

## STATES AS INTEREST GROUPS IN THE ADMINISTRATIVE PROCESS

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INTRODUCTION.....	954
I. STATE INTEREST GROUPS: A PRIMER .....	961
A. <i>Key Features of State Interest Groups</i> .....	961
B. <i>The Legal Framework: State Interest Groups as Part of the         Federal Administrative Apparatus</i> .....	970
1. <i>Trans-substantive Instruments: Executive Order 13,132             and the Unfunded Mandates Reform Act</i> .....	971
2. <i>Subject-Specific Statutes and Arrangements</i> .....	975
3. <i>Administrative Practice</i> .....	977
II. THE BENEFITS OF STATE INTEREST GROUPS FOR ADMINISTRATIVE FEDERALISM .....	979
A. <i>The Goal of—and Obstacles to—Protecting State Power</i> .....	980
B. <i>The Prowess of State Interest Groups in Advancing States’         Institutional Interests</i> .....	984
III. THE COSTS OF STATE INTEREST GROUPS IN THE ADMINISTRATIVE PROCESS .....	991
A. <i>Costs to Expert Agency Decision Making</i> .....	991
1. <i>Legitimacy and Information Inputs in Administrative             Law</i> .....	992
2. <i>The Effects of Group Decision Making: Trading             Substance for Force</i> .....	995
B. <i>Costs to Democratic Accountability</i> .....	999
1. <i>The Goal of Democratizing the Administrative Process</i> ...	999
2. <i>State Interest Groups’ Accountability Limitations</i> .....	1001

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a.	<i>The Mirage of a “State View” and the Inevitability of Imperfect Representation</i> .....	1001
i.	<i>Disengagement</i> .....	1001
ii.	<i>Internal Dissent</i> .....	1003
iii.	<i>Drift</i> .....	1007
iv.	<i>Capture</i> .....	1009
v.	<i>Intergroup Divisions</i> .....	1011
b.	<i>State Interest Groups’ Limited Transparency and Accountability</i> .....	1013
IV.	TRADEOFFS AND DESIGN PRINCIPLES .....	1016
A.	<i>Administrative Federalism’s Tradeoffs</i> .....	1017
B.	<i>Best Practices: A Preliminary Sketch</i> .....	1019
1.	<i>Federal Agencies and the OMB</i> .....	1019
2.	<i>State Interest Groups and Their Members</i> .....	1022
3.	<i>Courts</i> .....	1023
	CONCLUSION .....	1024

#### INTRODUCTION

IT has become an article of faith among both politicians and legal scholars that states should play an active role in the federal regulatory process. The President and agency heads vow almost as a mantra to “work with the states” to create successful regulatory programs in areas ranging from education<sup>1</sup> to health care<sup>2</sup> to climate change.<sup>3</sup> In the academy, scholarship on administrative federalism—roughly speaking, the

<sup>1</sup> See President Barack Obama, Address Before a Joint Session of Congress on the State of the Union 5 (Feb. 12, 2013), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201300090/pdf/DCPD-201300090.pdf> (“I propose working with States to make high-quality preschool available to every single child in America.”).

<sup>2</sup> See, e.g., Office of the Press Sec’y, Exec. Office of the President, Press Briefing by Press Secretary Jay Carney (Mar. 1, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/01/press-briefing-press-secretary-jay-carney-312011> (noting that Kathleen Sebelius, then-Secretary of Health and Human Services, was “committed to working with the states” on Medicaid issues).

<sup>3</sup> See Presidential Memorandum of June 25, 2013, Power Sector Carbon Pollution Standards, 78 Fed. Reg. 39,535, 39,536 (July 1, 2013) (directing the Environmental Protection Agency (“EPA”) to “launch [a new regulatory program] through direct engagement with States, as they will play a central role in establishing and implementing standards for existing power plants”); see also Interview by Inside EPA with Gina McCarthy, Assistant Adm’r, EPA Office of Air & Radiation (Jan. 18, 2013) (describing the EPA’s commitment to working with states); Obama, *supra* note 1, at 4 (“I’m also issuing a new [energy-efficiency] goal for America . . . . We’ll work with the States to do it.”).

study of the roles of states and of federalism values in the administrative process—advocates federal agency consideration of state interests.<sup>4</sup> The notion of state voice in the administrative process also has descriptive force. States not only implement cooperative federalism regimes,<sup>5</sup> but also help to shape federal regulation on the front end.<sup>6</sup> And the U.S. Supreme Court’s recent decision in *National Federation of Independent Business v. Sebelius*<sup>7</sup> seems poised to increase states’ leverage in inter-governmental relations.<sup>8</sup>

Yet talk of state-agency interaction rarely attends to *how* it functions. Despite widespread attention to institutional design in other areas of the administrative state, and despite rising interest in questions of who properly speaks for the states in other contexts,<sup>9</sup> there is scant study of the structure and operation of administrative federalism.<sup>10</sup> This Article begins to fill that gap. It first describes how state involvement in federal regulation has been operationalized through a largely overlooked uni-

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<sup>4</sup> See *infra* Section II.A.

<sup>5</sup> See, e.g., Heather K. Gerken, *Our Federalism(s)*, 53 *Wm. & Mary L. Rev.* 1549, 1556–60 (2012); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 *N.C. L. Rev.* 663, 668 (2001).

<sup>6</sup> See, e.g., Larry Kramer, *Understanding Federalism*, 47 *Vand. L. Rev.* 1485, 1543–44 (1994). I discuss this phenomenon in a recent work. See Miriam Seifter, *States, Agencies, and Legitimacy*, 67 *Vand. L. Rev.* 441 (2014).

<sup>7</sup> 132 S. Ct. 2566 (2012).

<sup>8</sup> See Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After NFIB*, 101 *Geo. L.J.* 861, 920 (2013) (observing that the decision “may have its greatest impact . . . in setting a new, state-friendly context for vertical intergovernmental negotiations”).

<sup>9</sup> The task of distinguishing among state representatives has recently captured attention in a variety of settings, including the headline-grabbing ruling that initiative proponents lacked standing to represent California’s interests in the Proposition 8 litigation, see *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013); the dilemma embedded in *NFIB* of which state actor(s) should be considered in analyzing coercion, see Glenn Cohen, *Conscientious Objection, Coercion, the Affordable Care Act, and US States*, 20 *Ethical Persp.* 163, 169, 182 (2013) (questioning whether the Supreme Court commits a “category error by treating States as the kinds of entities subject to this kind of coercion inquiry”); and the assignment of power to various state actors to enforce federal law, see Margaret H. Lemos, *State Enforcement of Federal Law*, 86 *N.Y.U. L. Rev.* 698, 746 (2011) (“[A]ttention to enforcement as a distinct form of state authority underscores the importance of breaking open the black box that represents ‘the state’ to reveal the diverse group of state actors within.”).

<sup>10</sup> Some scholars in both the legal and public administration literatures have noted the need for attention to this set of questions. See, e.g., Bruce D. McDowell, *Intergovernmental Relations Then and Now: Is There Still a Role for a National Commission?*, 36 *St. & Loc. Gov’t Rev.* 228, 230 (2004); Gillian Metzger, *Remarks of Gillian Metzger*, 65 *N.Y.U. Ann. Surv. Am. L.* 443, 445 (2010) (“If we accept the inevitability of federal agencies being involved in this area, a key question is how to structure the federal regulatory process to fully bring in state and local interests.”).

verse of “state interest groups”<sup>11</sup>—myriad associations of state officials that lobby federal agencies and consult on pending federal rules and policies, advancing the “state” view. It then analyzes the implications of that design choice for the project of administrative federalism. In so doing, the Article complicates the widespread enthusiasm for state involvement in the federal administrative process. Implementing state involvement, it turns out, inevitably requires tradeoffs among the core goals at the intersection of administrative law and federalism.

In developing this argument, the Article explores largely uncharted terrain. Existing attention to state interest groups in the legal literature is scarce.<sup>12</sup> This is surprising given their pervasiveness in federal policy-making; one cannot understand administrative federalism or intergovernmental relations<sup>13</sup> today without an appreciation of these groups, which range from well-known generalist groups like the National Governors Association (“NGA”) to countless specialist groups of state administrators. Many of the groups are now given formal roles in federal rulemaking—through statutes, executive orders, and longstanding practice—and have been pivotal players in recent policy developments.<sup>14</sup>

To the extent that legal scholars have taken any note of state interest groups, they have taken a generally favorable view, recommending that the groups be given an even greater role in order to serve various goals of federalism.<sup>15</sup> The details of state interest groups’ activities and pa-

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<sup>11</sup> In using this term I loosely follow Professor Donald Haider’s book. See Donald H. Haider, *When Governments Come to Washington: Governors, Mayors, and Intergovernmental Lobbying*, at x (1974) (coining the term “government interest groups”). Another set of authors has adopted the label “translocal organizations of government actors” (“TOGAs”). See Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 *Ariz. L. Rev.* 709, 730 (2008). This Article, however, focuses on state groups, saving for future work the distinctive questions raised by groups of local officials.

<sup>12</sup> See David S. Arnold & Jeremy F. Plant, *Public Official Associations and State and Local Government: A Bridge Across One Hundred Years*, at xv (1994) (calling the groups a “missing link”); Resnik et al., *supra* note 11, at 739 (noting the groups’ “relative invisibility in the legal literature”).

<sup>13</sup> “Intergovernmental relations” is a subfield of the public administration literature, so named to set aside the normative associations with federalism rhetoric. See Deil S. Wright, *Understanding Intergovernmental Relations* 6–8 (1988) (explaining the choice to refer to intergovernmental relations (“IGR”) rather than federalism).

<sup>14</sup> See *infra* Section I.B.

<sup>15</sup> Two accounts in the legal literature consider state interest groups. Professor Catherine Sharkey’s work on administrative federalism, while not focused specifically on state interest groups, recommends that agencies engage the groups, and also consult state attorneys general, in order to better understand state interests, see Catherine M. Sharkey, *Inside Agency*

thologies, and their effects on the administrative process, reveal that further attention is warranted.

