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## The Number of States and the Economics of American Federalism

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## THE NUMBER OF STATES AND THE ECONOMICS OF AMERICAN FEDERALISM

*Steven G. Calabresi and Nicholas Terrell\**

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## INTRODUCTION

In 1789, it was possible to speak of a federation of distinct states joined together for their mutual advantage, but today, it is rather the nation that is divided into subnational units. What caused this shift in focus from the states to the federal government? Surely, the transformation from a collection of thirteen historically separate states clustered along the Atlantic seaboard to a group of fifty states largely carved out of federal territory has played a role. Building on previous analysis of the economics of federalism, this Article considers the dynamic effects of increasing the number of states on the efficient allocation of government authority between the state and federal governments. When the number of states is low, the externalities imposed by state-level actions are more limited, and so is the scope of federal power. When the number increases, however, the scope of efficient federal power expands because the states face collective action problems.

In the second Part of this Article, we apply these insights from the economics of federalism to the question of the optimal number of states in a federal system. Having too few states will lead to insufficient cohesion at the federal level, risking secession, and ensuring weak government. On the other end of the scale, having too many states encourages the centralization of power. While the optimal number of states in a federal system will ultimately depend on geography, legal culture, and technology, the available data suggest that the ten provinces of Canada may be too few, but the fifty states of the United States may well be too many.

What difference did it make to American federalism and constitutional law between 1791 and 1912 that the United States grew from being a federation of only thirteen coequal states to being a federation of forty-eight coequal states? This Article will attempt to speculate about that important question—a question which has not been systematically analyzed so far in the otherwise extensive law review literature on federalism.<sup>1</sup> With its fifty states, the United States federation today has many more member units than it started out with and many more than do other federations around the world. Our thesis in this Article is that this trend in American federalism is a very consequential and under-appreciated development.

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1. The impact of the number of states on collective action problems in federal systems has been explored by Peter H. Aranson, *Federalism as Collective Action* (Mar. 29, 1995) (unpublished manuscript, on file with author). For an analysis of optimal nation size, see generally, ALBERTO ALESINA & ENRICO SPOLAORE, *THE SIZE OF NATIONS* (2005), and ROBERT A. DAHL & EDWARD R. TUFTE, *SIZE AND DEMOCRACY* (1973) (evaluating optimal nation size by comparing size and democracy at both national and subnational levels). For a static analysis of the optimal number of states in a federal system, see ALESINA & SPOLAORE, *supra*, at 137–53 (assuming a division of powers between federal and state governments and then determining the optimal number of states). This Article considers the inverse relationship over time: how does the number of states affect the division of powers between federal and state governments?

In comparing federalisms around the world today, we see some federations with a relatively small number of member states or autonomous regional entities, like Australia with six states,<sup>2</sup> Belgium with three autonomous regions,<sup>3</sup> and Canada with more territory than America but with only ten provinces<sup>4</sup>—a mere 20% of the fifty United States today. Other federations and confederations have a middling number of state equivalents, like Switzerland with twenty-six cantons or half cantons,<sup>5</sup> and the European Union with twenty-seven member nations.<sup>6</sup> India has twenty-eight states, as well as seven union territories administered by the federal government.<sup>7</sup> Mexico has thirty-one states;<sup>8</sup> Brazil has twenty-six states,<sup>9</sup> and Argentina has twenty-three provinces.<sup>10</sup> The United States stands outside of the pack, however, with fifty coequal federal subunits, and it reached this status early on. In 1860, at the outset of the Civil War, the United States already had thirty-four states, eleven of which banded together in an attempt to secede.<sup>11</sup> How would American history have been different and how would the United States be different today if the accidents of history had given us four states—one in the Northeast, one in the South, one in the Midwest, and one in the West? Would secession have worked? Would the federal government be a lot weaker than it is today? We seek herein to speculate on these questions.

The boundary lines of the fifty American states are mostly the result of very arbitrary and almost random occurrences. The thirteen original colonies, which successfully seceded from the quasifederalism of the British Empire, owed their boundaries to the accident of the first settlements in British North America. The Virginia colony thus grew out of the Jamestown settlement, the Massachusetts colony grew out of the Plymouth and Boston settlements, and the other eleven original colonies had similar beginnings.

The most consequential decision made by the founding generation in this respect was the cession of all the western lands claimed by Virginia, Pennsylvania, Connecticut, and other states to the federal government to

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2. *The World Factbook 2010*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2051.html> (last visited Nov. 15, 2010).

3. *Id.*

4. *Id.*

5. *Id.*

6. *The World Factbook 2010—European Union*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html> (last visited Nov. 15, 2010).

7. *THE WORLD FACTBOOK 2010*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2051.html> (last visited Nov. 15, 2010).

8. *Id.*

9. *Id.*

10. *Id.*

11. *July 11 1861: Ten Senators Expelled*, SENATE.GOV, [http://www.senate.gov/artandhistory/history/minute/Ten\\_Senators\\_Expelled.htm](http://www.senate.gov/artandhistory/history/minute/Ten_Senators_Expelled.htm) (last visited Oct. 21, 2010).

become the Northwest Territories, which included all of the U.S. land north of the Ohio River and east of the Mississippi. This cession of the Northwest Territories to the Articles of Confederation Congress occurred in part to prevent Virginia from becoming too much bigger and, thus, more powerful than all the other states.<sup>12</sup> Critically, the Northwest Territory was carved up into what became the six states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota, rather than itself being admitted just as one big state.<sup>13</sup>

The partition of the Northwest Territory into six states in turn set a crucial precedent for the enormous lands west of the Mississippi River, which were acquired from the French Emperor Napoleon as part of the Louisiana Purchase.<sup>14</sup> The Louisiana Purchase involved the acquisition of territory that today includes portions of fifteen current U.S. states, including all of present-day Arkansas, Missouri, Iowa, Oklahoma, Kansas, and Nebraska, and parts of Minnesota, North Dakota, South Dakota, New Mexico, Montana, Wyoming, Colorado, Texas, and Louisiana.<sup>15</sup> The land included in the Louisiana Purchase amounts to 23% of the whole territory of the United States today,<sup>16</sup> but it is divided among fifteen states! Other important additions of territory followed—especially as a result of the Mexican War,<sup>17</sup> the Gadsden Purchase,<sup>18</sup> the Alaska Purchase,<sup>19</sup> and the annexation of Hawaii<sup>20</sup>—while some territories held in 1787 (Kentucky,<sup>21</sup>

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12. See MAX FARRAND, *THE FATHERS OF THE CONSTITUTION* 56–59 (Allen Johnson ed., 1921); Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 127 (2004) (noting the emphasis on some rough population parity in admitting states from the Northwest Territory); Luis R. Dávila-Colón, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 CASE W. RES. J. INT'L L. 315, 316 (1981). For the formal adoption of the Northwest Ordinance into law, see An Act to provide for the Government of the Territory Northwest of the river Ohio, ch. 41, 1 Stat. 50 (1789). It is worth noting that despite ceding a substantial portion of its territory, Virginia nonetheless produced four of the first five presidents. *THE WORLD ALMANAC AND BOOK OF FACTS* 2010, at 521.

13. See Biber, *supra* note 12, at 132; Minn. Office of the Sec. of State, *The Northwest Ordinance of 1787*, <http://www.sos.state.mn.us/index.aspx?page=643> (last visited Oct. 18, 2010).

14. See Biber, *supra* note 12, at 139; LIBR. CONG., *LOUISIANA: EUROPEAN EXPLORATIONS AND THE LOUISIANA PURCHASE* 10 (2007), available at <http://international.loc.gov:8081/ammem/collect ions/maps/lapurchase/lapurchase.pdf>.

15. LIBR. CONG., *supra* note 14.

16. BUREAU OF LAND MGMT., DEP'T OF THE INTERIOR, *PUBLIC LAND STATISTICS 2002*, pt. 1-1, available at [http://www.blm.gov/natacq/pls02/pls11\\_02.pdf](http://www.blm.gov/natacq/pls02/pls11_02.pdf) (part titled "ACQUISITION OF THE PUBLIC DOMAIN, 1781–1867").

17. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., art. V, Feb. 2, 1848, 9 Stat. 922 (ceding certain Mexican land to the United States).

18. U.S. Dep't of State: Office of the Historian, *Gadsden Purchase, 1853–1854*, <http://www.state.gov/r/pa/ho/time/dwe/87721.htm>.

19. U.S. Dep't of State: Office of the Historian, *Purchase of Alaska, 1867*, <http://www.state.gov/r/pa/ho/time/gp/17662.htm>.

20. MARK STEIN, *HOW THE STATES GOT THEIR SHAPES* 75–78 (2008).

21. *Id.* at 108–12.

Tennessee,<sup>22</sup> Vermont,<sup>23</sup> and Maine<sup>24</sup>) were all admitted as additional individual states on equal footing with the original thirteen.

Indeed, as early as 1820, only thirty-one years after the Constitution had gone into effect, the United States had twenty-three states—almost twice as many as when it had started.<sup>25</sup> From that time on, the only significant controversy about adding states concerned keeping the numbers of new slave and free states equal.<sup>26</sup> By the outbreak of the Civil War in 1861, the Union was up to thirty-four states,<sup>27</sup> and by 1913, when the federal structure of the national government was radically altered by the additions of the Sixteenth and Seventeenth Amendments authorizing the federal income tax and providing for the direct election of senators, the Union had forty-eight states.<sup>28</sup> The Framers' concern that Virginia not be too much larger than the other twelve original states led unintentionally to a national policy of creating numerous new states out of territories rather than out of a few big ones.<sup>29</sup> It is for this reason that we today have fifty states rather than, say, twenty, and that is very consequential.

This Article will theorize about the likely effects of going from a small-number-of-states confederation of thirteen states to a large-number-of-states confederation of forty-eight states in 1912 in light of the economics of federalism. In previous writing, Professor Steven Calabresi has written about some of the economic policy arguments for empowering the national government and some of the economic policy arguments for empowering the state governments.<sup>30</sup> What effect is there on each of these arguments when you go from a few state federation of thirteen to a numerous state federation of forty-eight? What are the implications of the American experience for federalism in Australia, Canada, Germany, Belgium, Switzerland, and the European Union?

Part I addresses the question of how increasing the number of states affects the economic case in favor of empowering the federal government. Part II addresses the question of how increasing the number of states affects the economic case in favor of empowering the states. Part III considers the question of whether any meaningful kind of federalism is even possible once the number of states increases beyond a certain point. Put another way, what is the optimal number of states a federation ought to

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22. *Id.* at 257–62.

23. *Id.* at 276–80.

24. *Id.* at 119–25.

25. THE WORLD ALMANAC AND BOOK OF FACTS 2010, at 454.

26. See James P. Muehlberger, *Reflections on Lincoln's Kansas Campaign*, 78 J. KAN. BAR ASS'N, Nov./Dec. 2009, at 24, 25 (2009).

27. THE WORLD ALMANAC AND BOOK OF FACTS 2010, at 454.

28. *Id.*

29. See FARRAND, *supra* note 12, at 56–59.

30. See Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 774–84 (1995).

have if one wants to maintain a balance between national and state power so as to benefit from the economics of federalism?

## I. THE NUMBER OF STATES AND THE CASE FOR AUGMENTING NATIONAL POWER

This Part will argue that the United States' move from thirteen states at the Founding to forty-eight by 1912 greatly strengthened the public choice and economics of federalism cases for augmenting national power. We will discuss a number of economics of federalism arguments that are commonly made for empowering the federal government, and we will show that all of those arguments become more compelling as the number of states in a federation increases. We begin with collective action problems and end with problems of pluralism and civil rights.

### A. *Collective Action Problems*

#### 1. War and Foreign Affairs

The most compelling argument in American history for empowering our national government has been the need to overcome collective action problems.<sup>31</sup> All of Britain's colonies faced such a collective action problem in 1776 when Americans demanded the right to be represented in Parliament if they were going to be taxed, but only some parts of the British Imperial Federation were able to band together to secede. Notably, the British North American colonies in Canada chose not to leave the Empire at that point.<sup>32</sup> The thirteen colonies which did band together collectively to secede from Britain in 1776 quickly realized that they were struggling to act together to win the Revolutionary War and then to protect themselves from foreign enemies in the 1780s.<sup>33</sup> A principal argument for writing the U.S. Constitution in 1787 was that a stronger federal government was needed for defense or foreign policy reasons.<sup>34</sup> Many feared that the thirteen states acting collectively would be unable to defend themselves from being reacquired by Britain or being seized by some other

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31. See generally, e.g., Richard E. Levy, *Federalism and Collective Action*, 45 U. KAN. L. REV. 1241, 1241 (1997) (arguing that, "[W]e can understand the . . . 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.").

32. Under the Articles of Confederation, Canada in fact had a specific invitation to join the break-away colonies. It alone was guaranteed admission to the confederation. ARTICLES OF CONFEDERATION of 1781, art. XI.

33. Calvin H. Johnson, *States Rights? What States' Rights?: Implying Limitations on the Federal Government from the Overall Design*, 57 BUFF. L. REV. 225, 227 (2009); see also Matthew D. van Dalen, *Rumsfeld v. FAIR, A Free Speech Setback or Strategic Military Victory?*, 31 J. LEGAL PROF. 75, 90–91 (2007).

