasses a

For example, consider Baker and Young's concern about horizontal aggrandizement by some states through imposition of a uniform regulatory regime that disadvantages other states.³¹³ Cases of horizontal aggrandizement are hardly straightforward to identify. One of Baker and Young's case studies is a national ban on same-sex marriage.³¹⁴ Setting aside equal protection concerns implicit in this example,³¹⁵ it is not clear *how* one determines this ban is properly labeled "aggrandizement." Would a rule against plural marriages raise the same concern? What of a law that imposed a uniform age of consent? Any uniform national rule conforms to some states' preferences, while flying in the face of other states' wishes. The mere fact that there are both winners and losers tells us little about whether national uniformity is socially desirable. Rather, it is necessary to posit a substantive, normative theory (e.g., efficiency, equality, or some version of state sovereignty) to pick out cases in which nationalization is appropriate.³¹⁶ Absent such an account, merely positing the possibility of horizontal aggrandizement tells us nothing about whether any specific national law is undesirable or whether the net effect of national legislation is positive or negative.³¹⁷ Federalism, that is, is not a theory of substantive justice.

Worse, contrary to the empirical claims developed by Garrett et al., even casual observation suggests that states' interests are in fact often protected in federal legislation as a consequence of the mechanisms described in Part II. Further piecemeal evidence of the kind I present below, to be clear, is not dispositive—mere anecdote is no more conclusive when offered in rebuttal than when offered as part of a case-in-chief. But, at minimum, it elevates the burden of persuasion.

multitude of subdivisions, branches, and agencies controlled by various individual politicians). Claims about federalism thus risk having an imprecise and mercurial quality.

313. See Baker & Young, *supra* note 103, at 118-21; Baker, *supra* note 103, at 962-72.

314. See Baker & Young, *supra* note 103, at 110.

315. To be clear, I do not mean here to express a view on the Equal Protection Clause questions at stake in respect to debates on same-sex marriage. Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2692-93 (2013) (relying on not merely arguments of federalism but also liberty and equality arguments to require recognition of same-sex marriages by the federal government).

316. This parallels the problem in the individual rights context of figuring out "how we are supposed to distinguish . . . 'prejudice' from principled, if 'wrong,' disapproval. Which groups are to count as 'discrete and insular minorities'? Which are instead to be deemed appropriate losers . . . ?" Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063, 1073 (1980).

317. Michael Greve offers a similar horizontal aggrandizement claim, but uses a libertarian baseline of maximal economic competition to resolve it. See, e.g., MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 7, 11 (2012). Of course, the claim that all forms of economic competition are desirable, even if they produce negative externalities such as atmospheric pollution, wage deflation, or predatory firm behavior, is (to say the least) a controversial one.

To begin with, there is little doubt that states have ample institutional resources with which to lobby Congress.³¹⁸ Accordingly, even in domains where federal interests might be expected to trump state concerns, states' interests still receive special solicitude. In the foreign affairs domain, for example, the Senate as ratifier of international treaties has maintained a longstanding, stable practice of lodging federalism-related reservations to America's international law commitments.³¹⁹ Although initially rooted in several Southern states' concerns about race-related human rights,³²⁰ federalism reservations continue to be raised long after the end of Jim Crow. Ratifying the 2005 U.N. Convention Against Transnational Organized Crime, for example, the Senate attached a reservation invoking "fundamental principles of federalism" and declining to criminalize conduct of a "purely local character."³²¹

Congressional solicitude for federalism concerns outside the foreign affairs context is even more robust. For example, the 1996 restructuring of federal habeas corpus review was spearheaded by "ardent restrictionists . . . intend[ing] to shield state interests from federal incursion."³²² They can plausibly be said to have achieved this goal. In the same year, state attorneys general successfully persuaded Congress to enact a second, separate set of limitations on inmate litigation in order to protect the states' interests in the management of institutions such as prisons.³²³ In both the case of habeas and prisoner litigation reform, states' fiscal and regulatory interests molded federal legislative agendas and outcomes.³²⁴

318. See NUGENT, *supra* note 227, at 70-74 (documenting a "variety of forms" in which state officials participate in the federal policymaking process).

319. For useful discussions of this practice, see Louis Henkin, Commentary, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341, 345-46 (1995); and David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1984-87 (2003).

320. See Henkin, *supra* note 319, at 348-49.

321. See U.N. Convention Against Transnational Organized Crime, Message from the President of the United States, Feb. 23, 2004, S. TREATY DOC. NO. 108-16, at vii, available at <http://www.gpo.gov/fdsys/pkg/CDOC-108tdoc16/pdf/CDOC-108tdoc16.pdf>; Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1361-62 (2006) (discussing the United States' ratification of the U.N. Convention).

322. Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 459-68 (2007) (discussing 1996 federal habeas statute's legislative history and the Oklahoma City bombing).

323. Prison Litigation Reform Act of 1995, H.R. 2076, 104th Cong. tit. VIII (1995); see also Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1566-67 (2003) (discussing role of state attorneys general in lobbying for the Prison Litigation Reform Act, which restricted the powers of federal courts to interfere with the administration of state prison systems). The influence of state attorneys general on policymaking through the courts is extensive. See Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 540 (1994).

324. It bears noting that 1996 also saw enactment of the welfare reform legislation that increased states' policy control over social welfare policies dramatically. See Robert P. In-

Four years after habeas and prison litigation reform were enacted, Congress passed the Unfunded Mandates Reform Act (UMRA).³²⁵ UMRA contains information-forcing rules and congressional procedures, enforced via points of order, that both aim to prevent significant cost shifting to the states. By forcing Congress to produce information about unfunded mandates, and then allowing a single legislator to derail legislation when that information is not produced or when a bill imposes excessive costs on the states, UMRA provides a durable berth for states' interests in the federal legislative process. No other constitutional interest secures so procedurally privileged a perch on Capitol Hill.³²⁶ No other constitutional flaw can trigger a bill's defeat by the mere expedient of a single legislator's point of order. The "very passage [of UMRA] indicates the influence retained by state and local governments over the federal legislature."³²⁷ Even if an incomplete response to the problem of unfunded mandates, as Garrett has complained,³²⁸ UMRA is nonetheless evidence of extraordinary and asymmetric federal legislative solicitude for states' interests. Nor is it the sole example of federal legislative solicitude for states' policy preferences. States have also succeeded in both the tax³²⁹ and the regulatory arenas, producing federal laws, for example, that compel state approval for federally funded activities³³⁰ and dictate the terms of federally issued licenses.³³¹

In some instances, states may succeed in Congress in ways that impose net social costs because the ensuing federal enactments produce undesirable effects, either by nationalizing inefficient state regulation or by insulating welfare-undermining local regulations. Individual states and U.S. territories, for example, were guaranteed broad regulatory exclusivity over insurance products under the McCarran-Ferguson Act.³³² The result is a highly fragmented nation-

man & Daniel L. Rubinfeld, *Rethinking Federalism*, 11 J. ECON. PERSP. 43, 56-59 (1997) (describing the law's federalism effects).