This Article argues that state interest groups impose costs on the administrative process, not just benefits—and more broadly, that they reflect latent tensions among the principal aims of administrative federalism. This claim requires disaggregating goals that are often conflated. The most oft-cited goal of involving states in federal administration, mirroring a prevailing goal of contemporary federalism scholarship, is the protection of state power from federal excess. But two other goals are also relevant, and are often mentioned as coinciding benefits of state involvement. The second is the enhancement of agency expertise, a core administrative law value; the idea is that state consultation will improve agencies' decisions by conveying states' local knowledge and experience as regulatory "laboratories." The third goal is that state involvement will maintain, or even enhance, the democratic accountability of the regulatory process—that states can be trusted with privileged access to agency decision making because, unlike private groups, states are "co-regulators" and represent public constituencies themselves. State interest groups illuminate tensions among these goals: The most effective mechanism for advancing state power disserves the goals of expertise and accountability. I sketch the contours of these claims in this Introduction and develop them in the pages that follow.

On one hand, state interest groups deliver richly on the prominent federalism goal of defending states as institutions. Whereas individual state officials are notoriously unreliable advocates of state power due to their more pressing short-term incentives and a collective action problem among states, state interest groups largely overcome these obstacles. The groups' advocacy efforts were established for the very purpose of giving voice to states' shared institutional interests, and the groups' or-

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Preemption, 110 Mich. L. Rev. 521, 584 (2012), a recommendation echoed by the Administrative Conference of the United States, see Agency Procedures for Considering Preemption of State Law, 76 Fed. Reg. 81 (Jan. 3, 2011) (notice of adoption of recommendation). Professor Judith Resnik and her coauthors, though not focused on the administrative process, suggest that state interest groups be accorded favored legal status, in part because they stimulate interaction across ordinary jurisdictional lines and "enrich the public sphere." Resnik et al., *supra* note 11, at 770, 785. A number of other authors mention state interest groups more briefly in the course of other projects, but do not undertake a sustained study. See, e.g., Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. Kan. L. Rev. 1113, 1121–27 (1997); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 Colum. L. Rev. 215, 284–85 (2000).

ganizational structures facilitate that focus. In particular, because state interest groups treat the fifty states as an “it” rather than a “they,” the groups’ advocacy tends toward lowest-common-denominator positions that members can agree upon, often addressing the importance of state authority.<sup>16</sup> In addition, because the groups do not answer directly to citizens, and because they operate out of the public eye and without transparency, the groups’ institutional focus is largely insulated from countervailing political pressures.<sup>17</sup>

On the other hand, the same structural traits that foster this state-power orientation undermine the groups’ contributions to agency expertise and accountability. Consider first the tradeoff between advancing state power and enhancing expertise. As noted, state interest groups achieve their institutional orientation by overcoming the states’ collective action problem, and by giving states a unified voice. This convergence on single “state” positions limits the information the groups convey, and it impedes their ability to transfer to agencies states’ varied knowledge and experience. Perhaps ironically for entities that champion federalism, state interest groups submerge state diversity in favor of uniformity.

The second tension is between state interest groups’ prowess at advocating states’ rights and their capacity to enhance or maintain the democratic accountability of the administrative process. The groups are granted privileged access to the regulatory process, and gain their traction, on the understanding that they represent the states. Yet the features that foster the groups’ state-power focus—namely, their aggregate positions and insulation from public scrutiny—limit their representative capacity. The absence of transparency means that the groups can take a “state” position even where state constituents or even group members do not agree. And the groups’ advancement of a single position can mask a number of limitations: Many state interest groups do not represent all fifty states, and the groups are often afflicted with issues of disengagement, dissent, drift, and capture. In some cases, the groups may use federalism language to advance private agendas.<sup>18</sup> Because of these representational deficiencies, state interest groups threaten to compromise rather than enhance the accountability of the administrative process.

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<sup>16</sup> See *infra* Section III.A.

<sup>17</sup> See *infra* Section III.B.

<sup>18</sup> See *infra* Section III.B.

State interest groups' failure to foster expertise and accountability may limit the overall extent of those values in the regulatory processes in which they participate. The groups' privileged participation may limit or crowd out other state participation or skew agency impressions.<sup>19</sup> At least some individual states with distinctive information to share may lack the resources or incentives to work around state interest groups. And even when they do so, the groups' positions, displayed on letterhead and suggesting an official "state" stance, may carry more weight with agencies.

More broadly, the two tensions that state interest groups reflect appear to be inherent, rather than just the happenstance of how the groups currently function. States cannot convey their diverse knowledge or experiences while also coalescing around their collective interest. Nor is it likely that group members would be as committed to institutional agendas if the groups were retooled to act transparently or to serve as direct representatives of state citizens. The mechanisms for state input can be changed, but doing so will involve trading off key administrative federalism values, not achieving all of them at once.

Having identified these tradeoffs and effects, the Article proceeds to consider what they mean for the administrative state's institutional design. The Article's primary project is to prompt the first step: to encourage reflection on the state role in federal administration by illuminating the overlooked dynamics and tensions in the current state of affairs. Scholars and politicians alike espouse all three of the goals discussed in this Article, but they have not yet grappled with how state interest groups serve or disserve each goal, or with the inherent tensions among the goals.

The Article also identifies principles that might guide reform. To be sure, views may differ on precisely how to weigh the goals of protecting state power, advancing agency expertise, and maintaining democratic accountability. At the same time, if given the choice, most scholars likely would not elect the balance that currently exists; if all three goals have value, a system skewed toward state power, and away from expertise and accountability, warrants recalibration. I therefore suggest a preliminary suite of best practices for relevant audiences: executive branch actors within agencies and the White House, state interest groups themselves and member states, and courts reviewing agency actions. The aim

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<sup>19</sup> See *infra* Subsection III.A.2.

of these recommendations is to allow state interest groups to continue to function as state advocates while limiting their vices—in particular, by increasing their transparency and by creating additional channels for states to share the substantive information that the groups do not.

Finally, a word about methodology is in order. The attributes of state interest groups most central to this Article's analysis are based on publicly available information, as is the fact that the groups are heavily involved in the federal regulatory process. Of course, details make an account more interesting, and I have tried to illustrate with examples and specifics where possible. One key finding of this Article, however, doubles as an impediment: State interest groups do not lend themselves to detailed study. Not only do the groups operate in relative obscurity and enjoy immunity from public disclosure obligations, but some groups informed me that they do not keep records of certain facts (for example, votes). Moreover, although enough common ground exists among the groups to generate valuable insights, there are many differences at the margins, making categorical statements precarious. The account that follows draws from public documents, records that were shared with me on request, and approximately twenty-five background interviews with state and federal officials and state interest group staff members. Although I believe that my synthesis is faithful to what is happening on the ground—and that many of the most interesting questions about state interest groups do not rest on the fine-grained details—there is certainly much more to learn.

The Article proceeds in four Parts. Part I is descriptive. It provides a primer on state interest groups and describes the legal instruments that foster their central role in the federal administrative process. Parts II and III, the heart of the Article, analyze state interest groups' effects on contemporary concerns in federalism and administrative law. Part II first describes the relative success of state interest groups at prioritizing the prominent federalism value of protecting states as institutions. Part III describes how this success comes at a cost to two other relevant goal sets shared by administrative law and federalism: expert decision making and democratic accountability. Part IV considers how to synthesize the insights from the previous Parts. It highlights the tradeoffs that any reform agenda would entail and sketches best practices that may better balance the effects of state interest groups.



## I. STATE INTEREST GROUPS: A PRIMER

This Part sets the stage for reflection by providing a primer on the usually unseen world of state interest groups and their role in federal regulation. Section I.A describes the groups' distinctive traits and lobbying practices. Section I.B describes the role that state interest groups have come to play in the administrative process: As the federal government has sought at various times to work with states in setting federal policy, it has operationalized that aim largely by bringing in state interest groups. Thus, although the groups are not the exclusive channel for state-agency interactions, they are now built into the administrative process through both legal instruments and longstanding practice. These descriptive sections lay the groundwork for the critical analysis in Parts II and III.

*A. Key Features of State Interest Groups*

By “state interest groups,” this Article refers to organizations of state elected or appointed officials whose mission is to represent the official interests of their members, particularly in front of the federal government.<sup>20</sup> The intricacies and histories of these groups could fill volumes.<sup>21</sup> Here, I focus on four defining features that are necessary to understand the thesis advanced in Parts II and III—that state interest groups thrive as advocates of certain federalism values yet thwart substantive information transfer and democratic accountability. These four features are that each group (1) exists to advance state governmental interests; (2) speaks with one voice; (3) represents a variable selection of state (and sometimes non-state) actors; and (4) is relatively opaque to the public.

*1. Institutional mission.* First, state interest groups' advocacy efforts were initiated to create a voice for states qua states—a voice for the institutional interests of state governments rather than the varied political preferences of state constituents or individual state officials. By way of

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<sup>20</sup> As earlier noted, I will focus primarily on state groups, with only occasional reference to their local counterparts. As briefly indicated in Section III.B, however, further exploration of the role of local interest groups, and their potential conflicts with state interest groups, is warranted.

<sup>21</sup> A few in-depth accounts are available. For deeper treatment than I can provide here, see Arnold & Plant, *supra* note 12; Anne Marie Cammisa, *Governments as Interest Groups: Intergovernmental Lobbying and the Federal System* (1995); and Haider, *supra* note 11.

brief background, many state interest groups had already formed as professional associations in the early twentieth century.<sup>22</sup> In the 1960s, the expansion of federal programs and grants made states desperate to have a say in how the grant programs were designed and administered.<sup>23</sup> Yet acting individually, they found they had little voice. A “recognized need” arose for a “collective strategy”<sup>24</sup> to “lend weight and focus” to state officials’ shared interests.<sup>25</sup> The groups soon proliferated, moved their offices to Washington, D.C., and began to focus their attention on lobbying the federal government. The point was to capitalize on their numbers and visibility as a collective to advocate the common interests of state governments<sup>26</sup> and to avoid the scattershot approach that had left them as outsiders in government administration. State interest groups sought to be recognized as the official liaisons or representatives for “the state view”—and as Section I.B explains, they achieved success.