34. See Jason Mazzone, *The Security Constitution*, 53 UCLA L. REV. 29, 40–41 (2005).

European empire.<sup>35</sup>

In American history, the need to defend against a foreign enemy or to win a war, once one has started, has always led to the augmentation of national power.<sup>36</sup> National power emerged and grew in the 1770s and 1780s out of a need to cooperate against Britain;<sup>37</sup> it expanded enormously during and after the Civil War;<sup>38</sup> and it then again grew enormously during World War II such that national wage and price controls came to be thought of as within the scope of federal power.<sup>39</sup> Federations start as mutual defense pacts to solve a collective action problem, and federal governments grow in power in response to foreign threats.

Foreign threats are not, however, the only military collective action problem against which federalism protects. Federations also face the collective action problem of warfare among the members of the federation. In the seventy-five years between 1870 and 1945, the peace and harmony of Western Europe was interrupted by three Franco-German Wars: the Franco-Prussian War, World War I, and World War II. This is a collective action of the most destructive and ruinous kind. The modern day federation of the European Union began and has been built in part to end such warfare on the European Continent, and the EU, along with the North Atlantic Treaty Alliance, has done that.<sup>40</sup>

In the 1770s and 1780s, many founding generation Americans feared that there might emerge two or three federations with shared land boundaries in the area that is now the United States and that warfare might erupt among them, creating a need for standing armies and a concomitant loss of liberty.<sup>41</sup> Some Framers believed that the English tradition of liberty was in part a product of Britain's island geography, for which there was no need for a standing army to defend itself, since it could rely instead on its navy to prevent invasion.<sup>42</sup> Sailors are less numerous and less of a threat to domestic liberty than are soldiers.<sup>43</sup> Abraham Lincoln thought that one of the many reasons why it was vital to keep the Union together was to avoid the prospect of future warfare between the Confederacy and the North over issues such as access to the Gulf of Mexico from the Mississippi River

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35. See Johnson, *supra* note 33.

36. See generally JOHN YOO, *CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* (2009) (outlining historical boundaries of presidential power and noting how those boundaries expand in times of national crisis).

37. See Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 489–90 (1991).

38. *Id.* at 490–91.

39. See, e.g., *Yakus v. United States*, 321 U.S. 414, 422–23 (1944) (holding the Emergency Price Control Act to be a valid exercise of congressional power).

40. Amar, *supra* note 37, at 494–97.

41. THE FEDERALIST NO. 5, at 51–53 (John Jay) (Rossiter ed., 1961); Amar, *supra* note 37, at 486–91.

42. THE FEDERALIST NO. 8, at 70–71 (Alexander Hamilton) (Rossiter ed., 1961); Amar, *supra* note 37, at 486–90.

43. Amar, *supra* note 37, at 490.

through the port of New Orleans.<sup>44</sup>

Civil war between states or warfare between neighboring countries is the ultimate collective action problem, and it is averted by enhancing the power of national and transnational entities.<sup>45</sup> This is a principle argument as to why it is often desirable to enhance national or transnational power. How then does increasing the number of states from thirteen in 1790, to thirty-four in 1861, and to forty-eight in 1912 affect the collective action problem of providing for a common defense and protecting against civil warfare? We begin with the problem of providing for the common defense.

A loose confederacy of a very small number of states—say, four—would face very low costs in organizing defense against specific enemies and threats, so it would have less of a need to delegate broad and permanent defense powers to a national or transnational entity than would a confederacy with more member states.<sup>46</sup> As the number of member states goes up from four to thirteen to thirty-four and then to forty-eight, the costs of organizing against each specific threat as it arises increase exponentially, and the need for a permanent central national or transnational entity increases.<sup>47</sup> It is more difficult and more expensive to coordinate forty-eight armies, navies, and foreign policies than it is to coordinate four or even thirteen. As an example, George Washington found coordination of thirteen state militias during the Revolutionary War and its aftermath to be so exasperating that he led in the effort to draft the U.S. Constitution so that future Americans would never face that problem.<sup>48</sup>

The state militias survived ratification of the Constitution until eleven of the thirty-four states seceded in 1860 and 1861 and fought against the other twenty-three.<sup>49</sup> The militias were thereafter folded into the National Guard and subordinated,<sup>50</sup> which may well have become essential once the number of state militias increased from thirteen at the Founding to thirty-four in 1861. One would expect that as the number of states increased from

44. *See id.* at 490–91.

45. *See* Enrico Spolaore, *National Borders and the Size of Nations*, in *THE OXFORD HANDBOOK OF POLITICAL ECONOMY* 778, 794 (Barry R. Weingast & Donald A. Wittman, eds., 2006) (viewing defense as a public good). *But see id.* at 795 (noting the possibility under certain conditions of increased coordinating power leading to more overall conflict through an increase in the number—and decrease in the size—of states). *See generally* DENNIS C. MUELLER, *PUBLIC CHOICE III* 9–16 (2003) (discussing the formation of states as a response to collective action problems); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971) (discussing collective action problems of groups engaged in the provision of public goods).

46. *See* OLSON, *supra* note 45, at 33–36.

47. *See* R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 *passim* (1937) (on the firm as a solution to transaction costs); R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1, 16–17 (1960) (on the firm as a solution to externalities in the presence of transaction costs).

48. *See* YOO, *supra* note 36, at 10–11 (suggesting this experience was crucial in making Washington a supporter of a strong executive).

49. *See* Amar, *supra* note 37, at 501–02.

50. Militia Act of 1903, Pub. L. No. 57-33, 32 Stat. 775 (1903) (creating the National Guard).

thirteen to thirty-four, it would become more and more costly to leave anything of a military or foreign policy sort (like the militias) under state control because of the escalating costs of collective action. It is thus entirely predictable that the state militias would be forced to fade into irrelevance after eleven of them were so impertinent as to wage war against the other twenty-three.

What about the effects of an increasing number of states on the likelihood of an outbreak of a civil war and on that war's prospects for success? Here, increases in the number of states cut in both directions. On the one hand, one would expect that thirty-four states in 1861 would have more profound disagreements and controversies among themselves than thirteen states would have had in 1790. If you multiply the number of states who are actors, there are bound to be more disagreements among those states. Moreover, a few of the states—think South Carolina during the Nullification Crisis<sup>51</sup>—are bound to take positions that are especially provocative and extreme. Thus, a federation with a lot of states will likely have a few that are real outliers, as Louisiana, Vermont, and Utah are today. In this respect, increasing the number of states and making each state smaller will facilitate factional capture of a state and the taking of extreme positions.

On the other hand, however, is that increasing the number of states also creates a severe collective action problem for any would-be secessionists.<sup>52</sup> A successful secession in the face of military resistance requires that a large percentage of the states with a large percentage of the federation's population and wealth participate in the separation.

Consider the collective action problem that helped to forestall Southern secession during the Civil War. In 1861, there were fifteen slave states in an area that today has sixteen states: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Texas, and Virginia.<sup>53</sup> In addition, slavery was legal in the District of Columbia, in the territorial area that became Oklahoma, and in parts of the Nebraska Territory.<sup>54</sup> The number of slave and free states was deliberately kept even until 1858 to

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51. Letter from Andrew Jackson, President of the United States, to Martin Van Buren, Vice President of the United States (Jan. 13, 1833), available at <http://memory.loc.gov/cgi-bin/query/r?ammem/mcc:@field%28DOCID+@lit%28mcc/050%29%29>.

52. See Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 10–15 (discussing the sovereign-constituency transgression game with repeated interactions).

53. JEREMY BLACK, *AMERICA AS A MILITARY POWER: FROM THE AMERICAN REVOLUTION TO THE CIVIL WAR* 140 (2002).

54. R.O. Joe Cassity, Jr., *Residential Segregation Law on the Southwestern Frontier: 1889-1939*, S.U. L. REV. 167, 169 (2004); Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1, 8–10 (1996).

ensure an equal number of pro-slavery and anti-slavery senators.<sup>55</sup> In 1860 and 1861, only eleven of the fifteen slave states seceded, while four—Delaware, Kentucky, Maryland, and Missouri—did not leave the Union.<sup>56</sup> The non-secession of those four slave states, coupled with federal control over the District of Columbia and all the territories, may well have been indispensable to the North's victory. In addition, one of the slave states that seceded split in two (Virginia), with the free counties becoming the new pro-Union state of West Virginia.<sup>57</sup> Thus, in 1860, of the states in the geographical area where slavery was legal, almost one third of them—five out of sixteen—did not secede.

This may well be the collective action problem that doomed the Confederacy. As late as the summer of 1864, Abraham Lincoln was trailing in his re-election bid because the North had not won a bitter war.<sup>58</sup> How much worse would things have been for the Union had Delaware, Kentucky, Maryland, and Missouri—not to mention the District of Columbia, Oklahoma, and Kansas—all joined forces against a Union government with its capital in, say, New York City, which was besieged by anti-draft riots?<sup>59</sup> A good case can be made that the Confederacy was done in by the high cost of organizing secession among so many different legal and political actors. The Confederacy came much closer to succeeding than South Carolina had during the Nullification Crisis, because nearly one third of the states—eleven out of thirty-four—were defying federal power. Even that was not enough.

Consider the costs of collective action and what American politics might look like today if we had only four states instead of fifty: the Northeast, the South, the Midwest, and the West. Having lived in three of these four regions and having observed their distinctive regional subcultures, the authors think we would have serious regional secessionist movements if the number of states had panned out differently. The divide between red state and blue state America in presidential elections shows, among other things, a continuing sharp split between the South on one side and the Northeast and Pacific Coast on the other. If we had four states instead of fifty and if state lines corresponded to the regional divisions just mentioned, we think there might be serious talk of secession. Moreover, the federal government would be much less powerful and would be kept by the four regional superstates on a very short leash.

Those who doubt this need generally only compare U.S. federalism to

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55. Roberta Alexander, *Dred Scott: The Decision that Sparked a Civil War*, 34 N. KY. L. REV. 643, 646–47 (2007).

56. Joanne Freeman, Lib. Cong., *Time Line of the Civil War, 1861*, <http://memory.loc.gov/ammem/cwphtml/tl1861.html> (last visited Oct. 21, 2010).

57. STEIN, *supra* note 20, at 285–86.

58. Joanne Freeman, Lib. Cong., *Time Line of the Civil War, 1864*, <http://memory.loc.gov/ammem/cwphtml/tl1864.html> (last visited Oct. 21, 2010).

59. LESLIE M. HARRIS, *IN THE SHADOW OF SLAVERY: AFRICAN AMERICANS IN NEW YORK CITY, 1626–1863*, at 279–88 (2003).

that of Belgium or Canada. Canada is bigger than the United States but has only ten provinces, one of which is French-speaking Quebec.<sup>60</sup> Quebec is populous and large, and a referendum of secession in 1995 was defeated there only by the thinnest of margins: 50.6% to 49.4%.<sup>61</sup> The Canadian Supreme Court has ruled that Quebec has a constitutional right to secede, albeit not unilaterally and not without negotiations with the federal government in Ottawa.<sup>62</sup> The drawing of provincial boundary lines to correspond with linguistic, ethnic, and religious cleavages makes Quebec Province very different from all of the other nine provinces. Imagine how peaceful Canadian politics might be if Canada had fifty provinces instead of ten. Imagine the benefit of provincial boundary lines that are arbitrary and random the way U.S. state boundary lines are and that cross cut linguistic, ethnic, and religious cleavages.<sup>63</sup>

Now consider another non-democratic federation that recently split apart into fifteen sub-national units. This is, of course, the former Soviet Union, which had fifteen Republics, only one of which is the current Russian Federation.<sup>64</sup> The so-called constitution of the former U.S.S.R. had a grandiose Bill of Rights guaranteeing liberties of all sorts, including a right of secession.<sup>65</sup> No provision of the U.S.S.R.'s constitution was ever followed other than the secession clause. Why were nations like Ukraine, which had been Russian for hundreds of years, able to achieve independence from a nuclear-armed communist dictatorship? With only fifteen member Republics—many with their own histories and dialects or languages—covering the largest geographical area of any nation on earth, the costs of collective secessionist action were simply not that high. Had the U.S.S.R. been a fifty state federation, it would probably still be around today.

Consider the successful secession of the thirteen American colonies from the British Empire in 1776. There were major costs to this collective action, as mentioned above, and General Washington almost lost the war because of the weakness of the central government under the Articles of Confederation. Prior to the war, Britain directed its ire at only the tax rebels in Massachusetts in hopes that it could divide them from the other colonists. The so-called Intolerable or Coercive Acts in 1774 were targeted only at Massachusetts, but by then, Britain had tried to impose a sugar tax, a stamp tax, and a tea tax affecting all thirteen colonies. It is hardly surprising, then, that they all came to Massachusetts' side. The colonies in the end overcame the collective action problem of uniting to secede from the British Empire, in part because they were so different from Britain and had so much in common with one another.

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60. *The World Factbook 2010*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2051.html> (last visited Nov. 15, 2010).

61. 15 *THE NEW ENCYCLOPÆDIA BRITANNICA* 475 (15th ed. 2005).

62. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 55–56 (Can.).

63. See generally STEIN, *supra* note 20 (providing an overview of the historical accidents leading to the current state boundaries in the United States).