325. 2 U.S.C. §§ 1501-1571 (2012).

326. Article II values, though, may be vindicated by the Office of Legal Counsel's (OLC) bill comment process. See Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 711-12 (2005) (explaining ex ante review of bills by the OLC).

327. Julie A. Roin, *Reconceptualizing Unfunded Mandates and Other Regulations*, 93 NW. U. L. REV. 351, 380 n.109 (1999).

328. See Garrett, *supra* note 23, at 1173-75 (discussing the "limitations" of UMRA, including its "rather narrow coverage" and the fact that "process-based safeguards cannot guarantee that such deliberation will actually occur").

329. See Jane G. Gravelle & Jennifer Gravelle, *How Federal Policymakers Account for the Concerns of State and Local Governments in the Formulation of Federal Tax Policy*, 60 NAT'L TAX J. 631, 631 (2007).

330. Provisions of the Coastal Zone Management Act of 1972, for example, impose such state certification rules. See Coastal Zone Management Act of 1972 § 307, 16 U.S.C. § 1456(c)(1)(A) (2012).

331. See, e.g., PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700, 711-12 (1994).

332. Pub. L. No. 79-15, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011-1015 (2012)).

al market. Examining outcomes and efficiencies in the ensuing markets, some scholars have plausibly argued that the wholesale ouster of federal regulation was unwise and should be reversed.³³³ By contrast, other federal interventions into the insurance market, while inuring to individual states' benefit, may produce net social costs. For instance, federal subsidies for flood insurance that have been in place since 1968 aid states vulnerable to riverine or oceanic flooding,³³⁴ but in so doing encourage inefficient construction and residence in floodplains. Because the cost of such insurance is cross-subsidized by a national pool of taxpayers, excessive construction is likely to occur. The net consequence is that in the regulation of insurance Congress has ostentatiously withdrawn federal control in one way, but asserted itself aggressively in another. Both moves, however, can be criticized as dampening net social welfare measured at the national level to the benefit of a minority of states.

All of these federal measures thus protect states' policy choices. They are all instances in which the several states succeeded in the federal legislative process, albeit through different strategies and to different degrees. Of course, this is not to say that states will always prevail. Nor is it not to deny that sometimes nationalist interests prevail, or to reject categorically examples of federal legislative action that extend only symbolic protection to states' interests. The central point here is rather that a simple and singular model of collective action does not always or fully capture the extent and success of states' input into the federal legislative process.³³⁵

How then do the mechanisms identified in Part II aid the states as participants in the national political process? Start with the consequences of state heterogeneity: it is likely that states have widely divergent rates of success in lobbying Congress in respect to different policy issues. This variation results from the heterogeneous effects of federal intervention upon different states. A state's investment in lobbying will accordingly be dispersed unevenly across different policy domains. In any given policy domain, a handful of states likely have a sharper interest than most and so can serve as a critical mass. Arizona and New Mexico, for instance, may be attentive to issues related to immigrant participation in the workforce. Texas and Oklahoma may be especially attuned to federal regulation of capital punishment. California and Illinois may unique-

333. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation*, 68 N.Y.U. L. REV. 13, 17-20 (1993) (suggesting "modifications" to the statute).

334. National Flood Insurance Act of 1968, Pub. L. 90-448, 82 Stat. 572 (codified as amended in scattered sections of 42 U.S.C.).

335. The examples I give might also be explained in terms of the heterogeneous preferences of federal legislators over policy domains where states have an interest. Even if that explanation were compelling—and I am skeptical—it would still mean that states' interests were in fact protected in the federal legislative process, even if not as a result of states' political actions.

ly attend to federal legislation pertaining to prisons.³³⁶ If states are dispersed across different policy domains in this manner, the suboptimal effects of collective action may well not arise. If they do arise, they are likely to be somewhat muted. In effect, states especially interested in preserving their prerogatives in a particular regulatory field operate as disproportionate contributors to the collective good of federal laws that respect states' interests in that policy domain.

Once a subset of states achieves its policy goal, moreover, the ensuing regulatory regime may well have the characteristics of a step good: it will often be supplied in a sharply discontinuous lump, rather than in increments that distinguish between different states.³³⁷ This means that other states can free ride on the lobbying states' efforts. Many of those noncontributing states, in addition, will play an analog and complementary lobbying role in other regulatory fields. In this fashion, heterogeneity of benefits can interact with the step character of many legislative goods to mitigate collective action pathologies.³³⁸

Next, reconsider the common complaint that there is no reliable federalism constituency in Congress among private citizens—i.e., no small, cohesive minority capable of acting effectively to obtain federalism-related public goods.³³⁹ This observation may well be accurate, but it may also be irrelevant. It fails to account for the possibility that the promiscuity of federalism rhetoric can perversely redound to states' benefits. That is, the rhetoric of federalism, unlike other organizational resources used for lobbying, is characterized by

336. States' lobbies may also coalesce along party lines. *See, e.g.*, NUGENT, *supra* note 227, at 146-59 (describing influence of Republican governors in the design of 1996 welfare reform legislation).

337. Consider, for example, carve-outs for state actors from generally applicable regulatory regimes. These tend to benefit all states, not just those who participated in the lobbying effort. *See, e.g.*, 29 U.S.C. § 630(f) (2012) (exempting "policymaking" officials from the Age Discrimination in Employment Act of 1967). To be sure, Congress does not always carve out *all* states. The 1996 federal habeas statute, for example, contained a set of "opt in" provisions for states with respect to postconviction proceedings in death penalty cases. *See* 28 U.S.C. § 2261(b) (2012). Section 5 of the Voting Rights Act applied only to certain jurisdictions, at least when it was in force. 42 U.S.C. § 1973c (2011), *invalidated by* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013). Open geographic delimitation of the scope of federal legislation is sufficiently rare to suggest it demands its own explanation.

338. Two objections can be envisaged to this optimistic analysis. First, what if no state views a policy question as a priority, such that the policy falls through the gaps, so to speak, of state lobbying. This may indeed be a problem, although the intergovernmental lobby, *see infra* text accompanying notes 357-60, provides a partial solution. But notice that positing this problem as a justification for judicial intervention requires the further inference that states (or other interested parties) will choose to litigate these interstitial issues in federal court. Second, states may have conflicting regulatory interests, and their lobbying might be offsetting. Where states diverge evenly on the desirability of a national law, however, it seems reasonable to query whether we can be certain there is serious federal problem at stake.