State interest groups today continue their focus on states as institutions. Most of the groups have mission statements, official positions, or founding documents focused explicitly on the needs and concerns of state governments, with a significant emphasis on principles of state autonomy and flexibility. The National Governors Association, for example, has a “permanent policy” that seeks “the preservation of state sovereignty” and encourages “federal forbearance” in imposing national

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<sup>22</sup> As Professor Elizabeth Garrett notes, the groups formed primarily “as part of the effort to professionalize government service.” Garrett, *supra* note 15, at 1121. The groups did sometimes touch on federal affairs. In 1908, for example, the group that is now the National Governors Association was born when President Theodore Roosevelt gathered thirty-four governors at the White House to lobby Congress to enact his natural resources legislation, see Haider, *supra* note 11, at 20, but lobbying was not yet its focus. State interest groups today retain their professional activities alongside their lobbying activities. The groups sponsor training programs, share data and experiences among members, and publish newsletters and other publications devoted to topics of interest. See Garrett, *supra* note 15, at 1122.

<sup>23</sup> As Haider explains, the expansion of grants in particular “transformed intergovernmental relations, making states and local governments into client groups of federal programs and their chief executives into federal lobbyists.” Haider, *supra* note 11, at 93; see also Samuel H. Beer, *Federalism, Nationalism, and Democracy in America*, 72 *Am. Pol. Sci. Rev.* 9, 18 (1978) (“Their sudden surge of activity dates from the mid-sixties and came as a response to the increase in federal programs . . .”); Samuel H. Beer, *Political Overload and Federalism*, 10 *Polity* 5, 11–12 (1977) (describing how the “recent” proliferation in federal programs and federal grants in aid “created, or at any rate greatly expanded,” the intergovernmental lobby).

<sup>24</sup> Haider, *supra* note 11, at 98.

<sup>25</sup> Kramer, *supra* note 15, at 284–85.

<sup>26</sup> Haider, *supra* note 11, at 98.

standards.<sup>27</sup> The Interstate Oil and Gas Compact Commission (“IOGCC”) (with stationery stamped with “Collectively Representing the States” and a website describing the group as the “collective voice of member governors on oil and gas issues”) “advocates states’ rights to govern petroleum resources within their borders.”<sup>28</sup> The Environmental Council of the States (“ECOS”), representing state environmental agencies, has a federalism resolution that supports “expansion of environmental authority to the states” and opposes federal preemption.<sup>29</sup> The National Association of Regulatory Utility Commissioners has multiple resolutions opposing federal preemption of state law and has recently drafted federalism principles providing that “[s]tates and state regulators are closest to their citizens and are thus best positioned to determine the level of protection and service that should be available to the users of communications services.”<sup>30</sup> The Conference of State Bank Supervisors has a “Statement of Principles” noting that “[t]he states must retain their role as the front-line, grass-roots regulator for the financial services industry,” and denouncing federal preemption.<sup>31</sup> The list goes on. I discuss state interest groups’ institutional orientation further in Part II.

2. *Speaking with one voice.* Second, each state interest group speaks with one voice when it advocates state interests to the federal government. The groups’ modus operandi in advocacy is to support a unified position—an approach that enhances their lobbying clout.<sup>32</sup>

As should be expected in any group that advances a single position, the unified “state view” the groups advance reflects an attempt to distill a single position from a multitude of voices. To approximate a single

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<sup>27</sup> Permanent Policy Principles for State-Federal Relations, Nat’l Governors Ass’n, <http://www.nga.org/cms/home/federal-relations/nga-policy-positions/page-ec-policies/col2-content/main-content-list/principles-for-state-federal-rel.html#> (last visited May 16, 2014).

<sup>28</sup> What We Do, Interstate Oil & Gas Compact Comm’n, <http://www.iogcc.state.ok.us/what-we-do> (last visited Mar. 3, 2014).

<sup>29</sup> Env’tl. Council of the States, Resolution No. 00-1, On Environmental Federalism (2000) (rev. 2012), available at <http://www.ecos.org/section/policy/resolution> (follow “On Environmental Federalism” hyperlink).

<sup>30</sup> NARUC Draft Federalism Principles, Nat’l Ass’n of Regulatory Util. Comm’rs 1 (Feb. 15, 2013), [http://www.naruc.org/Publications/2013\\_02\\_15\\_FederalismPrinciples.pdf](http://www.naruc.org/Publications/2013_02_15_FederalismPrinciples.pdf).

<sup>31</sup> CSBS Statement of Principles, Conference of State Bank Supervisors, <http://www.csbs.org/about/what/Pages/csbs-principles.aspx> (last visited May 16, 2014).

<sup>32</sup> See, e.g., W. Douglas Costain & Anne N. Costain, Interest Groups as Policy Aggregators in the Legislative Process, 14 *Polity* 249, 269 (1981) (noting that if interest groups “are to have influence in Washington, they need to be recognized as advocating policies acceptable to most of their members” and that “[t]o avoid . . . fragmentation, prior aggregation of interests must take place”).

state view, state interest groups rely on governance mechanisms that may not represent the positions of all fifty states, or even a majority of them. Official group resolutions are generated by a vote open to the full membership (though only a quorum is usually required) and are determined by a majority, supermajority, or “consensus” vote, depending on the group.<sup>33</sup> State interest groups also send letters and regulatory comments to federal agencies on group letterhead. In some groups, these are submitted to the entire membership for comments; in others, they may be approved by group staff, officers, or a relevant subject-area committee.<sup>34</sup> Other communications with federal agencies—official consultations, participation in work groups and meetings, and day-to-day correspondence—are not run by the entire membership, but rather are handled by staff members or members of the group leadership.<sup>35</sup>

3. *Unclear identity—and line-drawing questions.* Third, although state interest groups describe themselves as advancing “the state view,”<sup>36</sup> that slogan masks a complicated question of whom the groups represent. In turn, the messy terrain of the groups’ composition raises both definitional questions regarding what counts as a state interest group and doubts about the plausibility of a “state view.”

To begin, many groups do not include all fifty states as members, even when they indicate that their members are “the fifty states.” Generally, the mark of a state’s membership in a state interest group is whether it pays annual dues, usually ranging in the tens or hundreds of thousands of dollars.<sup>37</sup> In some state interest groups, like the National

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<sup>33</sup> See *infra* Section III.A.

<sup>34</sup> See *infra* Section III.A.

<sup>35</sup> See *infra* Section III.A.

<sup>36</sup> See, e.g., Conference of State Bank Supervisors, 2012 Annual Report 26–27 (2013), available at <http://www.csbs.org/news/presentations/annualreports/Documents/2012CSBSANNUALREPORT.pdf> (noting that as the Dodd-Frank Wall Street Reform and Consumer Protection Act continues to be implemented, CSBS will continue to “inform the states and advocate for the state view”); see also Mission and Vision, Env’tl. Council of the States, [http://www.ecos.org/section/\\_aboutecos/mission](http://www.ecos.org/section/_aboutecos/mission) (last visited Mar. 3, 2014) (stating that the core mission of ECOS, the association of state environmental agency leaders, is in part to “articulate State positions to Congress, Federal agencies, and the public”).

<sup>37</sup> See, e.g., Lynn Bartels, Rep. Says Don’t Do Dues, *Denver Post*, Dec. 28, 2009, at A21 (“Colorado pays \$54,698 annually in dues to the National Association of Attorneys General, and \$14,784 a year to the Conference of Western Attorneys General.”); Michelle Cole, Oregon Quits Paying Governor Group Dues, *Oregonian*, Dec. 20, 2004, at B3 (stating that then-budget-crunched Oregon was saving over \$300,000 by ceasing to pay dues to the National Governors Association and Western Governors Association). As of 2012, dues to the National Governors Association ranged from \$22,000 to \$176,000 per year; Maine, which

Association of Insurance Commissioners (“NAIC”) and the Association of State Drinking Water Administrators, all fifty states currently pay dues. Yet some states seldom join certain state interest groups at all, and in other cases the decision is year-by-year. In any given year, for example, it is common for at least a few states to refuse to pay dues to the generalist groups like the National Governors Association, even though the group states that its members are “the governors of the 55 states, territories, and commonwealths.”<sup>38</sup> Similarly, while the website for the Environmental Council of the States says that its “members . . . are the state and territorial environmental protection agencies,”<sup>39</sup> in any given year its membership excludes a few states who choose not to join; as of September 2013, forty-five states were members.<sup>40</sup> The Ground Water Protection Council (“GWPC”) (whose members “are the state agencies that protect and regulate ground water resources”<sup>41</sup>) and the Interstate Oil and Gas Compact Commission have approximately thirty members each.<sup>42</sup> The National Association of Clean Air Agencies (“NACAA”) currently has forty-three state members.<sup>43</sup>

Another wrinkle in ascertaining a group’s representative scope is that some groups, like the National Governors Association and the Association of Clean Water Administrators, provide in their by-laws that all states are considered members (and are purportedly represented when the organization speaks), even when the states fail to pay dues or affirm-

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ceased paying dues, complained about the \$60,000 it was charged in dues. Mal Leary, LePage Pulls Out of National Governors Association, Bangor Daily News (Sept. 30, 2012, 2:22 PM), <http://bangordailynews.com/2012/09/30/politics/lepage-pulls-out-of-national-governors-association/>.

