Federalism and Collective Action

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I. INTRODUCTION

In this Paper I will examine the federal structure of the United States Constitution from the collective action perspective.¹ My basic point is that we can understand the United States federal system as a pragmatic response to collective action problems, which arise when a group of individual actors would benefit from cooperation, but lack the individual incentives to act collectively. This perspective can assist us in the ongoing task of defining the constitutional parameters of federalism.²

The collective action perspective suggests three interrelated ideas in relation to federalism in the United States. First, the problems that led to the framing of the Constitution were, in essence, collective action problems. Second, these problems arose because the Articles of Confederation did not respond effectively to the forces that cause collective action problems. Third, the constitutional structure of federalism responds to the failures of the Articles by facilitating collective action. Before exploring these ideas, in Part II of the Paper I summarize the general concepts of collective action and collective action problems and their application to the problem of interstate relations. Building on this foundation, Parts III and IV then apply collective action concepts to the United States federal experience. Part III explains how the problems of the preconstitutional period can be understood as collective action problems, and Part IV considers the defects in the Articles of Confederation and the response of the Framers from a collective action perspective. Finally, in Part V of the paper, I touch on some of the implications of the collective action perspective for contemporary issues of federalism.

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1. This Paper lays the foundation for a larger, book-length treatment of federalism from the collective action perspective. The focus of the paper is therefore on outlining the basic model, and the discussion of particular applications is rudimentary.

2. While I believe that the collective action perspective provides useful insights into federalism, I do not contend that this perspective can explain every aspect of federalism or that it is the only way to understand federalism.

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II. A BRIEF PRIMER ON COLLECTIVE ACTION AND ITS RELATION TO STATES

Beginning with Mancur Olsen’s seminal work, The Logic of Collective Action, analysis of collective action and collective action problems has become an important component of the broader economic and social choice analysis of public institutions. While the theory of collective action is applied primarily to the behavior of individual persons, it is also applicable to the analysis of collective action by states.

A. Collective Action and Collective Action Problems

Society reflects a combination of individual and collective action. Modern political and social theory starts with the premise that individuals are free agents who act in their perceived self-interest (in economic terms, they act to “maximize their utility”). These individuals, however, may perceive it to be in their self-interest to act collectively. Collective action is desirable from the collective perspective whenever it would produce a net gain in the aggregate welfare of the collective, as compared to the aggregate welfare of the collective if its members acted unilaterally. Olson recognized that the net gain from collective action is a species of “public good,”—a good whose consumption could not be limited by those who produce it. As with all public goods, the inability to limit consumption of the good creates free riper problems and consequent disincentives to collective action.

The free riper problem inherent in collective action may be overcome if the individual members of the collective reach agreement on a collective course of action. In theory, if collective action produces a net gain, then the individual members should be able to reach agreement. This is true even when some individual members of the collective would be net losers under a collective regime, because the net losers can be “bought off” by allocating a portion of the collective benefit to them.³


⁴ See generally R.H. Coase, THE PROBLEM OF SOCIAL COST, 3 J.L. & ECON. 1 (1960). According to the Coase theorem, whoever is allocated a right in the first instance (here the individual
But in the real world, transaction costs such as those arising from imperfect information, strategic behavior, or simple numerosity, may prevent agreement on collective action, even when it is desirable. One solution to the problem of transaction costs is to create institutional structures through which collective decisions can be made without requiring the consent of each member of the collective. Modern government and the "social contract" are the prime examples of this kind of arrangement under which individuals in society effectively agree to be bound by collective decisions even if they are net losers.\(^5\)

Once a collective decision has been reached, collective action problems may also frustrate the implementation of collective action because individual members of the collective may have incentives to cheat or defect. This problem is a form of agency cost, in the sense that once a collective decision has been reached, individual members become the agents of the collective who are obligated to implement the collective decision through their individual behavior.\(^6\) To the extent that individual interests diverge from those of the collective, there may be problems securing compliance with collective decisions.

This agency cost is inherent in the public goods context, where individuals have the incentive to be free riders by reaping the benefits of other members' adherence to the collective decision while disregarding that decision themselves.\(^7\) The incentives to cheat or defect from the

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or the collective) the right should always end with the party who values the right most highly. See id. at 8-15. If someone else values the right more highly, that person should be willing to pay the party to whom the right was originally assigned and a mutually beneficial exchange should result. See id. This conclusion, however, assumes that there are no transaction costs which prevent the optimal economic outcome. See id. at 15.

5. While the concept of the "social contract" implies voluntariness on the part of the collective's members, there is also a plainly coercive element to government. None of us voluntarily agrees to the social contract at birth, and in many countries the current government has its origins in the use of force to acquire power and assert authority. Nonetheless, most people do accept the social contract and recognize that they are better off with a government than without one.

6. The concept of agency costs, which posits that the divergence of interests between principal and agent will lead to imperfect correlation between the behavior of the agent and the interests of the principal, has been important to the economic analysis of the firm. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 305, 308 (1976). Applying the concept of agency costs to individual implementation of collective decisions assumes that the collective is the principal, and its individual members are the agents. From the perspective of the individual member, the principal/agent roles are reversed, and the agency costs run in the opposite direction because the collective cannot be relied on to further the individual's interests, particularly with respect to the initial collective decision to act in a particular way. These agency costs may help explain why individuals might prefer smaller units of government and thus why the maintenance of states in a federal system is desirable.

7. An obvious example of this phenomenon is a cartel. From the perspective of the cartel, profits can be maximized by restricting output and increasing prices. However, once the cartel is formed, individual members have the incentive to cheat by increasing their output, hoping to gain
collective are exacerbated if the institutional structure of the collective replaces consensus decision making with majority rule and eliminates the need for the collective to compensate net losers. To the extent that the collective may pursue action that causes harm to individual members and those members are not compensated, those members’ interests will provide especially strong incentives to resist the specific collective decision, even if membership in the collective is in the individuals’ long-run best interests. Governments and domestic legal systems address these difficulties through various enforcement mechanisms, ranging from cultural norms (e.g., patriotism, religion, etc.) to the use of force and punishment.

B. States and Collective Action

Collective action principles can also be applied to the relationship of states in the international system.8 At the international level, states occupy the roles of individuals, and international agreements and organizations represent forms of collective action.9 In the context of international law, states are sovereign, autonomous entities that act in their perceived self-interest.10 And states, no less than individuals, may

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8. The term “state” may be used to denote either a nation state under international law or a member state within a federal arrangement. The distinction between the two may not be so easy to draw, however, as illustrated by the European Union. In this Paper, I will use the generic “state” when its meaning is clear from the context, and use the specific term “nation state” or “member state” when necessary for purposes of clarity.


10. Today, the autonomy of individual persons typically needs no justification; it is a natural right from which most political theory proceeds. The justification for the autonomy of states at the international level is somewhat more difficult to explain. Under modern principles of international law, one might justify the sovereignty of states as an outgrowth of the “right of self-determination of peoples”—if a people decides collectively to form a state, the autonomy of that collective must be respected by the international community. But the principles of sovereignty and the autonomy of states was the bedrock principle of international law long before there was any suggestion of a right of self-determination (which is a Twentieth Century development), and prevailed at a time when international law recognized the acquisition of territory by conquest. The uncertain justification for state sovereignty raises some interesting and difficult questions in the context of federalism. Tom Stacy’s contribution to this Symposium offers a thoughtful and thought-provoking treatment of these questions. See Thomas Stacy, Whose Interests Does Federalism Protect?, 45 U. Kan. L. Rev. 1185 (1997).
engage in collective action when doing so produces a net gain for the collective of states. But the transaction and agency costs that cause collective action problems in the individual setting are also present in the international context.\textsuperscript{11}

These collective action problems have proven to be particularly significant because the institutional apparatus of the international legal system is far less developed than the governments and legal systems of most states. Most fundamentally, there is no social contract through which states in the international legal system relinquish their autonomy in exchange for the benefits of collective action (i.e., international government). The lack of such a governmental authority affects both the ability of states to agree on collective action and to implement the collective decisions that are made.

At the decision-making stage, the international system lacks the institutions to overcome transaction costs. Implicit in the premise of state sovereignty under international law is the principle that states may not be bound to international legal rules without their consent.\textsuperscript{12} This consent may be given expressly in the case of treaties and other international agreements, or implicitly through the formation of customary international law,\textsuperscript{13} which requires the consistent practice of states over time accompanied by their acceptance of that practice as required by law (\textit{opinio juris}).\textsuperscript{14} In the absence of some form of majority vote, transaction costs

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\item \textsuperscript{11} On the other hand, because there are fewer states in the international system than there are individuals, the collective action problems created by numerosity are less significant in the international context than in the context of domestic governments.

\item \textsuperscript{12} In the absence of an international legislature, the formation of international legal rules is a more organic process based upon the behavior of states. Generally, international law recognizes agreements between states, international custom, and general principles of law as "sources" of binding legal rules. See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1031, 1060, T.S. No. 993. In addition, judicial decisions and secondary authorities may be "evidence" of binding international legal rules, but they are not themselves the source of those rules. See id. For further discussion of the sources of international law, see generally sources cited \textit{supra} note 9. Of course, international legal rules are not the only form of collective action among states, any more than governments and laws are the only form of collective action within a state. International law is, however, the relevant form of collective action for purposes of analyzing federalism.