339. *See, e.g.*, Devins, *The Judicial Safeguards*, *supra* note 101, at 131; Hills, *supra* note 99, at 1243; *see also supra* text accompanying note 102.

pure jointness of supply³⁴⁰: the fact that some interest groups appeal to federalism values does not bar others from so doing.³⁴¹ To the contrary, a network effect might be observed when a heterogeneous array of lobbying groups repeatedly invoke states' interests using a federalism label, thus strengthening the appeal of federalism values by erasing their partisan valance and increasing their strength as focal points. Rather than leading to exhaustion, repeated invocation of states' rights might have the effect of embedding such claims firmly into the linguistic bedrock of American politics.

Finally, states' collective action pathologies may be *compounded*, rather than solved, by increased judicial solicitude for states' interests. To see this possibility, consider perhaps the most important instance of cost shifting between states—the safety net created by Medicaid matching funds, welfare block grants, disability payments, food stamps, and housing assistance. Among net recipients of these funds, “six of the top nine are in the Deep South.”³⁴² According to Katherine Newman and Rourke O'Brien, those Southern states have precommitted to underfunding social welfare provisions with state constitutional amendments that persistently constrain their own taxation.³⁴³ In this fashion, those states ensure that they remain on the winning end of federal tax redistribution. The observed efficacy of this precommitment strategy is suggestive of a chicken dynamic at work, with state constitutional rules providing the precommitment mechanism that in the original model is served by throwing the steering wheel out the window.³⁴⁴

Identifying the underlying dynamic as a chicken game distinct from the classical logic of collective action has the important consequence of undermining the case for external intervention by the federal courts on behalf of the several states as a cure for political fragility in the national legislative process. Given those Southern states' existing precommitments, that is, a return to state regulatory autonomy may not yield enlarged social welfare. Instead, Newman and O'Rourke argue, the better approach may be to *increase* federal control.³⁴⁵

340. See *supra* text accompanying note 130 (defining jointness).

341. For example, both environmental and industrial lobbies have alternated between support for local and national policymaking. See Elliott et al., *supra* note 265, at 315-17.

342. KATHERINE S. NEWMAN & ROURKE L. O'BRIEN, *TAXING THE POOR: DOING DAMAGE TO THE TRULY DISADVANTAGED* 140-41 (2011) (noting that the effect is to “subsidiz[e] low-wage employers in the southern states[] who face less wage pressure as a result”).

343. *Id.* at 13-14, 33-50.

344. Consider a simplified two-state version of the dynamic: Both states are within a federal welfare system, and both want to enjoy federal benefits while not investing in a domestic safety net. If both shirk, the net effect is a collapse of the safety net, raising mortality and morbidity without either state gaining. But if one state ties its hands by committing to underinvest, the other state gains little by underinvesting, even as it is committed to the safety net.

345. See *id.* at 159-60 (“[T]he basic principle, that all American families are entitled to safety nets of equivalent value, should be made real by taking states out of the equation.”). This assumes that reductions of crime, poverty, mortality, and morbidity are legitimate col-

In this context, judicial intervention may perversely allow some states to exploit other states' willingness to sustain redistributive social policies.

In sum, historical and contemporary evidence hardly supports the intuition that states suffer from disabling collective action problems when lobbying Congress. To the contrary, states' record of success inside the Beltway may be varied, but they have won sufficient trophies to suggest a singular and fatal prisoners' dilemma logic of collective action is not always at work.

C. *Noncoercive Solutions to the States' Collective Action*

States' successes in the national political process can also be explained in terms of voluntary solutions to collective action dilemmas. Two merit special attention: intracameral norms of federalism and the twentieth-century development of a dense and effective state lobby in Washington, D.C. Both are cases of institutional development generating historically stable solutions to collective action pathologies.

First, the federalism context may at first seem an unpromising locale to root conventions, but the Constitution does create stable institutional contexts in which norms that favor the states are inexpensive to cultivate. Empirical studies of Capitol Hill, for example, find evidence in the federal appointments process of "behavioral regularities of presidents and senators . . . that persist in the absence of formal rules and that deviations from which trigger sanctions."³⁴⁶ Consider the power a "home-state" senator has in regard to judicial appointments to her state.³⁴⁷ The "home-state" rule is evidence that conventions within national political institutions can durably promote federalism values. Congress has also developed noncoercive, externally oriented mechanisms that "affec[t] people's beliefs about how Congress will (formally) regulate in the future" and "credibly revea[l] the political preferences of Congress."³⁴⁸ For example, legislators not infrequently enact nonbinding resolutions extolling fidelity to federalism values.³⁴⁹ Although these lack the force of law, they none-

lective goods to be achieved via redistributive policies—a proposition to which some (not including myself) demur.

346. Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687, 1687 (2001).

347. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 143 (2000). For empirical evidence of this influence, see Michael W. Giles et al., *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 624 (2001).

348. Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 578 (2008).

349. See, e.g., H.R. Con. Res. 299, 105th Cong. (1998) (specifying criteria for executive departments to follow when preempting state law consistent with the Constitution); H.R. Con. Res. 161, 101st Cong. (1989) (expressing the "sense of the Congress that it is in the interest of a viable Federal system of Government that primary regulatory authority over alcohol beverages within their borders shall remain with the States").

theless express and entrench legislators' preferences for federalism. By binding elected officials publicly to federalism norms, they serve as a focal point for states as lobbyists and thus raise the cost of subsequent inconsistent actions.³⁵⁰ One apotheosis of intracameral federalism norms is UMRA, which comingles an inward-looking function of congressional procedures and an external, communicative function. Together, these effects of UMRA vest the states' lobby with both an epistemic advantage and a procedural wedge with which to secure their interests.³⁵¹

Second, when a group of specific states or legislators has a history of working together, it may develop tools to mitigate holdout and free rider problems as "a by-product of whatever [other] function this organization performs that enables it to have a captive membership."³⁵² The logic of collective action here is "path dependent" insofar as "[o]nce established . . . patterns of political mobilization, the institutional 'rules of the game,' and even citizens' basic ways of thinking about the political world will often generate self-reinforcing dynamics" to mitigate undesirable infringements on states' prerogatives.³⁵³ Of course, there is no reason to believe that such voluntaristic solutions will solely be conscripted into the service of desirable goals. One reason why the Second Reconstruction of the mid-twentieth century did not begin in Congress, for example, was the obstructive power of a Southern bloc of legislators intent on maintaining Jim Crow.³⁵⁴ For federalism has of course been deployed toward both normatively attractive and morally ugly ends, and by hymning the possibility of its effective political safeguards, I do not mean to suggest otherwise.³⁵⁵

Twentieth-century institutional development has yielded resources for states to mitigate collective action dilemmas effectively on their own. An obvious vehicle for collective political action is the national political parties, which

350. At least on the assumption that legislators have a preference for being seen as having consistent preferences over time. That is, I presume (reasonably, I think) that there is some credibility-related cost to politicians to taking mutually inconsistent positions at different points in time.