<sup>38</sup> See, e.g., Peter Hamby, GOP-led States Skipping Payments to Governors Association, CNN Politics (Feb. 24, 2011, 3:20 PM), <http://politicsticker.blogs.cnn.com/2011/02/24/gop-led-states-skipping-payments-to-governors-association/> (noting that Texas, South Carolina, and Idaho refused to pay their NGA dues and quoting a spokesperson for Texas Governor Rick Perry as explaining that he “withdrew membership several years ago”).

<sup>39</sup> Officers and Membership, Env’tl. Council of the States, [http://www.ecos.org/section/\\_aboutecos/officers\\_membership](http://www.ecos.org/section/_aboutecos/officers_membership) (last visited Mar. 3, 2013).

<sup>40</sup> Env’tl. Council of the States, 2013 Annual Report 16–18 (2013), available at [http://www.ecos.org/section/\\_aboutecos](http://www.ecos.org/section/_aboutecos) (follow “2013 Annual Report” hyperlink).

<sup>41</sup> State Membership, Ground Water Prot. Council, <http://www.gwpc.org/about-us/state-membership> (last visited June 23, 2014).

<sup>42</sup> E-mail from Dan Yates, Assoc. Dir., Ground Water Prot. Council, to author (July 30, 2013) (on file with author) (stating that the GWPC represents twenty-eight states); Member States, Interstate Oil & Gas Compact Comm’n, <http://www.iogcc.state.ok.us/member-states> (last visited Mar. 3, 2014) (listing thirty member states).

<sup>43</sup> Jeremy P. Jacobs, Officials from 17 States Launch Splinter Group of Regulatory Agencies, Greenwire, Jan. 23, 2013, <http://www.eenews.net/stories/1059975195>.

actively attempt to withdraw from the organization. In a few high-profile cases, for example, states have explicitly withdrawn from the National Governors Association but remained “represented,” according to the group.<sup>44</sup>

Separate from how many states belong to a group, there is the question of what other entities have voice in state interest groups. Some groups receive funding from, or even allow membership by, private entities. Most state interest groups receive at least some private funding or revenue or federal government funding through grants or contracts. For many groups, non-state contributions constitute the bulk of their budgets. For example, the National Association of Medicaid Directors receives about two-thirds of its funding from private industry sponsorship of conferences and contracts with the federal government or foundations; the other third comes from state dues.<sup>45</sup> The National Association of Insurance Commissioners receives only three percent of its budget (of over \$80 million in 2013<sup>46</sup>) from state membership dues; the rest comes almost entirely from licensing fees and sales of publications and data.<sup>47</sup> The Environmental Council of the States receives roughly seventy percent of its budget from federal grants and contracts; state dues constitute only ten percent.<sup>48</sup> The National Association of Attorneys General (“NAAG”) receives a mix of funds—from state dues, federal grants, publication sales, and meetings and seminars.<sup>49</sup> The National Governors Association accepts corporate sponsorships of its meetings.<sup>50</sup> Some

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<sup>44</sup> See Leary, *supra* note 37 (noting Maine governor’s withdrawal from the NGA, but describing an NGA statement that every governor is “considered a member of the organization” even if the governor ceases paying dues).

<sup>45</sup> See Telephone Interview with Matt Salo, Exec. Dir., Nat’l Ass’n of Medicaid Dirs. (Apr. 12, 2013).

<sup>46</sup> See Nat’l Ass’n of Ins. Comm’rs, Proposed 2014 NAIC Budget 2 (2013), available at [http://www.naic.org/documents/about\\_budget\\_2014\\_budget.pdf](http://www.naic.org/documents/about_budget_2014_budget.pdf). NAIC’s new Chief Executive Officer (“CEO”), former Senator Ben Nelson, will earn a salary of \$950,000. Andrew G. Simpson, New NAIC CEO Nelson: ‘No Need for Dual Regulation,’ *Ins. J.* (Jan. 23, 2013), <http://www.insurancejournal.com/news/national/2013/01/23/278318.htm>.

<sup>47</sup> See NAIC Frequently Asked Questions, Nat’l Ass’n of Ins. Comm’rs, [http://www.naic.org/documents/about\\_faq.pdf](http://www.naic.org/documents/about_faq.pdf) (last visited Feb. 26, 2014); see also Nat’l Ass’n of Ins. Comm’rs, 2012 Annual Report 3 (2012), available at [http://www.naic.org/annual\\_report\\_2012/annual\\_report\\_2012\\_financials.pdf](http://www.naic.org/annual_report_2012/annual_report_2012_financials.pdf).

<sup>48</sup> See *Env’tl. Council of the States*, *supra* note 40, at 14.

<sup>49</sup> How Is NAAG Funded?, Nat’l Ass’n of Att’ys Gen., [http://www.naag.org/how\\_is\\_naag\\_funded.php](http://www.naag.org/how_is_naag_funded.php) (last visited Mar. 3, 2014).

<sup>50</sup> Reid Wilson, Corporate Money in Politics? Old News., *Nat’l J.* (Feb. 25, 2012), <http://www.nationaljournal.com/blogs/hotlineoncall/2012/02/corporate-money-in-politics->

groups, like the County Executives of America, allow private entities to act as “associate” or “affiliated” members.<sup>51</sup> The Interstate Oil and Gas Compact Commission formally comprises governors in oil and gas producing states, but “governors generally appoint alternates, usually the state’s top oil and gas official or an oil company executive.”<sup>52</sup>

It is worth pausing here to question whether and how private affiliations or funding, or apparently “private” agendas, should affect the definition of a state interest group. Consider, as a provocative illustration, the American Legislative Exchange Council (“ALEC”), a group of state legislators and private-sector members that has been criticized for “act[ing] as a stealth business lobbyist.”<sup>53</sup> One might want to exclude ALEC from the state interest group category because it allows private funding. As of 2010, the group’s private members (paying annual dues of \$7,000 to \$25,000) supplied most of its \$7 million budget; state legislators pay only \$50 per year.<sup>54</sup> But as just noted, many other state interest groups receive private funding, sometimes to significant degrees. The same pushback would apply to the temptation to exclude ALEC from the state interest group category because it allows private members; so do other more mainstream state interest groups, and ALEC has stated in response to criticism that its state legislator members have the final say over all policy positions.<sup>55</sup> One might instead seek to exclude ALEC from the state interest group category because, even though it often roots its positions in rationales of states’ rights, limited government, and federalism,<sup>56</sup> it in fact presses an industry-friendly orientation. But that too does not appear to be unique. As discussed in Part III, other state interest groups pursue federalism-oriented agendas that either coincide

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old-news--25 (noting 147 corporate sponsors of the NGA’s 2012 winter meeting and describing “corporate money” as “crucial . . . to the organization’s success”); see also Richard Tapscott, Schaefer Leads Uprising at Governors Conference, *Wash. Post*, Aug. 17, 1993, at B5 (“Besides the nearly \$4 million from dues each year, the association receives about \$7 million in grants, corporate donations and federal aid, largely for research.”).

<sup>51</sup> See CEA Membership, *Cnty. Execs. of Am.*, [http://www.countyexecutives.org/cea/associate\\_members.php](http://www.countyexecutives.org/cea/associate_members.php) (last visited Feb. 25, 2014).

<sup>52</sup> Mike Soraghan, Hydraulic Fracturing: Public Disclosure Database Kept Private, *EnergyWire*, Aug. 13, 2012, <http://www.eenews.net/stories/1059968679>.

<sup>53</sup> Mike McIntire, Nonprofit Acts as a Stealth Business Lobbyist, *N.Y. Times*, Apr. 22, 2012, at A1.

<sup>54</sup> *Id.*

<sup>55</sup> See Frequently Asked Questions, *Am. Legislative Exch. Council*, <http://www.alec.org/about-alec/frequently-asked-questions/> (last visited Feb. 26, 2014).

<sup>56</sup> See *id.*

with or appear to be motivated by private-sector interests.<sup>57</sup> Ultimately, these distinctions all seem to be matters of degree within the set of state interest groups rather than categorical boundaries. Thus, rather than treating groups' private affiliations as reason to exclude them from the category and the study, I suggest—and develop in the rest of this Article—that the complexity of the groups' composition and orientation offers reason to reflect upon the access and understanding of the category as a whole.

There is also variety, and sometimes ambiguity, as to *which* state actors a group represents. While state interest groups emphasize their ability to speak for “state views,” each group represents only a subset of state officials,<sup>58</sup> and a group's representation of the state's general population is indirect at most. Focusing on the state officials involved in a group suggests three distinctions: (1) generalist versus specialist; (2) political versus career; and (3) national versus regional.

▪ *Generalist versus specialist* reflects whether the members of the group are officials with broad portfolios or subject-focused administrators. The core set of groups representing elected officials are known as the “Big Seven”: the National Governors Association, the National Conference of State Legislatures, the National Association of Counties, the U.S. Conference of Mayors, the Council of State Governments, the National League of Cities, and the International City/County Management Association.<sup>59</sup> Many more groups represent state administrators or state agencies within particular subject areas, and these may be the groups that any given agency hears from most frequently. By way of example, the National Association of Insurance Commissioners—now intimately involved in the workings of the agencies implementing the Affordable Care Act, including the Departments of Health and Human Services (“HHS”), Labor, and the Treasury, and the Office of Personnel Man-

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<sup>57</sup> See *infra* Section III.B. One other potential distinction is that some state legislators, but not all, reportedly pay their (modest) dues to ALEC from personal rather than taxpayer funds. See Lisa Graves, A Comparison of ALEC and NCSL, PR Watch (July 13, 2011), <http://www.prwatch.org/news/2011/07/10882/comparison-alec-and-ncsl>.

<sup>58</sup> See *supra* notes 36–44 and accompanying text.