64. 28 *THE NEW ENCYCLOPÆDIA BRITANNICA* 998 (15th ed. 2005).

65. KONSTITUTSIJA SSSR (1977) [KONST. SSSR] art. 72 [USSR CONSTITUTION].

Another successful secession occurred on January 1, 1993, when the Slovak people dissolved their union with the Czech people even though the differences between the two peoples are vanishingly small.<sup>66</sup> The fact that Czechoslovakia dissolved so easily is no doubt attributable in part to the fact that it consisted of only two peoples, each living in geographically defined areas, rather than fifty peoples living comingled with one another. This made the cost of secessionist action by the Slovaks very low.

Low secession cost also led at this time to the dissolution of the six republic federation of Yugoslavia.<sup>67</sup> Under Marshal Tito, its formidable and moderate longtime communist dictator, Yugoslavia had seemed to be a model of inter-ethnic tolerance, but with Tito's death, it dissolved fairly swiftly and violently.<sup>68</sup> The fact that it had only six republics, rather than, say, twenty-five or fifty, and that each republic, like Quebec, contained a territorially homogenous ethnic, linguistic, or religious group, made Tito's federation much more unstable than any realized. The violent dissolution of Yugoslavia calls to mind both the partition of British India into Islamic Pakistan and Hindu India in 1947<sup>69</sup> and the partition of Ireland into Protestant Northern Ireland and the Catholic Republic of Ireland in 1921.<sup>70</sup> Here again, the division of the population into two main groups—Hindus and Muslims in India and Catholics and Protestants in Ireland—greatly lowered the cost of collective secessionist action.

A similarly low cost of collective action has led to serious devolution movements in Belgium, the United Kingdom, Spain, and France. Belgium has devolved tremendous power to its Flemish and Walloon communities,<sup>71</sup> and it seems quite possible it will peacefully dissolve as did Czechoslovakia. The United Kingdom recently devolved some power to Scotland and Wales,<sup>72</sup> and the movement for Scottish independence still remains a real threat to the United Kingdom, despite the unity of the Crown since 1603 and Parliament since 1707.<sup>73</sup> The division of the British island into two peoples—the English and the Scots—may prove as unstable as the division of Czechoslovakia into Czechs and Slovaks. Spain faces similar problems with Catalonia and the Basque Region<sup>74</sup> while

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66. 3 THE NEW ENCYCLOPÆDIA BRITANNICA 837 (15th ed. 2005).

67. See 12 THE NEW ENCYCLOPÆDIA BRITANNICA 870–71 (15th ed. 2005).

68. *Id.*

69. For a discussion on the partition of British India in Pakistan and India, see 21 THE NEW ENCYCLOPÆDIA BRITANNICA 109–10 (15th ed. 2005).

70. For a discussion on the partition of Ireland into Northern Ireland and Ireland, see 9 THE NEW ENCYCLOPÆDIA BRITANNICA 679–80 (15th ed. 2005).

71. See 2 THE NEW ENCYCLOPÆDIA BRITANNICA 62 (15th ed. 2005).

72. Cabinet Secretariat, *Devolution—Scotland, Wales, and Northern Ireland*, [http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/secretariats/economic\\_and\\_domestic/legislative\\_programme/guide\\_html/devolution.aspx](http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/secretariats/economic_and_domestic/legislative_programme/guide_html/devolution.aspx) (last visited Oct. 19, 2010).

73. See 12 THE NEW ENCYCLOPÆDIA BRITANNICA 132–33 (15th ed. 2005).

74. Simon James, *EU Reactions to Kosovo's Independence: The Lessons for Scotland*, 5

France has to deal with a terrorist secessionist movement on the island of Corsica.<sup>75</sup>

American history offers two examples of unsuccessful secessionist pressure by a single state's action. In the 1780s, tiny Rhode Island boycotted the Philadelphia Convention that produced the Constitution,<sup>76</sup> and it then refused to ratify the Constitution, presumably for fear that the new federal government would tax its wealthy merchants.<sup>77</sup> For similar reasons, Rhode Island had earlier been the lone state to veto an amendment to the Articles of Confederation that would have given Congress the power to regulate and tax commerce.<sup>78</sup> The Articles of Confederation could only be amended by all thirteen colonies acting unanimously.<sup>79</sup> Rhode Island thus tried to block ratification of the Constitution by denying its consent. The other states, however, called Rhode Island's bluff. By the spring of 1790, President Washington had the new federal government up and running under the Constitution without Rhode Island, but with all twelve of the other thirteen original states.<sup>80</sup> Washington declared that he would start imposing customs duties on all trade between the United States and Rhode Island, causing the wealthy merchants in Providence and Newport to threaten secession and the Antifederalists in the state to back down.<sup>81</sup> Rhode Island ratified the Constitution by two votes on its third try in 1790.<sup>82</sup>

A second example in American history of a single state failing to rebel against the federal government came with South Carolina's effort to nullify a high federal tariff in the Nullification Controversy of 1832.<sup>83</sup> South Carolina called a special convention analogous to the convention that had ratified the Constitution, and the convention adopted an ordinance declaring the federal tariff null and void within the territorial confines of South Carolina.<sup>84</sup> President Andrew Jackson issued a proclamation declaring South Carolina's ordinance unconstitutional, and Congress

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(2008), <http://www.ucl.ac.uk/constitution-unit/files/media/articles/2008/Kosovo08.pdf>.

75. *Id.* at 12.

76. Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 505 (1995).

77. *Id.* at 538–39.

78. *Id.* at 489 (noting that attempts to impress upon Rhode Island the necessity of the taxing power foundered after Virginia withdrew its consent, effectively scuttling the amendment); Johnson, *supra* note 33, at 227.

79. ARTICLES OF CONFEDERATION OF 1781, art. XIII.

80. *See* Ackerman & Katyal, *supra* note 76, at 537–38.

81. *Id.* at 538–39.

82. *Id.* at 539.

83. William J. Rich, *Lessons of Charleston Harbor: The Rise, Fall and Revival of Pro-Slavery Federalism*, 36 MCGEORGE L. REV. 569, 595 (2005) (citing WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 1816–1836*, at 260–63 (1966)).

84. *Id.*

passed a force bill authorizing President Jackson to use military force to subdue South Carolina if necessary.<sup>85</sup> South Carolina acquiesced and repealed its ordinance of nullification, but it learned that the next time it wanted to challenge federal power—which turned out to be in 1860—it would need to seek allies from among the other states. In 1832, there were only twenty-four states in the Union (twelve of which were slave states),<sup>86</sup> whereas in 1860, there were thirty-four states in the Union (only fifteen of which were slave states).<sup>87</sup> The logic of collective action suggests that South Carolina waited too long to try to organize a secession.<sup>88</sup>

In 1798, the Virginia and Kentucky Resolutions, whereby the two states—led by Thomas Jefferson and James Madison—tried to declare that the newly passed Federal Alien and Sedition Acts were unconstitutional, providing a foreshadowing event for the Nullification Controversy.<sup>89</sup> The Resolutions claimed the states had formed the Union and that they could interpose themselves against unconstitutional assertions of federal power. Rhode Island passed a resolution disagreeing and claiming that the federal Constitution was only to be enforced by the federal courts.<sup>90</sup> The controversy was taken to the American people in the election of 1800, and Jefferson was elected President while his allies won control of Congress.<sup>91</sup> As a result, the Alien and Sedition Acts died with Jefferson pardoning those convicted under them.<sup>92</sup>

In conclusion, we argue that the case for enhancing federal power over war-making or foreign affairs becomes stronger as the number of member states in a federation increases. We also conclude that the likelihood of a successful secession or civil war decreases sharply as the number of member states in a federation increases. This is especially true if state boundary lines are drawn arbitrarily, as they were in the United States, rather than territorially to empower linguistic, ethnic, or religious subgroups as they were in Canada, the U.S.S.R, and Yugoslavia.

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85. *Id.* at 595–96.

86. H.R. DOC. NO. 23-269 (1832), available at <http://www2.census.gov/prod2/decennial/documents/1830a-01.pdf>.

87. THE WORLD ALMANAC AND BOOK OF FACTS 2010, at 616.

88. See generally OLSON, *supra* note 45 (explaining that while secession may itself seem an excludable good, there remains the possibility of free-riding by states who hold back their support until the likely outcome becomes discernable).

89. David W. Tyler, Note, *Clarifying Departmentalism: How the Framers' Vision of Judicial and Presidential Review Makes the Case for Deductive Judicial Supremacy*, 50 WM. & MARY L. REV. 2215, 2233 (2009).

90. *Id.* at 2234.

91. Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. 1105, 1125 (2009).

92. Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1939–40 (2008).

## 2. Free Trade

In addition to winning wars and formulating a foreign policy, all countries have a strong national interest in trading with one another. International trade, by definition, leaves both sides better off, and it increases GDP in those countries that participate. Unfortunately, all governments need revenue to function, and taxes on international trade are often a politically popular way to raise money because powerful local economic interests may want to be shielded from foreign competition.<sup>93</sup> Aside from revenue-raising tariffs, governments may find themselves besieged by requests from politically powerful local interests to ban certain imports altogether.<sup>94</sup> Without coordinated action, therefore, governments often find themselves with mutual bans on trade that hurt everybody concerned. Overcoming these bans on trade and acquiring access for one's products to foreign markets typically requires that a government negotiate a free trade treaty with another country or countries. This is a costly and time-consuming endeavor.

The thirteen original American colonies did not have to worry about free trade or foreign markets in which to sell their products prior to 1776 because they were part of the free trade system of the British Empire.<sup>95</sup> After independence and in the 1780s, however, America found itself without access to British or French markets, and the federal government under the Articles of Confederation had limited constitutional authority to make treaties permitting trade with foreign powers.<sup>96</sup> The individual states, meanwhile, lacked the leverage to negotiate such treaties.<sup>97</sup> Efforts were made twice to amend the Articles to give Congress the power to set duties on trade, but the first effort was vetoed by Rhode Island and the second by New York.<sup>98</sup> A principle reason for writing the Constitution, therefore, was to give Congress the power to regulate trade and economic relations with foreign countries.<sup>99</sup>

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93. See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 130–40 (1982) (discussing the political expediency of tariffs and interest group demand for protectionist measures).

94. See *id.*

95. See Ferdinand P. Schoettle, *Big Bucks, Cloudy Thinking: Constitutional Challenges to State Taxes—Illumination from the Gatt*, 19 VA. TAX REV. 277, 280 n.1 (1999) (noting that the U.S. Supreme Court asserts the Constitution is a free trade document).

96. EDWARD S. CORWIN, *NATIONAL SUPREMACY: TREATY POWER VS. STATE POWER* 50 (BiblioLife, LLC 2009) (1913) (noting the contradictory Confederation Article that granted exclusive treaty power to the federal government while, in effect, allowing a state veto or subjugation of that federal action); Articles of Confederation art. IX.

97. Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 49 n.200 (1999).

98. Ackerman & Katyal, *supra* note 76, at 489–90.

99. See *id.*

The universal need for trade thus turns out to be second only to the need for mutual defense as a reason for the creation of national or international governing entities. As the number of member states in a federation goes up from, say, thirteen to thirty-four or forty-eight, one would expect the need for delegation of power to negotiate trade agreements to federal or confederal governments to go up exponentially as well. If even the thirteen original American states needed a central government to negotiate trade treaties, then surely the fifty American states today need that central government even more badly.

This point is augmented by the fact that federations need free trade domestically among their member states as well as with foreign countries. In 1789, the federal government thus acquired a power to regulate domestic interstate commerce, which Congress had lacked under the Articles of Confederation.<sup>100</sup> As the number of member states in a federation goes from thirteen to thirty-four to forty-eight, the need for a central government with the power to protect domestic free trade goes up exponentially as well. Imagine the cost and time it would take for each of the fifty states today to negotiate a free trade agreement with all of the forty-nine states other than itself. Clearly, the need for free trade both with foreign nations and domestically is so powerful that many sovereign nations have entered into free trade pacts with their neighbors—or in the case of the European empires, with their colonies—whose pacts are enforced by some kind of confederal governmental structure. The European Union is one such structure, and the World Trade Organization's General Agreement on Tariffs and Trade (GATT) may well become another. Again, the greater the number of member states in a federation, the more the need for federal or confederal centralized governmental power.

One would thus expect that as the number of members of a federation increases, the amount of regulation of interstate commerce and the scope of the federal government's power over interstate commerce would increase as well. This, of course, is exactly what has happened in the United States. The nation started out in 1790 with only thirteen states, and from that time until the Civil War, Congress passed almost no laws exercising its commerce power, and this power was mainly enforced in the Supreme Court's dormant Commerce Clause case law, about which we will say more below. Arguably, Congress's first major exercise of its power to regulate interstate commerce came in 1887 with the passage of the Interstate Commerce Act and the creation of the Interstate Commerce Commission.<sup>101</sup> Three years later, in 1890, Congress passed a second major statute regulating interstate commerce, the Sherman Antitrust Act.<sup>102</sup> In

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100. U.S. CONST. art I, §§ 8, 10.

101. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified in scattered sections of 49 U.S.C.).

102. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C.).

1887, there were thirty-eight states in the Union, and by the end of 1890, there were forty-four.<sup>103</sup> Obviously, the rationales for passing these federal statutes are complex and various, but it must have been far easier for Congress to regulate interstate commerce in a Union of forty-four states than in a Union of thirteen states.