\item \textsuperscript{13} While customary law may at times bind a state even if the state has not acted in accordance with it, the state's failure to object is a form of tacit acquiescence. In most circumstances, a state may avoid being bound by customary law by consistently objecting to the custom during the period of its formation. While this persistent objector rule has been criticized and may be inapplicable to certain so-called "peremptory" norms of international law, there are few, if any, instances of customary law being enforced against a recalcitrant state. For a general discussion of customary law, see Anthony A. D'Amato, \textit{The Concept of Custom in International Law} (1971).

\item \textsuperscript{14} In addition to custom and international agreements, binding international legal rules are also said to derive from "general principles" of law common to the major legal systems of the world. See generally \textit{supra} note 10. While the role of consent in the creation of such legal rules remains

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often prevent international action even when it is plainly desirable.\textsuperscript{15} While the difficulty should not be overstated,\textsuperscript{16} most of us can think of many recent instances in which collective action by states would have been desirable, but was frustrated by their inability to agree upon a course of action.

Second, the international system lacks the institutions needed to overcome agency costs from cheating or defection. Perhaps because international rules are made by consensus, states ordinarily comply with their legal obligations.\textsuperscript{17} Nonetheless, when states do have incentives to disregard their international obligations, the institutional structure of international law makes enforcement difficult. Because international law imposes obligations only on states rather than directly on individuals, a state determines how to implement those obligations within its domestic law, which facilitates resistance.\textsuperscript{18} The failure to implement international obligations in its domestic law may place a state in violation of international law,\textsuperscript{19} but the lack of centralized enforcement institutions means that such violations often will not have significant consequences.\textsuperscript{20} The effectiveness of such rudimentary enforcement mechanisms as the United

unclear, the recognition of such general principles is extremely rare and does not significantly undermine the general point that a state may not be bound to international law without its consent.

15. Thus, for example, it has been quite difficult to reach effective international agreement on collective action to address environmental problems, despite progress on some fronts, because of the diverging interests among states. See generally Levy, supra note 9, at 96-97 (discussing Soviet liability for transboundary environmental harm in the context of the Chernobyl accident).

16. Notwithstanding collective action difficulties, a significant body of international law has emerged over the years. This fact does not indicate that collective action problems are insignificant, however, but rather underscores the benefits that do result from collective action.

17. See HENKIN, supra note 9, at 47 ("It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.").

18. In other words, whether international obligations are "directly applicable" (that is, enforceable by individuals without further action by the political branches of government) or superior to contrary provisions of domestic law is dependent on the domestic law of the state in question. Under United States law, for example, customary law is incorporated into the common law without legislative or other action by the political branches, but is superseded by contrary domestic legislation, see The Paquete Habana, 175 U.S. 677, 700-12 (1900). Treaties are directly applicable only if they are deemed to be self-executing, and are superseded by subsequent inconsistent legislation. See Whitney v. Robertson, 124 U.S. 190, 193-99 (1888). Thus, states may easily render international law ineffective by failing to take the necessary action to implement international obligations or enacting contrary laws that supersede those obligations.


20. In the absence of a central authority, enforcement is essentially "horizontal" and depends ultimately on the offended state's capacity for self-help or on collective action by the international community. While horizontal enforcement provides some disincentives to cheat or defect and works in some cases to deter such behavior, it is often ineffective.
Nations Security Council\textsuperscript{21} and the International Court of Justice\textsuperscript{22} is solely limited by principles of state sovereignty. In light of the international legal system's limitations, it is not surprising that more comprehensive legal arrangements between states would develop under the auspices of international law to facilitate collective action. Supranational organizations and treaty regimes, such as the European Union and GATT, for example, provide more effective vehicles for collective action than the traditional baseline regime of international law.\textsuperscript{23} In this sense, federalism is a particularly highly integrated form of collective action among states in which the collective arrangement transcends the level of international law and becomes a matter of the domestic constitution law of a new, larger nation state.\textsuperscript{24} This is the transformation that occurred during the Founding. In response to the collective action problems that arose under the Articles of Confederation, which more closely resembled a supranational organization than a federal nation state, the Framers crafted a more highly integrated, constitutionally based federal system.

III. COLLECTIVE ACTION PROBLEMS IN THE PRECONSTITUTIONAL ERA

The United States Constitution was drafted in response to a series of problems that arose under the Articles of Confederation.\textsuperscript{25} While there

\textsuperscript{21} The Security Council and other mechanisms for the imposition of sanctions to enforce international law are problematic because they are premised on state sovereignty and thus essentially call for a form of collective action, but do not establish the institutional mechanisms to overcome transaction or agency costs; that is, they replicate the general problems of collective action at the international level. While there are some examples of successful collective action to enforce international law against recalcitrant states, these successes are the exceptions that prove the rule.

\textsuperscript{22} Implicit in the principle of state sovereignty is that states may not be subjected to the jurisdiction of the International Court of Justice (ICJ) without their consent. See Statute of the International Court of Justice, \textit{supra} note 12, art. 36, at 1042 (stating that states may accept the jurisdiction of the ICJ by specific agreement, through treaty provisions, or by submitting a declaration accepting its jurisdiction as compulsory with respect to disputes with states that have also accepted its compulsory jurisdiction). This may create problems even when a dispute arises out of a good faith disagreement regarding the proper interpretation of international law. Moreover, the ICJ operates only at the level of international law—only states have the capacity to invoke its jurisdiction, and its decisions (like international law generally) operate only on states. Thus, it is up to the states to implement these decisions, and problems of enforcing decisions against recalcitrant states are significant. For example, after the ICJ's unfavorable decision on jurisdiction issues in the Nicaragua dispute, the United States purported to withdraw its declaration accepting the compulsory jurisdiction of the Court, and ignored the Court's decision on the merits. \textit{See} Levy, \textit{supra} note 9, at 110.


\textsuperscript{24} Federalism differs from a unitary state, however, insofar as the member states retain a distinct constitutional status.

\textsuperscript{25} For more detailed historical treatments of the founding period, see generally \textit{THE AMERICAN
is considerable controversy surrounding the degree to which these problems were felt by the population as a whole, as opposed to privileged classes of property owners and merchants, there is little dispute over what the problems were. They included difficulties in raising revenue to run the government and pay off the Revolutionary War debt, protectionist and retaliatory trade measures taken by individual states, the states’ pursuit of independent foreign policies and treaties at the expense of national foreign relations efforts, and a general inability to enforce national decisions against the states. Each of these problems is, in essence, a collective action problem.

A. Debt and Taxes

Let us begin with the problems of paying the Revolutionary War debt and the lack of ability to raise revenue to run the national government (such as it was under the Articles), because these related problems illustrate the classic collective action problem of a public good. A public good, such as the oft-cited example of common defense, has two key characteristics. First, its use or enjoyment by one individual does not prevent its use or enjoyment by others. Second, once the good is produced, its use or enjoyment by all cannot be prevented. As a result of these characteristics, public goods create “free rider” problems. No

26. The traditional assumption that these problems were broadly felt by all segments of society, and that there was a wide consensus regarding the need for a new constitution was challenged by Charles Beard’s famous characterization of the Constitution as drafted to benefit wealthy property owners and merchants. See generally CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913). While Beard’s work has been discredited in some respects, see ROBERT E. BROWN, CHARLES BEARD AND THE CONSTITUTION 195-200 (1956), it stimulated more nuanced accounts of the complex factors that shaped the events of this critical period. Ultimately, the debate that has emerged in the wake of Beard’s thesis does not affect my analysis. Regardless of who may have felt the problems that led to the Constitutional Convention, there is little dispute about what those problems were. See generally authorities cited supra note 25.

27. As noted previously, Mancur Olsen’s seminal work on collective action problems, THE LOGIC OF COLLECTIVE ACTION, characterizes all collective action problems as a species of the public good phenomenon. See generally OLSEN, supra note 3.


29. See id.

30. See id.
one has the incentive to produce a public good because the producer cannot charge a price for its use or enjoyment and everyone has the incentive to wait until another produces it, so that he or she can gain the benefit of the good without incurring the costs of production.  

In general terms, the net gain produced by any form of collective action—including government—is a species of public good. The coercive authority of government, particularly with respect to taxation, is justifiable because government action is (at least in theory) a public good that would not be produced voluntarily because of free rider problems. But even when it is desirable to take collective action to produce a public good, each individual member of the collective retains the incentives to free ride to the extent that is possible by, for example, opting out of the group effort or refusing to contribute his or her fair share of the costs.

The difficulty of the national government under the Articles in raising revenue to meet its war debts and fund its operations generally is an example of the public goods problem. During the Revolutionary War, the military threat posed by British forces provided immediate incentives that were sufficient to overcome free rider problems (especially to the extent that the common defense was funded by debt that did not impose immediate costs on the colonies). Once that threat dissipated, however, there was little incentive to pay off those debts—each state could hope to free ride on the contributions of others. This kind of incentive applied more broadly to the limited activities of the national government under the Articles. Each state could hope to enjoy the benefits of those activities without having to pay its fair share of costs.

B. Interstate Trade

Next, consider the problems of interstate trade and protectionist measures. The conventional wisdom is, of course, that the need for federal authority to regulate interstate commerce (commerce among the states) was among the most important reasons for the adoption of the new Constitution. Most plainly, states adopted a variety of protectionist and discriminatory measures that upset commercial intercourse. More generally, the lack of national authority to regulate in this area made it

31. In this sense, the public goods problem is a problem of “positive externalities.” See infra note 40.

32. Of course, there is considerable controversy over whether the full range of government activity is justified or desirable, but even the most narrow views of government authority recognize the appropriateness of governmental authority with respect to classic public goods problems, such as the common defense. See Richard E. Levy, Escaping Lochner’s Shadow: Toward a Coherent Jurisprudence of Economic Rights, 73 N.C. L. Rev. 329, 436-39 (1995) (discussing the legitimacy of redistributional regulation by government).