<sup>59</sup> See Arnold & Plant, *supra* note 12, at 15. The EPA requires consultation with two additional generalist groups, the County Executives of America and the National Association of Towns and Townships, as well as with the Environmental Council of the States, and calls this set of groups the “Big 10.” See EPA, EPA's Action Development Process, Guidance on Executive Order 13132: Federalism 45–46 (2008) [hereinafter EPA Guidance], available at <http://www.govexec.com/pdfs/111908rb1.pdf>.



agement—represents state insurance commissioners;<sup>60</sup> the National Association of Regulated Utility Commissioners represents state officers in charge of utilities from telecommunications to electricity and interacts regularly with the Federal Communications Commission (“FCC”) and Federal Energy Regulatory Commission (“FERC”);<sup>61</sup> and the Environmental Council of the States represents heads of state departments of environmental quality and is deeply involved in the work of the Environmental Protection Agency (“EPA”).<sup>62</sup>

▪ *Political versus career* breaks down the administrator category further, separating politically appointed or elected administrators from division chiefs or other career employees. For example, while the Environmental Council of the States comprises politically appointed environmental administrators, related groups like the National Association of Clean Air Agencies and the Association of State Drinking Water Administrators are usually career division heads.

▪ Finally, *national versus regional* refers to the scope of the group’s membership; while many groups are open to all states in the nation, others, like the Western States Water Council and the Northeast Waste Management Officials’ Association, are specific to geographic regions.<sup>63</sup>

4. *Opacity.* Related to their aforementioned disconnection from citizens, state interest groups disclose little about their membership or operations. As hybrid entities that straddle the public-private divide, the groups are not subject to the key means of making government open to public examination or participation. The Administrative Procedure Act,<sup>64</sup> Freedom of Information Act,<sup>65</sup> and Federal Advisory Committee

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<sup>60</sup> See generally *infra* notes 97–102.

<sup>61</sup> See generally Policy, Nat’l Ass’n of Regulatory Util. Comm’rs, <http://www.naruc.org/Policy/> (last visited May 25, 2014) (describing the organization’s representation of state interests before the federal government, including the FCC and FERC).

<sup>62</sup> See generally About ECOS, Env’tl. Council of the States, [http://www.ecos.org/section/\\_aboutecos](http://www.ecos.org/section/_aboutecos) (last visited Apr. 3, 2014); see also Seifter, *supra* note 6, at 473 (discussing interactions between ECOS and the EPA).

<sup>63</sup> See generally About WSCW, W. States Water Council, <http://www.westernstateswater.org/about-wswc/> (last visited Apr. 3, 2014) (“The Western States Water Council is an organization consisting of representatives appointed by the governors of 18 western states.”); About NEWMOA, Ne. Waste Mgmt. Officials’ Ass’n, <http://www.newmoa.org/about/aboutus.cfm> (last visited Apr. 3, 2014) (noting that the group’s members are state officials from eight northeastern states).

<sup>64</sup> 5 U.S.C. §§ 500, 551 (2012).

<sup>65</sup> *Id.* § 552.

Act<sup>66</sup> do not apply, by their terms, to state interest groups. Nor are most state interest groups voluntarily forthcoming. As described in more detail in Part III, many groups do not publicize their membership rosters, and some groups even have a policy not to disclose membership information upon request.<sup>67</sup> The groups also generally do not disclose (and some do not even record) internal participation or votes by their members.

Each of these four features, Parts II and III will argue, contributes to state interest groups' mixed results for values of federalism and administrative law. The groups' commitment to state institutional concerns, unification around single group positions, and insulation from the citizenry all help to make the groups important contributors to the oft-cited federalism goals of protecting state power. But those same traits, combined with the groups' variegated and unclear identities, impede the groups from serving—and may cause them to thwart—informed agency decision making and democratic accountability. Before I unpack that analysis, Section I.B describes the privileged access the groups now enjoy in the federal administrative process.

### *B. The Legal Framework: State Interest Groups as Part of the Federal Administrative Apparatus*

State interest groups' quest to be recognized as official voices of state interests has been successful. To the extent federal law has directed agencies to engage states in federal decision making, it has done so largely by giving state interest groups a central role.<sup>68</sup> The key trans-substantive legal instruments are Executive Order 13,132<sup>69</sup>—the “Federalism Executive Order,” bolstered by a recent Obama administration memorandum<sup>70</sup> and agencies' own implementing guidance—and the

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<sup>66</sup> Id. app. §§ 2–3.

<sup>67</sup> See, e.g., Sean Cavanagh, Texas Is Not Paying Dues to National Governor's Group, *Either, Educ. Week, State EdWatch* (June 24, 2011, 3:17 PM), [http://blogs.edweek.org/edweek/state\\_edwatch/2011/06/a\\_few\\_days\\_ago\\_i.html](http://blogs.edweek.org/edweek/state_edwatch/2011/06/a_few_days_ago_i.html) (“[NGA spokesperson] Omear said NGA won't reveal specific information about which individual states are paying dues, but those costs range from \$22,000 to \$176,200 a year, depending on the size of the state.”).

<sup>68</sup> Cf. Haider, *supra* note 11, at 306 (calling the groups “a kind of ‘third house’ of elected representatives at the national level”).

<sup>69</sup> Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted in* 5 U.S.C. § 601 (2012).

<sup>70</sup> Memorandum on Preemption, 2009 Daily Comp. Pres. Doc. 1 (May 20, 2009).

Unfunded Mandates Reform Act (“UMRA”),<sup>71</sup> as construed by its implementing guidelines. Each of these requires consultation with states under certain circumstances and recommends state interest groups as appropriate state consultants. Some subject-specific instruments, too, have required consultation with state interest groups.<sup>72</sup> Finally, even where the law gives state interest groups no explicit role, historical practice and practical necessity have made them key consultants in cooperative federalism regimes. This Section describes the legal instruments and practices that have given state interest groups pride of place in intergovernmental relations.

One caveat bears noting before proceeding. I do not claim here that these instruments give state interest groups a particular quantum of *influence* over agency decision making, though other scholars have identified the groups as influential.<sup>73</sup> Measuring interest group influence is well recognized to be difficult in any particular circumstance,<sup>74</sup> and making generalizations about groups’ influence is even more fraught. My point in this Section is to show that the groups have become embedded in the administrative process; they are not just voices in the vast crowd of lobbyists and interest groups that try to persuade agencies. An understanding of state interest groups is therefore vital to a practical understanding of administrative law and federalism.

### *1. Trans-substantive Instruments: Executive Order 13,132 and the Unfunded Mandates Reform Act*

The 1999 Federalism Executive Order—itsself born of state interest group lobbying<sup>75</sup>—has established a central role for state interest groups. The Order requires agencies to be “guided by” certain “fundamental federalism principles,” including that issues not national in scope should be “addressed by the level of government closest to the people”; that “the States possess unique . . . abilities to meet the needs of the people and should function as laboratories of democracy”; and that “the nation-

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<sup>71</sup> Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified as amended in scattered sections of 2 U.S.C.). See generally Garrett, *supra* note 15, at 1136 (discussing the UMRA).

<sup>72</sup> See *infra* Subsection I.B.2.

<sup>73</sup> See, e.g., Kramer, *supra* note 15, at 285 (“The influence of this ‘intergovernmental lobby’ is, in fact, widely acknowledged and respected in Washington.”).

<sup>74</sup> See, e.g., Costain & Costain, *supra* note 32, at 252–56.

<sup>75</sup> See John D. Nugent, *Safeguarding Federalism* 65 (2009).

al government should be deferential to the States when taking action that affects” states’ policymaking discretion.<sup>76</sup> The Order further instructs federal agencies to avoid regulation that unnecessarily restricts state prerogatives and to consider state input when federal regulation is necessary.<sup>77</sup> To implement these instructions, the Order requires agencies to consult with states on any “policies that have federalism implications,”<sup>78</sup> establish “an accountable process to ensure meaningful and timely input” from state representatives,<sup>79</sup> and prepare a “federalism summary impact statement,” describing state concerns and the extent to which they have been met.<sup>80</sup>

Most relevant here, the Order endorses state interest groups as appropriate state representatives. The groups are specifically included in the definition of state and local officials in the Order,<sup>81</sup> in the operative Office of Management and Budget (“OMB”) guidance,<sup>82</sup> and in individual agencies’ own guidance for consultations under the Order.<sup>83</sup> Agencies

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<sup>76</sup> Exec. Order No. 13,132, 3 C.F.R. 206, 207 (2000), *reprinted in* 5 U.S.C. § 601 (2012).

<sup>77</sup> *Id.* at 207–10.

<sup>78</sup> *Id.* at 207–08. “Policies that have federalism implications” are defined as regulations and “other policy statements or actions that have substantial direct effects” on (1) “the States,” (2) “the relationship between the national government and the States,” or (3) “the distribution of power and responsibilities among the various levels of government.” *Id.* at 206.

<sup>79</sup> *Id.* at 209. Agencies must submit a description of the process to the Office of Management and Budget (“OMB”). *Id.*

<sup>80</sup> *Id.* at 210; see also Reg Map: Specific Analyses, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Exec. Office of the President, [http://www.reginfo.gov/public/reginfo/Regmap/regmap\\_analyses.jsp](http://www.reginfo.gov/public/reginfo/Regmap/regmap_analyses.jsp) (last visited Feb. 25, 2014) (stating that a federalism summary impact statement is required for a “discretionary rule that has federalism implications and imposes substantial unreimbursed direct compliance costs on State and local governments” and for a rule that has “federalism implications and preempt[s] State law”).

<sup>81</sup> 3 C.F.R. 207.

<sup>82</sup> Interpretations from the OMB designate the “Big Seven” groups as the appropriate parties for agencies to consult with. See Letter from Mickey Ibarra, Dir., Office of Intergovernmental Affairs, Exec. Office of the President, to Donald J. Borut, Chair, Big 7 Organizations (Mar. 9, 2000), *in* EPA Guidance, *supra* note 59, at 43. The OMB has also asked the EPA to consult with two additional state interest groups, the County Executives of America and the National Association of Towns and Townships. See EPA Guidance, *supra* note 59, at 4 (“OMB has specifically designated nine national organizations as being representative of [state and local] officials for purposes of complying with the consultation requirements of the Order.”); see also *supra* note 59.