The Supreme Court dramatically expanded its doctrinal understanding of the scope of federal power under the Commerce Clause in the 1903 case of *Champion v. Ames*,<sup>104</sup> which came down at a time when there were forty-five states.<sup>105</sup> *Champion* is of critical importance because it upheld regulations of interstate commerce enacted for moral rather than free trade purposes.<sup>106</sup> The statute upheld in *Champion* regulated the interstate shipment of lottery tickets.<sup>107</sup> In the wake of *Champion*, Congress passed federal morals laws governing interstate commerce in prostitution and in harmful food and drugs.<sup>108</sup> *Champion* opened the door to what has proved to be an explosive growth in the federal police power.

By 1912, the Union had added another three states and was up to forty-eight members.<sup>109</sup> A year later, the ratification of the Sixteenth Amendment gave the federal government the power to tax incomes without apportionment among the states.<sup>110</sup> The Sixteenth Amendment, coupled with a federal police power under *Champion*, overturned the balance of American federalism. Before 1913, the federal government was dependent on the tariff for revenue, but the Sixteenth Amendment changed that, opening vast sums of money for federal use. Since Congress has almost unlimited power to attach strings to federal funds under the Constitution,<sup>111</sup> increasing the federal government's revenue enormously meant an enormous increase in its power over the states as well. By the 1920s, even conservative Republican Congresses and presidents were spending federal money to promote maternal and infant health.<sup>112</sup> The leap from this to spending federal funds for social security or welfare was only one of degree and not of constitutional dimension.

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§§ 1–7 (2006)).

103. THE WORLD ALMANAC AND BOOK OF FACTS 2010, at 454.

104. 188 U.S. 321, 363–64 (1903).

105. THE WORLD ALMANAC AND BOOK OF FACTS 454 (2010).

106. *Champion v. Ames*, 188 U.S. 321, 356 (1903).

107. *Id.* at 321.

108. White-Slave Traffic Act of 1910, ch. 395, 36 Stat. 825 (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)); Pure Food Act of 1906, ch. 3915, 34 Stat. 768 (repealed 1938).

109. THE WORLD ALMANAC AND BOOK OF FACTS 2010, at 454.

110. U.S. CONST. amend. XVI.

111. *See* *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987).

112. *See generally* J. Stanley Lemons, *The Sheppard-Towner Act: Progressivism in the 1920s*, 55 J. AM. HIST. 776, 776 (1969) (describing The Sheppard-Towner Act as “[t]he first venture of the federal government into social security legislation”).

The Supreme Court did make a famous and much discussed effort to cabin the Commerce Clause in *Hammer v. Daggenhart*.<sup>113</sup> The line the Court tried to draw was one that would allow Congress to regulate the flow of harmful goods across state lines, but not harmless goods, like the cotton goods manufactured with child labor in *Hammer*.<sup>114</sup> The obvious objection to this line of reasoning was that if the federal Commerce Clause did not create a free trade zone, then goods made with child labor would encounter customs barriers when they crossed state lines.<sup>115</sup> Instead of those customs barriers, such commerce encountered the public policy of the United States as established by federal law.<sup>116</sup> It is an unanswerable objection. Indeed, at about the same time it was deciding *Hammer*, the Supreme Court upheld federal power in the *Shreveport Rate cases* to regulate rates on wholly intrastate railroad rates where such regulation had a substantial effect on interstate commerce.<sup>117</sup> The *Shreveport Rate cases* led inexorably to the conclusion that the Supreme Court reached in 1937 in *NLRB v. Jones & Laughlin Steel* that Congress can, under the Commerce Clause read together with the Necessary and Proper Clause, regulate all wholly intrastate activities that substantially affect interstate commerce.<sup>118</sup> The Court in *Jones & Laughlin Steel* upheld the federal labor laws, which regulated the conditions of manufacturing.<sup>119</sup> A few years later, *United States v. Darby* overruled *Hammer v. Daggenhart*, and state power bit the dust.<sup>120</sup>

What should we make of the fact that even after the ratification of the Sixteenth Amendment in 1913, the Supreme Court resisted federal power in *Hammer* in 1918 and in a couple of cases striking down New Deal statutes? Not very much. *Hammer* itself was an Indian summer of the old order.<sup>121</sup>

There was another constitutional amendment adopted in 1913, only a year after the Union expanded to forty-eight states, that dealt yet another crippling blow to the states. We refer, of course, to the ratification of the Seventeenth Amendment, which ended direct election of senators by state

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113. 247 U.S. 251 (1918).

114. *Id.* at 271–72.

115. *See id.* at 281 (Holmes, J., dissenting).

116. *Id.*

117. *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 355 (1914).

118. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937).

119. *Id.* at 22–26.

120. *United States v. Darby*, 312 U.S. 100, 116 (1941).

121. For those unfamiliar with the term, “Indian summer” refers to the common meteorological phenomenon of a short period of warm, summer-like weather during autumn. It metaphorically denotes any anachronistic emergence of a type of thing more in keeping with a recently declining period, rather than the current trend. In this usage, it is similar to a last gasp or a throwback to an earlier era.

legislatures.<sup>122</sup> This transformed the Senate from being a kind of U.N. Security Council of ambassadors from the several states into being an arm of the national government as well. That transformation was made possible in part because the expansion from thirteen states in 1790 to thirty-four in 1860 to forty-eight in 1912 had the necessary effect of increasing the number of Senators from twenty-six to sixty-eight to ninety-six.<sup>123</sup> A twenty-six member Senate elected by the state legislatures was small enough to be a real check on federal power. A ninety-six member Senate elected by the voters of the states was not. Moreover, by 1912, only fifteen states had originally been independent countries—the original thirteen plus Texas<sup>124</sup> and (arguably) California<sup>125</sup>—while thirty-three had been carved out of federal territory. The very fact that the Seventeenth Amendment could be rammed down the throat of a Senate partly elected by state legislatures was proof of how dire the situation of federalism had become. As a matter of practical politics, the federal government had become constitutionally omnipotent by 1913, as *Missouri v. Holland*<sup>126</sup> would begin to show.

So why did the Court decide *Hammer v. Daggendhart* in 1918 and its taxing power companion, *Bailey v. Drexel Furniture Co.*,<sup>127</sup> in 1922 the way it did? The answer is simply that it took time for the nine Supreme Court Justices, who had been picked in part by a federalist pre-Seventeenth Amendment Senate, to be replaced by more nationalist Supreme Court Justices confirmed by a post-Seventeenth Amendment Senate. The first Justice appointed after these momentous events was Attorney General James McReynolds, whose conservative pro-state power views had been shaped by a lifetime growing up in a different Union from the one the United States had become.<sup>128</sup> McReynolds became one of the four conservative Justices on the Court of the 1930s who were referred to as the “Four Horsemen” of the apocalypse.<sup>129</sup>

The lag in Supreme Court turnover was augmented by the fact that conservative Presidents William Howard Taft and Warren G. Harding filled ten vacancies on the Supreme Court in holding the White House for

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122. U.S. CONST. amend. XVII.

123. THE WORLD ALMANAC AND BOOK OF FACTS 454 (2010).

124. STEIN, *supra* note 20, at 267.

125. *Id.* at 33–34.

126. 252 U.S. 416, 435 (1920) (upholding the Migratory Bird Treaty Act despite its coverage of matters outside Congress’s enumerated powers).

127. 259 U.S. 20 (1922) (striking down a tax that sought to indirectly regulate child labor, a traditional state responsibility).

128. McReynolds took his judicial oath on October 12, 1914. Members of the Supreme Court of the United States, [http://www.supremecourt.gov/about/members\\_text.aspx](http://www.supremecourt.gov/about/members_text.aspx) (last visited Oct. 21, 2010).

129. See, e.g., Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 559 (1997).

seven years; however, progressive Presidents Theodore Roosevelt and Woodrow Wilson got only six vacancies despite holding the White House for more than twice as long—fifteen years.<sup>130</sup> The Supreme Court that struck down a lot of New Deal laws between 1933 and 1937 on a five-to-four vote had no appointees of Franklin Delano Roosevelt on it.<sup>131</sup> Three of the five Justices who voted with the majority in *Jones & Laughlin Steel*—the famous switch in time that helped to save nine—were appointees of Republican Herbert Hoover,<sup>132</sup> while one was an appointee of Republican Calvin Coolidge.<sup>133</sup> Only one of the five justices who made the switch in time that saved nine was appointed by a progressive president.<sup>134</sup> In contrast, two of the four *Jones & Laughlin Steel* dissenters were Harding appointees while one was the Wilson appointee, McReynolds.<sup>135</sup> The final dissenter was Willis Van Devanter, appointed by Republican President Taft. Our conclusion is that *Hammer v. Daggenghart* and the Indian summer of the constitutional order of dual federalism were the result only of a lag before the nationalizing effects of the Sixteenth and Seventeenth Amendments could be felt.

Yale Law School Professor Bruce Ackerman has famously argued that American Constitutional history is usefully divided into three regimes: the Founders' Republic, the Middle Republic, and the New Deal Republic, with constitutional moments and change occurring in 1789, 1868, and 1937.<sup>136</sup> There is a case to be made for Ackerman's periodization based on Supreme Court doctrine. In fact, Ackerman is right that we have had three regimes with respect to the scope of federal power, but the key fact one needs to know is that the Union had thirteen states in 1790, thirty-four in 1860, and forty-eight in 1913. The increase in the number of states first made Southern secession too expensive to organize as a matter of collective action, and it then made any residual claims of state power and dual federalism impossible to maintain during the Progressive era. There was indeed a Rooseveltian transformative presidency, but it was Republican Theodore Roosevelt rather than his Democratic cousin who created the political climate that led to the Sixteenth and the Seventeenth Amendments' obliteration of dual federalism. Our three transformational presidents are Federalist George Washington and Republicans Abraham Lincoln and Theodore Roosevelt. FDR just piled on for the ride.

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130. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 846 (2006).

131. Members of the Supreme Court of the United States, *supra* note 128 (illustrating that the first Justice nominated by President Franklin Roosevelt—Hugo Black—did not take the oath of office until August 1937).

132. *Id.* (Justices Charles Hughes, Owen Roberts, and Benjamin Cardozo were appointed by Hoover).

133. *Id.* (Justice Harlan Stone was appointed by Coolidge).

134. *Id.* (Justice Louis Brandeis was appointed by Wilson).

135. *Id.* (Justices George Sutherland and Pierce Butler were appointed by Harding).

136. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 58 (1991).

### B. Externalities

Another commonly mentioned problem that favors national or transnational power is a need for a national or transnational entity that can stop state laws that generate serious negative externalities for other states.<sup>137</sup> A classic example of such a negative externality might be, until recently, air pollution emissions by Midwestern manufacturing states that caused acid rain in New England. A state generating such negative externalities might have little political incentive to correct them because the state's own citizens may benefit from manufacturing, the costs of which are felt mainly by out-of-staters with no vote in the manufacturing state's elections.

How would the expansion from thirteen states in 1790 to thirty-four states in 1860 to forty-eight states in 1912 affect the externality-correcting case for the enhancement of national power? Obviously, a greater number of states will generate a far greater number of externalities. As it happens, forty-eight is roughly four times thirteen, but the number of externalities will increase exponentially. It is thus entirely predictable that federal power would grow steadily as the number of states increased: first with the emergence in the Founders' Republic of the dormant Commerce Clause<sup>138</sup> and of federal common law,<sup>139</sup> and then with the emergence during the Middle Republic of the Sherman Antitrust Act,<sup>140</sup> the Interstate Commerce Commission,<sup>141</sup> federal paper money in peacetime,<sup>142</sup> federal rules proscribing polygamy,<sup>143</sup> and a federal police power for interstate gambling,<sup>144</sup> prostitution,<sup>145</sup> and shipment of impure food and drugs.<sup>146</sup> The post-1913 Progressive Republic with its forty-eight states has seen federal government power mushroom exponentially to the point where the growth of six marijuana plants in one's own home is a federal crime because of the harmful external effects that growing those plants is said to have on other

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137. See Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 556 (1994).

138. *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1, 240 (1824).

139. See generally Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267, 271 (1986) (examining "the evidence for an early federal common law of crime and reconstruct[ing] the constitutional basis of the early statutes and cases").

140. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7 (2006)).

141. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified in scattered sections of 49 U.S.C.) (created the Interstate Commerce Commission).

142. *Legal Tender Cases*, 79 U.S. (1 Wall.) 457, 552 (1870).

143. Morill Anti-Bigamy Law of 1862, ch. 126, 12 Stat. 501.

144. Act of Mar. 2, 1895, ch. 191, 28 Stat. 963 (suppressing lottery traffic through national and interstate commerce).

145. White Slave Traffic Act of 1910, ch. 395, 36 Stat. 825 (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)).

146. Pure Food Act, ch. 3915, 34 Stat. 768 (1906).

states.<sup>147</sup>

The greater the number of states, the greater the number of externalities, and the larger the role of the federal or confederal government. In theory, confederations could negotiate solutions to externalities among their members just as they could all adopt codes of uniform state laws. In practice, the costs of negotiating such collective action become prohibitive once the number of federal subunits becomes too large.<sup>148</sup> As a result, federations with a lot of federal subunits will have very powerful central governments.