33. See authorities cited supra note 25.
practically impossible to address national economic problems.34 These difficulties arose from three kinds of collective action problems that are common in the area of interstate trade and commercial activity: a prisoner’s dilemma problem that frustrates free trade, externalities, and barriers to achieving uniformity.

1. Free Trade and the Prisoner’s Dilemma

According to classical economic theory, a regime of free trade is desirable from the collective viewpoint because it ensures that resources are put to their most productive use, thus increasing output and reducing the price of goods and services.35 Thus, a collective of states like the United States (or the European Union) would generally benefit from the pursuit of free trade policies, but viewed from the perspective of individual states, there are strong incentives to act in a protectionist manner regardless of what other states do. These incentives produce a variant of the frequently cited prisoner’s dilemma game.36

Assume two prisoners, A and B, who are charged with a joint crime and confined in separate cells and whose sentence will depend on which, if either, of them confesses and implicates the other.37 If both A and B confess, each will receive a two-year sentence. If neither A nor B confesses, each will receive a one-year sentence. If either A or B confesses and the other does not, the confessor will receive a six-month sentence, but the other who remained silent will receive a five-year sentence. Viewed collectively, the best result for A and B is for both to remain silent and receive one-year sentences. But viewed from the perspective of either prisoner, it is desirable to confess regardless of what the other does. From A’s perspective, if B confesses, A will be better off confessing (two years) than remaining silent (five years), and if B remains silent, A will be better off confessing (six months) than

34. Of course, during this period there was little impetus or political support for the widespread regulation characteristic of modern government. Nonetheless, the early constitutional period did see the federal government take some steps to stimulate economic growth and facilitate interstate trade. See generally KELLY ET AL., supra note 25, at 153-58.

35. See generally, e.g., CHARLES P. KINDLEBERGER, INTERNATIONAL ECONOMICS (5th ed. 1973). This benefit results from the comparative advantages different geographic regions may have in producing different kinds of goods and services. These advantages enable firms to produce those goods and services at lower prices than their competitors in other regions. In a competitive market, then, firms in those other regions could not compete effectively and would devote their resources to producing other goods or services for which their region has a comparative advantage. Protectionist measures counteract these competitive forces.


37. These sentence differentials are presumably the result of plea bargains based on the availability of the evidence, the likelihood of conviction, and the cooperation offered by each prisoner.
remaining silent (one year). The same is true for B. As a result, both A and B will confess and receive two-year sentences, even though each would be better off if both had remained silent. 38

Free trade and protectionist measures fit the prisoner’s dilemma game. 39 Although, a group of states is generally better off collectively if the members of the group pursue free trade policies, from the perspective of individual states there are strong incentives to behave in protectionist ways regardless of what other members of the group do. If the other states maintain their free trade policies, then a state may receive many of the benefits of free trade and yet gain a competitive advantage for its own

38. Assuming negotiations are possible, a prisoner’s dilemma may not appear to present serious collective action problems because each individual will presumably recognize the advantages of mutual silence. Once an agreement is reached, however, each has a strong incentive to cheat or defect from the agreement. Thus, for example, it is much easier to reach an agreement to form a cartel than it is to enforce that agreement, as the experience of OPEC illustrates. The advantages of restricting output to raise prices make the original agreement attractive, but once the prices rise, each member of the cartel has a strong incentive to increase its output to take advantage of the higher prices. See supra note 7. Moreover, if we move beyond a two-player game to one with multiple parties, it may be more difficult to reach agreement because of hold-out problems. In other words, one party may refuse to go along in the hopes that it can benefit from the remaining members’ agreement.

39. Although not the focus of justifications for the commerce power during the founding period, other variants of the prisoner’s dilemma are relevant to the current scope of the commerce power, insofar as they may create a “race to the bottom” among states. This rationale applies, for example, in the area of child labor laws. Most observers would agree that states are better off if child labor is prohibited, but a prisoner’s dilemma situation arises because individual states have incentives to permit child labor, regardless of what other states do. Child labor is inexpensive and firms have incentives to use it. To the extent that capital is mobile, we may expect firms to locate in jurisdictions with permissive child labor laws. Thus, from the perspective of an individual state, it is always best to permit child labor. If other states permit child labor, that state will lose firms to other states unless it also permits child labor. If other states prohibit child labor, the state may attract capital by permitting child labor. Thus, an important criticism of the Supreme Court’s decisions in Hammer v. Dagenhart, 247 U.S. 251, 276-77 (1918) (invalidating prohibition on shipment in interstate commerce of goods made with child labor), and Bailey v. Drexel Furniture Co., 259 U.S. 20, 34-35, 44 (1922) (invalidating tax on shipment in interstate commerce of goods made with child labor), is the Court’s failure to recognize the need for collective action to address the problem of child labor.

Of course, the force and scope of this “race to the bottom” rationale is the subject of some controversy. Proponents of greater state and local control of policy argue that the “race to the bottom” often is really a beneficial form of competition. This argument has, for example, recently been applied to arguments for federal control of environmental policy. See, e.g., HENRY N. BUTLER & JONATHON R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 17-21 (1996); Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation, 67 N.Y.U. L. REV. 1210 (1992). Ultimately, whether interstate competition represents beneficial competition or a harmful race to the bottom is a policy judgment that must be made on a case-by-case basis. The collective action perspective on federalism would tend to suggest that this judgment should be made at the federal level.
producers by enacting protectionist measures such as tariffs or quotas.\textsuperscript{40} Conversely, if other states deviate from the free trade regime by enacting protectionist measures, then a state must adopt protectionist measures of its own to prevent its producers from being at a competitive disadvantage. Thus, we would expect states to adopt protectionist measures in the absence of a reliable agreement to maintain a regime of free trade.

2. Externalities and Debtor Relief Laws

Another collective action problem that led to economic and commercial problems under the Articles was the problem of externalities. An externality, also known as a spillover cost, occurs when an activity creates a cost that is not born by the actor.\textsuperscript{41} From an economic perspective, an externality creates improper incentives because the actor does not take full account of the costs of the activity and therefore may engage in the activity even though its costs outweigh its benefits to the collective. Thus, although a collective may benefit as a whole from a particular course of action (or inaction), some members may reject this course of action or resist its implementation because they can externalize the costs of inaction onto other members of the collective.\textsuperscript{42}

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\textsuperscript{40} True, a state adopting protectionist measures would lose some of the benefits of free trade to the extent that the costs of imported goods and services to consumers would rise as a result. But the proliferation of tariffs and other protectionist actions in the area of international trade attests to the fact that either the net effect of such measures is beneficial to the state or the producers who benefit from protectionist action within the state have greater political power than the consumers who bear the costs. Indeed, because protectionist measures provide a large benefit to a relatively small group of people while free trade provides a relatively small and diffuse benefit to a large number of people, interest group theory would generally suggest that the beneficiaries of protectionist measures will have organizational and other political advantages over the proponents of free trade. \textit{See generally} Shapiro \& Tomain, \textit{supra} note 28, at 112-13.

\textsuperscript{41} \textit{See}, \textit{e.g.}, \textit{id. at 44-45}. In this context, I am describing a "negative" externality; that is, the externalization of costs. Externalities may also be "positive." A positive externality is a benefit from an activity that is not enjoyed by the actor. Positive externalities mean that individual actors will not have the incentives to engage in activity that is desirable from the collective viewpoint. The problem of public goods, described above, is essentially a problem of positive externalities. \textit{See supra} notes 27-30 and accompanying text.

\textsuperscript{42} A common example of an externality that is relevant to questions of federalism is pollution. If, for example, a river basin is shared by a number of states, it is likely to be in the collective interest to maintain the basin relatively free of pollution. But upstream states are likely to be able to externalize much of the pollution that they create because it will flow downstream and the costs of the pollution would fall more heavily on the downstream states. Thus, although collective measures to limit pollution and/or restore the river basin would be advantageous to the group, upstream states may resist such collective action because they do not bear the full costs of the pollution. This rationale for federal environmental regulation is accepted even by proponents of greater state and local control over environmental decisions, although this acceptance is often qualified by objections to the form of federal regulation. \textit{See generally} Butler \& Macey, \textit{supra} note 39, at 17; Richard L. Revesz, \textit{Federalism and Interstate Environmental Externalities}, 144 U. Pa.
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The proliferation of state debtor relief laws under the Articles is a collective action problem that was caused by externalities. Most observers would agree that society as a whole benefits from the enforcement of contractual obligations because it provides the foundation for private economic activity. Indeed, a general rule requiring that contractual obligations be honored is found in virtually every legal system in the world. State debtor relief laws deviate from this widely accepted norm by relieving debtors of their contractual obligation to repay debts. The states that enacted debtor relief laws did so because their citizens were primarily debtors who owed money to out-of-state creditors. Thus, the costs of these debtor relief laws were externalized to other states' citizens.