<sup>83</sup> See EPA Guidance, *supra* note 59, at 3–4; see also Statement of Policy on Intergovernmental Consultation in the Development of Regulations that Have Federalism Implications, 65 Fed. Reg. 13,735, 13,736 (Dep’t of Energy Mar. 14, 2000) (“With respect to State governments, the Secretarial Officer should give actual notice by letter, using a mailing list maintained by the DOE Office of Intergovernmental and External Affairs that includes elect-

that endeavor to comply with the Order thus tend to do so by consulting relevant state interest groups.<sup>84</sup> In practice, this means that state interest groups are often the main, or only, state entities that are consulted during the 13,132 process. The best examples of how the consultation process works come from the EPA, which has been most attentive to the Order.<sup>85</sup> When contemplating a rule that might have federalism implications, the Agency sends a letter to the relevant state interest groups, inviting them to a meeting at EPA headquarters to “obtain [the groups’] input on the options under consideration” before the rule is proposed.<sup>86</sup> It is common for state interest group staff—but not any of their state members—to participate in the consultation.<sup>87</sup>

To the extent it has been considered at all, state interest group participation in the agency consultation process has been well-received. Professor Catherine Sharkey has suggested that Executive Order 13,132

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ed chief executives, the National Governors Association, the National Conference of State Legislatures, and the Council of State Governments.”)

<sup>84</sup> See, e.g., EPA Guidance, *supra* note 59, at 3–4, 9; see also U.S. Gov’t Accountability Office, GAO-06-8, OCC Preemption Rulemaking 19 (2005), available at <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-06-8/pdf/GAOREPORTS-GAO-06-8.pdf> (discussing the Office of Comptroller of the Currency consulting with the Conference of State Banking Supervisors).

<sup>85</sup> While early studies indicated the Order was most often ignored, see, e.g., Nina A. Mendelson, *Chevron and Preemption*, 102 *Mich. L. Rev.* 737, 784 (2004), and U.S. Gen. Accounting Office, GAO/T-GGD-99-93, *Federalism: Implementation of Executive Order 12612 in the Rulemaking Process 1* (1999), the tide seems to be turning. The EPA, in particular, officially changed its policy in 2008 to lower the threshold for triggering a consultation. See EPA Guidance, *supra* note 59, at 2 (noting that “EPA policy is broader than the Executive Order, reflecting EPA’s commitment to early and meaningful intergovernmental consultation”). Since then, the Agency has conducted twelve consultations pursuant to the Order (compared to only two consultations before the policy change), and each consultation has occurred with state interest groups. See Interview with Andrew Hanson, Intergovernmental Liaison, EPA, in Washington, D.C. (May 22, 2013). And as Professors Gillian Metzger and Catherine Sharkey have reported, agencies appear to be more sensitive to preemption issues under the Obama administration, in part as an apparent response to the administration’s memorandum on preemption in 2009. Gillian E. Metzger, *Federalism Under Obama*, 53 *Wm. & Mary L. Rev.* 567, 594–95 (2011) [hereinafter Metzger, *Federalism Under Obama*]; Sharkey, *supra* note 15, at 531–32. The memorandum states, *inter alia*, that administrative preemption “should be undertaken only with full consideration of the legitimate prerogatives of the States.” Memorandum on Preemption, 2009 Daily Comp. Pres. Doc. 1 (May 20, 2009).

<sup>86</sup> See, e.g., Letter from Denise Keehner, Dir., EPA Office of Wetlands, Oceans & Watersheds, to Intergovernmental Ass’ns (Mar. 1, 2013) (on file with author).

<sup>87</sup> See Interview with Andrew Hanson, *supra* note 85.

should serve as a “blueprint” for meaningful state-agency partnerships,<sup>88</sup> and has recommended better outreach to both the Big Seven—the core generalist groups of state and local elected officials—and the specialist groups focused on particular subject areas.<sup>89</sup> The Administrative Conference of the United States (“ACUS”), drawing from Sharkey’s study, has since recommended that agencies consult with state interest groups.<sup>90</sup> At least some agencies appear to be cognizant of this exhortation, explicitly modeling their internal consultation guidelines on the ACUS recommendations.<sup>91</sup>

The Unfunded Mandates Reform Act, enacted in 1995, is another trans-substantive instrument requiring state-agency consultations. It requires consultation with states on regulations that would include “significant Federal intergovernmental mandates,”<sup>92</sup> defined to include federal statutes or regulations that “impose an enforceable duty” on state or local governments or decrease funding or strengthen conditions in certain existing federal programs, all subject to certain exceptions.<sup>93</sup> Here, too, state interest groups are identified as legitimate partners. The relevant OMB guidance interprets the statute as requiring consultation with the groups, among other state officials, noting that it is “important” to consult with the groups, which can then serve as liaisons to state and local officials.<sup>94</sup> All such consultations with states are exempted from the extensive disclosure requirements of the Federal Advisory Committee Act.<sup>95</sup> One might dispute the extent to which the UMRA is followed—

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<sup>88</sup> See Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 *Duke L.J.* 2125, 2129 (2009).

<sup>89</sup> See Sharkey, *supra* note 15, at 582–90. Sharkey also recommends the addition of a new notification provision to the state attorneys general and to the National Association of Attorneys General. *Id.* at 588.

<sup>90</sup> See *Agency Procedures for Considering Preemption of State Law*, 76 *Fed. Reg.* 81 (Jan. 3, 2011) (notice of adoption of recommendation).

<sup>91</sup> See *Federalism*, U.S. Dep’t of Transp., <http://www.dot.gov/regulations/federalism> (last visited Apr. 3, 2014) (noting that internal guidance is “modeled after” the ACUS recommendations, and providing a link to ACUS contact sheet listing “the Big Seven,” other state interest groups, and state attorneys general).

<sup>92</sup> 2 U.S.C. § 1534(a) (2012).

<sup>93</sup> *Id.* § 658(5).

<sup>94</sup> *Guidelines and Instructions for Implementing Section 204, “State, Local, and Tribal Government Input,” of Title II of Public Law 104-4*, 60 *Fed. Reg.* 50,651 (Office of Mgmt. & Budget Sept. 29, 1995).

<sup>95</sup> See *id.*

2014]

*States as Interest Groups*

975

the Act's definition of qualifying "mandates" is notably malleable<sup>96</sup>—but there is no dispute that the Act blesses a role for state interest groups.

## 2. *Subject-Specific Statutes and Arrangements*

Some subject-specific instruments also assign a role to state interest groups. Occasionally, this may be provided for by statute. The most recent and salient example is the Affordable Care Act ("ACA"), which assigns an important role to the National Association of Insurance Commissioners, a state interest group comprising the elected or appointed insurance commissioners from all fifty states, the District of Columbia, and several territories.<sup>97</sup>

The NAIC's role under the ACA goes a step beyond the consultation role provided for in the trans-substantive instruments. Not only does the Act direct HHS to develop its regulations on multiple discrete issues "in consultation with the [NAIC],"<sup>98</sup> but the Act also directs the NAIC to "establish" definitions and methodologies for several key provisions,

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<sup>96</sup> Unfunded Mandates and Regulatory Overreach: Hearing Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations & Procurement Reform of the H. Comm. on Oversight & Gov't Reform, 112th Cong. 34 (2011) (statement of Denise M. Fantone, Director, Strategic Issues, U.S. Government Accountability Office) ("GAO consistently found that agencies' rules seldom triggered UMRA.").

<sup>97</sup> See About the NAIC, Nat'l Ass'n of Ins. Comm'rs, [http://www.naic.org/index\\_about.htm](http://www.naic.org/index_about.htm) (last visited Feb. 26, 2014); see also NAIC Membership List, Nat'l Ass'n of Ins. Comm'rs (Mar. 5, 2014), [http://www.naic.org/documents/membership\\_membershiplist.pdf](http://www.naic.org/documents/membership_membershiplist.pdf).

<sup>98</sup> Timothy Stoltzfus Jost, Reflections on the National Association of Insurance Commissioners and the Implementation of the Patient Protection and Affordable Care Act, 159 U. Pa. L. Rev. 2043, 2045 (2011); see also Metzger, Federalism Under Obama, *supra* note 85, at 578–79 (describing the NAIC's "significant responsibilities under the [ACA]").

As Professor Jost reports, HHS must consult with the NAIC in issuing regulations for the creation of interstate "health care choice compacts," 42 U.S.C. § 18053 (Supp. V 2012); in setting "permissible age bands" for rate-setting purposes, *id.* § 300gg; in developing standards for the explanation of benefits and coverage that insurers must provide, *id.* § 300gg-15(a); and in setting standards for a "transitional reinsurance" program (under which certain contribution amounts must be "based on the best estimates of the NAIC"), *id.* § 18061(b). The most significant consultation requirement pertains to the ACA's core section implementing insurance market reforms: HHS must consult with the NAIC in setting, *inter alia*, the regulations for the "establishment and operation" of the Act's health insurance exchanges and the requirements for the offering of qualified health plans through the exchanges. See *id.* § 18041(a); Jost, *supra*, at 2045.

subject to “certification” by HHS.<sup>99</sup> In 2010, the NAIC proposed its first set of definitions and methodologies pertaining to the medical loss ratio (“MLR”), one of the most important and contested aspects of the statute.<sup>100</sup> These were “adopt[ed] and certifie[d] in full” by the Agency, which praised the NAIC’s “thorough and transparent process.”<sup>101</sup> Moreover, in virtually every rulemaking conducted pursuant to the ACA, the Agency has reported consulting with the NAIC.<sup>102</sup> As will be noted in Part III, the NAIC’s positions are sometimes controversial, and some critics have balked at the notion of giving so central a role to an essentially private organization that is not subject to disclosure laws and that has a history of strong industry ties.