Canada with ten provinces,<sup>149</sup> Germany with sixteen states (called Länder),<sup>150</sup> Australia with six states,<sup>151</sup> Switzerland with twenty-six cantons or half cantons,<sup>152</sup> and the European Union with twenty-seven member nations,<sup>153</sup> have all been able to maintain some meaningful limits on federal or confederal power. The United States was able to do the same as late as 1860, when the United States had as many as thirty-four states. But once one gets to that large a number of federal subunits, the increase in the number of externalities and the ability of the states to defend their authority from national expropriation begins (as Karl Marx might say) to wither away. We shall return below to the question of what is the optimal number of states for maintaining dual federalism, but we strongly suspect that the United States surpassed that magic optimal number a long time ago. The U.S. federation of fifty states has come dangerously close to omnipotent federal government.

There is a school of thought that suggests that there are political safeguards for state power in the United States, because the states draw boundary lines for U.S. House districts, elect senators by state, and elect the President and Vice President through the federalist mechanism of the Electoral College.<sup>154</sup> As a practical matter, however, the states are so dependent on federal appropriations and on the income tax subsidy for state and local taxation, that the federal government is essentially omnipotent as far as the political branches are concerned. There is no area

147. See *Gonzales v. Raich*, 545 U.S. 1, 32–33 (2005).

148. See Coase, *The Problem of Social Cost*, *supra* note 47, at 15–19 (discussing the effects of prohibitive transaction costs of bargaining to solve externality problems).

149. The World Factbook 2010, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2051.html> (last visited Nov. 15, 2010).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. See generally Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (expanding on Professor Herbert Wechsler's notion of political safeguards to include contemporary party politics); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (arguing that elements of the political process inherently protect the distribution of power between the nation and the states).

of law—not family law, not tort law, not education, not health care, not criminal law, not obscenity law, not religion clause law, and not abortion nor gay rights law—where the federal government has not had the last word, either through Congress or the Supreme Court. The federal government has in recent times established a fifty-five mile per hour speed limit<sup>155</sup> and a national drinking age of twenty-one.<sup>156</sup> There is little of importance that must be decided in the United States at the state level.

One symptom of this brooding omnipresence of federal law is the gradual incorporation of the Bill of Rights and of natural and inalienable rights into § 1 of the Fourteenth Amendment to constrain state action. The first incorporation case involved the Takings Clause of the Fifth Amendment and occurred in 1897,<sup>157</sup> when the Union had already grown to include forty-five states.<sup>158</sup> By 1905, the Supreme Court, in *Lochner v. New York*, imposed substantial additional national constitutional constraints on state power.<sup>159</sup> Most of the Bill of Rights beyond the Takings Clause was incorporated in the period between 1925<sup>160</sup> and 1969,<sup>161</sup> while the Union went from forty-eight to fifty states.<sup>162</sup> Unenumerated, national, natural law rights were judicially enforced in the economic arena from 1905 to 1937, and then with respect to personal, non-economic matters from 1965 to the present.<sup>163</sup> For the last 105 years, critics have complained that national rights creation by the Supreme Court infringes on state power, reduces competition and experimentation, and is a usurpation of power by the high Court.<sup>164</sup> This criticism, loud and persistent though it has been, has proven to be ineffectual. Once the number of states hit forty-five in 1896, forty-eight in 1912, and fifty in

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155. Emergency Highway Energy Conservation Act, Pub. L. No. 93-239, § 2(b), 87 Stat. 1046 (1974) (repealed 1975).

156. National Minimum Drinking Age Act, 23 U.S.C. § 158 (1984).

157. *See* *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 234–35 (1897).

158. THE WORLD ALMANAC AND BOOK OF FACTS 2010, at 454.

159. *Lochner v. New York*, 198 U.S. 45, 58 (1905).

160. *See, e.g., Gitlow v. New York*, 268 U.S. 652, 666 (1925) (suggesting in dictum that the Due Process Clause of the Fourteenth Amendment incorporates First Amendment freedom of speech and freedom of the press provisions).

161. *See, e.g., Benton v. Maryland*, 395 U.S. 784 (1969) (holding that the Due Process Clause of the Fourteenth Amendment incorporates the Fifth Amendment double jeopardy prohibition).

162. THE WORLD ALMANAC AND BOOK OF FACTS 454 (2010).

163. Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1563–70 (2004) (examining the attitudes of the Supreme Court toward unenumerated substantive due process rights, first relating to economic rights during the *Lochner* era, then relating to non-economic rights after *Griswold*).

164. *See Lochner v. New York*, 198 U.S. 45, 75–76 (Holmes, J., dissenting) (arguing forcefully against interference by the courts in the exercise of state police powers where the Constitution does not require it and where reasonable minds may differ as to the most effective policy).

1959,<sup>165</sup> the creation of a national human rights law was likely unstoppable. Likewise, incorporation and substantive due process were likely inevitable once the number of states hit forty-five. In retrospect, the federal ban on polygamy in Utah was a forerunner of what was to come.<sup>166</sup>

There is one respect in which federal elimination of state-caused externalities diminished as the number of states increased. The states have gained with respect to less vigorous enforcement of the dormant Commerce Clause, the elimination of the Supreme Court's role through federal common law in creating a uniform federal commercial law, and the establishment during the New Deal of a more state-friendly standard for federal preemption of arguably conflicting state laws. These developments do not, however, respect a newfound desire to empower the states so much as they reflect a federal policy of encouraging economic planning and rent-seeking behavior. We will have more to say below about why increasing the number of federal subunits would have been likely to encourage state efforts to get Washington to enable and enforce cartels.

### C. *Economies of Scale*

Another economic argument for national or international power derives from the economies of scale that are gained if some activities are done once by a national or international government rather than fifty times by state governments. We think it is self-evident that there are economies of scale that are gained by letting the national government create an Air Force, a National Aeronautics and Space Administration, and a medical science research program through the National Institutes of Health, none of which is authorized as enumerated powers of the federal government. This is why Britain, France, and Germany chose not to create their own space programs but instead pooled their efforts into a trans-European space program. Less is not always more, and sometimes bigger is better. This is why national grocery market chains have largely replaced corner grocery stores. The advantage of national and international governmental entities is that they can realize economies of scale that the fifty states cannot.

So how does increasing the number of states from thirteen to thirty-four to forty-eight affect this economic normative argument in favor of enhanced federal power? Imagine here the difference between a United States with four states—the Northeast, the South, the Midwest, and the West—as compared with the current fifty state structure. A federation with fifty subunits rather than four will be more likely to experience economies of scale from enhanced national power. A federal subunit consisting of the Northeast or the West might well fund its own stem cell research program, for example, when the state of Massachusetts acting alone would not

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165. THE WORLD ALMANAC AND BOOK OF FACTS 2010, at 454.

166. Morill Anti-Bigamy Law of 1862, ch. 126, 12 Stat. 501.

undertake such an expense. California today has its own global warming and environmental policies,<sup>167</sup> in part because it has about one-ninth of the total population of the United States,<sup>168</sup> it is geographically the third largest of the fifty states,<sup>169</sup> and it has an economy that would be one of the largest in gross domestic product (GDP) in the world if California were an independent sovereign nation.<sup>170</sup> Carving the territory of the United States into fifty rather than four regions inevitably means more activities will exist for which there are economies of scale from undertaking action at the federal level, which inevitably means a more powerful federal government.

In theory, of course, the states could negotiate to undertake joint activities and thus to realize economies of scale. To some extent, the states do that when (with federal permission) they create regional airport authorities and other such entities. The problem again is that the greater the number of federal subunits, the higher the cost of collective action. And, the higher the costs of collective action, the greater the incentive just to empower the federal government and let it handle the problems in question.

This point, in conjunction with the other points about the escalating costs of collective action as the number of territorial subunits increases, suggests that the prospects for the success of the European Union may be bright indeed. The EU already has twenty-seven member nations, and there remains a line of nations wanting to join.<sup>171</sup> An EU with twenty-seven member nations will often experience economies of scale by doing things itself rather than leaving them to be done by Germany, France, or the U.K. alone. Moreover, there will be many externalities eliminated by EU action and a diminished ability of any one of the twenty-seven member nation states to threaten credibly to secede or play holdout. The EU is fast approaching the thirty-four state threshold the United States experienced in 1860 when the South discovered that the costs of collective secessionist action had become prohibitively high. If conservative elements of the Tory Party in the U.K. were to regain control of the Prime Minister's office and of Parliament, could they ever withdraw from the EU or nullify an EU policy? We doubt it—although it might well be wise for the United States to offer the U.K. membership in NAFTA if such a state of events were to occur.

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167. *See, e.g.*, California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE §§ 38500–38599 (West Supp. 2010).

168. U.S. Census Bureau, *California Quick Facts*, <http://quickfacts.census.gov/qfd/states/06000.html> (last updated Aug. 16, 2010).

169. STATE PROFILES: THE POPULATION AND ECONOMY OF EACH U.S. STATE 21 (Diane Werneke & Katherine A. DeBrandt eds., 3d ed. 2006).

170. STEIN, *supra* note 20, at 34.

171. *The World Factbook 2010—European Union*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html> (last visited Nov. 15, 2010).

The bottom line is that increasing the number of member subunits in any federation or confederation obviously increases collective action costs, thus leading to enhanced national power. The key, therefore, to understanding the changes in America's constitutional balance between federal and state power from the Founders' Republic to the Middle Republic to the Modern Republic is to be found in the increase in the number of states from thirteen to thirty-four to forty-eight and now fifty. Our argument helps explain the dissolution of federations and nations in the U.S.S.R., Yugoslavia, and Czechoslovakia and the tension experienced in federations like Canada with ten provinces and Belgium with two language groups. Federations of twenty-six cantons or half cantons like Switzerland or of twenty-seven nations like the EU seem to be quite stable as systems of dual federalism. Once the number of federal subunits hits the high 30s or 40s, dual federalism ends and is replaced by functional national omnipotence.

#### D. Pluralism and Civil Rights

A fourth argument for national and international power has its origins in a debate that went on between 1787 and 1788, during the ratification process for the U.S. Constitution. Opponents of the Constitution, who called themselves the Anti-Federalists, argued that democracy was only possible in small city-states like Athens and Rome, before it acquired its empire.<sup>172</sup> They claimed that government had to keep close to the source of its power (the people) to reduce agency and monitoring costs.<sup>173</sup> Direct popular participation in governments larger than a city-state was obviously not feasible in the 18th Century given then-available technologies. Moreover, the Framers' prior experience with a sort of federalism through membership in the British Empire had soured them on the feasibility of making a distant imperial government responsive to democratic preferences in the provinces.

James Madison responded to this argument with his now famous argument in *The Federalist No. 10*, the genius of which has only come to be appreciated in modern times. The discussion that follows draws from the author's law student Note in the Yale Law Journal published twenty-eight years ago.<sup>174</sup> As explained there, Madison argued in *The Federalist No. 10* that the gravest threat to democracy came from violent factional conflicts.<sup>175</sup> In saying this, he was undoubtedly thinking of the religious wars in 17th Century England among Anglicans, Catholics, and Puritan

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172. See, e.g., THE ANTIFEDERALIST PAPERS 36–39 (Morton Borden ed., 1965).

173. See, e.g., *id.*

174. Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403, 1405 (1982) (arguing for the application of Madisonian political theory to equal protection analysis).

175. *Id.* (citing THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961)).

dissenters,<sup>176</sup> as well as the fights among merchants, farmers, investors, and debtors, which were then plaguing America.<sup>177</sup> Madison argued that federalism would help solve one of the key problems of democracy, which was the ever-present risk of a tyranny of the majority.<sup>178</sup> Such a tyranny occurs, according to Madison, when an entrenched majority faction consistently decides an issue or a set of issues unjustly for its own self-interested benefit.<sup>179</sup> Madison thought that “[t]he latent causes of faction . . . [were] sown in the nature of man,”<sup>180</sup> but that they were aggravated in small democratic city-states where one monolithic faction or alliance of factions could entrench itself and abuse the minority.<sup>181</sup> Madison identified two structural features of the federal government that he believed would make majority tyranny less likely at the federal level than it had been in the thirteen states.

First, Madison argued that a federal republic of thirteen states would have a much greater variety of interest groups and factions than would any one state alone.<sup>182</sup> This increase in the number and variety of factions, Madison argued, would make it harder for a permanent tyrannical majority coalition to form and to endure at the national level as compared to the state level.<sup>183</sup> The many factions in national majority coalitions would have dissimilar interests that likely would conflict over time.<sup>184</sup> As Madison predicted, designing the compromises necessary to hold such coalitions together has proven difficult for national leaders.<sup>185</sup> FDR’s New Deal coalition ultimately broke apart over civil rights, when southern and northern Democrats went their separate ways, a process that was evident as early as the midterm elections of 1938.<sup>186</sup> The Reagan Revolution ultimately foundered when social and economic conservatives parted company, a process that was evident when the popular President Ronald Reagan could not get social conservative Judge Robert Bork confirmed to the Supreme Court.

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176. See generally 2 CHRISTOPHER HILL, *RELIGION AND POLITICS IN 17TH CENTURY ENGLAND* (1986) (discussing the causes and consequences of the English Revolution).