3. Collective Action and the Need for Uniformity

Collective action to adopt uniform standards for a field of activity, or "rationalization," is often desirable because it produces significant net gains from increased efficiency.\(^43\) While rationalization is normally considered from the perspective of a particular industry or other field of economic activity, it is also relevant from the perspective of law and government; that is, uniform legal and other governmental standards are often highly desirable because they reduce transaction costs and other inefficiencies in private economic activity.\(^44\) Indeed, the advantages of rationalization are often sufficient to prompt collective action without any governmental or institutional arrangements to facilitate and enforce it.\(^45\) Nonetheless, collective action problems may prevent rationalization.\(^46\)

In the initial phases of a given activity, no member of a collective has a vested interest in any particular standard, and everyone would benefit from adopting a uniform standard. In this context, the main problems are lack of information and other transaction costs.\(^47\) Lack of information

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\(^{43}\) See, e.g., Shapiro & Tomlin, supra note 28, at 44. Shapiro and Tomlin use the example of the production of lightbulbs. Having a single standard for lightbulbs and lightbulb sockets is efficient because it means any lightbulb can fit any socket. Other examples, such as video tapes or computer operating systems, abound.

\(^{44}\) A clear example of these advantages in the context of international relations and federalism is the adoption of a common currency.

\(^{45}\) Consider, for example, the adoption of the Uniform Commercial Code.

\(^{46}\) By comparison to the prisoner's dilemma and externality problems, the need for uniformity was a relatively minor problem under the Articles. Because it has become an increasingly important rationale for federal authority over interstate commerce, I include it in this discussion for purposes of completeness.

\(^{47}\) The situation is similar to the driving coordination game posited by game theorists. If player one drives right, player two will want to drive left; if player one drives left, player two will want to drive right. This game produces "Nash Equilibrium" in that neither player is better off changing his or her play given the other's choice. On the other hand, there is no dominant solution;
may cause the development of nonuniform standards because members of a collective develop their own standards without being aware that other members are developing different standards (or that uniform standards would be advantageous). Even if lack of information is not a problem, an individual member of the collective may hold out for adoption of its preferred standard if the collective adoption of that standard produces greater benefits to that member than alternative standards. 48

If disparate standards do develop, the barriers to the collective adoption of a uniform standard become significantly greater because the cost to individual members of changing standards may be great. 49 While a changeover may be possible if the collective compensates the individual member for this loss, such a solution is often impractical or impossible in light of transaction costs. Thus, the collective often has an especially strong interest in establishing uniform standards from the outset of a collective activity.

C. Foreign Relations, Collective Bargaining, and the Prisoner’s Dilemma

The final problem area under the Articles of Confederation involved the inability of the United States to speak with one voice in the realm of foreign relations. 50 The Articles conferred foreign relations powers on “the United States in Congress assembled,” 51 but this power proved ineffective for two related reasons. First, states did not comply with their obligations under treaties negotiated by the United States. Second, individual states negotiated independent agreements with foreign powers. These difficulties caused serious problems for United States foreign relations, as foreign governments did not know who to negotiate with and regarded the United States as unreliable. This familiar story is a variant of the prisoner’s dilemma that is commonly associated with collective bargaining.

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48. Consider in this regard the examples of video tape cartridges and computer operating systems cited supra note 43. In both of these areas, a company (Sony and Apple, respectively), attempted to resist the industry standard that later emerged. Note, however, that this strategy proved unsuccessful.

49. This phenomenon is well illustrated by the United States’ persistent refusal to convert fully to the metric system or the fact that cars still drive on the left side of the road in the United Kingdom and a few other countries. In both of these examples, it would plainly be advantageous to these countries if, ex ante, they adopted the same standard as the rest of the world. However, once the alternative standards were well established in those countries, the costs of changing to the dominant standard apparently precluded rationalization.

50. See generally sources cited supra note 25.

51. The ARTICLES OF CONFEDERATION, passim.
After their independence from England, collective bargaining in foreign relations was highly advantageous to the states as a whole. Individually, the states were weak, and had a poor bargaining position vis-a-vis established foreign powers. By bargaining as a collective, the states could pool their resources and were in a much stronger bargaining position. This sort of collective bargaining is common in the field of labor, and is essentially a species of cartel. In the commercial context, members of a cartel lack the monopoly power to dictate prices—they are individual price takers. By pooling their market share, the cartel obtains a monopoly and can dictate prices. In the labor context, a union is a labor cartel. Of course, whether this is a good or a bad thing for society as a whole is the subject of some controversy, but from the perspective of the cartel members, there are clear advantages to collective bargaining. The states attempted to secure these advantages under the Articles by pooling their foreign relations resources.

While the obvious advantages of collective bargaining may make it relatively easy for members of a collective to agree on that strategy, collective bargaining creates significant enforcement problems because individual members have strong incentives to cheat or defect. In the commercial context, for example, if a cartel fixes prices at a level that is significantly higher than market prices otherwise would be, individual members have incentives to price their product just below the fixed price. These incentives are a form of agency cost, and create what amounts to a prisoner’s dilemma problem: while the cartel is better off as whole if there is collective action, each individual member has the incentive to act counter to the collective interest regardless of what the other members do. To overcome this problem, the collective must have viable means of enforcing the collective agreement.

In light of the prisoner’s dilemma problem, it is not surprising that under the Articles the United States had difficulty speaking with one voice in foreign relations matters. While the states could agree in principle on a strategy of collective bargaining in foreign relations, individual states had strong incentives to disregard collective agreements and pursue independent arrangements with foreign powers. And in the

52. See generally Posner, supra note 3 (analyzing effectiveness of legal and nonlegal sanctions in enforcing collective action in the labor context).
54. Likewise, if the cartel restricts production in order to raise market prices, then individual members have incentives to exceed their production limits, as the experience of OPEC demonstrates. See supra notes 7, 37.
55. Conversely, foreign countries had incentives to “buy off” a few states and undermine the collective strategy.
absence of any arrangements to enforce the collective agreement and prevent cheating or defection, there was little or nothing that the national government could do to secure compliance.

IV. DEFECTS OF THE ARTICLES AND CONSTITUTIONAL RESPONSES

The collective action problems described above proliferated under the Articles of Confederation because the Articles did not represent a significant departure from the international legal baseline. Indeed, the first substantive pronouncement of the Articles is that "[e]ach State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States . . . ."56 Thus, the Articles hew closely to the fundamental premise of the international legal system—the sovereignty of states. As a result, the Articles did not respond to the collective action problems in reaching and enforcing collective decisions that confront states in the international system.

In contrast, the Constitution departs substantially from the international conception of state sovereignty. The Constitution was approved by a special ratifying convention in each state and its preamble proclaims its adoption by "We the People of the United States."57 It contains no pronouncement of state sovereignty, and, as will be discussed more fully below, a number of provisions that are incompatible with the state sovereignty premises of international law.

56. THE ARTICLES OF CONFEDERATION, art. II. Article I provides merely that "[t]he stile of this confederacy shall be "The United States of America.""

57. U.S. Const. preamble. The Articles of Confederation, in contrast, were ratified by the legislatures of the states, and contain no reference to the people of the United States. The last paragraph of the Articles does indicate that the delegates sign on behalf of and pledge the faith of their "constituents," but that paragraph also makes clear that the delegates represent their state legislatures. The difference in the means through which the two charters were adopted may itself be a fundamental aspect of the shift from a confederation to a federal system. It has been suggested that so long as a confederal arrangement is reached through a "contract" between states, it can never be a true federal system, and that federalism exists only when there is a new social contract reflected in a Constitution adopted by the people. See generally John H. Barton, Two Ideas of International Organization, 82 Mich. L. Rev. 1520 (1984). Whatever the merits of that argument, it should be clear that when states negotiate collective action as states, they are unlikely to relinquish their sovereignty. Indeed, political theorists at the time of the framing believed that a state could not cede its sovereignty. See G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 360 (1969). In contrast, the people might adopt a new social contract that divides sovereignty between the state and national governments. See id. at 530-32; KELLY ET AL., supra note 25, at 105-06. In any event, important early Supreme Court decisions, such as McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), emphasize that the Constitution was adopted by the people in rejecting states' rights arguments premised on state sovereignty.
This fundamental change in the underlying conception of state sovereignty is indicative of significant structural changes in the Constitution. The resulting "federal" structure responds to the collective action problems experienced under the Articles at two levels. First, the Constitution facilitates collective decision making by expanding national authority and creating a more workable legislative process. Second, the Constitution incorporates institutional changes that improve implementation of collective decisions.

A. Facilitating Collective Decisions

From the collective action perspective, the central feature of government is that it replaces a regime in which the consent of each individual is required for collective action with a system in which collective governmental institutions may bind all members of the collective to a collective decision without their specific consent to that decision.58 By eliminating the requirement of unanimity, the institution of government reduces the transaction costs that would otherwise prevent collective action.59 Under the Articles of Confederation, the United States had only very limited authority to reach collective decisions without the consent of each of the states, and the legislative process did not do much to facilitate action within the scope of this limited authority. The Constitution responds to these problems by expanding the scope of federal authority and improving the legislative process.

1. Limited Authority Under the Articles

The national government established by the Articles of Confederation, to the extent that it could be called a government at all, was rudimentary at best. The Articles referred to "the United States in Congress assembled," reflecting the fundamental vision of the United States as an assembly of representatives from independent states. Congress was the United States, and its powers were not that much greater than an

58. This arrangement is the essence of the "social contract" in which the individual gives up some personal liberty by agreeing to be bound by government action, in exchange for the benefits that government provides.

