

STATE COLLECTIVE ACTION*

Although the Blue and Gray armies disbanded after Appomattox, the primordial forces that caused the Civil War are perpetual. These forces are not specific to antebellum America, but rather are the incentives that generate state collective action, a phenomenon by which states with common interests act in concert to obtain benefits for themselves without regard for national welfare. In the Civil War, both the North and the South went to war partially over these sectarian interests. And although modern-day instantiations of state collective action are less bellicose and less capacious than the Civil War was, they still have a potentially important effect on social welfare and yet are undertheorized in the literature. This Note aims to fill that gap.¹

Three stylized examples of how state collective action may be used to regulate pollution illustrate how state collective action operates and what effects it may have. Each example assumes that the northeastern United States has greater air pollution than the rest of the country, but varies the cause of the increased pollution. In the first example, the higher pollution is caused by air currents that blow pollution into the Northeast from power plants that are located outside the Northeast and generate power exclusively for states located outside the Northeast. This example is the familiar case of a negative externality: the non-northeastern states will pollute more than is optimal because they do not bear the full costs of their pollution. Acting individually, each northeastern state likely can do little to affect the behavior of the polluting states; however, if they act collectively, they may be able to impose sanctions on the polluting states to address the excess pollution, leading to socially superior outcomes. Such state collective action would be socially beneficial on a national basis, but would redistribute welfare from the polluting states to the northeastern states.

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¹ By describing how groups of states act like interest groups or factions, this Note implicates a large literature on collective action and interest group influence. On collective action generally, see, for example, MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971); and MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* (1982). On the influence of interest groups and factions, see, for example, *THE FEDERALIST* NO. 10 (James Madison); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986); and Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985). Previous work has noted that government subdivisions can be viewed as interest groups, see, e.g., Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 41 (1991) ("In effect, each district will be an interest group that . . . is relatively small and intensely interested in its own local projects."), but has not focused on the methods by which government subdivisions act collectively.

In the second example, power plants in each northeastern state generate power used only in that state but cause pollution across the whole region. Here the northeastern states will generate more power than is optimal because of collective action problems: by generating less power, each state receives a small benefit from the resulting pollution reduction but incurs a large cost from lost power. If the northeastern states banded together, they may overcome this collective action problem by regulating power production and pollution regionally. State collective action in this example would also be socially beneficial on a national basis, but would affect only the Northeast.

In the third example, northeastern residents cause the higher levels of air pollution by driving more miles than residents of other states. Assume further that automakers could improve fuel efficiency to ameliorate this problem, that doing so would increase the cost of each car, and that production constraints force automakers to sell a standardized product in all states. Although the benefit from reducing emissions is worth the cost of fuel-efficient cars for the northeastern states, that benefit is not worth the cost to the other states. Thus, the status quo of automakers producing fuel-inefficient cars is socially optimal. However, the northeastern states may respond by acting collectively to adopt regional emissions standards that force automakers to make fuel-efficient cars if they want to sell any cars in the Northeast.² This type of state collective action would be socially suboptimal on a national basis and would involve the Northeast imposing costs upon the rest of the nation to obtain a less valuable regionalized benefit.

These examples lay out the three basic effects state collective action can have. It can maximize social welfare by creating benefits for the acting group that outweigh the costs to nonacting states, it can maximize social welfare without imposing costs on other states, or it can be socially suboptimal by imposing costs on other states that outweigh the private benefits obtained by the acting group. A central question this Note explores is whether a method exists to identify and encourage welfare-maximizing uses of state collective action while simultaneously identifying and preventing socially suboptimal uses.

This Note first elaborates why states act collectively (Part I), second describes methods by which states can act collectively (Part II), and third considers what mechanisms exist or could be developed that may limit state collective action (Part III). Recognizing that state collective action either could increase or could decrease social welfare, this Note then assesses whether any of these mechanisms successfully distinguish between socially optimal and suboptimal instances of state

² Note that the Clean Air Act prohibits states other than California from setting their own vehicle emissions standards. *See, e.g.*, 42 U.S.C. § 7507 (2000).

collective action (Part IV). It concludes that although no first-best mechanism distinguishes good and bad instances of state collective action, a second-best approach would be to refocus Compact Clause jurisprudence on the functional question of whether a specific instance of state collective action has effects on states other than those acting collectively and to adopt a default rule against state collective action with such effects.

I. THE POTENTIAL FOR STATE COLLECTIVE ACTION

This Part considers why states may act collectively. The starting premise of this Note is that government and law should maximize the welfare of the national polity, and this Note's purpose is to examine how the existence of states and the potential for collective action among those states may advance or impede this goal.³ This analysis necessarily ignores a number of important yet largely intractable questions, such as what welfare means, how to calculate welfare across individuals, and who is a member of the national polity;⁴ moreover, this analysis elides numerous aspects of the central question of how government and law should be structured to maximize welfare. Rather, this Note takes the basic governmental structure as given and focuses on how state collective action affects national welfare.

The logical starting point is to explain why state collective action matters if individuals are the ones who benefit from or pay for a policy. The reason to focus on states instead of individuals is that meaningful collective action requires the group acting collectively to overcome collective action problems among its own members and to have enough influence to affect policy.⁵ In general, as the size of the group against which the group acts collectively increases, efficacious collective action becomes more difficult to sustain.⁶ The relatively small

³ This inquiry is only a part of an analysis of the wisdom of federalism, which implicates a broad literature. See, e.g., DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995); Larry E. Ribstein & Bruce H. Kobayashi, *The Economics of Federalism* (U. Ill. Law & Econ. Research Paper No. LE06-001, 2006), available at http://papers.ssrn.com/paper.taf?abstract_id=875626 (introducing and summarizing literature).

⁴ On the first two points, see Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 976-99 (2001). On the third, this Note assumes the polity has been defined exogenously by basic structural choices.

⁵ See OLSON, *THE LOGIC OF COLLECTIVE ACTION*, *supra* note 1, at 22-36, 53-65, 125-31.