351. For some evidence of UMRA's efficacy, see NUGENT, *supra* note 227, at 73 (quoting a state lobbyist to the effect that UMRA "has really worked . . . it has really worked well").

352. OLSON, *supra* note 7, at 133; *id.* at 51. Olson at this point seems to assume the synchronous provision of private and public goods, whereas the argument in the main text alludes to the possibility that an institutional structure emerges at one point in time for the provision of private goods, and at a later time can be employed to produce public goods because the relevant start-up costs do not need to be expended.

353. PIERSON, *supra* note 156, at 10.

354. See KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN 102-04 (2004) (noting Southern resistance); see also JOHN LEWIS, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT 129 (1998) (same).

355. I develop the point that the relationship between federalism and individual liberty is an unstable one elsewhere. See Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1484-89 (2013).

provide a focal point for states sharing common policy interests.³⁵⁶ Perhaps even more important, though, are state-specific lobbying organizations. In the last century, states have developed an “intergovernmental lobby,” including the Council of State Legislators and the National Governors Association, to represent their interests in the national legislative process.³⁵⁷ This lobby advances states’ interests by “[t]estifying before congressional committees, speaking to individual congressmen, initiating legislation for consideration, and contacting executive agencies.”³⁵⁸ Empirical studies find that this intergovernmental lobby chalks up many successes.³⁵⁹ In congressional debates over the 2010 health care legislation, for example, the lobby “wield[ed] influence during the congressional process in several notable respects,” securing several significant changes to the law despite intense private lobbying to contrary ends.³⁶⁰

To be sure, these solutions to collective action problems were not self-generating.³⁶¹ Ironically, it was federal officials who defrayed the “initial costs of organizing.”³⁶² President Theodore Roosevelt organized one of the earliest state lobbying institutions, the Conference of Governors, in 1908.³⁶³ President Franklin Roosevelt then “strengthened intergovernmental associations that were advocates for his New Deal programs.”³⁶⁴ Today, the intergovernmental lobby benefits from deep institutional roots and past federal support to forcefully articulate states’ interests.³⁶⁵ On many issues, including block grant programs, preemption, and constitutional tort liability, state governments have convergent interests, making the intergovernmental lobby very effective.³⁶⁶

356. I am grateful to Richard McAdams for discussion on this point.

357. Samuel H. Beer, *Political Overload & Federalism*, 10 *POLITY* 5, 11 (1977); see also NUGENT, *supra* note 227, at 31-32 (discussing state lobby); Judith Resnik, *The Internationalization of American Federalism, Missouri and Holland*, 73 *MO. L. REV.* 1105, 1128-30 (2008) (listing organizations with founding dates).

358. John P. Pelissero & Robert E. England, *State and Local Governments’ Washington “Reps”—Lobbying Strategies and President Reagan’s New Federalism*, 19 *ST. & LOC. GOV’T REV.* 68, 68 (1987).

359. See NUGENT, *supra* note 227, at 146-67 (cataloging successes).

360. John Dinan, *Shaping Health Reform: State Government Influence in the Patient Protection and Affordable Care Act*, 41 *PUBLIUS* 395, 407 (2011).

361. See *supra* text accompanying note 159.

362. Garrett, *supra* note 23, at 1121.

363. Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 *YALE L. & POL’Y REV.* 227, 254 (1996).

364. Garrett, *supra* note 23, at 1121.

365. See, e.g., *Permanent Policy Principles for State-Federal Relations*, NAT’L GOVERNORS ASS’N, <http://www.nga.org/cms/home/federal-relations/nga-policy-positions/page-ec-policies/col2-content/main-content-list/principles-for-state-federal-rel.html> (last visited Feb. 1, 2014) (delineating proposals for reform on structural federalism issues).

366. See NUGENT, *supra* note 227, at 48 tbl.1 (tabulating frequency of assertions of state governmental interests by state lobbies, and finding numerous shared interests).

Accordingly, it can be observed to influence Congress's agenda³⁶⁷ (an oft-overlooked lever of control³⁶⁸), to participate in committee hearings,³⁶⁹ and to organize concerted lobbying campaigns.³⁷⁰ Separately and collectively, states are also influential in agency rulemaking processes,³⁷¹ in particular rulemaking initiated under the Negotiated Rulemaking Act of 1990.³⁷²

Once again, a caveat is necessary: I do not mean to suggest that states are always successful in federal legislative battles. Nor I do not mean to offer a precise or quantitative account of the degree to which Congress—say, in relation to the courts—is protective *vel non* of states' interests. Moreover, voluntary solutions are no panacea—so much should be obvious given the will to move from the Articles of Confederation to the Constitution. There remain numerous important instances in which noncooperative behavior can be observed between states yielding socially undesirable outcomes,³⁷³ even when only a small number of states are involved.³⁷⁴ The tally of these successes and failures suggest the historical pathways of American political development have yielded *some* durable norms and institutions to mitigate states' collective action dilemmas in the national legislative process. The ensuing voluntary institutions supplement the enabling effects of heterogeneities and step-good characteristics to stymie the necessary emergence of any tragedy of the federalism commons. Arguments for the judicial vindication of federalism that ignore this rich—but importantly incomplete—institutional legacy are at risk of misdiagnosis if they assume that such a tragedy will always or even often emerge.

367. *Id.* at 63 tbl.4 (listing examples of states' agenda-setting influence); *id.* at 71 (noting the role of state officials on federal advisory committees).

368. One reason that agenda control is overlooked is identified by Riker, who argues that the existence of "elaborate" legislative choices involving the simultaneous consideration of multiple amendments can obscure the existence of decisional intransitivities. See William H. Riker, *The Paradox of Voting and Congressional Rules for Voting on Amendments*, 52 AM. POL. SCI. REV. 349, 354 (1958). This opportunity for both creating and hiding intransitivities in turn might be exploited by a legislative agenda setter in order to steer outcomes toward his or her preferred policy ends.

369. NUGENT, *supra* note 227, at 63 tbl.4.

370. *Id.*

371. See Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2150-52 (2009) (documenting how agencies were more responsive to state regulatory concerns about the REAL ID Act of 2005 than Congress); see also Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 741 (2004).