59. In Coasean terms, however, the institution of government also eliminates the need to compensate those who are net losers as a result of the collective decision. This factor has at least two important implications. First, because the beneficiaries of collective action do not bear its costs, there is a danger that government will act to transfer wealth from the politically powerless to the politically powerful, whether or not such a wealth transfer produces any gain to the collective. This problem is addressed in much of the literature on political theory, especially public choice theory. Second, the fact that people are bound without their consent and without compensation may lead to increased resistance and difficulties in enforcing collective decisions, as compared to a regime in which collective decisions are always made by consensus.
assembly of state representatives would possess under traditional principles of international law. Even these limited powers were concentrated primarily in the foreign relations realm. In this area, the Articles both prohibited the states from acting independently in foreign relations matters, such as establishing embassies, entering into agreements with each other or foreign states, or engaging in war, without the consent of Congress, and authorized Congress to take important actions on behalf of the collective, including “determining on peace and war,” sending and receiving ambassadors, and entering into treaties.

Conversely, congressional authority with respect to matters such as taxation or regulating interstate commerce was quite limited. With respect to taxes, for example, Congress could ascertain or “allow” expenses for the common defense or general welfare, but could not raise that revenue directly. Instead, the Articles required states to impose taxes to supply the necessary funds for the common treasury (in proportion to the value of the land in the state). Likewise, there was no general power to regulate interstate commerce, although Congress was granted the authority to set the alloy and value of money coined under the authority of the United States or the individual states, to fix the standards of weights and measures, and to establish post offices for interstate mails.

Therefore, while the Articles granted the United States some authority to act in areas where collective action was desirable (such as the common defense and international relations), in other areas, particularly interstate commerce and the taxing power, Congress lacked the authority to make collective decisions. In these areas, collective action required the consent

60. The Articles of Confederation also contained some basic provisions on interstate comity that have been carried forward in one form or another under the Constitution. For example, the Articles of Confederation guaranteed the free interstate movement of persons, contained an analog to the Privileges and Immunities Clause of Article IV, and required states to give full faith and credit to the records, acts, and judicial proceedings of other states. The Articles of Confederation art. IV.

61. Id. art. IX.

62. See id. In theory, this provision binds states to provide the necessary revenues—which if effective would amount to an indirect power of taxation. This sort of indirect taxation via the intermediary of states currently operates relatively effectively in the European Union, for example. See George A. Bermann et al., Cases and Materials on European Community Law 91 (1993). As will be discussed more fully below, however, this indirect power was ineffective because operating via the intermediary of states facilitated, indeed invited, resistance by the states, and the national government lacked the institutional mechanisms to compel compliance.

63. See The Articles of Confederation art. IX. It is worth noting that the power to fix the alloy and value of money and the power to set standards for weights and measures are prime examples of situations where rationalization is highly desirable, and where it is much easier to set uniform standards before divergent standards have developed. The establishment of post offices is also an area where collective action is highly desirable, and where no state is likely to have any countervailing interest.
of all states to either amend the Articles or to establish a new agreement under principles of international law. Thus, it is not surprising that the states experienced collective action problems in these areas.

Even in those areas where the United States was empowered to act under the Articles, the legislative process was not designed to facilitate collective action. For all important actions, including engaging in war, entering into treaties and alliances, coining or regulating the value of money, ascertaining expenses for the conduct of the common defense or the general welfare, and several other actions, the Articles required the approval of nine of the thirteen states. This supermajority requirement enabled any minority of five states to block collective action, which increased transaction costs (in comparison to simple majority requirements) by facilitating strategic behavior. More generally, such a supermajority requirement decreases the chances that the requisite number of states would agree to collective action.

2. Constitutional Response

As any student of constitutional law knows, the Framers responded to these problems by expanding the scope of federal power and fundamentally restructuring the legislative process. As a result of these changes, the new government had the necessary authority to make collective decisions in areas where collective action problems had prevented effective decision making under the Articles.

Most federal powers are, of course, enumerated in Article I of the Constitution, which expands the foreign relations powers of the federal

64. See id. art. XIII ("[N]or shall any alteration at any time hereafter be made in any of [the Articles of Confederation]; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State"). The failure of the Constitution's Framers to follow this means of amending the Articles has been the source of considerable academic discussion, with some observers suggesting that this point raises doubts as to the legitimacy of the Constitution. See, e.g., GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 5 (3d ed. 1996) ("There is . . . a sense in which the Constitution itself was an unlawful act. Notably, the Convention disregarded the amending procedure set out in the Articles, which required approval by all thirteen state legislatures.").

65. See THE ARTICLES OF CONFEDERATION art. IX.

66. It is also worth noting that the delegates to Congress were under the complete control of the states—they were appointed by the states and could be recalled by them at any time. See id. art. V. Thus, the delegates were agents of the states rather than agents of the collective, and delegates could not be expected to sacrifice their states' interest in the broader interest of the collective. To the extent that members of Congress are currently elected directly by the people of their state or district and cannot be recalled (although they must face reelection), strategic behavior may be reduced somewhat.

67. U.S. CONST. art. I, § 8. Some federal powers, of course, rest in the executive and the judiciary. For example, the President makes treaties with the advice and consent of the Senate. Id. art. II, § 2. To simplify the discussion, I am treating all collective decisions as "legislative" in
government, adds the power to tax and spend, and authorizes federal regulation of interstate commerce and other economic matters. These powers are supplemented by the Necessary and Proper Clause, which confirms broad federal authority to select the means of implementing the enumerated powers. The expansion of federal authority in these areas is not only a pragmatic response to the problems that arose under the Articles, but also makes sense in collective action terms. Each area is one in which we might expect collective action problems to prevent effective collective decision making under traditional principles of international law.

Equally important, the new legislative process created by the Constitution reduced the transaction costs that limited the effectiveness of Congress under the Articles. First, the means of electing members of Congress attenuated state control over them in comparison to the Articles, character and all "legislative" decisions as originating in Congress. While neither generalization is entirely accurate, they do not alter the basic analysis. Transaction costs are clearly no greater barrier to collective decisions when those decisions are made by the executive or the judiciary than when they are made by Congress.

68. See id. art. 1, § 8, cl. 3 (foreign commerce); id. cl. 10 (define and punish piracy, offenses on the high seas, and offenses against the law of nations); id. cl. 11 (declare war, grant letters of marque and reprisal, and make rules concerning capture); id. cl. 12 (raise and support an army); id. cl. 13 (maintain a navy); id. cl. 14 (make rules for land and naval forces); see also id. art. II, § 2, cl. 2 (presidential power to make treaties and appoint and receive ambassadors and other ministers). While some of these powers were also granted under the Articles, others, such as the power to raise and support armies, were not. The foreign relations powers of the federal government were strengthened in other respects as well. For example, the Constitution absolutely prohibits states from entering into treaties with each other or foreign governments, see id. art. I, § 10, cl. 1, while treaties were permitted under the Articles, with the consent of Congress. See THE ARTICLES OF CONFEDERATION art. VI. On the other hand, the Constitution does permit states to enter into compacts or agreements with congressional consent. see U. S. CONST. art. I, § 10, cl. 1.

69. See id. art. I, § 8, cl. 1. As noted previously, there is a sense in which the Articles granted Congress the power to tax indirectly by deciding on expenditures and binding states to impose taxes to contribute their share. In that sense, perhaps, the real significance of the taxing and spending power under the Constitution may be in converting the power from an indirect to a direct one.

70. See U.S. CONST. art. I, § 8, cl. 3. Of course, the scope of the commerce power has depended to a large degree on its interpretation by the Supreme Court, but its addition to the panoply of federal authority is both widely recognized as crucial to the new Constitution, and as a matter of consensus among the Framers.

71. For example, the federal power with respect to currency was strengthened in comparison with that under the Articles, as Congress was granted exclusive authority to coin money. See id. art. I, § 8, cl. 5. In addition, Congress was granted power to adopt uniform bankruptcy laws, see id. art. I, § 8, cl. 4, which can be understood as the flip side of the Constitution's prohibition of state laws that impair the obligation of Contract. See id. art. I, § 10, cl. 1; Levy, supra note 32, at 430-31. Other powers related to interstate commerce include the power to establish post offices and post roads, see U.S. CONST. art. I, § 8, cl. 7, and the patent and copyright power, see id. art. I, § 8, cl. 8.

72. See supra notes 25-55 and accompanying text.
under which the state had complete control of their representatives and could recall them at any time. The House of Representatives was elected by direct popular vote,\textsuperscript{73} and thus were not politically accountable to the state government at all. And while Senators were initially elected by state legislatures, they served for six year terms and could not be recalled.\textsuperscript{74} This reduced control reduced the likelihood that legislators would act solely as agents of their state government, and thus reduced (but did not eliminate) the likelihood of strategic behavior. More important, legislative decisions are with few exceptions made by majority vote. Although bicameralism and presentment requirements increase transaction costs and make it somewhat more difficult to reach collective decisions than under pure majority rule,\textsuperscript{75} the legislative process in the United States is much more easily satisfied than either the requirements of consent under traditional international law or the supermajority and unanimity requirements of the Articles of Confederation.\textsuperscript{76}

\section*{B. Implementing Collective Decisions}

While the Constitution's expansion of federal authority and restructuring of the legislative process was clearly an important response to the collective action problems that arose under the Articles of Confederation,

\textsuperscript{73} See U.S. CONG. ART. I, § 2.

\textsuperscript{74} See id. art. 1, § 3. The 17th Amendment provides for direct popular election of Senators, and was adopted in 1913. But given the lack of recall power or the power to "instruct" senators, state control was already quite attenuated prior to the adoption of the 17th Amendment. See William H. Riker, \textit{The Senate and American Federalism}, 49 AM. POL. SCI. REV. 452, 455-61 (1955). Indeed, over time federal elections determined the outcome of state legislative races, as senatorial candidates campaigned for "pledged" legislators at the state level. See id. The situation was analogous to, though not as extreme as, the operation of the Electoral College today, where most people do not even realize that they are voting for electors rather than for a presidential candidate, and the vote of the electors is more or less a formality.