In other instances, federal agencies enter into formal arrangements or agreements with state interest groups on particular substantive issues without direction from Congress. For example, the Consumer Financial Protection Bureau and the Conference of State Bank Supervisors recently established a framework<sup>103</sup> pledging consultation and coordination on “standards, procedures, and practices” related to bank examination and enforcement.<sup>104</sup> Similarly, the EPA has a longstanding memorandum of understanding with the Interstate Oil and Gas Compact Commission to

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<sup>99</sup> See 42 U.S.C. § 300gg-18(c) (stating that, “subject to the certification of the Secretary” of HHS, the NAIC “shall establish” definitions and methodologies for calculating the medical loss ratio); Jost, *supra* note 98, at 2046.

<sup>100</sup> The MLR essentially requires health insurers to devote a proportion of health care dollars to medical benefits and improving the quality of care rather than administrative or other expenses; insurers that do not achieve an MLR of eighty percent (or eighty-five percent for large groups) must give customers a rebate.

<sup>101</sup> Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 74,864, 74,865–66 (Dec. 1, 2010) (to be codified at 45 C.F.R. pt. 158).

<sup>102</sup> See, e.g., Patient Protection and Affordable Care Act; Health Insurance Market Rules; Rate Review, 78 Fed. Reg. 13,406, 13,408 (Feb. 27, 2013) (to be codified at 45 C.F.R. pts. 144, 147, 150, 154, and 156) (noting that, as required, “HHS consulted with the NAIC through its Health Care Reform Actuarial (B) Working Group to define permissible age bands”); Summary of Benefits and Coverage and Uniform Glossary, 77 Fed. Reg. 8668, 8670 (Feb. 14, 2012) (to be codified at 45 C.F.R. pt. 147) (“The statute directs the Departments, in developing such standards, to ‘consult with the [NAIC] . . . . The proposed regulations and accompanying document adhered to the recommendations of the NAIC.”).

<sup>103</sup> Consumer Fin. Prot. Bureau & Conference of State Bank Supervisors, 2013 CFPB-State Supervisory Coordination Framework (2013), available at [http://files.consumerfinance.gov/f/201305\\_cfpb\\_state-supervisory-coordination-framework.pdf](http://files.consumerfinance.gov/f/201305_cfpb_state-supervisory-coordination-framework.pdf).

<sup>104</sup> Press Release, Consumer Fin. Prot. Bureau, The CFPB Establishes Framework to Better Coordinate with State Regulators (May 21, 2013), <http://www.consumerfinance.gov/newsroom/the-cfpb-establishes-framework-to-better-coordinate-with-state-regulators/>.



coordinate regulation of oil and gas activities.<sup>105</sup> Pursuant to this agreement, the EPA has engaged in early consultations with the IOGCC on proposed rules, has participated in joint EPA-IOGCC task forces, and attempts to address concerns raised by the group.<sup>106</sup> The IOGCC also has a memorandum of understanding with the Department of Energy to work together on issues related to oil and gas production, carbon capture, and other topics;<sup>107</sup> pursuant to the agreement, the IOGCC has, among other tasks, developed a model framework for disbursement of funding under the Energy Policy Act of 2005.<sup>108</sup>

### *3. Administrative Practice*

Finally, much—perhaps most—communication between state interest groups and agencies happens outside of mandatory consultation processes. Some of these interactions, discussed more below, are documented and fairly routinized, and may be considered part of the fabric of administrative practice: State interest groups regularly send letters to and file comments with agencies, develop official policy positions and convey them to agencies, and participate in state-agency work groups. The work groups, composed exclusively of state representatives and agency officials, collaborate on regulatory issues of shared interest, often at the pre-proposal stage. For example, the Association of State Drinking Water Administrators traditionally participates in work groups with the EPA on forthcoming drinking water rules, and other state interest groups participate in rule development in the areas of air pollution, water pollution, and waste.<sup>109</sup> On other occasions, agencies engage in extended consulta-

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<sup>105</sup> See Rob Lawrence, EPA Works with Oil and Natural Gas Producing States, EPA Greenversations (Dec. 12, 2008), <http://blog.epa.gov/blog/2008/12/epa-works-with-oil-natural-gas-producing-states> (describing EPA-IOGCC memorandum of understanding); see also Meeting Agenda, Interstate Oil & Gas Compact Comm'n, <http://www.iogcc.state.ok.us/agenda> (last visited Feb. 25, 2014) (listing meeting for IOGCC-EPA memorandum of understanding).

<sup>106</sup> See, e.g., Federal Requirements Under the Underground Injection Control (UIC) Program for Carbon Dioxide (CO<sub>2</sub>) Geologic Sequestration (GS) Wells, 75 Fed. Reg. 77,230, 77,238–39 (Dec. 10, 2010) (to be codified at 40 C.F.R. pts. 124, 144, 145, 146, and 147).

<sup>107</sup> See DOE, IOGCC Sign MOU on Oil, Gas, Inside Energy, Oct. 1, 2009, available at Factiva, Doc. No. NRGXTR0020091015e5a100005.

<sup>108</sup> See Interstate Oil & Gas Compact Comm'n, Technology's Impact on Production: Developing Environmental Solutions at the State and National Level, Groundwork, <http://groundwork.iogcc.org/content/technologys-impact-on-production-developing-environmental-solutions-at-the-state-and-nationa> (last visited Feb. 25, 2014).

<sup>109</sup> See Seifter, *supra* note 6, at 471–73.

tion or collaboration with state interest groups without using the “work group” title, though the relationship may be similar. For example, the Bureau of Land Management has reported that it is “working closely” with the Interstate Oil and Gas Compact Commission and the Ground Water Protection Council,<sup>110</sup> a group made up of state ground water agencies. As discussed further in Part III, the Department of the Interior’s proposed rule to regulate fracking states the Agency’s intention to incorporate a web-based chemical disclosure program called FracFocus, which was developed by the two state interest groups in conjunction with the oil and gas industry.

In addition, even more informal interactions are common—offhand conversations at conferences, e-mail exchanges and conference calls on topics of mutual interest, and so on. The EPA’s official guidance implementing Executive Order 13,132 instructs agency officials to seek out opportunities for such conversations.<sup>111</sup> Federal agency officials also routinely attend the biannual conferences of state interest groups.<sup>112</sup> And the groups themselves consistently press for a greater role, lobbying the executive branch to include them in decision making regarding federal programs, and often wind up with a seat at the table.<sup>113</sup>

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<sup>110</sup> See Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. 31,636, 31,640 (May 24, 2013) (to be codified at 43 C.F.R. pt. 3160).

<sup>111</sup> See EPA Guidance, *supra* note 59, at 22, 47–48.

<sup>112</sup> See, e.g., Kramer, *supra* note 6, at 1552–53 (noting the informal connections between federal officials and the intergovernmental lobby); 2014 Spring Meeting Agenda, Env’tl. Council of the States, [http://www.ecos.org/section/2014\\_spring\\_meeting\\_agenda](http://www.ecos.org/section/2014_spring_meeting_agenda) (last visited June 23, 2014) (listing presentations by EPA officials and various sessions and discussions open only to EPA officials and state interest group members/staff); Ground Water Prot. Council, Event Handbook for Annual Forum, Groundwater Protection: Reflecting Progress and Responding to the Future (2013), available at <http://www.gwpc.org/sites/default/files/events/FinalAgenda0919.pdf> (listing participants from federal agencies and describing a “State-EPA Roundtable”); Nat’l Ass’n of Regulatory Util. Comm’rs, Final Program for 125th Annual Meeting, Managing Risk: Protecting Consumers and Critical Assets 6, 10–12, 14 (2013), available at <http://www.narucmeetings.org/MeetingPrograms/2013AnnualProgram.pdf> (listing as participants officials from FERC and the FCC). Federal officials’ participation in state interest group meetings is a decades-old practice. See Daniel Elazar, *Federalism: A View from the States* 64 (2d ed. 1972) (describing the practice).

<sup>113</sup> See, e.g., Letter from Governors Jack Markell and Mary Fallin, Nat’l Governors Ass’n, to President Barack Obama (Feb. 27, 2013), available at <http://www.nga.org/cms/home/federal-relations/nga-letters/executive-committee-letters/col2-content/main-content-list/february-27-2013-letter---presid.html> (“[W]hile your administration has worked to improve government operations, we would like to establish a mechanism for institutionalizing input from the states to assist in redesigning the way services are delivered, improving outcomes for our citizens and reducing costs.”).

State interest groups of course do not provide the only means for states to interact with the federal executive branch. States may communicate individually with federal administrators as well, on an ad hoc basis. For example, most state governors' offices maintain a Washington, D.C. office that may devote some of its time to executive branch (and not just legislative) lobbying; individual states with interest in a particular rulemaking may file their own comments or have offline conversations with administrators; and the practice of "federalism by waiver," which is pervasive in the Medicaid context, entails individualized conversations between states and federal administrators. What matters for purposes of this paper is not whether state interest groups are the exclusive consultation partners, but rather that they are central ones. Interesting future work might study the dynamics between individual state interactions with agencies and group interactions with agencies, a dynamic I only begin to explore below.

## II. THE BENEFITS OF STATE INTEREST GROUPS FOR ADMINISTRATIVE FEDERALISM

By offering a primer on state interest groups, Part I sought briefly to illuminate their unusual practice of treating states as a collective—and their opaque means of doing so. The analysis in Parts II and III aims to show, with some texture, the effects and implications of state interest group participation in the administrative state—not only on the goal of protecting state power, but also on objectives of expert agency decision making and democratic accountability.

In particular, I will argue that the groups generally (1) are more consistent advocates than states individually of the institutional values commonly sought by federalism proponents; (2) fail to facilitate, and may even stymie, the transfer of information to federal agencies about individual state views; and (3) are less transparent and accountable to state citizens than individual state officials, and may compromise the accountability of the federal administrative process in which they participate.