372. For example, the Clean Water Act's Phase II Stormwater Rule was negotiated by a "rulemaking advisory committee includ[ing] . . . municipal, environmental, and industrial stakeholder groups." Ryan, *supra* note 266, at 56. States can also resist the results of negotiated rulemaking, as occurred with the REAL ID Act of 2005. *Id.* at 56-58.

373. For inferential evidence of socially undesirable rent-seeking through state taxation, see Charles D. Kolstad & Frank A. Wolak, Jr., *Competition in Interregional Taxation: The Case of Western Coal*, 91 J. POL. ECON. 443, 449, 454-55 (1983).

374. See Dennis Coates & Michael C. Munger, *Strategizing in Small Group Decision-Making: Host State Identification for Radioactive Waste Disposal Among Eight Southern States*, 82 PUB. CHOICE 1, 2 (1995).

D. *Comparative Analysis of States' Collective Action Costs*

Collective action arguments for federalism's judicial safeguards tend to focus narrowly on the ability of the states to cooperate in the national political process. In so doing, they elide two other important comparative questions related to the political efficacy of subnational actors. First, what is the balance of power between states and opposing interests within Congress both in regard to specific issues and also more generally? Second, what is the effect of adding *judicial* contestation to *legislative* battles over federalism? Answers to these comparative questions further undermine the case against federalism's political safeguards. There is no reason to believe states lose consistently to opposing interest groups. And grafting judicial review onto the legislative process, rather than aiding the states, has more ambiguous effects on the federal balance than its proponents care to concede.

1. *Collective action in Congress*

Drawing on public choice theory, some federalism scholars have argued that states are persistently outmatched in Congress by opposing interest groups such as industry lobbies.³⁷⁵ This asymmetry is said to conduce a pro-nationalist bias in national law. But the claim that states are weaker than their congressional opponents rests on fragile empirical premises.³⁷⁶ In fact, the universe of congressional lobbies is much more heterogeneous. A recent and extensive empirical study of federal lobbying finds that material resources (of the kind industry groups certainly possess) have only a "modest" impact on policy outcomes.³⁷⁷ The same study also found that coalitions for and against federal policy change tend to be varied in composition, in contradistinction to the conventional specter of states persistently lined up against powerful big business.³⁷⁸

Moreover, it is simply not empirically substantiated that states are ineffectual lobbyists on account of their numerosity. Rather, the heterogeneity of state contributions and benefits, the step nature of legislative goods, and the historical legacy of institutional development all make states potentially more effective lobbyists than the simple logic of collective action implies.³⁷⁹ As a result of these advantages, it cannot merely be assumed that states' opponents will be

375. Cf. Roin, *supra* note 327, at 376 ("The case against unfunded mandates relies either on the presence of unsophisticated voters or on a systematic pattern of weaker interest groups at the local cost-bearing level than at the federal benefit-enjoying level." (footnote omitted)).

376. See Garrett, *supra* note 23, at 1124; McGinnis & Somin, *supra* note 101, at 103.

377. FRANK R. BAUMGARTNER ET AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 237 (2009).

378. *Id.* at 26 (noting "a surprising tendency for sides to be heterogeneous").

379. States may also benefit because they typically seek to defend a status quo, which is perhaps the best predictor of federal lobbying success. *Id.* at 241-43.

more “effective”³⁸⁰ than the intergovernmental lobby—especially when we recall that not all of the states’ foes are as powerful as the business lobby. Consider, for example, the possibility that states will lobby for weakening federal environmental rules as a way to transfer costs onto future generations who are unrepresented in Congress. Legislative debates over federal antidiscrimination laws also can match states against diffuse, ill-coordinated groups such as the poor. It is thus unlikely that states will always be on the losing side. Further, in some cases—think of mid-century opposition to civil rights laws—they surely deserve to lose.³⁸¹ Like many other interest groups with constitutionally salient interests, the states will sometimes be David, sometimes Goliath.³⁸²

The argument that states are systematically disadvantaged in Congress against industry and trade groups also rests on controversial assumptions about lobbying dynamics. It assumes that interest groups seek out legislators, not vice versa.³⁸³ But it is not clear this is always so. Well-heeled interest groups may be “victims of the political process,” subject to ““shake down[s]” for campaign contributions.”³⁸⁴ In paying rents to legislators, industry interest groups “compensat[e] the legislator for not exercising his power to charge individuals

380. McGinnis & Somin, *supra* note 101, at 103; *accord* Garrett, *supra* note 23, at 1124.

381. For the reasons developed in the main text, the claim that decentralizing federalism concerns are identical to or substantially overlap with some neutral concept of the public good seems implausible to me. *But see* Devins, *Congressional Factfinding*, *supra* note 101, at 1194-200 (arguing that judicial enforcement of federalism ensures that legislation serves the public good).

382. States’ comparative advantage may also be deepened by an epistemic edge they have on private interest groups (although the empirical evidence for this effect is sparse). Recent studies of lobbying suggest that lobbying operates “as a form of legislative subsidy—a matching grant of costly policy information, political intelligence, and legislative labor.” Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 69 (2006). If this is so, states can leverage their greater knowledge of local conditions and cooperative federalism schemes to secure access in a way that private interest groups cannot. The empirical evidence, however, cuts against this claim. A recent study of Medicaid implementation, for example, found congressional committees attending more to “lobbyists from industry and trade associations [than to] state agency officials.” Kevin M. Esterling, *Does the Federal Government Learn from the States? Medicaid and the Limits of Expertise in the Intergovernmental Lobby*, 39 PUBLIUS 1, 18 (2008).

383. There is evidence that interest group contributions foster access. *See* David Austen-Smith, *Campaign Contributions and Access*, 89 AM. POL. SCI. REV. 566, 566 (1995). Whether access translates into influence over the content of laws is debated. *See* Martin Gilens, *Under the Influence*, BOSTON REV., July/Aug. 2012, at 15, 31 (doubting that differential interest group access explains why federal lawmaking is more responsive to some slices of the population than others); *see also* BAUMGARTNER ET AL., *supra* note 377, at 237.

384. Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159, 1164 (2006); *see also* FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 2 (1997) (“[P]ayments to politicians often are made, not for particular political favors, but to avoid particular political disfavor, that is, as part of a system of political extortion, or ‘rent extraction.’”).

and firms for the right to keep capital they have amassed and wealth they have produced.”³⁸⁵

Rent extraction of this kind is likely to be a greater risk for private firms than states for two reasons.³⁸⁶ First, federal legislators can extract goods (most importantly campaign contributions) from firms in a way that they cannot from states. Members of Congress thus have a reason to threaten firms with regulation that does not apply to states. Second, states have a range of constitutional protections that private firms lack. Congress, for example, is constrained from using its Article I powers to expose states to damages actions filed by individuals.³⁸⁷ Nor can Congress “commandeer” state executive or legislative actors.³⁸⁸ And even when Congress employs its Article I spending authority to impose conditions on federal grants to states, it must expend considerable resources to generate clear statutory language anticipating and specifying all relevant state obligations.³⁸⁹ Attention to the possibility of legislative rent extraction thus inverts the conventional wisdom that states will be outmatched by industry special interest groups in the legislative process. Rather than being disadvantaged by not being able to provide campaign funding, states’ immunity from rent seeking may be an important comparative advantage when it comes to the task of lobbying.

I have focused here on positive, descriptive problems in the public choice version of collective action federalism. These difficulties seem intractable to me. Even if they were not, arguments from public choice dynamics are often inconclusive in the absence of some normative theory telling us which group should prevail. Different normative intuitions might be sparked, for example, by legislative battles between, say, African Americans and pro-segregation

385. Guy Halfteck, *Legislative Threats*, 61 STAN. L. REV. 629, 664 n.145 (2008) (documenting the pervasiveness of rent extraction). Even the threat of adverse government action can have a negative effect on firms. See R. Beck et al., *Rent Extraction Through Political Extortion: An Empirical Examination*, 21 J. LEGAL STUD. 217, 223 (1992) (demonstrating that Canadian firms suffered negative stock returns following the announcement of potential adverse government action).

386. In addition, it is possible that intraindustry competition will conduce to “races to the Hill” in order to secure exclusionary regulation that enables a lobbying firm to capture monopoly rents. See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 5 (1971). Although states are said to engage in horizontal competition, it would be surprising if it was as intense as interfirm competition.

387. See *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (not allowing abrogation of state sovereign immunity under Article I); see also *Alden v. Maine*, 527 U.S. 706, 754 (1999) (holding that Congress could not abrogate state sovereign immunity in state court under Article I).

388. See *Printz v. United States*, 521 U.S. 898, 929-30 (1997); *New York v. United States*, 505 U.S. 144, 168-69 (1992).

389. See, e.g., *Sossamon v. Texas*, 131 S. Ct. 1651, 1658 (2011) (concluding that absent an “unequivocal expression of state consent,” the phrase “[a]ppropriate relief” in the Religious Land Use and Institutionalized Persons Act of 2000 could not be construed to permit money damages); *Barnes v. Gorman*, 536 U.S. 181, 185-88 (2002) (same for punitive damages).

Southerners in the civil rights context and tort plaintiffs and product manufacturers seeking preemption in the product liability context. That supplemental layer of normative concerns means that collective action arguments based on interest group dynamics need to contain an implicit theory of fair representation—an added complexity that renders their use as a heuristic implausible.

2. *Are courts or Congress a better forum for states?*

The collective action argument against *Garcia* assumes federal courts are good venues for states seeking to vindicate their interests. But, as McGinnis and Somin note, “why [should we assume that] the federal judiciary would prove better than political actors . . . at protecting federalism[?]”³⁹⁰ McGinnis and Somin’s answer—that judges lack a “direct interest in undermining the distribution of powers” and have “first order” preferences that “may often help federalism”³⁹¹—is unpersuasive absent evidence of judges’ preferences (which they do not supply). The question therefore persists: why expect courts to do better?

It is, indeed, quite unclear that one should expect courts to be systematically more sympathetic to states’ interests. Federal judges are hardly acoustically separate from political trends. Judicial appointments are made through an overtly political process in which the President³⁹² and the Senate play important roles. The Senate’s failure to confirm about one-fifth of presidential nominees to the Supreme Court shows that senators do influence the composition and preferences of the federal courts.³⁹³ The politicized nature of judicial selection means there is a (lagged) correlation between judicial preferences and the preferences of appointing political coalitions in the White House and the Senate.³⁹⁴ Judicially enforced federalism is accordingly likely to arise if, and

390. McGinnis & Somin, *supra* note 101, at 128.

391. *Id.*

392. See CHRISTINE L. NEMACHECK, STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH 111, 127-28 (2007) (arguing that Presidents who believe themselves freed of confirmation constraints select nominees from the pool who are the most ideologically compatible).

393. For studies of rates of senatorial disapproval, see Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 382-84 (showing legislative influence over time); and Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 408.

394. There is a large body of empirical work to this effect. See Lee Epstein et al., *The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, 32 FLA. ST. U. L. REV. 1145, 1168-70 (2005) (finding that a candidate’s ideology as well as her qualifications influences senators’ decisions); see also Charles M. Cameron et al., *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525, 530-31 (1990); Jeffrey A. Segal et al., *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96, 113-14 (1992). In addition, legislators have long exercised influence on judicial behavior through court funding and jurisdictional legislation. See Howard Gillman, *How Political*

only if, it converges with that coalition's preferences. Consistent with this hypothesis, studies of the "federalism revolution" sparked by the Rehnquist Court confirm that the latter reflected existing trends in the federal government's elected branches, rather than being countermajoritarian.³⁹⁵ The Justices' fin de siècle rediscovery of federalism "trail[ed] developments in the elected branches" and placed "only modest restraints on the national governing coalition."³⁹⁶ And in any case, "even though the Court may hedge the boundaries of permissible national or state action, it cannot determine the extent to which states recapture the political initiative."³⁹⁷ The arc of judicially enforced federalism, in other words, begins and ends outside the courthouse door.³⁹⁸

If judicial willingness to enforce states' interests correlates (with a lag) to political branch preferences,³⁹⁹ it is hard to see how courts can function as substitutes for absent legislative solicitude for states' interests. Instead, courts will vindicate states' interests only once national politicians have been similarly attentive. Judicial enforcement of federalism values will not smooth out variation in Congress's solicitude for states' interests over time. It is instead likely to exacerbate such variance. Rather than ensuring that national law promotes both the national collective good and federalism values, judicial review on behalf of the states may yield greater oscillation between overprotection and overexposure of states' interests.

Furthermore, critics of *Garcia* implicitly assume that the pathologies of national action they discern in Congress find no echo in the federal courts. This is yet another nirvana fallacy. Just like the political process, judicial review may

Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891, 96 AM. PO. SCI. REV. 511, 512, 515-16, 520 (2002).

395. See J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSP. ON POL. 233, 240-43 (2004); see also Cornell W. Clayton & J. Mitchell Pickerill, *Guess What Happened on the Way to the Revolution? Precursors to the Supreme Court's Federalism Revolution*, 34 PUBLIUS 85 (2004). This hypothesis is also consistent with the historical analysis of BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 355-57 (2009) (summarizing thesis that federal courts' constitutional conclusions rarely stray from national majoritarian preferences).