⁶ Although a group's ability to influence a policy depends heavily on how the policy is generated, in general, larger collective groups are required to influence policies developed by larger background groups. For the assumption that smaller groups are better able to overcome collective action problems, see *id.* See also THE FEDERALIST NO. 10, *supra* note 1 (size and heterogeneity of national polity minimizes factionalism); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (discrete groups are better able to accomplish policy goals). A large literature explores the truth of the hypothesis that smaller groups are better at acting collectively. See, e.g., Joan Esteban & Debraj Ray, *Collective Action and the Group Size Paradox*, 95 AM.

number of states allows groups of states to satisfy these two conditions easily, whereas groups of individuals may not be able to do so.⁷ To see why, consider the stylized examples. The tens of millions of people who live in the Northeast and the rest of the country would have difficulty organizing themselves around the pollution issue without falling prey to the collective action problems that arise because each individual's contribution to the group effort will be unimportant to the outcome but costly to the individual.⁸ Moreover, even if the individuals wished to organize, they would have to expend resources to identify those with common interests and to develop a mechanism for collective action.⁹

The federal system ameliorates these difficulties by forcing individuals to be residents of a state, by tying these individuals' interests together through their interest in the state's welfare, and by creating the centralized mechanism of state government to pursue those common interests.¹⁰ The relatively small number of states then can act collectively without suffering as greatly from the problems identified above. Therefore, in the stylized examples, the potential for the northeastern states to act collectively is real because, among the states involved, each knows its contribution has a sizeable effect and each can monitor the behavior of the other participating states. The ways in which states can act collectively are considered in greater detail in Part II. For now, the important point is that states have opportunities for collective action that an undivided national polity does not.¹¹

Consider now the reasons why states may act collectively. In the simplest terms, collective action may be more desirable than individual state action because it opens a panoply of otherwise unavailable policy choices and may be more desirable than federal action because it allocates power to a better-positioned actor.¹² These advantages may exist

POL. SCI. REV. 663 (2001) (whether large or small groups are more effective depends on the elasticity of the cost of lobbying).

⁷ Collective action among individuals is difficult because a group will need to consist of a large number of individuals to affect policy, but this need exacerbates collective action problems such as free-riding. See OLSON, THE LOGIC OF COLLECTIVE ACTION, *supra* note 1, at 22–36, 53–65, 125–31; George J. Stigler, *Free Riders and Collective Action: An Appeal to Theories of Economic Regulation*, 5 BELL J. MGMT. SCI. 359 (1974).

⁸ See OLSON, THE LOGIC OF COLLECTIVE ACTION, *supra* note 1, at 11–16.

⁹ See *id.* at 46–48 (discussing organization costs).

¹⁰ Obviously, this amelioration is imperfect, and individuals within each state will have incentives to act against the interests of the state. These issues, however, are beyond the scope of this Note.

¹¹ Note also that opposing collective action through a group of states will be easier than within the national polity. Part III considers the potential for this force to constrain state collective action.

¹² For a discussion of why one level of government may be better than another, see David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2551–60 (2005), which describes

because regional organizations have better information, are better positioned to act on that information, or avoid duplicative costs or coordination problems.¹³ Also, collective action may be desirable politically because it may make certain programs either more or less politically salient.¹⁴ Similarly, political actors may want to act collectively because doing so spreads or diversifies political risk.¹⁵ Lastly, collective action may provide opportunities for economies of scale or rent-seeking behavior that states cannot achieve independently.¹⁶

Some brief examples of how states may act collectively illustrate the importance of the topic.¹⁷ As in the stylized examples, states may act collectively to reduce pollution. Groups of states also could develop plans to use common reserves of natural resources, including oil fields or aquifers that cross state lines, or plans to allocate the use of rivers, lakes, forests, or other natural resources. They may also regulate wildlife that lives in multiple states, either to protect that wildlife or to use it for commercial purposes. States may take similar action to regulate or allocate energy or to develop interstate transit infrastructure, such as highways, rail lines, or regional airports. States may regulate the production or distribution of goods or create economic development organizations organized either geographically or by some other trait, such as agricultural or oil and gas production. They also may wish to regulate certain industries or set labor standards in common ways or may wish to regulate products commonly by adopting similar production standards or tort rules. As a final example — although one can imagine many other motivations for state collective action — states may collectivize to provide better social welfare or governmental insurance programs.

various justifications for federalism, including functional theories of comparative process, pluralism, and comparative efficiency.

¹³ These are comparative process justifications. *See id.* at 2553–56.

¹⁴ Political actors care about political costs and benefits, not actual costs and benefits. *See* Sam Peltzman, *Towards a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

¹⁵ On the shifting of political risks, see Kathleen M. McGraw, *Managing Blame: An Experimental Test of the Effects of Political Accounts*, 85 AM. POL. SCI. REV. 1133 (1991); and R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL'Y 371 (1986).

¹⁶ *See* MICHAEL HECHTER, PRINCIPLES OF GROUP SOLIDARITY 33 (1987) (noting that people join groups to obtain jointly produced goods or goods that would be more costly to obtain individually). This is an example of a comparative efficiency justification. *See* Super, *supra* note 12, at 2559.

¹⁷ Some of these theoretical uses of state factionalism may raise constitutional or federal preemption issues. However, whether preemption exists is a difficult, fact-specific inquiry that is far beyond the scope of this Note and not necessarily relevant to its theoretical purposes. Thus, this Note does not consider preemption issues as a potential limit on state collective action except in Part IV. Moreover, many of the methods of collective action described in Part II allow states to circumvent these concerns by acting through or obtaining the approval of the federal government.

One can imagine that in some of these areas, state collective action would lead to desirable social outcomes, whereas in others the outcomes would be socially suboptimal, and the stylized examples illustrate both possibilities. The stylized examples also demonstrate that whether state collective action is good or bad depends not so much on the background conditions or the goals (in the stylized examples, alleviating air pollution concentrated in the Northeast), but rather on specific facts concerning how the background conditions arose, what the proposed solution is, and how that solution would affect the nation as a whole. Thus, deciding whether an instance of state collective action is desirable is a difficult inquiry, and the goal of this Note is not to analyze in detail whether specific instances of state collective action are desirable, but rather is to lay out the theoretical arguments for why state collective action matters and to consider possible mechanisms to encourage socially optimal varieties of state collective action.

II. THE METHODS OF STATE COLLECTIVE ACTION

This Part describes the basic methods through which state collective action can manifest itself in policy. Specifically, this Part considers examples of state collective action of varying degrees of formality, from formal interstate compacts to more informal coordinated action. While acknowledging that some characteristics of state collective action are not unique to this topic, this Note emphasizes the unique traits and concerns that it raises.¹⁸

The most formal method of state collective action is the interstate compact, which is essentially an agreement that can order affairs between states in much the same way that contracts order affairs between individuals.¹⁹ The Constitution's Compact Clause, which provides that "No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State," explicitly authorizes states to enter into compacts with one another.²⁰ In theory, these agreements can be between any number of states and can deal with essentially any issue the participating states wish, subject to a few doctrinal limitations. The crucial question in Compact Clause jurisprudence is exactly when the consent of Congress is required. The Supreme Court has held that the purpose of the Compact Clause

¹⁸ For example, certain aspects of state collective action overlap with ways in which individual states can act to accomplish their goals and with ways in which nonstate actors can act collectively to promote their common interests.