177. See, e.g., VIRGINIA DEJOHN ANDERSON, *NEW ENGLAND’S GENERATION 1–2* (1991).

178. Note, *supra* note 174, at 1404–05 (citing *THE FEDERALIST* NO. 10 (James Madison) (Clinton Rossiter ed., 1961)).

179. *Id.* (citing *THE FEDERALIST* NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961)).

180. *Id.* at 1405 (quoting *THE FEDERALIST* NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961)) (alterations in original).

181. *Id.* at 1404–05 (citing *THE FEDERALIST* NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961)).

182. *Id.* at 1405 (citing *THE FEDERALIST* NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961)).

183. *Id.*

184. *Id.* at 1405–06.

185. *Id.* at 1406.

186. See M. Stephen Weatherford, *After the Critical Election: Presidential Leadership, Competition and the Consolidation of the New Deal Realignment*, 32 *BRIT. J. POL. SCI.* 221, 241–44 (2002).

Ultimately, the difficulty of maintaining a permanent majority coalition in Congress has proven to be similar to the difficulty that groups like OPEC face in maintaining a large, multi-member cartel.<sup>187</sup> Like such cartels, majority coalitions in Congress usually have more members than their leaders can keep happy at the same time. Some of those members thus find themselves inevitably led by their own self-interest to seek new and more promising allies.<sup>188</sup> Southern Democrats thus defected out of the New Deal coalition over civil rights issues, just as socially liberal suburban Republicans defected out of the Reagan coalition over social issues. The result is that national majority coalitions of factions or special interest groups are hard to form—and even harder to hold together over time. Such national coalitions are unlikely to harden into entrenched majority and minority blocks.<sup>189</sup> Self-interest and the stunning variety of factions in the constantly changing political landscape of a large federal republic prevent any one group from monopolizing the political marketplace.

At the state level, however, the smaller number of factions facilitates the formation of entrenched majority coalitions.<sup>190</sup> Entrenched majority coalitions form most easily in homogenous legislatures with few factions, just as cartels form most easily in homogenous markets with few producers.<sup>191</sup> The more competitive or fluid the environment, the more difficult cartelization becomes. Further, competitive environments with large numbers of dissimilar factions quickly wear away any entrenched majorities.

The fact that majority coalitions are less stable at the federal level than at the state level means that consistent tyranny by the same majority over the same minority is less likely at the federal level. Congressional leaders will often be in need of the votes of those sympathetic to minority rights in the future, so they will have more of an incentive to treat minorities fairly. The political processes at the federal level are thus less likely to be curtailed by the kind of prejudice that John Hart Ely wrote about in *Democracy and Distrust*.<sup>192</sup> Indeed, by forcing national congressional leaders to bid for their support, minority groups in Congress may acquire the political leverage of single-issue voters, able to extract political

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187. Note, *supra* note 174, at 1406; see also Daniel Diermeier, *Coalition Government*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 162, 173 (Barry R. Weingast & Donald A. Wittman eds., 2006) (discussing the dynamics of coalition termination); OLSON, *supra* note 45, at 9–11 (describing the defection effects that plague cartels and large interest groups, of which majority coalitions may be viewed as a particular type).

188. Note, *supra* note 174, at 1406; WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM 85–88 (1982) (addressing the shifting positions of political alliances over time).

189. Note, *supra* note 174, at 1406–07.

190. *Id.* at 1407.

191. *Id.*

192. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 153–61 (1980); Note, *supra* note 174, at 1407.

concessions in Congress that they could never have obtained at the state level. The larger number of factions at the federal level, and the instability this causes in congressional coalitions, thus, benefits minorities by making prejudice more costly and less likely at the federal level than at the state level.

A second feature of the federal government that works to protect minority rights, as Madison explained, involves the large numbers of people who must be brought together in a large democracy in order to form a popular majority coalition.<sup>193</sup> As Mancur Olson long ago pointed out<sup>194</sup> and as Madison anticipated, large numbers create a communication problem by making it hard for would-be oppressors “to discover their own strength and to act in unison.”<sup>195</sup> As Madison foresaw, communication and organizational costs are comparatively lower for discrete and insular minorities than for large amorphous groups.<sup>196</sup> Richard Nixon’s famous silent majority was silent because it was too expensive to communicate. The very cohesiveness of minorities, as well as their discreteness and insularity, make it comparatively more expensive and less likely for majorities to organize than for special interest groups to organize.<sup>197</sup>

As the size of a polity expands, this organizational advantage that minorities have over majorities becomes even more pronounced. Of course, modern communications technologies have greatly lowered the costs to majorities of organizing and communicating, but they have correspondingly lowered those costs for minorities and factions, as well. The development of first conservative talk radio and then of the Internet sites that supported the Barack Obama presidential campaign illustrate this vividly.

In sum, Madison’s variety-of-interests argument and his organizational costs argument are interdependent. Low organizational costs for minority factions in Congress would prove useless if that body were dominated by a stable majority coalition.<sup>198</sup> Such a situation may be typical of state legislatures, leaving minorities with little room to exploit their organizational advantage. At the same time, the instability of congressional coalitions would not help minorities much if they could not afford to organize more easily than the majority. It is for this reason that large amorphous groups like taxpayers, whose organizing costs are high, lose out

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193. Note, *supra* note 174, at 1408 (citing THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961)).

194. OLSON, *supra* note 45.

195. Note, *supra* note 174, at 1408 (quoting THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961)).

196. OLSON, *supra* note 45, at 46–47; Note, *supra* note 174, at 1408.

197. Note, *supra* note 174, at 1408; *see also* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. MGMT. SCI. 3, 12 (1971) (noting that small minorities with strong preferences find the costs of procuring favorable regulation lowest).

198. Note, *supra* note 174, at 1408.

to special interest rent-seekers.

The political influence and organizational strength of minorities at the federal level together lead to better protection for minorities in Congress than in the state legislatures. This has historically been true for the minority of property owners at the founding, for African-Americans, and for crony capitalist rent-seekers alike throughout American history. The very discreteness and insularity that render minorities vulnerable at the state level accords them power disproportionate to their numbers in the federal legislative process. Whereas state procedure and structure reinforce the tendency of majorities to tyrannize minorities, federal procedure and structure weaken any such tendency. As Madison remarked, “[I]n the extent and proper structure of the Union . . . we have beheld a republican remedy for the diseases most incident to republican government.”<sup>199</sup>

How then did the expansion of the federal government from a league of thirteen states on the Atlantic seaboard in 1790 to a league of thirty-four states stretching to the Pacific Ocean to a league of forty-eight states encompassing much of North America affect the normative case for national power? Obviously, this expansion increased the number and heterogeneity of interest groups represented in Congress and in other federal institutions. A transcontinental democratic empire engaged in extensive global trade with many religious and ethnic subgroups has many more interest groups than the United States did in 1790, and further, those interest groups differ more from one another. The formation of permanent majority cartels in Congress thus ought to be harder now than at the Founding, and special interests correspondingly ought to be more powerful.

Of course, the states too have grown in population, and several new and very large states have been admitted to the Union, including California, Texas, and Florida. These mega-states, more populous by far than the whole United States in 1790, will, according to *The Federalist No. 10*, be less prone to majority tyranny than, say, Rhode Island. But compared to the vast federal government, even mega-states like California, Texas, and Florida will be easier for majorities to capture and to hold than will be Congress. It is striking in this regard that Republicans at this writing appear to have a lock on the governorships, state senates, and state houses of representatives in Texas and Florida, while Democrats have a lock on the state legislature in California and a newly elected Democrat governor. In all three states, as in others, Republican and Democratic voting patterns correlate strongly with race, ethnicity, and gender.<sup>200</sup> Majority tyranny is more likely even in mega-states than it is at the federal level, and it is much more likely in states that are geographically small, like Rhode

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199. *Id.* (quoting THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961)).

200. David E. Campbell, *Voter Turnout and Vote Choice*, in GUIDE TO POLITICAL CAMPAIGNS IN AMERICA 126, 136–37 (Paul S. Herrnson ed., 2005).

Island, or that have low populations, like Wyoming.

So again, we ask: What if the current geographical territory of the U.S. was divided among only four regional mega-state or only ten provinces, as in Canada? We saw above that costs of secession and of resistance to federal power to the states would decrease, but what would the picture look like for, say, civil rights protection? In a U.S. federation of four mega-states—the Northeast, the South, the Midwest, and the West—one would expect more tolerance at the state level than we see today or than we have seen over the course of American history. Four large, heterogeneous states would be less likely dominated by entrenched majority tyrannies than were thirty-four in 1861 or forty-eight in 1912. Still, one cannot help wondering in such a four state U.S. federation how African-Americans would fare in the South or how devoutly religious Americans with traditional values would fare in the Northeast. In the West in recent years, California's politics have been roiled by bitter warfare over cultural/religious and racial/ethnic issues.<sup>201</sup> Our intuition is that the current transcontinental United States federation would do a better and fairer job of avoiding entrenched majority tyrannies than would even a four mega-states federation occupying the same territory.

The United States, of course, did not go down the four mega-state road, having opted instead for a large number of smaller states starting with the Northwest Ordinance in 1787.<sup>202</sup> What are the consequences for the normative case as to civil rights protection of the fact we went from thirteen states in 1790 to thirty-four in 1861 to forty-eight in 1912 to fifty today? Does the fact that the expansion in the number of states coincided with our adding new territory and immigrants mitigate any increased likelihood of majority tyranny at the state level? It seems likely that the addition of territory and of immigrants suggests that the states as a whole are not less diverse today than they were in 1787. Indeed, there are almost certainly more factions in present day Virginia or Rhode Island than there were in the 1790s. Moreover, some new states, like Arizona, are very heterogeneous, even if others, like Wyoming, are less so.

Still, the press and politically active pundits must monitor all fifty state governments today for civil rights violations, instead of merely thirteen. This undoubtedly allows abuses to go unpunished. Moreover, Congress today represents a far greater variety of factions than it did 220 years ago. *The Federalist No. 10* case for enhanced national power because such power reduces the danger of majority tyranny is thus stronger today than it was at the founding. And, it is stronger in a Union of thirty-four or forty-eight or fifty states than it is in a Union of four mega-states occupying the same territory and including the same population. The greater the number

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201. MICHAEL BARONE & RICHARD E. COHEN, *THE ALMANAC OF AMERICAN POLITICS* 2008, at 145–49 (2007).

202. See Biber, *supra* note 12, at 126.

of states, the more federal civil rights law one might expect to see. Thus, it is no surprise that Congress passed the first civil rights law in 1866 when the Union had thirty-six states; that the Supreme Court began incorporation of the Bill of Rights in 1897, when we had forty-five states and essentially finished it once we were up to forty-eight and then fifty states; and that since we have had fifty states, Congress has legislated extensively to protect civil rights at the national level. Even the appearance of federal judicial invention of unenumerated civil rights against the states in *Lochner*<sup>203</sup> in 1905 and in *Griswold v. Connecticut*<sup>204</sup> in 1965 fits with this picture.

The bottom line is that increasing the number of states from thirteen to fifty by itself makes federal civil rights law more desirable and likely, even without factoring in an addition of land and people.

## II. THE NUMBER OF STATES AND THE CASE FOR AUGMENTING STATE POWER

We want here to consider three economics of federalism arguments for augmenting state power in federations: first, that augmenting state power allows for a better tailoring of laws to varying tastes, conditions, and preferences; second, that augmenting state power leads to enhanced competition and experimentation; and third, that augmenting state power leads to lower monitoring costs. We address each point in turn by relating it to the change the United States has experienced as a result of moving from thirteen to fifty states.

### A. *Varying Tastes, Conditions, and Preferences*

A standard, pro-state power economic argument is that tastes, preferences, and conditions vary across the states in a federation. Montana has different needs with respect to a speed limit than does New Jersey. Louisiana and Utah have different preferences as to abortion than California or New York. By devolving some power from the national to the sub-national level, constitution writers can hope to maximize social welfare and utility. Many people will be happier if there is no national speed limit or abortion policy, and the diverging policies that result may be better tailored to real differences among the states and their peoples. A fifty-five mile per hour speed limit in Montana may not make sense because of the large size and low population density of that state.

That tastes, conditions, and preferences vary geographically is a powerful argument for state power in the United States, for provincial power in Canada, and for real subsidiarity and member-nation power in the

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203. *Lochner v. New York*, 198 U.S. 45, 53 (1905) (finding the liberty of contract protected by the Fourteenth Amendment).

204. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding a right to privacy in the First, Third, Fourth, Fifth, and Ninth Amendments).

European Union. The question becomes: How is that argument affected if a federation has a larger number of states—say, forty-eight—as opposed to a small number occupying the same geographical area and having the same population? A continental United States divided up among forty-eight states, as there were after 1912, rather than, say, four mega-states, would in theory be able to do a better job of tailoring laws to local tastes, preferences, and conditions, assuming the national government's power and role stayed the same (which it would not). The larger the number of territorially defined states within the same geographical area and with the same population, the greater the ability to tailor state laws exquisitely and uniquely to each state's different tastes, conditions, and preferences. This particular policy argument for federalism or devolution becomes stronger as the number of states increases, even as it becomes less likely that states will secede or have real political power at the national level.