396. Clayton & Pickerill, *supra* note 395, at 91.

397. Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483, 527 (1998).

398. I do not wish to overstate the case here. As noted, judges' attention to politics surely declines in the period after their appointment, and the judiciary's agenda may imperfectly overlap with that of the elected branches.

399. Is it possible that the time lag between congressional and judicial preferences will have a smoothing effect on outcomes? It is certainly possible that the preference divergence necessarily created by the lag has a stabilizing effect at some moments. But it might also be that federal judges are appointed to satisfy more ideologically committed factions of a party, such that they run a little ahead of legislators. This possibility would help explain why states may go to federal courts even though they have already sought and failed to obtain a result in Congress (although the frictional effect of vetogates in Congress means that even a court with similar preferences to Congress has a freedom to act that legislators lack).

also be a vehicle for states to engage in horizontal aggrandizement by shifting costs onto other states⁴⁰⁰ or for the same interest groups that dominate in Congress to extend their policy control.⁴⁰¹ In Congress, states are said to engage in horizontal shifting of costs to other states by securing uniform national laws that suppress competition. But judicial review can also be invoked to strike down federal enactments that prevent harmful interstate externalities, in effect preserving some states' ability to shift costs onto their neighbors. Congress, for example, might promulgate a statute to prevent a deleterious deregulatory "race to the bottom," prompting states already at the bottom of the regulatory slope to seek recourse in the federal courts to protect their national-welfare-corroding comparative advantage.⁴⁰²

To give some more substance to this concern, imagine that several states confront a collective action problem, say, concerning the decision as to where disposal sites for low-level radioactive waste will be located. Those states secure congressional endorsement of a comprehensive accord settling the problem to the advantage of all, a Pareto-optimal deal embedded in a federal statute. A single recalcitrant state wishing to renege on its part of the bargain, however, can act as a foul dealer. It might turn to the federal courts to undo one element of the deal in a way that allows it to free ride on the efforts of others. This scenario, of course, is not a hypothetical. It arguably captures the basic facts of *New York v. United States*, wherein a state attacked one element of an interstate bargain that proved particularly onerous to it.⁴⁰³ Just as the national legislative process creates opportunities for states to secure asymmetric benefits, *New York* suggests, so too the judicial process is used by strategic state actors to unravel equitable deals reached through bargaining on Capitol Hill.

The point here is not that courts are either just as "good" or "bad" as Congress. The comparison is likely to depend on the quiddities of personnel and politics at any given moment in time, not to mention the policy question at stake. Hence, there is no a priori reason to expect that adding judicial safe-

400. Baker, *supra* note 103, at 961-62.

401. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 82-83 (1991).

402. Decisions that fit this profile might include *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 44 (1922), which struck down the Child Labor Tax Law. States maintain robust federal court litigation capacity consistent with either a positive story of judicial safeguards or a negative one about rent-seeking through the courts. PAUL M. COLLINS, JR., *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* 73-74 tbl.3.6 (2008) (documenting the increase in the number of state amicus briefs filed between 1950 and 1995); ERIC N. WALTENBURG & BILL SWINFORD, *LITIGATING FEDERALISM: THE STATES BEFORE THE U.S. SUPREME COURT* 60-61 tbl.5.1 (1999).

403. 505 U.S. 144, 187 (1992). The *New York* Court invalidated the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, but left the balance of the statute standing. That Act "resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem." *New York*, 505 U.S. at 189 (White, J., concurring in part and dissenting in part).

guards to political safeguards will always yield less horizontal aggrandizement, less strategic state action, or a “better” federal balance.

* * *

The collective action argument against federalism’s political safeguards relies on tenuous theoretical and empirical assumptions. In the abstract, it is certainly possible that collective action dynamics will lead Congress to underenforce federalism values. But as with nationalist arguments for collective action federalism, this highly abstract claim is bedeviled by the details. Heterogeneities of contributions and benefits, and the step quality of collective goods, may vitiate the tragedy of the federalism commons. The latter may give way to more effective cooperation among states in the national political process. Intracameral norms in Congress and states’ standing lobbying institutions (albeit seeded by the federal government) can also generate solutions to coordination problems. Nor need these claims remain in the realm of the hypothetical, for there is ample cause to believe that states can and do speak loudly for themselves in the national lawmaking and administrative processes. Finally, a comparative analysis of collective action within Congress and between the branches suggests that judicial review will often be unnecessary and sometimes counterproductive for states. Judicial safeguards of federalism, that is, have a Janus-faced quality that should provoke heightened caution, rather than exhilaration, in the rush to repudiate *Garcia*.

Along with the arguments developed in Part III, this critique of the judicial safeguards of federalism again points to the weakness of standard justifications for treating federalism questions as justiciable. The foregoing analysis suggests that just as federal judges will be hard pressed to identify instances in which national legislative action is warranted on consequentialist grounds, so too they will be systematically unable to pick out those cases in which states’ interests have not been respected in the national legislative process. Absent some generally available heuristic to support a presumptive distrust of federal legislative outcomes, courts cannot effectively sort for more intensive review those instances in which the states’ lobby was overwhelmed—even assuming they were able to conjure up a baseline to evaluate such claims in the first instance. Whatever the correct disposition of a given federalism debate, therefore, it would seem unlikely that judges will be best placed to render an accurate and faithful answer.

CONCLUSION

The central aim of this Article has been to evaluate the cogency of the collective action arguments that have come lately to haunt federalism doctrine. In contrast to treating collective action as a single dissolving template, thus accounting for current critique and enabling its critique, I have suggested that there is no one singular logic of collective action capable of being applied at a high level of abstraction. There is, in other words, no single model that can resolve, across the board, all of American federalism's many crosscutting tensions.

On the contrary, collective action is irreducibly plural. Efforts to stanch that complexity by settling on one parameter, such as numerosity, as a proxy for determining when collective action will succeed are, in my view, unlikely to bear worthwhile fruit. The loss of complexity attendant on such efforts, in my view, comes at too high a price in terms of predictive accuracy and analytic ambiguities. While it is unquestionably true that parsimonious models are useful tools in navigating complex empirical realities, parsimony is not warranted for its own sake. A simple model is only useful if its predictions prove sufficiently reliable in practice. It is not at all clear this basic precondition holds true for the simple models of collective action found in the extant federalism literature. This in turn suggests that there is no lodestar to be found there for judges or scholars seeking to understand or enforce federalism. My answer to this Article's eponymous question is, accordingly, "no": no single logic of collective action well *explains* federalism doctrine.