¹⁹ See Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution — A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925); see also Emanuel Celler, *Congress, Compacts, and Interstate Authorities*, 26 LAW & CONTEMP. PROBS. 682 (1961); Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285 (2003).

²⁰ U.S. CONST. art. I, § 10, cl. 3.

is to “ensure that Congress [will] maintain ultimate supervisory power over cooperative state action that may otherwise interfere with the full and free exercise of federal authority.”²¹ The plain text of the provision notwithstanding, the Supreme Court has held that congressional consent must be obtained only for compacts “directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.”²² Thus, many compacts do not require explicit approval from Congress, but because these matters inevitably involve interstate concerns, Congress typically is able to override any compact it wishes, either explicitly or by preempting the field in which the compact operates.²³ This allocation of the burden matters because legislative inertia makes it more difficult for Congress to kill an agreement than to refuse to approve one.²⁴ Ultimately, then, states have great freedom to make agreements on any number of subjects.²⁵

One example of a formal compact approved by Congress is the Northeast Interstate Dairy Compact, which expired in 2001.²⁶ This compact was designed to protect small dairy farmers in the compacting states by allowing those states to regulate milk prices, which dormant commerce clause doctrine otherwise would prevent.²⁷ The supporters of the compact were congressmen from the region, who tried to broaden the number of states in the compact to increase its political support,²⁸ while congressmen from other milk-producing states, such as Wisconsin, opposed the compact.²⁹ Clearly this compact had a negative effect on states not in the compact because it limited the amount of milk those states were able to sell to consumers within the

²¹ *Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

²² *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 468 (1978) (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)) (internal quotation mark omitted). *But see Greve, supra* note 19, at 296–308 (questioning the wisdom of this approach).

²³ In some areas states may make agreements that are beyond Congress’s powers, but under current definitions of commerce, these areas would be quite narrow. *See, e.g., Gonzalez v. Raich*, 125 S. Ct. 2195 (2005) (medicinal marijuana regulation within Commerce Clause).

²⁴ *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1524–25 (1987). Inertia also plays a central role in Guido Calabresi’s arguments for judicial review. *See* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 91–119 (1982).

²⁵ States have taken advantage of this freedom. *See* WILLIAM KEVIN VOIT, *COUNCIL OF STATE GOV'TS, INTERSTATE COMPACTS & AGENCIES* 10–13, 158–59 (2003) (listing 199 active compacts and 62 more that may be dormant or defunct).

²⁶ *See* 7 U.S.C. § 7256 (2000) (approving the compact).

²⁷ *See W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (Massachusetts milk price support programs violated the dormant commerce clause); *see also* Jim Chen, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 MINN. L. REV. 1764, 1786 (2004) (describing how Congress responded to *West Lynn* by ratifying the compact).

²⁸ *See, e.g.,* 140 CONG. REC. 28,953–54 (1994) (statements of Sen. Jeffords and Sen. Mitchell).

²⁹ *See, e.g., id.* at 28,954–55 (statement of Sen. Feingold).

compact.³⁰ These adverse effects suggest that this compact is an example of states acting collectively to achieve localized benefits at a social cost.³¹ Another example of a formal compact approved by Congress is the Interstate Compact to Conserve Oil and Gas, which authorized a price-fixing cartel among oil-producing states in the 1930s and controlled about half of all then-known U.S. oil reserves.³² This compact is another example of Congress acquiescing to states acting collectively through the Compact Clause to obtain localized benefits at the expense of the general welfare.

A less formal type of interstate collective action may look similar to the operation of an oligopoly since states could make an implicit arrangement to adopt a certain policy or one state could act as the leader and set certain policies knowing that other states would follow suit.³³ Of course, informal arrangements suffer from the same problems as all cartels, namely the difficulty of ensuring the continued cooperation of all members.³⁴ However, informal arrangements have several benefits relative to formal compacts. First, informal agreements may be less costly to reach and may entail fewer political risks than formal compacts, perhaps as a consequence of their lack of enforceability.³⁵ Second, this approach may allow states to act on some matters that otherwise would require Congress's approval under Compact Clause jurisprudence. Third, even when Congress's approval is unnecessary, Congress may be less inclined to disapprove of informal agreements because it may be less likely to focus its attention on a subject absent a formal agreement.³⁶

³⁰ Trade limitations such as this typically lower welfare unambiguously for all parties. See W. MAX CORDEN, *TRADE POLICY AND ECONOMIC WELFARE* 1–6 (2d ed. 1997).

³¹ Obviously, by limiting trade and competition the dairy compact harms the participating states as well as other states, suggesting that this compact arose because of interest group pressure within the compacting states. However, one simplifying abstraction of this Note is to assume that internal state politics lead to welfare maximizing outcomes for those states, meaning that a deeper inquiry into the motivations behind the compact is beyond this Note's scope.

³² See 49 Stat. 939, 939–41 (1935); see also 1 ROBERT L. BRADLEY JR., *OIL, GAS & GOVERNMENT: THE U.S. EXPERIENCE* 103–06 (1996) (noting that although this compact still exists, changed market conditions make it obsolete); Greve, *supra* note 19, at 326–27.

³³ For an explanation of the economics of oligopolies, see PHILLIP AREEDA, LOUIS KAPLOW & AARON EDLIN, *ANTITRUST ANALYSIS* 203–14 (6th ed. 2004).

³⁴ See, e.g., Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 524–28 (2004) (discussing cartels as prisoner's dilemmas and noting that “[u]ltimately, cheating destroys cartels”).

³⁵ See, e.g., Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495, 500–01 (1991) (lower negotiating and implementation costs favor informal agreements); *id.* at 509 (informal agreements involve less of a reputational stake).

³⁶ See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 66 (2000) (noting that legislative inertia is “especially [strong] in the face of problems that have low visibility”).