\textsuperscript{75} Indeed, the "Great Compromise" that produced the bicameral legislature was, in a sense, specifically designed to facilitate the obstruction of legislation by a "minority" coalition of states. As the familiar story goes, larger states naturally favored proportional representation in the legislature, while small states favored equal representation. The small states feared that the large states would unfairly control the legislature if proportional representation were adopted, while the large states feared that the small states would "unfairly" dominate under equal representation. Bicameralism allows a group of states that is in the minority in one of the houses to block legislation in the other.

\textsuperscript{76} Of course, the principle is not applied uniformly throughout the Constitution. Most clearly, Treaties require the approval of two-thirds of the Senate and Constitutional Amendments are even more difficult. These departures from the principle of majority vote, however, underscore the pervasiveness of the principle as a general matter. The Framers departed from majority vote only with respect to those issues they considered to be of particular importance. Treaties were reserved because of the fear that such entanglements would draw the collective into war, \textit{see The Federalist} No. 64, and Constitutional Amendments because they involved a change in the fundamental relationships within the collective.
the Framers’ response to the problem of noncompliance under the Articles was at least as important.\textsuperscript{77} As discussed above, when an individual member’s interests diverge from that of the collective, as it often will, the member has an incentive to cheat or defect, and these incentives are all the more powerful and recurrent when the collective can act without the consent of all of its members. Effective collective action, therefore, requires some means to enforce collective agreements and ensure compliance. The Articles, hewing closely to the international model, did not provide the necessary institutional mechanisms or legal structure to enforce federal decisions. It is therefore not surprising that the states often did not comply with their obligations under the Articles. The Framers responded to the problem of noncompliance by creating the necessary federal institutions and fundamentally restructuring the legal relationship between the federal government and the states.

1. Implementation Under the Articles

The problems of noncompliance under the Articles were the product of their failure to establish effective means of implementing and enforcing collective decisions. To the extent that the Articles imposed long-term obligations and bound states to collective decisions to which they might not consent, the interests of individual states often diverged from those of the collective. But the indirect implementation of federal law under the Articles actually facilitated state resistance, and the lack of federal enforcement institutions or sanctions for noncompliance meant that states could ignore their obligations with impunity.

Like international law, the Articles of Confederation operated on the states in their corporate capacity, and did not apply directly to persons.\textsuperscript{78} This was true both with respect to the obligations incorporated into the Articles themselves, and to the exercise of authority granted to the “United States in Congress assembled.”\textsuperscript{79} Thus, federal action pursuant

\textsuperscript{77} Leonard Levy has characterized the problem of noncompliance as “more serious” than the lack of federal authority. See Leonard Levy, Constitutional History, 1776-1789, in AMERICAN CONSTITUTIONAL HISTORY 18, 23-24 (L. Levy et al. eds., 1989).

\textsuperscript{78} In other words, the United States under the Articles operated under the “dualist” model of international law, under which international and domestic legal systems operate on different planes. See generally LOUIS HENKIN ET AL., INTERNATIONAL LAW 140-41 (2d ed. 1987). Under this model, the “objects” of international law are states, and individuals have no legal status. Domestic law applies to individuals, but is seen as a separate legal system, and some action by domestic authorities is necessary to make international law applicable to individuals. While some domestic legal systems reject the dualist model and treat international law as directly incorporated into domestic law without further action by domestic authorities, they do so as a product of their own domestic legal system. From the perspective of international law itself, the dualist model continues to predominate.

\textsuperscript{79} See The ARTICLES OF CONFEDERATION art. VI (prohibitions); id. art. VIII (contributions); id. art. IX (powers); see also id. art. XIII (discussing how states agree to “abide by determinations
to the Articles did not ordinarily affect individuals directly, but rather states acted as intermediaries for the implementation of federal authority.\textsuperscript{80} Because states implemented federal law, there was no need for a federal executive or judiciary. From a collective action perspective, this indirect model of implementation is flawed because it exacerbates agency costs. States retain control over whether and how to implement federal law, and if their interests diverge from those of the collective, it is easy for them to cheat or defect.\textsuperscript{81}

In light of the states’ incentives and opportunities to cheat or defect, it was especially important for the Articles to provide some means of ensuring that states complied with their obligations. But, jealous of their traditional sovereignty under international law, the states were unwilling to submit to any significant collective enforcement authority. While the Articles proclaim that “[e]very state shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them,”\textsuperscript{82} they are conspicuously silent as to what happens if a state fails to do so. There are no provisions for sanctions and no federal institutions to enforce any sanctions that might be imposed. The Articles authorized Congress to create ad hoc tribunals for purposes of resolving disputes between states “concerning boundary, jurisdiction or any other cause whatever,” and private disputes over land claimed under grants from different states,\textsuperscript{83} but no similar provision was made for resolving questions of state compliance with obligations under the Articles.

The significance of these defects in the Articles is well illustrated if one considers the question of taxation. The conventional wisdom is that Congress did not have any power to tax under the Articles, that this lack of power causes the United States great problems, and that the solution was to grant Congress the power to tax. As noted previously, however, the Articles arguably do confer on Congress an indirect power to tax. Under Article VIII, Congress has the power to “allow” charges of war and other expenses incurred for the common defense and general welfare, and states are obligated to levy the necessary taxes to pay their proportional share of these charges and expenses. The problem is that because this provision depends upon states to levy, collect, and pay over the taxes, of the United States in Congress assembled”). Some incidental powers of Congress, such as the power to grant letters of Marque and Reprisal, apparently did operate on individuals, but these examples do not alter the basic tenor of the Articles as a compact between states.


\textsuperscript{81} Implementation by states also made it more difficult to detect noncompliance.

\textsuperscript{82} The Articles of Confederation art. XIII.

\textsuperscript{83} Id. art. IX.
it is easy for states to resist.\textsuperscript{84} And when states did not live up to their obligations, there was nothing that Congress could do about it. Thus, the problem under the Articles arguably was not so much the lack of any federal power to tax, but rather the ineffectiveness of the power that was granted.

2. Constitutional Response

The Framers’ response to the problems of implementation and enforcement under the Articles is, in many respects, the central constitutional innovation that characterizes federalism and distinguishes it from other collective arrangements under international law. The Constitution replaces the dualist model of the Articles with a single, integrated legal system in which federal institutions directly implement and enforce federal law.\textsuperscript{85} This fundamental restructuring of the legal relationships between the states and the national government greatly reduced problems of noncompliance, and provided the foundations for successful collective action.

The most obvious constitutional manifestation of this fundamental change was the creation of federal institutions to implement the law directly. While the United States under the Articles consisted solely of Congress, the Constitution provided as well for the creation of an executive branch to represent the collective internationally and implement federal law, and a judicial branch to interpret and apply the law to resolve disputes between individuals. Aside from the President and the Supreme Court, the Constitution does not specify the composition or structure of either the executive or judicial branches, but rather leaves those tasks to Congress. And while the executive and judicial branches created by the First Congress were a far cry from the mammoth federal government in place today,\textsuperscript{86} the authority and power of these new federal institutions

\textsuperscript{84} As noted above, states will have incentives to do so because a public good is involved. See supra notes 27-32 and accompanying text.

\textsuperscript{85} In international legal theory, this would be referred to as a “monist” view of the relationship between domestic and international law. Some countries’ internal law operates under a monist model. This is true in United States law, for example, with respect to “customary” international law, which is incorporated directly into United States law without any action by the political branches. See The Paquette Habana, 175 U.S. 677, 711-12 (1900). But the employment of a monist model is entirely a matter of the domestic law of the country involved—states are not required by international law to adopt a monist model. See supra note 78.

\textsuperscript{86} Initially, the executive branch included only the Departments of War, State, and Treasury, and the Offices of Attorney and Postmaster General. See Kelly et al., supra note 25, at 123-28. In the early constitutional period, the post office was far and away the largest federal employer. See Nelson, The Irony of American Bureaucracy, in BUREAUCRATIC POWER IN NATIONAL POLICY MAKING 163, 168 (4th ed. 1986) (“Jefferson found that only 600 of the federal government’s 2700 civilian positions were his alone to fill—Congress had entrusted the Postmaster-General with more
marked a major change from the Articles. The creation of these institutions meant that the federal government was a true government in every sense of the word, and was no longer dependent upon the states to implement collective decisions.

The creation of federal institutions reflected a more subtle, but in some respects more significant, shift. While collective decisions under the Articles applied only to states in their corporate capacities, legislation and other federal action under the Constitution was to apply directly to individuals.87 The significance of this shift was not lost on the Framers, who overwhelmingly endorsed direct applicability as the means of avoiding problems with state resistance that had surfaced under the Articles.88 By making federal law directly applicable to individuals and creating federal institutions to enforce federal law directly, the Constitution greatly reduced the opportunity for states to resist the implementation of collective decisions. These federal institutions were not directly accountable to the states, moreover, and would therefore act as agents of the collective rather than an individual state, reducing agency costs.89

appointees than the President."). While the executive branch grew throughout the 19th century (the first new department, the Department of the Interior, was added in 1849), massive growth in the federal government did not occur until the New Deal Period. See generally BUREAUCRATIC POWER AND NATIONAL POLICY MAKING, supra; DAVID NACHMIAS & DAVID H. ROSENBLOOM, BUREAUCRATIC GOVERNMENT USA (1980); LEONARD D. WHITE, THE FEDERALISTS (1948). The original Judiciary Act of 1789 provided for federal Circuit Courts, with jurisdiction over diversity suits. Original jurisdiction over federal question cases (except briefly and abortively under the Midnight Judges Act) and the creation of Federal District Courts did not occur until 1875. See Richard E. Levy, Comment, Federal Preemption, Removal Jurisdiction, and the Well-Pleased Complaint Rule, 51 U. CHI. L. REV. 634, 636 & nn.11-12 (1984).