The self-selection or opt-out argument gains weight as the number of states increases within a given geographic area. When states are relatively numerous, the costs individual citizens bear by relocating between jurisdictions are lower than when states are few. In terms of dislocation, travel time (for economic or social reasons), and direct costs of relocation, moving a shorter distance is likely to result in lower costs than moving a greater distance. Increasing the number of states—or reducing legal or other barriers to relocation—is thus similar to reducing the poll tax on voting with one's feet. By increasing mobility, having more states also ensures a higher correlation between the preferences of citizens of a state and the policies of that state. When citizens vote with their feet, they simply relocate their policy preferences to a more favorable political climate. This associative selection over time will lead to differences in substantive law even for states within close proximity, as citizens relocate to jurisdictions that more closely match their policy preferences. This should occur in any system but is particularly so in situations where the costs of opting out are lower.

For instance, anyone living in Los Angeles who wishes to opt out of the particular governmental choices of California must bear a substantial cost in moving hundreds of miles (or to another nation). The costs of leaving Los Angeles are clearly higher than they would be for a similarly situated resident of Chicago, New York, or Washington—each of which is surrounded by three separate states and, therefore, three separate state-level polities. A resident of the District of Columbia upset by its strict firearms laws, high taxes, and lack of representation in Congress could simply move across the river to Virginia—with the only major disruption being a slight change (perhaps even an improvement) in his morning commute. The same cannot be said of a similar resident of Miami, FL.

This argument for greater state power should be distinguished from the argument considered in Part II.B, viz., that competition among states leads

to beneficial innovation. The argument on preferences is based on the notion that there should be some level of divergence in the laws of different jurisdictions. The argument on competition is based on the notion that some laws or policies are simply better than others within a broad range of preference distributions. While it is possible that a society that rejected individual liberty and democracy as necessary conditions of good government might rationally choose laws quite different from those found in Western liberal democracies, it does not follow that Texas and Massachusetts are so distinct in their political preferences that they would not want the same type of efficiency in their laws. The gravamen of the local preferences argument is not that many states compete amongst themselves more effectively to supply bundles of government preferred by mobile citizens but rather that the demand for divergence in state government bundles is greater when there are more states because the costs of exercising the right to vote with one's feet is lower.

#### B. *Competition or Experimentation Among the States*

A second and related economic argument for federalism and state power is that, in a federation, the member states will compete with each other for taxpayers, for industry, for the highest standard of living, and in providing the optimal governmental bundle of public goods.<sup>205</sup> This competition among states will in turn spur experimentation. States will become laboratories of democracy, as Justice Louis Brandeis argued, competing with one another to offer their voters the optimal bundle of public goods.<sup>206</sup> Thus, federalism not only allows for laws to be tailored to different tastes, conditions, and preferences, but it ideally also sets in place a free market of bundles of public goods.<sup>207</sup> Citizens and businesses will vote with their feet for the optimal bundle, and states will experiment and compete vigorously with one another as a result.

These are powerful arguments for state power, devolution, and subsidiarity, but how are they affected by increasing the number of states in a federation from thirteen to thirty-four to forty-eight? The answer, we submit, is evident from antitrust law, which tells us that a free market with forty-eight players generally will be more competitive and will lead to more experimentation and innovation than a market with thirty-four or thirteen players. As the number of players goes up, the market share of the largest players will be likely to go down, and the ability of the players to

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205. See Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 422 (1956).

206. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

207. See generally Yingyi Qian & Barry R. Weingast, *Federalism as a Commitment to Preserving Market Incentives*, 11 J. ECON. PERSPECTIVES 83 (1997) (examining the governance structure of the state as a method for providing efficient public goods and preserving market incentives).

coordinate their activities voluntarily to form a cartel on their own will go down, too. Even when the states form a voluntary cartel, that cartel is less likely to prove to be stable in a forty-eight member federation than in a thirteen state member federation, because it is more likely that a state will defect and cheat on the cartel. When one of forty-eight states refuses to go along with a coordinated policy—reducing air pollution, for example—it will have less of a unilateral effect on the national average than if one of thirteen states does so. Thus, each individual state has less of an effect on the likelihood of achieving the common policy goal, so the temptation to avoid the cost and free ride on the other states increases with the number of states.

This derives directly from the insight of Mancur Olson that small interest groups are more cohesive than large ones.<sup>208</sup> The classic examples of each type are the trade group of a concentrated industry on the one hand and taxpayer or consumer groups on the other. The former group is substantially hindered in its goals if any member defects, whereas defection in the latter group is scarcely noticeable.<sup>209</sup> In terms of competition between state governments, this implies that regional accords on issues such as pollution standards are less likely to occur as the number of states increases.

Another reason to expect greater competition between many states has nothing to do with coordination. If the states can be conceived of as competing in the provision of public goods on a quantity rather than price basis, then the standard Cournot model of oligopolistic competition would predict that simply increasing the number of competitors would lead to a more efficient outcome.<sup>210</sup> When there are few states, each essentially has greater market power, so it can unilaterally benefit from restricting its output of public goods to increase the value it derives from them. In the extreme case of a duopoly, both states would essentially produce lower quantities of ‘good law’ and reap political profits of special interest regulations. This is easily seen by analogy to standard economic markets, where two firms controlling the entire market would each produce fewer widgets—regardless of what the other did—than they would in a competitive market. Within a certain range, the increase in price from restricting output more than offsets the foregone sales. Each firm in the duopoly, expecting the other to act likewise, will restrict output to a level

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208. OLSON, *supra* note 45, at 46–47.

209. *Id.* at 43–45.

210. The Cournot model describes the solution to the simultaneous output decisions of a number of producers, whereby each producer maximizes profit based on the assumption that each other producer will also maximize profit. In the model, firms choose a quantity of a good to produce and then charge the same price. For present purposes, the intuitive importance of the model lies in its prediction that prices and quantity will approach competitive levels as the number of producers increases. *See generally* HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS: A MODERN APPROACH* 494 (7th ed. 2006).

that maximizes its own profit. This level is even lower because the other firm can be expected to also restrict its output from the competitive level. However, the ability of oligopolists to obtain supracompetitive profits plummets as the number of competitors increases. Of course, this discussion of the degree of competition is merely a step toward greater and more efficient experimentation in policy among the states. For these reasons, one would expect more bracing and vigorous competition among the states, leading to more experimentation as the number of states in the Union goes up.

All of this experimentation and competition would be of little consequence if it did not systematically lead to better government. So, is there a reason to believe it does? Yes, and that reason is rent-seeking. Interest groups (Madison's "factions") naturally seek their own advantage. Pharmaceutical companies seek reduced tort liability; heavy industry seeks looser pollution controls; utilities seek regulated monopolies over unregulated competition. Some interest groups will be sufficiently motivated and organized to secure legislation granting them special protection from competition—including lawyers. These groups are not, however, the only ones benefiting from such arrangements. Politicians who grant such concessions do not do so out of charity to the most deserving industrial sectors. In fact, some research has been done on the *in terrorem* value of threatened legislation in extracting support from interest groups.<sup>211</sup> Absent some competitive force, the laws of each state would quickly devolve into a jumble of special interest concessions.

Three such competitive forces are easily identified. The first and most obvious competitive force is the ballot box. Voters can and do rein in their representatives when they give away too much too noticeably.<sup>212</sup> However, this requires a prohibitively high investment in monitoring and is subject to all the agency costs inherent in delegation of authority.<sup>213</sup> Notably, the next politician may be even worse than the one just voted out.

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211. See Fred S. McChesney, *Rent Seeking and Rent Extraction*, in THE ELGAR COMPANION TO PUBLIC CHOICE 382–86 (William F. Shughart II & Laura Razzolini eds., 2001) (discussing the ability of the legislature to obtain benefits by either offering or extracting rents from interest groups).

212. See Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King?*, 115 YALE L.J. 2611, 2615, 2618 (2006) (finding that voters use midterm elections to express disapproval of presidential policies); Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 56–59 (2001) (arguing the federal system of multiple election cycles at multiple levels improves the quality of the voting mechanism as a sampling of popular will). See generally Stephen C. Erickson, *The Entrenching of Incumbency: Reelections in the U.S. House of Representatives, 1790-1994*, 14 CATO J. 397 (1995) (providing a thorough overview of the rate at which representatives have left or been voted out of office over the course of American history).

213. See Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1705–12 (2009); Calabresi, *supra* note 30, at 777–79. See generally ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 259 (1957).

The second competitive force is the long-term availability of rents to be distributed. Since rent-seeking interest groups must compete with themselves for the produce of valuable activities of the constituents of the state, earlier rents diverted to interest groups limit the output of the economic activities of the state in the future.<sup>214</sup> That in turn limits the ability of future rent-seekers to obtain concessions. This obviously presents only a minor constraint and hardly holds any hope of efficient government.

The third competitive force is the competition among states for mobile resources, whether capital or labor. Under the classic Tiebout model, states will be forced to compete for valuable resources by offering efficient bundles of government.<sup>215</sup> States that experiment with efficient government will see their fortunes wax while those that adopt inefficient laws and regulations will see their fortunes wane.<sup>216</sup> While it has been a subject of some debate, the primacy of Delaware in corporation law has long presented a conspicuous example of the potential power of state competition.<sup>217</sup>

Unfortunately, all this competitive pressure is also likely to lead to more calls for federal help in forming and policing cartels, since government is the surest source of monopoly. One would therefore expect an increase in calls for federal government “standard setting” as the competition among the states intensifies. This, of course, is exactly what happened over the course of American history. When the number of states hit the mid-thirties, we got the federal floor as to standards set by the Thirteenth, Fourteenth, and Fifteenth Amendments. When the number of states hit forty-five, we began to see incorporation and Lochnerian substantive due process. By the time we got to forty-eight states in 1912, the constitutional dam broke and we saw the Sixteenth and Seventeenth Amendments, which enormously empowered the federal government. The Supreme Court held out for the old constitutional order for twenty-five years after 1912 thanks largely to Taft and Harding appointing ten Justices in seven years while Teddy Roosevelt and Woodrow Wilson appointed only six in almost sixteen years, but by 1937, the game was up.<sup>218</sup> After 1912, the competition among states came to be viewed by our legal and academic elites as a race to the bottom that could only be stopped by a

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214. This “limitation” derives directly from the interest groups’ own interests in maximizing the total of all present and future rents. See Mancur Olson, *Dictatorship, Democracy, and Development*, 87 AM. POL. SCI. REV. 567, 568 (1993) (distinguishing between the incentives of stationary bandit and roving bandit dictators relative to investment in future taxable wealth).

215. Tiebout, *supra* note 205.

216. *Id.*

217. See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 664–66 (1974) (viewing this as an example of a race to the bottom); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254–58 (1977) (viewing this as an example of beneficial competition).

218. Calabresi & Lindgren, *supra* note 130, at 811–12, 846.

federal cartel.<sup>219</sup> From the New Deal on, this perception has carried the day, and so it can be correctly said that the competition among the states was so successful that it may have led to its own downfall.

### C. Lower Monitoring or Agency Costs

Another good economics of federalism policy argument for devolving power to the states is that agency costs in a federal system are inversely related to the number of states. Voters will experience lower costs monitoring their politicians in smaller democracies, and they will be better able to rein in their elected agents.<sup>220</sup> In theory, assuming federal and state politicians receive comparable press coverage—which they do not—voters ought to be able to monitor more closely their elected state officials because they are closer to home, easier to meet with and see, more likely to be a neighbor, and are generally more accessible. In addition to the direct reduction in monitoring costs, the increase in monitoring level should lead to greater democratic control of politicians, thereby further reducing agency costs. As a consequence, state-elected officials should, in theory, be on a shorter leash than federal officials, assuming equal media coverage, comparable ethics, and similar criminal penalties for misconduct.

Agency costs are of two main types: monitoring costs and enforcement costs. Agents, whether they are political representatives or hired employees, of course, have their own interests, some of which may conflict with those of their principals. In order to restrain agents, their bosses must first learn what the agents are doing. This monitoring cost, of course, rises when the agent is further removed from the principal. The principals must also learn their own interests if not readily apparent, which also becomes more of a problem when the scope of the agency expands.<sup>221</sup> Next, the principals must incur costs to force the agent to do their bidding.<sup>222</sup> In political terms, the voters must support a challenger—or at least credibly threaten to do so. Sometimes, this may be as costless as refusing to donate to a campaign fund, but it may just as well require funding a challenger. Of course, the more the principals monitor the agent's actions, the closer the agent will adhere to their wishes. Similarly, the more easily the principals may control the agent, the more the agent will be constrained to do—or at least appear to do—what the principals intend.

How does increasing the number of states affect agency costs? It ought quite obviously to lower both monitoring and enforcement costs. If we

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219. See *Liggett v. Lee*, 288 U.S. 517, 588–89 (1933) (Brandeis, J. dissenting in part) (approving of Florida legislation aimed at regulating the size of corporations); Cary, *supra* note 217.

220. See DOWNS, *supra* note 213, at 259 (analyzing rational ignorance and information costs in voting).

221. See *id.* at 253.

222. See *id.* at 254.

disallow for differences in media coverage and in legal sanctions for misconduct, it should be easier to monitor state officials in more and smaller states than in a few bigger states. It is presumably easier to monitor the governor of Rhode Island or Alaska than it would be to monitor a governor of all the southern states, for example. Not only will the voters be more informed of their own interests in the smaller state but they will be better able to learn of the activities of the officials. One need only consider whether the newspapers of Washington, D.C., shine a brighter light upon the political acts of the federal government than newspapers in New York or Chicago. Even in an age of Internet communication, proximity reduces the cost of information.