One example of a relatively informal agreement is the Regional Greenhouse Gas Initiative (RGGI), to which a number of northeastern and mid-Atlantic states are party.³⁷ RGGI's purpose is to cap regional emissions of and to facilitate trading of carbon dioxide emissions; currently, the program focuses on power plant emissions but may extend to other sources in the future.³⁸ Precisely why the states want to participate in RGGI is unclear — because greenhouse gases do not have localized effects, the states do not seem to receive any tangible benefit from this program even though they bear the costs of the cap³⁹ — but perhaps the states receive some psychic benefit from feeling that they contribute to a cleaner environment.⁴⁰ Why the states are acting collectively on this initiative is also unclear, but perhaps banding together increases the psychic benefits, limits the relative costs by ensuring that others must also bear similar costs, improves the cost effectiveness or liquidity of the trading system, generates more pressure on other states to reduce emissions, or simply provides greater visibility and political benefits. In any case, RGGI clearly involves states acting in a manner that is not a formal compact yet seems to be more binding than other informal paths of action.⁴¹ Indeed, RGGI may represent a model for how states can act collectively while circumventing federal control. Another example of a less formal agreement that avoided the requirement of congressional approval is the Multistate Tax Commission, which various states joined in the 1960s as a method for dealing with the taxation of interstate business income.⁴² The goal of the compact was to determine multistate taxpayers' state and local tax liabilities while avoiding duplicative taxation and promoting uniformity, convenience, and compliance.⁴³ Regardless of whether the Commission was welfare enhancing, it demonstrates how interstate collective action can affect important aspects of the economy absent congressional approval.

³⁷ See Regional Greenhouse Gas Initiative, <http://www.rggi.org> (last visited Mar. 12, 2006); see also Anthony DePalma, *States Agree on Plan To Cut Power Plant Gas Emissions*, N.Y. TIMES, Dec. 21, 2005, at A32.

³⁸ See Regional Greenhouse Gas Initiative, *supra* note 37.

³⁹ See, e.g., Press Release, Associated Indus. of Mass., A.I.M. to Mass: Proposed Greenhouse Gas Regulations — High Cost, Little Benefit (Sept. 22, 2005), available at <http://www.aimnet.org/AM/Template.cfm?&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=7832> (describing opposition to RGGI on precisely these grounds).

⁴⁰ Of course, the true motivating factor is the political benefit that the politicians instituting the measure obtain, but this begs the question of why political benefits would accrue for reducing pollution that lacks a localized effect, with one plausible answer being the psychic benefits.

⁴¹ For a discussion of whether RGGI needs congressional approval and whether it is federally preempted, see Note, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877 (2006).

⁴² See *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 479 (1978) (upholding the Commission against Compact Clause and other constitutional challenges).

⁴³ See Greve, *supra* note 19, at 303.

Scores of other compacts of varying degrees of formality exist on subjects including the environment, energy, transportation, traffic, water rights, crime, and education.⁴⁴

Two other types of state collective action that do not fit neatly into either the formal or informal category also warrant special mention since they illustrate the flexibility of the ways in which states can band together. The first is the potential for states to act collectively through litigation, such as when multiple states file suits against a common target or pool their resources to investigate and pursue claims.⁴⁵ For example, consider the litigation and \$206 billion settlement by forty-six states against the tobacco companies.⁴⁶ One could view this as an example of informal state collective action through the tort system because states that had little interest in the well-being of the tobacco industry banded together to file suits against it, thereby injuring tobacco-producing states, tobacco companies, and tobacco users.⁴⁷ Depending on one's priors, the tobacco litigation may have been socially beneficial or harmful, but clearly it caused a wealth transfer from one group of states to another in the way contemplated by this Note's depiction of state collective action.⁴⁸ The second method of state collective action that warrants special mention is privatization.⁴⁹ If a group of states privatize certain state functions and use the same private corporation in that effort, then that private corporation can operate on an interstate basis and adopt policies that states would want to adopt collectively. Privatization may be an especially effective method of state collective action because it creates a centralized mechanism for action that is removed from the political process, is driven by the profit motive to act efficiently, and at least partially binds the states to adhere to the centralized decisions.

⁴⁴ See VOIT, *supra* note 25, at 10–13, 158–59.

⁴⁵ On how interest groups can use litigation and the court system more generally to accomplish their goals, see SCHLOZMAN & TIERNEY, *supra* note 1, at 364–73.

⁴⁶ See National Association of Attorneys General, Master Settlement Agreement and Amendments, <http://www.naag.org/backpages/naag/tobacco/msa/> (last visited Mar. 12, 2006); see also W. KIP VISCUSI, SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL 33 (2002).

⁴⁷ If states with an interest in tobacco are injured, one may wonder why these states joined the litigation. The reason is differences in ex ante and ex post litigation incentives: even if tobacco-producing states preferred not to litigate ex ante, once litigation began, they had incentives to join to obtain some recovery for themselves and minimize their harm.

⁴⁸ Observe also that the tobacco settlement demonstrates the flexibility of some forms of state collective action since the attorneys general of the involved states and the tobacco companies signed it without obtaining approval from either the state legislatures or Congress. See generally VISCUSI, *supra* note 46, at 33–59 (describing the settlement agreement).

⁴⁹ On government privatization efforts generally, see, for example, Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1435–43 (2003).

III. THE CONSTRAINTS ON STATE COLLECTIVE ACTION

This Part aims to map the various constraints on state collective action and explores whether new constraints can be devised. Note that in order to be fully effective, a constraint needs to screen out state collective action's undesirable manifestations while retaining its desirable instances; thus, constraints that indiscriminately limit all forms of state collective action are not first-best mechanisms and in fact may be socially undesirable if the positive instances of state collective action outweigh the negative ones.

This Part divides the types of constraints on state collective action into three categories and considers them in order. The first category is political constraints, which includes various structural limitations as well as more practical ones, such as constituent voting behavior. The second category is market constraints, which includes the ways in which basic economic forces may limit collective action. The third category is judicial constraints, which focuses on courts as a potential limiting source. Obviously all of these categories overlap — for example, political forces are at base market forces, judges are not entirely insulated from political or market forces, and so forth — but categorizing them in this manner is conceptually helpful nevertheless. These constraints are not necessarily unique to the state collective action context and may also constrain other forms of interest group behavior, but considering them in this context is appropriate because state collective action raises unique concerns.