87. Curiously, perhaps, the Constitution does not expressly provide that federal law shall be directly binding on individuals, although that clearly was the Framers' intent. See New York v. United States, 505 U.S. 144, 165-66 (1992). The powers listed in Article I, section 8, however, are phrased in broad terms that are inconsistent with the notion that federal legislation applies only to states in their corporate capacities. More importantly, perhaps, the Supremacy Clause provides that federal law is the supreme law of the land and declares that "the Judges in every State" shall be bound by it. U.S. CONST. art. VI, § 2. Because state judges resolve legal disputes between private individuals, this language would imply that federal law applies directly to those individuals.

88. See, e.g., THE FEDERALIST NO. 15 (Alexander Hamilton) ("The great and radical vice in the construction of the existing Confederation is the principle of LEGISLATION for STATES or GOVERNMENTS in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist."). For a collection of illustrative statements from the Framers, see New York v. United States, 505 U.S. at 163-65. While Justice O'Connor's opinion in New York v. United States recognizes the significance of the shift to direct applicability of federal law, I disagree with the conclusions she draws from this historical background. See infra notes 104-20 and accompanying text.

89. The President is elected by the electoral college, and state legislatures are to determine the means of selecting the electors. See U.S. CONST. art. II, § 2. While this mechanism means that the Framers intended states to have some input into the selection of the President, the President is ultimately accountable to a national constituency, and is intended to represent the national interest.
Two related constitutional principles reinforce the direct applicability of federal law and the creation of federal institutions to enforce it. The first is the principle of federal supremacy, which is expressly stated in the Supremacy Clause. As a result of this provision, states could not render federal law ineffective by the simple expedient of passing contrary legislation. The second principle is federal jurisdiction to review state court decisions, especially those raising issues concerning the interpretation and application of federal law. This principle gave federal institutions final say on the interpretation and application of federal law, providing an institutional mechanism to ensure that states applied and recognized the supremacy of federal law.

This is not to say that the Constitution completely eliminated problems with implementing collective decisions. Because the federal government had been given greatly expanded power to bind states to collective decisions without their consent (and over their objections), such problems were to be expected, especially in the initial phases during which the federal arrangements crafted by the Framers were being worked out in practice. Thus, state resistance remained something of a problem throughout the early constitutional period, and southern fears concerning

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The President in turn appoints (with Senate consent) major executive officials, as well as Supreme Court Justices and lower federal court judges.

90. See U.S. Const. art. VI, § 2.

91. Ironically, Madison and other delegates to the Constitutional Convention who favored strong federal power settled on the Supremacy Clause as a “second best” solution after their original proposal for a congressional veto over state laws was rejected by a majority of the delegates. See, e.g., Mason, What Was the Federalist-Antifederalist Debate About?, in The Confederation and the Constitution: The Critical Issues, 37, 41 (G. Wood ed., 1973). In practice, the Supremacy Clause is much more powerful than a congressional veto would have been. First, the Supremacy Clause gives Congress a practical veto over state laws (at least those that fall within the scope of federal power) because Congress need only pass contrary legislation. Second and more importantly, the Supremacy Clause allows the federal judiciary to invalidate state laws without the need for congressional action. While the legislative process under the Constitution facilitated collective decision making by comparison to the Articles, reliance on a congressional veto of state laws to invalidate them would have required Congress to take affirmative action in response to every state law that was inconsistent with federal policy, which might not have been possible and certainly would have been difficult in many cases.

92. See Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 351, 362 (1816) (upholding Judiciary Act’s grant of appellate jurisdiction over state court decisions presenting federal questions). Consider in this regard Justice Holmes’s famous statement, “I do not think that the United States would come to an end if we [judges] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.” Oliver Wendell Holmes, Collected Legal Papers 295-96 (1920).

93. See Martin, 14 U.S. (1 Wheat.) at 347 (“The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.”).

94. In particular, states resisted federal decisions in several noted instances, including Martin,
the perpetuation of slavery eventually led to the Civil War, which sorely tested the survival of the collective. Notably, however, the United States survived intact; the collective continued to be effective. The institutional changes wrought by the Constitution thus had their desired effect—they enabled the collective to overcome the problem of cheating or defection by its members.

Indeed, the inability of states to successfully resist federal law provides its own lesson in the dynamics of collective action. On various occasions, individual states defied federal authority directly because federal action interfered with a particularly important state interest.\textsuperscript{95} In the process, these states often asserted broader principles and state prerogatives that might have been expected to garner support from other states. But these states typically remained isolated in their resistance because the federal action in question did not engage the interests of other states to the same degree. In other words, states had difficulty resisting federal authority because they lacked the institutional mechanisms to overcome collective action problems. Conversely, the failure of state resistance ultimately demonstrates the superiority of the constitutional mechanisms for facilitating and enforcing collective action.

V. IMPLICATIONS

In the preceding Parts of this Paper, I have shown that the collective action model provides a powerful tool for understanding the structure of federalism in the United States Constitution. The problems that led to the adoption of the Constitution can be traced to the failure of the Articles of Confederation to address collective action problems, and the Constitution responds to this failure by facilitating collective decision making and creating an institutional structure to ensure compliance with collective decisions. This model of federalism has significant implications for a variety of current issues of federalism. At this juncture, I will make no attempt to fully explore or develop these implications, but I will offer a

\textsuperscript{95} See examples cited supra note 94.
few examples to illustrate the potential uses of a collective action perspective on federalism.

A. Construing the Scope of Federal Power

First, insofar as 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, collective action considerations might also inform the determination of the proper scope of federal power. For example, the expansion of federal authority under the Commerce Clause makes sense from a collective action perspective because of externalities and the prisoner’s dilemma (or race to the bottom) problems.

From this perspective, the Court’s decision in United States v. Lopez might also make sense because there is no immediately obvious collective action problem that would cause states acting unilaterally to reach inappropriate decisions regarding the legality of gun possession at or near schools. Gun possession in the schools does not appear to be a public goods externality, or prisoner’s dilemma/race to the bottom problem. Defenders of federal authority in this area might argue that there are significant economies of scale or that the problem is so large that only the federal government has the necessary resources to address this problem, but these rationales do not distinguish gun possession from any other social problem and would justify universal federal authority.

In offering this perspective on Lopez, I do not mean to endorse its specific result or the general proposition that the Supreme Court should enforce the principle of enumerated powers by invalidating legislation.

96. See supra notes 3-7, 25-42 and accompanying text.
97. The problem of child labor, for example, which the pre-New Deal Court considered to be beyond the scope of federal authority, is essentially a prisoner’s dilemma or race to the bottom problem that justifies collective action. See supra note 39.
98. 115 S. Ct. 1624 (1995). The commentary on Lopez is already prolific, and I shall not attempt to catalogue it here. To be sure, many commentators have made the point that there is no particularly good reason for federal action in this area, although others would disagree. The collective action perspective provides one particular way of looking at the question of whether this area is an appropriate one for federal action.
99. Safety and freedom from crime are certainly public goods from the individual perspective. But one state’s decision to enforce a gun free school zone does not solve the problem for other states so as to give states incentives to be free riders.
100. There may be an externality involved insofar as gun violence in schools spreads from one community to another. This cost is exported and a community in which gun violence in schools is a problem might therefore underinvest its resources in addressing the problem. Yet an unwillingness to invest in criminalizing gun possession in schools did not appear to be a problem prior to the adoption of the Federal Gun Free School Zones Act, although an inability to do so may have been.
101. It is hard to see what a state or community might gain by allowing gun possession in schools that would create the necessary incentives to cause such problems.
that exceeds the scope of those powers as construed by the Court. Indeed, if collective action considerations are relevant to determining whether federal regulation in a particular field is appropriate, it is arguably the province of Congress and the President to determine whether collective action problems in a given area that affects commerce are sufficiently serious to warrant federal action. Thus, I am much more comfortable advocating the use of collective action considerations to inform legislative judgments than as a rubric for judicial enforcement of limits on federal authority.

On the other hand, the collective action perspective is more directly relevant to constitutional doctrine in another area of federal power—individual rights. In an earlier Essay, I expressed my belief that the Supreme Court has taken an inappropriately narrow view of the congressional individual rights authority conferred in the Reconstruction Amendments. Ultimately, this narrow view of the individual rights authority seems to stem from some intuitive assumption that although the individual rights power was a necessary response to the particular problem of freed slaves after the Civil War, the power is somehow inconsistent with the broader scheme of federalism. The collective action perspective suggests an alternative set of assumptions about the individual rights power.

Individual rights, like other areas of federal authority, is a field in which we might expect collective action problems to arise. First, in the absence of federal minimums, there is a significant risk of a race to the bottom respecting the treatment of “undesirable” minorities. To the extent that unpopular minorities are unprotected in the political process, they are likely targets of discrimination and other rights abuses. The threat that such people might “vote with their feet” and leave the state provides no disincentive, since this outcome would be viewed by the majority as a benefit, rather than a harm. Second, individual rights abuses also create geographic externalities, both in the form of refugees who impose significant costs on surrounding states, and in the emotional impact of abuses on those who witness or are aware of them. Finally,


103. Evan Caminker made this point in the discussion after Nelson Lund presented his Paper, Nelson Lund, Federalism and Civil Liberties, 45 U. Kan. L. Rev. ___ (1997), in response to Professor Lund’s use of the Mormon settlement of Utah as an example of the advantages of state control over individual rights.