Similarly, the costs of enforcement will decrease as the number of states increases. It is easier to organize opposition in local elections than in statewide elections because there are fewer voters, who are located in a geographically confined area. This is in part because the number of voters needed to vote a state-level incumbent out of office rises. This will require a more organized and expensive campaign. The interests of the voters in a geographically dispersed area will also tend to be more diverse. Consider whether the interests of the voters in Ohio are similar to the interests of voters in Massachusetts. Organizing them to vote not merely against an incumbent but also for a particular challenger would be more difficult than it would be in either of these states alone. The more numerous the states, then, the greater the advantage of vesting power in them relative to the federal government. Thus, again, the argument for state power federalism, or for devolution, or for subsidiarity in the EU becomes stronger as the number of subparts in a federation increases. Federations with many subparts will experience lower monitoring and enforcement costs than federations with fewer subparts, and since monitoring and agency costs were among the reasons why the United States declared its independence from the British Empire in 1776, this conclusion ought certainly to be of interest.

### III. WHAT IS THE OPTIMAL NUMBER OF STATES?

#### A. *The Number of States and Interest Group Pressure*

Although not as frequently mentioned as the salutary effect of federalism in curbing the influence of faction, the analysis in *The Federalist No. 10* suggests a malign aspect as well. When the size of the federal system grows, it presents greater opportunity for widely dispersed but well organized groups to apply pressure at the federal level that they would be unable to apply in the states. Indeed, the externalities and competition discussed above encourage a shift of rent-seeking from the local to the national stage. Were any faction to prevail in one state, it would face competition from other states with more robust markets. The

rent-seeking effort of the faction in the first state would create positive externalities for competitors in other states, presenting the classic free-riding problem that is the bane of all interest groups.<sup>223</sup> To solve this problem, interest groups can organize at the federal level, but this tends to expand the scope of the national power over the states. As the number and interconnectedness of the several states increased, so too did factional demands for expanded federal regulation.

Beginning with the fundamental insight of the Tiebout model, federalism is rightly seen as promoting efficiency in government through competition.<sup>224</sup> When states must compete for labor and capital (and tax revenue), they are acting as producers of bundles of government in a competitive market. If they provide a bundle that consumers (in this case citizens and capitalists) demand, then they will prosper. If they offer corruption and waste, they will not. In essence, consumers of government will vote with their feet as well as their ballots.<sup>225</sup>

Of course, this rosy image of efficiency and prudent government depends on effective competition and the mobility of both investment capital and some relevant segment of the population. William Riker further refined this analysis by developing the conditions for a self-enforcing federalism, which requires that the hierarchical levels of government be autonomous and of limited scope.<sup>226</sup> However, even this addition will only perpetuate some form of federalism, rather than the particularly desirable competitive market form of federalism that the Tiebout model envisions.

To ensure a market-preserving federalism, Barry Weingast added three additional conditions: a national market, a hard budgetary constraint at the state level, and a division of powers that places primary responsibility for economic policies at the state level.<sup>227</sup> The first two conditions are constitutionally provided<sup>228</sup> and uncontroversial; the third is the linchpin of the analysis. It is here that the number of states becomes an issue of concern.

In a federation of thirteen states with relatively limited interstate commerce, the natural locus for the provision of economic regulation is the state. When the number of states, the size of the federation, and the amount of commerce increase, regional regulation through informal agreements becomes more efficient. Increase the size yet further, and national regulation becomes more attractive. This is a result of several forces. First, transaction costs increase at an exponential rate as the number of relevant

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223. See Stigler, *supra* note 197, at 13 (noting that small minorities with strong preferences find the costs of procuring favorable regulation lowest).

224. Tiebout, *supra* note 205.

225. *Id.* at 418.

226. WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 11 (1964).

227. Weingast, *supra* note 52, at 4.

228. U.S. CONST. art. I §§ 8, 9 (prohibiting States from coining money or imposing duties).

bargaining parties grows. Second, economies of scale are realized through standardization, which produces greater benefits as the number of potential standards increases.<sup>229</sup> Third, externalities from economic activity in one state are likely to be increasingly felt in other states as the number of states increases.<sup>230</sup> Fourth, and finally, the increasingly competitive government market between states forces factions to seek economic rents through federal regulation.<sup>231</sup>

This last force for centralization of economic regulation deserves particular consideration. The other forces are discussed above and all lead to the conclusion that an increase in federal power as the number of states increases merely maintains an optimal division of powers between the levels of government in our federal system. They offer the benign explanation for consolidation and expansion of government power. The influence of interest groups offers the malign explanation. It is this, above all, that suggests that having too many states leads to an excessive centralization of government and disrupts the vertical balance of powers in a federal system.<sup>232</sup> The economics of federalism analysis explains why the balancing point has shifted in favor of national power; the interest group analysis suggests there is a thumb on the scales.

As Madison recognized in *The Federalist No. 10*, an “extended republic” will indeed “break and control the violence of faction” on the state level by introducing countervailing interests.<sup>233</sup> However, the transaction costs of organizing majority opposition to cohesive minority rent-seeking will grow as the number of states and the size of the nation increase.<sup>234</sup> This results from the principal problem of organizing interest groups: free-riding.<sup>235</sup> With respect simply to the number of states, an

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229. It is interesting to note the development of the major interstate commerce-facilitating actions by the federal government. First, the Bank of the United States solved a fundamental problem of financing transactions across great distances. Second, the Interstate Commerce Commission solved a problem of transportation efficiency after the advent of the railroads. Third, the Securities and Exchange Commission solved a problem of information disclosure with respect to investments in an increasingly national market. Fourth, the Federal Communications Commission removed telecommunications from the ICC jurisdiction when such interstate communications became increasingly widespread and complex.

230. This is the down side of experimentation. As the number of states grows, the potential for externalities increases if for no other reason than the proliferation of (potentially externality-generating) policies. Holding the probability of externality generation constant, more policies in force should lead to more externalities, on average.

231. Aranson, *supra* note 1 (manuscript at 7–10).

232. This offers one explanation for the tendency of central governments to concentrate fiscal power over time, sometimes referred to as “Popitz’s Law.” For an overview of the literature on fiscal federalism, see generally MUELLER, *supra* note 45, at 227–29; Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LIT. 1120 (1999).

233. THE FEDERALIST NO. 10, at 52 (James Madison) (Clinton Rossiter ed., 1961).

234. Aranson, *supra* note 1 (manuscript at 9).

235. See Stigler, *supra* note 197, at 13.

increase in states leads to an increase in competition under the Tiebout model. This then has the perverse effect of altering the calculus of interest groups in favor of federal rent-seeking, rather than state rent-seeking.<sup>236</sup> Precisely because of competition between the states, interest groups find greater benefit in pursuing national regulation.<sup>237</sup> This then encourages an expansion of the central government at the expense of the state governments in the area of economic regulation, which undermines one of the conditions for self-enforcing, market-preserving federalism.<sup>238</sup> It also systematically skews the balance of power away from the states and toward the federal government.

By expanding from thirteen to thirty-four to fifty states, the United States has seen the balance of power shift in favor of centralization. The previous Parts have explained in detail how this has resulted quite naturally and benignly from the necessity of changed circumstances. Assuming diminishing marginal returns, both to the advantages of state-level government (competition and experimentation, agency costs, and adherence to local preferences) and to the advantages of federal level government (economies of scale, elimination of collective action problems, internalization of externalities, and the protection of minority interests through countervailing factions) as the number of states increases, there should be an equilibrium between state and federal power that maximizes the net value of all government. There should also be a number of states that is optimal—large enough for cohesion but small enough for true competition between the states. As the number of states increases, the advantage Madison ascribed to the “extended republic” of checking majority factions will begin to tip toward facilitating rent-seeking by minority factions. Just as the benign aspects of the economics of federalism suggest the benefit of more states in limiting rent-seeking by interest groups, the malign aspects suggest the benefit of fewer.

### B. Implications—When Is Enough Too Many?

Our analysis thus far suggests that all the economics of federalism policy arguments both for national and for state power in the United States become more telling as the number of states increases. The fifty United States today need a national government more than would a four state federation in the same geographical territory because of collective action problems with respect to: (1) war and foreign affairs; (2) free trade; (3) correcting externalities imposed by state action; and (4) reaping the benefits of economies of scale. The fifty United States also need a national

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236. Aranson, *supra* note 1 (manuscript at 8–9).

237. *Id.*; see also MUELLER, *supra* note 45, at 227–29 (noting that, “[E]lected members of the Länder were willing accomplices in the process which stripped their governments of their tax authority . . . to free themselves of the necessity of having to compete with one another in setting tax rates.”).

238. See Weingast, *supra* note 52, at 26–27.

government more today than would a four-state federation to protect civil rights and guard against tyranny of the majority.

On the other hand, a fifty state federation is more likely to allow for tailoring laws to suit differences in local tastes, conditions, and preferences than would be a four state federation. A fifty state federation will also do more to promote vigorous competition and experimentation among its members, which will have the negative side effect of increasing demands for federal floor-setting or cartelization. Finally, a fifty state federation may benefit from lower monitoring and agency costs.

All of these arguments suggest that when a federation expands from thirteen to thirty-four to forty-eight states, it gets more of both the good and the bad things that come with having a federal as compared to a unitary constitutional structure. Ironically, fifty state competitive federalism may be potentially much better than twenty-five state competitive federalism, but it is also probably impossible politically to sustain because of the way in which state power is weakened when the number of states expands. The competition among fifty states and the collective action problems and externalities of a fifty state federalism produce unstoppable demands for national floor setting by cartels. If this argument is correct, it bodes ill for the fate of American federalism today and in the future. Once the number of U.S. states went from thirty-eight to forty-four in 1889–1890, the retention of any kind of meaningful American federalism through political checks was probably doomed.

The immediate temptation, of course, is to conclude that to reap the benefits theoretically available from federalism, one ought to opt for a much smaller number of federal subunits like Canada's ten provinces or the thirteen original states. This argument fails, however, because it overlooks the enormous danger of secession and civil war that comes along with a few-state federalism, as well as the likely weakening of national power that such a federalism would cause. Some federations like the six state Australian federation of course work just fine, but the dissolution of the fifteen republic U.S.S.R., or of the six republic Yugoslav federation, or of the two region regimes in Czechoslovakia and possibly Belgium, all raise major concerns. An interesting question in this regard is: When did it become politically too hard for the slave owning American South to secede from the Union? History tells us that it could not be done once the Union had hit thirty-four states in 1861, but it might still have been possible at the time of the Nullification Crisis when the United States had only twenty-four states—half of them slave states—had not an implacable Andrew Jackson stood in the way. Any number of federal subunits below twenty and possibly below fifteen might thus be so low as to raise fears of secession depending critically, of course, on the territorial distribution of racial, ethnic, linguistic, religious, and economic cleavages.

The mid-twenties looks in many ways like an optimal number of

subunits for maintaining a balance of power, a federal structure, and reaping the benefits of the economics of federalism. Switzerland with its twenty-six cantons or half cantons and the European Union with its twenty-seven member nations may thus be at the optimum point around now, if one wants to create what the Supreme Court famously called “an indestructible Union, composed of indestructible states.”<sup>239</sup> Consequently, further expansion of the EU might be a mistake that leading member nations ought to guard against, unless they actively want to see the European nation states disappear altogether. An EU federation might survive with larger numbers of subunits than did American federalism because of the long histories, separate languages, and distinctive subcultures of the EU member states as compared to the fifty American states. At some point that is not that far off, however, the number of subunits may make all efforts to maintain subsidiarity impossible.

Moving beyond the federalism of the European Union, we should note the tremendous spotlight of public attention that President Obama just recently shined on the G-20,<sup>240</sup> a group of twenty nations from all over the world that are interconnected economically and are global leaders. For the first time, the G-20 received the kind of media attention normally reserved for meetings of the G-8. The G-8 consists of: Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States while the G-20 includes eleven nations in addition to these eight and the European Union: Argentina, Australia, Brazil, China, India, Indonesia, Mexico, Saudi Arabia, South Africa, South Korea, and Turkey. Elevating the visibility and role of the G-20 and delegitimizing the G-8 is a shrewd way for the United States to play off giants like India, China, Brazil, and Argentina against rogue states and regimes hostile to Western liberal democracy. This Article suggests reasons to be more bullish about the prospects for success in the G-20 than in the G-8.

Our bottom line is that the wealth of nations is enhanced by federalisms with a healthy balance between national and state power, and that, in turn, depends on the size of nations and, in this case, federations. The optimal number of subunits for a balanced federalism is probably somewhere between about eighteen and thirty-four, although there will be occasional exceptions like six state Australia. Even Canada with only ten Provinces has not broken apart—at least not yet. Federalists of the World Unite! But only in confederacies of between eighteen and thirty-four.

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239. *Texas v. White*, 74 U.S. 700, 725 (7 Wall. 1868).

240. *See generally, e.g.*, President Barack Obama, News Conference Following Second G-20 Plenary Session (Sept. 25, 2009); President Barack Obama Remarks at G-20 Press Conference (June 27, 2010).