A. Political Constraints

Most obviously, the federal government will impede state collective action because Congress must explicitly approve some compacts and has plenary power to overrule almost all interstate agreements.⁵⁰ For the few agreements that require explicit consent, this check is quite strong because any agreement will need to obtain the consent of both houses of Congress, which will be difficult to do for agreements that are socially suboptimal because representatives from injured states can vote them down.⁵¹ Rational apathy may cause congressmen whose

⁵⁰ See *supra* p. 1861. For a detailed consideration of federal judicial doctrines limiting states' ability to encroach on one another's decisional autonomy, see Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization: Grappling with the "Risk to the Rest of the Country"*, 53 UCLA L. REV. (forthcoming Aug. 2006).

⁵¹ Note that the different representation structures in the House of Representatives and the Senate constrain state collective action in different ways. The equal representation structure of the Senate prevents larger states from imposing costs on smaller states, whereas the population-based representation of the House prevents smaller states from adopting policies that injure the broader nation. Obviously, the exact voting behavior of Congress depends on the specific characteristics of the distribution of costs and benefits of an instance of state collective action and on

polities suffer small harms not to vote against an instance of state collective action, but in a relatively small democratic body such as a legislature, rational apathy problems are much reduced because each vote plays a larger role in determining the outcome.⁵² This check also will constrain desirable forms of state collective action because sometimes they too impose costs on a large group of states for the benefit of a few, and, even when costs are not imposed on a large group, the need to obtain congressional approval raises the costs of state collective action and thus will foreclose some subset of beneficial agreements. For the broader range of agreements that Congress may disapprove of but need not consent to, the check is not as powerful because the onus is on the opposition to strike down an agreement; nevertheless, this check may help constrain the worst manifestations of state collective action. This check will apply to both formal and informal instances of state collective action because in both cases the federal government can remove a field from state control. However, the check may be less powerful against informal action, which may have less visibility and thus will be more difficult for Congress to override. One ancillary issue is the involvement of the President in approving or overriding a compact. Although technically the President is not needed to approve compacts, in practice the President does approve them.⁵³ The participation of the President should reduce the chance of socially beneficial agreements being overridden because the President represents a broader national constituency than does each congressman and thus may veto attempts to restrict beneficial agreements.⁵⁴

Nevertheless, the existence of pork-barrel spending and other decisions driven by interest groups rather than by welfare considerations suggests that these structural protections operate imperfectly.⁵⁵ Two specific examples of how regional interests have manifested themselves

precisely how those costs and benefits translate into political incentives, but in general, suboptimal forms of state collective action will involve a small group of states imposing harms on a larger group, and there is no reason to believe that congressmen from the larger group of states will have political incentives to ignore costs that are being imposed upon their citizens.

⁵² On rational apathy, see ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 260–74 (1957).

⁵³ See Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 *COLUM. L. REV.* 403, 508 & n.411 (2003).

⁵⁴ The presidential veto operates as a check on factionalism, of which state collective action is but one variety. See, e.g., *THE FEDERALIST NO. 73*, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the veto “establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction”); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 *U. CHI. L. REV.* 361, 394 (2004) (noting that “factionalized decisionmaking and legislative herd behavior . . . caused the framers to provide for the presidential veto”).

⁵⁵ See, e.g., David P. Baron, *Majoritarian Incentives, Pork Barrel Programs, and Procedural Control*, 35 *AM. J. POL. SCI.* 57 (1991); Kenneth A. Shepsle & Barry R. Weingast, *Political Preferences for the Pork Barrel: A Generalization*, 25 *AM. J. POL. SCI.* 96 (1981).

in federal politics help illustrate how the federal check may fail to restrict state collective action. The first example is the decades-long legislative controversy over regulation of sulfur dioxide emissions and acid rain.⁵⁶ Northeastern and western states supported stricter regulations, but during the 1970s and much of the 1980s midwestern states successfully stymied regulatory attempts; not until the late 1980s did Congress enact sulfur dioxide legislation.⁵⁷ A second example of the influence that regional interests have on the federal government is the prevalence of farm subsidies, which effect a transfer of wealth from non-farm to farm states by supporting inefficient businesses.⁵⁸ Both of these examples suggest that the federal government may fail to restrain suboptimal forms of state collective action because the political forces operating within the federal government sometimes lead Congress to support sectarian interests that are detrimental to national welfare.

In addition to the basic checks of bicameralism and presentment, the nonconstitutional structures of the federal system also may help constrain state collective action. For example, the structure and allocation of power under the committee system may be such a constraint.⁵⁹ Similarly, the delegation of powers to agencies or courts also may help limit the ability of states to act collectively.⁶⁰

Other political constraints also limit state collective action. First, the existence of political parties checks state collective action because individual actors may act in the interests of the party as a whole rather than in their own self-interest and because party interests likely will be broader than those of any single political actor; thus, parties will take

⁵⁶ See generally BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981); Robert W. Crandall, *Air Pollution, Environmentalists, and the Coal Lobby*, in *THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS* 84 (Roger G. Noll & Bruce M. Owen eds., 1983); Paul L. Joskow & Richard Schmalensee, *The Political Economy of Market-Based Environmental Policy: The U.S. Acid Rain Program*, 41 J.L. & ECON. 37 (1998).

⁵⁷ See Joskow & Schmalensee, *supra* note 56, at 45–51.

⁵⁸ There is a large literature on the political economy of farm subsidies. See, e.g., Bruce L. Gardner, *Causes of U.S. Farm Commodity Programs*, 95 J. POL. ECON. 290 (1987).

⁵⁹ Depending on how committee membership is chosen, committees either could foster or could check interest group behavior; for example, the former may occur if self-selection determines membership, the latter if membership is randomized. See Elhauge, *supra* note 1, at 42 (“[The] committee structure can exacerbate interest group influence.”); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 367–72 (1991).

⁶⁰ The logic is that insulating decisions from the political process limits interest group influence, but whether agencies and courts are less susceptible to this influence than legislatures are is subject to debate. Compare Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95–96 (1985) (agencies less susceptible), and Sunstein, *supra* note 1 (interest group theory justifies greater judicial review), with William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 DUKE L.J. 618, 632–37 (agencies more susceptible), and Elhauge, *supra* note 1 (interest group theory does not justify greater judicial review).

fuller account of all the costs and benefits of a certain behavior.⁶¹ The effectiveness of this check depends on the ability of political parties to monitor and control the actions of individual politicians who are members of that party,⁶² but even if their ability to command obedience is imperfect, the existence of political parties may reduce state collective action by pushing politicians toward broader national welfare considerations.⁶³ Second, if political actors want to pursue higher political offices, that desire may constrain state collective action.⁶⁴ For example, a governor wishing to run for President may not engage in suboptimal state collective action because he later will need to appeal to a national constituency.