104. That this is in essence a form of “aesthetic” or emotional, as opposed to physical or economic, harm does not detract from its significance. For many people, rights abuses—even those that occur at great geographic remove—evoke strong reactions, as the situation in Bosnia, for example, illustrates. Certainly the issue of slavery aroused very strong feelings among a large segment of the population in the United States.
individual rights protections also engage federal interests in securing compliance with federal law, insofar as individual rights protections and the rule of law are closely allied, and states must respect the rule of law for the institutional structure of federalism to work effectively.105

From the collective action perspective, then, the omission of federal individual rights authority under the original Constitution is perhaps the most significant flaw in the federal structure of the Constitution. While such an omission may have been necessary to accommodate slavery and thereby secure the ratification of the Constitution, it was the failure to deal with slavery that nearly caused the demise of the Union. Thus, just as the Constitution corrected the flaws of the Articles of Confederation, the Reconstruction Amendments corrected the flaw in the federal structure of the original Constitution by completing the panoply of federal powers.

B. State Sovereignty and the Institutional Structure of Federalism

The collective action perspective also raises questions about some federalism doctrines premised on state sovereignty, or what is sometimes called the autonomy or barrier model of federalism.106 Both the no commandeering rule of New York v. United States107 and the application of the Eleventh Amendment to bar suits against states even when those suits arise under federal law seem inconsistent with the institutional structure of federalism.

As I have argued elsewhere, the Court’s historical analysis in New York v. United States distorts the context of the Framers’ decision to make federal law directly applicable to individuals, and thus draws faulty conclusions from that historical background.108 The Court reasoned that because the Framers endorsed the direct applicability of federal law, they implicitly denied Congress the authority to act via the intermediary of

105. Respect for the rule of law reduces the costs of enforcing federal decisions by reducing the incidence of outright state defiance as well as less obvious forms of resistance and noncompliance. While the federal government may resort to the threat or use of force or other sanctions to secure compliance, such measures entail significant costs. More broadly, federal systems sustained solely by the threat or use of force do not last, as the disintegration of nominally federal systems after the demise of the Soviet Union demonstrates. This argument is developed more fully in Levy, supra note 102, at 97.


states by requiring states to legislate in accord with a federal mandate. But the collective action account of federalism clarifies that the direct applicability of federal law increased federal power vis-a-vis the states by limiting the states’ opportunities for resisting federal law. Collective action (legislation) that operates on states in their corporate capacity and requires them to legislate in accord with federal policy is the very model through which the international system preserves state sovereignty.

There may be other justifications for the result in *New York v. United States*. Indeed, the collective action perspective suggests that state implementation of federal mandates may be undesirable because it breeds resistance by states, and that concern was certainly expressed by the Framers. Perhaps the risk of such resistance is sufficiently great that the Framers chose to deny this option to Congress, but that conclusion does not follow directly from the decision to empower Congress to act directly on individuals or from the historical record cited by the Court in *New York v. United States*. And of course this rationale is far from the concern for the preservation of state sovereignty expressed by the Court in *New York v. United States*. More fundamentally, the collective action account of the institutional structure of federalism underscores that its essential feature is the rejection of the dualist, state sovereignty-based model of international law.

Likewise, the interpretation of the Eleventh Amendment in *Hans v. Louisiana* to bar suits against states by their own citizens arising under federal law seems incompatible with the collective action account of the institutional structure of federalism. Neither the text of the Eleventh Amendment nor its historical background requires its application outside of the context of diversity suits. A recognition of state sovereign immunity in that context makes some sense, but to immunize states

109. See id. at 521-22.
110. See id. at 515-22.
111. Indeed, legislation via the intermediary states is arguably more protective of state prerogatives than directly applicable federal legislation. See id. at 524-26.
112. See supra notes 85-89 and accompanying text.
113. 134 U.S. 1 (1890).
115. The international legal principle of sovereign immunity rests on the premise of the sovereign equality of states, which implies that no state may subject another state to its laws or its courts. See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 451-63 (discussing the judicial immunity of states). While the Constitution abandons the international
from suits for violation of federal law is incompatible with the basic principle of federal supremacy and with the federal courts' final say on the interpretation and application of federal law, which are essential components of the institutional response to the problem of noncompliance under the Articles. More fundamentally, the institutional structure of federalism rejects the premise of state sovereignty in the relationship between the states and the federal government.

The importance of federal jurisdiction to oversee state compliance with federal law has required the Court to engage in a series of doctrinal contortions that have left Eleventh Amendment jurisprudence hopelessly incoherent. These include the doctrine of Ex parte Young, which allows state officials to be sued for injunctive relief; approval of state waivers of sovereign immunity, including waivers of sovereign immunity that are required as a condition of receiving federal funds; and congressional abrogation of state immunity under the Fourteenth Amendment and even, until the decision in Seminole Tribe v. Florida, under the commerce power. These doctrines reconcile to some extent the holding of Hans with the need for federal jurisdiction to enforce federal law, but they do so at considerable cost in terms of doctrinal cohesion, and the institutional enforcement arrangements they permit are much weaker than those which would exist if federal jurisdiction over states with respect to matters arising under federal law were permitted. In any event, the collective action perspective raises further questions about the Court's decision in Hans.

116. See supra notes 89-92 and accompanying text.
118. For general discussion of this doctrine, see 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3524, at 151-56 (2nd ed. 1984).
119. See id. at 182-90.
123. The Seminole Tribe decision, while undoubtedly correct in its conclusion that Congress may not abrogate Eleventh Amendment immunity under the commerce power, is a further indication that the Court is not interested in reconsidering Hans.
VI. CONCLUSION: COLLECTIVE ACTION AND THE ROLE OF STATES

In offering a collective action perspective on federalism, I have in this paper focused on the national perspective. I have sought to understand more fully the problems that arose due to the weakness of national government under the Articles of Confederation, and thereby to gain insight into the ways in which the Constitution strengthens the national government. This is, of course, a one-sided account. Standing alone, this analysis does not explain federalism because it does not explain why the states should be retained. Put differently, if collective action problems among the states were the only concern, the states should be abolished and the United States should be a unitary state. Such an outcome obviously would have been politically unacceptable at the time of the framing, and almost certainly continues to be so today. But there is more to it than that.

The collective action concepts which illuminate our understanding of national power also illuminate the retention of states. As noted previously, all governments are a form of collective action and, as such, are the agents of their citizens. However, insofar as the interests of individuals within the collective diverge—as they inevitably will—they are imperfect agents. The collective interest (which is essentially the aggregation of individual interests) will necessarily run counter to the interests of some individuals in some instances. We all tolerate these agency costs, however, because they are greatly outweighed by the benefits of collective action. Nonetheless, individuals will naturally prefer a form of government in which these agency costs are minimized.

Generally, agency costs are lower in smaller and more homogenous political communities because their members are more likely to have shared interests.124 As the political community becomes larger and more diverse, agency costs will increase. Thus, all other things being equal, people generally prefer to be governed at the local level, where they have greater confidence that their interests are shared by others and proportionally greater say in collective decisions.125 Because collective action among states increases agency costs, it will be acceptable only if there are concomitantly greater benefits. Thus, the Constitution allocates authority to the federal government in areas where collective action problems are

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124. The smallest unit is the individual, who as a rational profit maximizer is presumably a perfect agent for his or her own interests. A family is a slightly larger unit in which individual interests are shared to a particularly large extent, although the degree of shared interests obviously varies greatly from family to family.

125. As Madison recognized, however, the down side of this greater control in small, homogenous communities is that it can be used to oppress political minorities. See THE FEDERALIST No. 10 (James Madison).
likely to arise, but reserves authority for the states in those areas where the interests of the broader collective is slight.

Since there are other advantages to local governance, even unitary states allocate some authority to governmental subunits. But experience has shown that power has a tendency to concentrate at the center, and one might not trust the central government (or the people who operate that government) to make appropriate decisions about whether to devolve authority to state or local authorities. The Framers responded to these concerns by preserving in the Constitution a certain independence and status for the states that enables them to counterbalance the centralizing trends of the national government. This approach, like the Framers’ approach to separation of powers, uses competing governmental institutions to check the undesirable tendencies of each other. The institutional counterweight of member states, which distinguishes a federal system from a unitary state, means that the allocation of central and peripheral authority will differ markedly between federal and unitary states.

Cases like New York v. United States, Lopez, and Seminole Tribe suggest that the Court believes the balance of authority has swung too far to the national government. As this Symposium illustrates, the Court’s apparent interest in revisiting federalism issues has prompted a renewed discussion of the proper balance of authority in our federal system. In rethinking the balance of authority, however, we should remain conscious of the collective action problems that led the Framers to expand collective decision making and enforcement authority in the Constitution. Restricting federal power so as to preserve or enhance state autonomy may be desirable, but it also entails costs.

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126. For example, information costs would indicate that local decision making is desirable where knowledge of local conditions is essential.

127. See The Federalist No. 51 (James Madison) ("But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.").

128. Thus, while the focus of the Paper has been on using collective action concepts to understand why and how national authority was increased under the Constitution, these concepts can also facilitate our understanding of the role of states in a federal system. I expect to explore that role further as part of a larger and more comprehensive collective action theory of federalism.