Instead, I hope that this Article triggers more granular analysis of discrete policy problems—be it health care or national security or environmental policy—on their own terms, enriched by close attention to the incentives, investments, and strategic options of each state participant within whatever logic of collective action is at work. At best, attention to the heterogeneous collective action mechanisms developed in this Article (although not limited to that catalog) will sharpen appreciation of the polymorphous welfare implications of American federalism.

My conclusion also has ramifications for the appropriate judicial role in vindicating federalism, as intimated in the closing words of Parts III and IV. Obviously, there is a great deal to be said respecting this question of the justiciability of federalism values, and I do not advance here a comprehensive case in favor of ousting judicial review of federalism questions.⁴⁰⁴ Rather, the

404. For example, Prakash and Yoo make three arguments for judicial review of federalism values: (1) there is no textual exception for federalism in the scope of judicial review; (2) the Supremacy Clause requires judges to enforce federalism values as much as they enforce other constitutional concerns; and (3) given the absence of the Bill of Rights in 1788, judicial review must have been intended as a bulwark of structural constitutional values. Prakash & Yoo, *supra* note 91, at 1462-71. But their arguments are unpersuasive quite apart from the point developed here. First, federal courts are not vested with the power of judicial

lesson immanent in the foregoing appraisal of collective action arguments has a narrow gauge. In pressing on the empirical complexity of collective action claims, and pointing out the fragility of many posited mechanisms, I have expressed qualms about consequential arguments for the judicial review of federalism questions founded on the logic of collective action. To the extent one accepts those particular consequentialist foundations of federalism—rather than, say, the noninstrumental logic of constitutional originalism or textualism—one might further conclude that judges should play a more chastened role in calibrating the federal balance, or even no role at all.

To unpack this a bit further, both pro-nationalist and pro-decentralization scholars have argued for their respective positions by identifying a political process that is supposed to yield desirable results, and then identifying a flaw in that process. Based on that flaw, they have then pivoted to advocate judicial review as a compensating remedy. In that sense, their accounts can be understood as applications of what is known as the theory of the second best.⁴⁰⁵ This is the idea that that once a complex system peels away from its ideal parameter settings along one axis, welfare is not maximized by hewing to remaining first-best conditions but rather by making compensating adjustments to account for other imbalances.

At least so far as collective action federalism is concerned, the foregoing analysis suggests that such second-best arguments for judicial superintendence are vulnerable to several objections. On the one hand, diagnoses of our deviation from a first-best state of affairs are more fragile than might first seem. In respect to both kinds of state collective action addressed here (for the production of collective goods on the one hand and for the production of political representation on the other), there are powerful reasons for thinking that the putatively missing state collective action will in fact be observed with some frequency. If this is so, there is no second-best condition to correct.

On the other hand, proposed treatments for collective action flaws are also vulnerable to second-best criticisms in their turn. Courts, that is, are ill posi-

review by the plain constitutional text, and so the scope of such power must be a matter of inference and construction, rather than a matter of textual coverage. The absence of an exception for federalism is hence neither here nor there. Second, courts have excised substantial swatches of federal constitutional law from the fabric of justiciability under the political question doctrine and its ilk, notwithstanding the Supremacy Clause. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). Hence, mere citation of Article VI is unavailing. Finally, in some tension with Prakash and Yoo's reliance on the circumstances of 1788, judicial practice around the Founding instead supports only narrow judicial review. *See William Michael Treanor, The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 527 (1994) (describing preratification proceedings in which participants believed a statute had to be "dramatically at odds with the constitution" for it to be unconstitutional).

405. For a general statement of the theory, see R.G. Lipsey & R.K. Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11 (1956) ("[I]f there is introduced into a general equilibrium system a constraint which prevents the attainment of one of the Paretian conditions [i.e., the circumstances that generate Pareto-optimal outcomes], the other Paretian conditions, although still attainable, are, in general, no longer desirable.").

tioned to identify or predict collective action dynamics in practice because they lack the institutional capacity to resolve in a satisfactory fashion the knotty empirical and theoretical ambiguities inherent in any resulting federal-state boundary line.⁴⁰⁶ This is due to the complexity of the plural collective action mechanisms in observed operation, the absence of any close harmony between the constitutional text and modern economic concepts, and the inevitable distortions of the national political economy on the judicial appointments process.

Nor are courts well suited to policing federal legislation on the theory that they will be able to discover those instances in which the states' lobby in Congress has been overwhelmed by hostile interest groups and the political safeguards of federalism as a consequence traduced. Judges are poorly positioned to pick out cases in which states will fail to lobby for constitutionally adequate answers (quite aside from the hard baseline questions that federalism doctrine has never resolved about the states' appropriate success rate on Capitol Hill). It is no response to these concerns to posit that the political branches will be influenced by extrinsic political concerns and thus biased away from optimal policy choices. Courts will also be similarly biased, simply in a lagged and thus slightly discordant fashion. Skepticism about political incentives therefore necessarily infects predictions of judicial behavior.

The claims of collective action federalism on either the pro-national or the pro-state side of the ledger, therefore, depend on empirical and theoretical assumptions that are ultimately hard to sustain. As a result, no collective action logic can plausibly underwrite the practice of judicial review in the federalism domain (although perhaps such doctrine can be explained as instantiating static and unchanging historical commands derived from a conjuring of the Constitution's notional original public meaning—if such a jurisprudence is even possible and desirable).

The futility of judicial review of federalism matters, though, should not necessarily be a cause for large alarm. For the appropriate federal balance may well be far less fragile than the conventional rhetoric in public law scholarship might suggest. Whether engaged in the creation of collective goods or collaborating within the bounds of the federal legislative process, the states have a deep toolkit and a substantial track record of achievements. Practical experience demonstrates that the states are not as helpless as they are sometimes made out to be. As a result, it is quite plausible to think that the federalism balance is not really better off in judicial custody than in political hands—and indeed that it may well be worse off with judicial safeguarding.

406. Writing in these pages last year, I offered an analogous institutional capacity argument respecting certain separation-of-powers questions. See Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 70-76 (2013) (arguing that Article II challenges to administrative positions based on a deficit of presidential control should not be justiciable). Obviously, the federalism-related argument here resonates with the skepticism about separation-of-powers jurisprudence offered there.

It follows then that federal courts should not invoke collective action arguments as warrants for judicial review of federalism questions. Moreover, any furtherance of recent judicially enforced federalism *tâtonnements* should be greeted with trepidation and skepticism both by mavens of state authority and also by supporters of broad national power. For whether viewed from the aeries of national authority or the autochthonic heartlands of states' autonomy, the collective action foundations of federalism jurisprudence prove to be fabricated of fragile, fallible, and even fabular stuff.