B. Market-Based Constraints

The most basic market constraint is the possibility of movement by individuals and businesses, which will help to prevent long-term rent-seeking behavior by any group of states.⁶⁵ If a certain group of states collectively has achieved rents for itself at the expense of other states, one would expect that individuals and businesses would migrate to those states to obtain some of those rents and that this migration would continue until all individuals and businesses are equally well off.⁶⁶ The resulting state of the world may be either better or worse than the previous state depending on whether the state collective action is welfare enhancing. In a perfectly functioning system, then, no incentive for states to abuse collective action would exist because any

⁶¹ See Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1604 (1988).

⁶² See, e.g., Fiona McGillivray, *Party Discipline as a Determinant of the Endogenous Formation of Tariffs*, 41 AM. J. POL. SCI. 584 (1997); James M. Snyder, Jr. & Tim Groseclose, *Estimating Party Influence in Congressional Roll-Call Voting*, 44 AM. J. POL. SCI. 193 (2000); Gene M. Grossman & Elhanan Helpman, *Party Discipline and Pork-Barrel Politics* (Nat'l Bureau of Econ. Research, Working Paper No. 11,396, 2005), available at <http://www.nber.org/papers/w11396>.

⁶³ Conversely, in some cases the calculus of the political parties may reinforce suboptimal collective action tendencies. For example, imagine that the success of a political party depends primarily upon mobilizing a narrow base of constituents; in this case, one may expect that the party would support policies that cater to that narrow base rather than policies with broader benefits.

⁶⁴ Cf. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 929 (2005) (professional mobility among politicians externalizes the benefits of decisions).

⁶⁵ See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 309–31 (1974); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). But see William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201 (1997) (challenging the economic logic behind jurisdictional competition). For an application of the theory of jurisdictional competition to environmental politics, see Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

⁶⁶ See Tiebout, *supra* note 65.

attempt to do so would be thwarted by market reallocation of individuals.⁶⁷ In reality, of course, movement involves high transaction costs, meaning that the potential for exploitative state collective action remains, but the freedom of movement likely provides an upper bound on the problem.

The dynamic behavior of other groups of states is an additional market constraint. If one group of states acts collectively to impose costs on another group of states, the existence of those costs will create incentives for the injured states to organize to oppose the initial group.⁶⁸ Returning to the first air pollution example, one could view the polluting states as a group acting against the northeastern states and generating incentives for the northeastern states to band together to exert counterpressure. Thus, different groups of states competing against one another will at least partially reduce the general incentives for state collective action.⁶⁹ Ultimately, whether the collective action of the second group leads to more or less optimal outcomes is an empirical question. Also, because this situation resembles an iterated game with repeat players, game theory suggests that cooperation may be the optimal strategy for all groups of states.⁷⁰ Although states may benefit from injuring other states in any single stage, over time all states may be better off if they cooperate.

C. Judicial Constraints

A politically insulated institution like the federal judiciary may be able to identify and prevent undesirable types of state collective action.⁷¹ But debate rages over whether the judiciary is able to limit the influence of interest groups.⁷² These doubts also apply to judicial review of state collective action since groups of states are simply a type of interest group. This Note does not enter the debate on whether in-

⁶⁷ Movement also would diminish state incentives for socially beneficial collective action because movement would disperse the benefits of such action more broadly.

⁶⁸ Cf. Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 386–91, 409–10 (2003) (discussing how collective sanctions help build group solidarity and help define group membership, which may inadvertently provide the penalized group with the ability to challenge the party imposing the sanctions).

⁶⁹ See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983) (interest group struggles promote welfare better than alternatives).

⁷⁰ See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 68–69 (1984).

⁷¹ This category also includes constitutional constraints and other constraints imposed by actors removed from the political system, such as administrative agencies or international governance structures. See Sunstein, *supra* note 1, at 33 & n.16 (discussing rights as a limit on interest group behavior); *id.* at 49–59 (discussing judicial and constitutional doctrines that limit interest group behavior). State judiciaries also may be able to provide a constraint against state collective action, but this Note focuses on the possibility of external, federal constraints on the problem rather than on the internal mechanisms of states.

⁷² See *supra* note 60.

terest group politics justify judicial review; rather, it maps out the debate and considers how it applies to state collective action. The argument for judicial review to counteract interest group influence is essentially that political insulation makes the judiciary less susceptible to interest group pressures and thus better able to look objectively at particular policy choices and to work to cabin the distorting influences of interest groups.⁷³ However, this argument operates from a largely undefended baseline that interest group politics are undesirable, assumes that judicial review will not be influenced by interest groups or by other factors — such as judges' personal preferences — that may be more harmful than interest group influence, and ignores the potential perverse effects that greater judicial review may have on both interest group behavior and the transaction costs of interest group capture.⁷⁴ On the second of these concerns, the judiciary may be poorly positioned to make the normative policy choices that interest group influence affects, and thus greater judicial involvement may lead to affirmatively worse results than those that a distorted legislative process reaches.⁷⁵ In short, the question is whether judicial review of interest group behavior generates more error costs than it eliminates. This is a difficult question at the heart of the most fundamental legal debates, which obviously this Note does not resolve, but for reasons described below, more intensive judicial review seems unlikely to reduce the net error costs in the state collective action context.

As an illustration, consider in more detail the doctrines that courts may apply to limit suboptimal state collective action. One is the Compact Clause, but as discussed above, the Court has circumscribed this provision of the Constitution, suggesting that it would not be an effective constraint in practice. A more vigorous Compact Clause would be a more effective constraint, but could limit desirable as well as undesirable state collective action. Similarly, the dormant commerce clause — which restricts the ability of states to burden interstate commerce through regulation on the logic that Congress generally favors interstate economic activity⁷⁶ — could limit state collective action. But it clearly would not prevent many potential instances of state collective action because the policies at issue often will be facially neutral with nondiscriminatory purposes and effects and thus will not run afoul of the doctrine and often also would survive an open-ended balancing

⁷³ See, e.g., Sunstein, *supra* note 1, at 49–59.

⁷⁴ For detailed treatment of each of these challenges, see Elhauge, *supra* note 1, at 48–101.

⁷⁵ See *id.* at 66 (showing that the baselines used in judicial review may not be those that the polity, however defined, prefers); cf. *The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 169, 353–55 (describing why courts are poorly positioned to judge the wisdom of ancient political choices).

⁷⁶ See, e.g., *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531–35, 544–55 (1949).

test.⁷⁷ Thus, although these two doctrines provide an outer bound for state collective action, they provide little guidance for the broad range of difficult intermediate cases. Moreover, both of these fairly rule-like doctrines suffer from the familiar concern of over- and underinclusiveness,⁷⁸ an apropos concern here because deciding whether state collective action is good or bad is a fact-specific, context-dependent inquiry that rules are ill-equipped to handle.

A more standard-like approach that the judiciary could use to examine the facts and context in individual situations to ferret out undesirable state collective action may involve courts adopting the judicial mantle from antitrust law, in which courts engage in open-ended functional inquiries about whether conduct is socially desirable.⁷⁹ However, doctrines that apply to businesses do not apply well to states because governments have goals that are far broader and more difficult to measure than profit maximization.⁸⁰ Moreover, having courts conduct an open-ended review of political branch activity without grounding principles raises legitimacy concerns, and the source of judicial power to conduct such a review is uncertain because unlike in antitrust, in which courts operate under the auspices of what is effectively legislative delegation, here no such delegation exists.⁸¹ An open-ended standard would be troublesome because courts typically lack the information and experience to evaluate the wisdom and effect of various political judgments, meaning that they are poorly positioned to apply such a standard to foreclose socially suboptimal state collective action while allowing socially desirable state collective action.⁸² Even if courts were able to conduct this type of review to limit interest group influence more generally, courts are in a worse position to evaluate state collective action because they will be less familiar with the policies states are pursuing than with federal laws, because there will be

⁷⁷ See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628–29 (1978) (facial discrimination); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 348–54 (1977) (purpose or effect); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142–46 (1970) (balancing test).

⁷⁸ See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 586–93 (1992).

⁷⁹ See Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 51–54 (1984) (considering this approach for interest group review); John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 743–44 (1986) (same).

⁸⁰ See, e.g., Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 728 (2002) (“[W]hatever its validity for firms, the goal of profit maximization cannot be transposed to states.”).

⁸¹ See Sherman Antitrust Act, 15 U.S.C.A. §§ 1–7 (West 1997 & Supp. 2005); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 44 (1985) (Sherman Act is delegation to courts to make federal common law).

⁸² See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (arguing for a law of general rules rather than individual standards).

more political action involved and thus greater legitimacy concerns, and because the process by which state collective action occurs may be less transparent and thus harder for courts to review. Ultimately, then, the potential for effective judicial constraints on state collective action seems limited at best.

IV. ASSESSMENT OF THE CONSTRAINTS ON STATE COLLECTIVE ACTION

This Part makes a preliminary assessment of the efficacy of the constraints discussed above and describes some potential improvements to these constraints. An efficacious constraint will limit suboptimal state collective action while treating neutrally or fostering welfare-enhancing varieties. This Part concludes that no first-best solution to these problems exists; it then argues that a more vigorous Compact Clause doctrine with a new default rule prohibiting state collective action that imposes costs on other states unless an agreement receives congressional approval represents the second-best solution.

An assessment of the previously described constraints is ultimately a difficult empirical question. Although some of the constraints — namely the influence of political parties and the market mechanisms of population flow — may deter suboptimal state collective action without also deterring optimal state collective action, the likely effect of many other constraints is less encouraging. For example, many of the structural political limits will constrain both positive and negative types of collective action because, first, to the degree that positive state collective action is not Pareto efficient and imposes external costs, representatives from other states will oppose those manifestations,⁸³ and, second, they raise the costs of state collective action and thus deter it across the board. Likewise, the market constraint of states acting at cross-purposes will hinder both positive and negative state collective action (except again for Pareto efficient manifestations). The judicial controls also seem unable to perform the requisite sorting because judges typically are unable to engage in the functional inquiry necessary to determine whether a certain manifestation of state collective action is desirable. Thus, ultimately, the various constraints described above are a hodgepodge, with the end result being an uncertain effect on state collective action.

This analysis of current constraints on state collective action suggests that the chances of finding a first-best solution are low. The many different factors shaping state collective action make it difficult to envision optimal policy solutions. Any potential first-best solution

⁸³ On the Pareto principle, see, for example, Louis Kaplow & Steven Shavell, *Notions of Fairness Versus the Pareto Principle: On the Role of Logical Consistency*, 110 YALE L.J. 237 (2000).

would have to be at the federal level, and the general goal of any such solution would be to make the federal government more representative of and more responsive to national welfare concerns rather than regional concerns or other interests that may be particular to a group of states. The first group of potential solutions involves adjustments to existing mechanisms, such as reforming and strengthening the congressional committee system, limiting the amount or type of political activity in which political actors may engage, providing a line item veto, and so forth.⁸⁴ All of these changes may help limit the ability of states to act collectively in their sectarian interests but would also have effects beyond simply limiting state collective action.

A second type of potential solution would be for Congress to set up an agency or agencies that could inquire into various state collective actions to determine whether those actions are in fact socially optimal. These agencies may be politically insulated so that they could serve as neutral arbitrators or policymakers, but unlike courts would have some expertise in the relevant area.⁸⁵ These agencies could evaluate instances of state collective action and make recommendations to Congress about how to deal with them. However, these agencies likely still would suffer from many of the problems from which judicial review suffers, including the democratic legitimacy concerns resulting from delegating authority to politically insulated actors.

A third type of potential solution may be to increase the information available about the desirability of certain types of state collective action; the hope would be that greater information would improve existing structures so that new or improved structures to regulate state collective action would be unnecessary. Of course, information about bad policies is not a complete substitute for good policy because such information will not always translate into the desired action, but nonetheless it may help limit the problem.⁸⁶ One method of increasing the

⁸⁴ On committees, see *supra* note 59. On regulating political activity, see, for example, H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365 (1998); and Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1127-28 (1994). On the line item veto, see, for example, H. Jefferson Powell & Jed Rubenfeld, *Laying It on the Line: A Dialogue on Line Item Vetoes and Separation of Powers*, 47 DUKE L.J. 1171 (1998).

⁸⁵ One partial example of a disinterested body analyzing costs and benefits in practice is the Defense Base Realignment and Closure Commission. See generally Benjamin L. Ginsberg et al., *Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONT. L.J. 169 (1994) (describing the Commission and its decisions). However, this body is not charged with as open-ended an evaluation as the hypothetical body proposed here would be.

⁸⁶ See WESLEY A. MAGAT & W. KIP VISCUSI, INFORMATIONAL APPROACHES TO REGULATION 4-9 (1992); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 418-19 (2000); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 613-33 (1999).

available information would be to rely either on the agencies discussed above to publicize the policy or on independent watchdog groups. But administrative costs, such as determining who will produce and disseminate this information, and agency costs, such as ensuring that whoever is responsible for providing the information acts objectively, may limit the efficacy of reliance on these groups.⁸⁷ An alternative method to develop information that largely would circumvent these difficulties would be to use market mechanisms, such as a bond offering or a futures market, to value the likely social impact of a policy.⁸⁸ Obviously, informational mechanisms such as these could be used to limit both suboptimal forms of state collective action and other suboptimal forms of governmental behavior, but their application to state collective action is especially appropriate given the failure of other potentially constraining mechanisms.

The last type of solution is greater ex ante attention to the problem, which could result either from Congress adopting preemptive statutes in various areas in which states may act collectively⁸⁹ or from courts developing new doctrines, such as a more vigorous Compact Clause doctrine, to constrain state collective action.⁹⁰ The difficulty with the preemption approach, though, is its overinclusiveness, since preemptive statutes would hinder positive forms of state collective action as well as negative forms. However, perhaps Congress is well positioned to know where overinclusive rules foreclosing state collective action are desirable, and thus perhaps the overinclusiveness of preemptive statutes is not that problematic. Moreover, even when preemptive statutes do exist, states can circumvent them by getting congressional approval for their compacts. Thus, more preemptive statutes would push more instances of state collective action toward formal methods, which may be desirable to the degree that Congress is more likely to endorse positive forms of state collective action than negative ones and to the degree that formal state behavior generates greater information. Moreover, mandating formal procedures comports with the constitutional structure of federal lawmaking, which ensures that the interests of all the states and the national polity are represented by requiring

⁸⁷ See, e.g., Sunstein, *supra* note 86, at 626–27 (noting cost of informational regulation).

⁸⁸ On information markets, see, for example, Michael Abramowicz, *Information Markets, Administrative Decisionmaking, and Predictive Cost-Benefit Analysis*, 71 U. CHI. L. REV. 933 (2004); and Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962 (2005).

⁸⁹ See generally Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000); David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125 (1999).

⁹⁰ For a similar argument, albeit lacking some of the nuance that the proposal here contains, see Greve, *supra* note 19.

approval of both houses of Congress and the President, whereas informal state collective action circumvents these requirements.⁹¹

Similarly, the judiciary could develop a more vigorous Compact Clause doctrine requiring congressional approval for more instances of state collective action.⁹² The merits of adopting a more vigorous Compact Clause vis-à-vis Congress passing more preemptive statutes is that the courts could apply a more nuanced approach than broad preemptive statutes could because the courts would be looking at individual cases rather than deciding which fields as a whole should be removed from state activity. Of course, the judiciary generally will be less informed than the legislature and thus the worry may be that the judiciary will make bad decisions more often. However, limiting the role of the judiciary while still adopting a more vigorous Compact Clause doctrine seems possible. The revised doctrine would have courts engage in a simple functional inquiry and ask whether the compact in question caused effects beyond the states in the compact. If the answer to this inquiry is no, then the agreement presumptively would be allowable and would not need congressional approval. If the answer is yes, then the agreement would be prohibited and would require congressional approval.⁹³ Although courts still may have difficulties with this inquiry — with the central one being determining what “effects” are substantial enough to answer this question affirmatively since any policy will have some small effect on other states — those difficulties should be less than those that would inhere in a full inquiry into the costs and benefits of state collective action and should be manageable because courts already often engage in similar activities of determining who is harmed and how significantly when dealing with tort doctrines like causation or proximate harm.⁹⁴

⁹¹ For example, the different structures of the House of Representatives and the Senate suggest that society wants to protect the interests of both large and small states and prevent either of these groups from adopting policies that benefit themselves at the national expense.

⁹² Unlike preemptive statutes, this doctrine likely would not foreclose more informal instances of state collective action because those would be beyond the scope of the Compact Clause. One way to close this gap may be for Congress to give states the ability to sue other states when they are injured by state collective action, which would allow the courts to review informal instances of state collective action. Clearly some solution to permit application of the Compact Clause to informal agreements is necessary; otherwise, the effect of a more vigorous Compact Clause doctrine simply would be to push states toward more informal mechanisms, which may be undesirable for the reasons discussed above.

⁹³ One potential difficulty with this approach is that it may lead to holdout problems because of the need to receive approval from affected states. See, e.g., Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 927–29 (2004). However, the fact that states are repeat players will limit this problem.

⁹⁴ On scope of liability issues such as these, see DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 110–29 (3d ed. 2002).

This approach would have the virtue of not foreclosing positive forms of state collective action that only affect one region (as in the second air pollution example), unlike preemptive statutes, which likely would not allow these desirable agreements. This approach would prevent some instances of state collective action that impose costs on a group of states but are welfare enhancing in the aggregate, but this problem is limited because the benefiting states can compensate the burdened states, which is always possible because any socially desirable policy is potentially Pareto efficient, assuming that utility can be transferred between states, and because the benefiting states can obtain congressional approval. Clearly, the doctrine would still prevent some instances of positive state collective action because it would raise the transaction costs of engaging in such action and because in some circumstances redistribution from the benefiting states to the injured states would be too costly to implement efficiently. Overall, however, this doctrine would foreclose all negative forms of state collective action while only preventing some small subset of positive forms of state collective action, meaning that, on balance, although this revised Compact Clause doctrine may not be a first-best solution, it may well represent an improvement over the status quo.

CONCLUSION

This Note's description of the potential for state collective action is only the beginning of a larger inquiry into how dynamic interactions between groups of states affect national welfare. On the positive side, agreements between states could develop flexible, intermediate governmental structures between federal and state actors that are better equipped to handle certain types of challenges. On the negative side, the obvious worry is that these intermediate governmental structures would impose costs on other states or the nation as a whole, and thus the challenge is to delineate exactly when such intermediate regulation is appropriate. But as this Note demonstrates, identifying these boundaries is a complicated task without clear solutions. The potential solution proposed above is to use a more vigorous Compact Clause jurisprudence to force groups of states to contract with other states to ensure that socially suboptimal policies are not adopted. But although this solution represents an improvement over the status quo, it is not a first-best solution, and thus future work might discover a superior approach that allows society to capture more fully the benefits of state collective action while better avoiding the potential costs.