These mixed effects, I argue, also reflect deeper tensions in administrative federalism—between states' various hats of protecting their regulatory authority, conveying information, and representing their citizens. State interest groups' practice of advancing a single "state" position, and their lack of transparency in doing so, facilitate advocacy of the state institutional concerns that matter most to many federalism proponents. But

that same practice of presenting a single position squelches the diversity of state experiences that could strengthen the epistemic foundations of agency decision making. Moreover, absent transparency, there is a risk that the aggregate view is not shared by member states' citizens or even by the state members themselves. The unified positions may instead suggest a faux consensus to agencies that masks disengagement, dissent, drift, or capture.

*A. The Goal of—and Obstacles to—Protecting State Power*

State interest groups are a boon for administrative federalism because they have largely overcome a problem that otherwise bedevils federalism proponents: that states will not be reliable advocates of the federal structure or of their own autonomy. Explaining this problem requires a brief description of the prominent goal of protecting state power.

Administrative federalism, in its contemporary incarnation, seeks to advance federalism values through the administrative process and administrative law.<sup>114</sup> In order to serve the core values widely associated with federalism, including the ability of states to check the central gov-

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<sup>114</sup> See Seifter, *supra* note 6, at 451 n.20 (collecting sources). Representative works cited there include Metzger, *Federalism Under Obama*, *supra* note 85, at 570 (noting “the central importance of the administrative sphere to modern-day federalism” because agencies will make “[c]ritical decisions about the actual scope of state powers and autonomy”); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 *Duke L.J.* 2023, 2028 (2008) [hereinafter Metzger, *Administrative Law as the New Federalism*] (examining the possibilities of judicial use of administrative law “as a vehicle for addressing federalism concerns”); Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 *Duke L.J.* 1933, 1939 (2008) (concluding that agencies “outperform” other branches in “allocating policymaking power” between federal and state governments); Sharkey, *supra* note 88, at 2127–28 (concluding that “federal agencies . . . surprisingly emerge as the best possible protectors of state regulatory interests” and that agencies should be “reform[ed] . . . to ensure they can become a rich forum for participation by state governmental entities”); Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 *Duke L.J.* 2111, 2136–37 (2008) (describing the “surprising amount of interest” devoted to administrative federalism); Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 *S. Cal. L. Rev.* 45, 48 (2008) (opining that “[i]t may be most important to protect federalism in the administrative law context” because “federal administrative regulations” can “reduce state autonomy without Congress ever addressing these federalism concerns”). The urgency of this project seems heightened by the observation that the administrative state is now vast, and to some minds, wields a worrisome amount of power. See *City of Arlington v. FCC*, 133 *S. Ct.* 1863, 1879 (2013) (Roberts, C.J., dissenting) (“[T]he danger posed by the growing power of the administrative state cannot be dismissed.”).

ernment,<sup>115</sup> the project has a goal common to broader federalism discourse: to preserve some version of state power,<sup>116</sup> or to “protect” states from federal overreaching.<sup>117</sup> In this context, “protecting states” is generally understood to refer to states’ *institutional* interests—the interests of “states qua states,”<sup>118</sup> or of state governments, rather than the idiosyncratic or political interests of particular state officials.<sup>119</sup> To safeguard the federal structure, that is, and to provide resistance to federal encroachment, the understanding is that states must retain some amount of their own authority.<sup>120</sup> As Professor Ernest Young explains:

The emphasis on the institutional interests of state governments is critical because virtually all the important benefits of federalism stem from the existence of the states as self-governing entities. States cannot function as checks on the power of the central government, or as laboratories of experimental regulation, if they lack the institutional ability to govern themselves in meaningful ways. It is thus the independent policymaking authority of state governments that is the critical variable, not the extent to which geographically-concentrated private interests are represented.<sup>121</sup>

Before turning to the problem that confronts this goal, a few additional notes will help to fill out what state institutional interests entail. Most definitions of states’ institutional interests juxtapose state regulatory authority against federal preemption.<sup>122</sup> But protection from federal

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<sup>115</sup> See, e.g., Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 *Colum. L. Rev.* 1, 3–7 (1988).

<sup>116</sup> See, e.g., Metzger, *Administrative Law as the New Federalism*, *supra* note 114, at 2026 n.4.

<sup>117</sup> See, e.g., Kramer, *supra* note 6, at 1503.

<sup>118</sup> John C. Yoo, *The Judicial Safeguards of Federalism*, 70 *S. Cal. L. Rev.* 1311, 1399–1400 (1997).

<sup>119</sup> See Kramer, *supra* note 15, at 222 (distinguishing between “preserv[ing] the regulatory authority of state and local institutions to legislate policy choices,” which is the goal of federalism, and sensitivity to private interests that coincide with state boundaries, which is not); see also, e.g., Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 *Harv. L. Rev.* 915, 920 (2005) (distinguishing interests of government institutions from those of government officials).

<sup>120</sup> See Ernest A. Young, *Two Cheers for Process Federalism*, 46 *Vill. L. Rev.* 1349, 1374 (2001) (“[T]he most important aspect of any desirable federalism doctrine is the protection of state regulatory authority . . .”).

<sup>121</sup> *Id.* at 1358 n.42.

<sup>122</sup> See, e.g., *id.* at 1352. To be sure, even staunch advocates of protecting state power recognize that federal intervention is sometimes entirely consistent with the federal structure,

preemption is not the only value that matters to states as institutions. Once that ship has sailed and a federal program exists, the preservation of state power, and the “continuing relevance of state governmental institutions” to citizens’ lives,<sup>123</sup> may well call for greater authority or flexibility within a federally guided structure—federal rules that are floors rather than ceilings,<sup>124</sup> greater choice in how money is spent (and funding of federal mandates to avoid depleting state fiscs), more discretion to enforce federally determined rules, and more freedom to decide how to reach a general federal target.<sup>125</sup> In addition, although institutional interests are a discrete category insofar as they are distinctively rooted in arguments for preserving state governments, positions based on such interests will of course also align with substantive policy positions. A state government (or court) that seeks to stave off federal regulation, therefore, will find itself bedfellows with whatever partisans and interest groups favor the same outcome. Whether a state entity agrees with, or even is mostly motivated by, those partisan positions does not change whether an institutional interest is at stake.<sup>126</sup>

The problem facing the goal of preserving states as institutions is that states do not reliably fight for their own institutional interests. As Justice

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though they disagree about where to draw the line. One approach, for example, would find federal intervention justified when states would otherwise face a collective action problem. See Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 *Stan. L. Rev.* 115, 184 (2010).

<sup>123</sup> Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 *Sup. Ct. Rev.* 1, 3 (arguing that this continued relevance is necessary to foster “the confidence of the people” and thereby protect “states’ ultimate security”).

<sup>124</sup> See generally William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 *N.Y.U. L. Rev.* 1547, 1586 (2007) (praising floor preemption because it “preserves substantial state roles, displaces only some states’ choices, and permits the mutual learning that further regulatory interaction can foster”).

<sup>125</sup> Cf. Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *Yale L.J.* 534, 586–87 (2011) (noting how some types of cooperative federalism schemes can be “federalism-respecting” because they may “enable states to run federal programs rather independently, and in that sense reflect some of the traditional federalism values”); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *Yale L.J.* 1256, 1268 (2009) (noting that states administering federal programs may “enjo[y] microspheres of autonomy,” but not the autonomy that federalism scholars typically envision, which emphasizes “separateness and independence”).

<sup>126</sup> On this view, one could agree with the insight that federalism arguments are often used as a vehicle for policy preferences, see, e.g., Louis Michael Seidman, *Depoliticizing Federalism*, 35 *Harv. J.L. & Pub. Pol’y* 121, 123 (2012) (noting the “obvious fact” that “[a]ll sides regularly use the rhetoric of federalism to advance contestable political positions”), and still find that institutional interests are at stake.

O'Connor explained in *New York v. United States*, “powerful incentives” might impel state officials “to view departures from the federal structure to be in their personal interests.”<sup>127</sup> Several scholars have made similar points.<sup>128</sup> State officials have myriad reasons not to prioritize state institutional interests—to avoid responsibility for difficult problems; to obtain more federal funding; or because federal regulation would advance partisan, ideological, or constituent interests.<sup>129</sup> They also face a collective action problem: State officials have no incentive to prioritize autonomy interests above their many other concerns absent some assurance that their counterparts in other states will do the same.<sup>130</sup>

States' lack of commitment to their institutional interests poses an apparent problem for various accounts of how federalism, including administrative federalism, should operate. It is particularly problematic for “process federalists”—those who argue that state power is best (or even sufficiently) protected through state participation in formal or informal political processes.<sup>131</sup> If states won't stand up for their own authority, then hinging protection of the federal structure on states' role in the political process seems misplaced.<sup>132</sup> In the same vein, attempts to use state participation in the administrative process to achieve federalism goals—as the Federalism Executive Order envisions—seem fraught if states will not advocate institutional prerogatives.<sup>133</sup> Even for scholars who envi-

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<sup>127</sup> 505 U.S. 144, 182 (1992).

<sup>128</sup> See Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 Mich. L. Rev. 752, 797–98 (1995); Roderick M. Hills, Jr., The Eleventh Amendment as Curb on Bureaucratic Power, 53 Stan. L. Rev. 1225, 1242 (2001); Levinson, *supra* note 119, at 940–41; Yoo, *supra* note 118, at 1399–1400; see also Jessica Bulman-Pozen, Partisan Federalism, 127 Harv. L. Rev. 1077, 1084 n.18, 1093 n.57 (2014) (questioning the assumption that state politicians will seek to protect state autonomy).

<sup>129</sup> See sources cited *supra* note 128.

<sup>130</sup> See Calabresi, *supra* note 128, at 797–98; Hills, *supra* note 128, at 1244.

<sup>131</sup> The leading contemporary account, which updated contributions from Professors Jesse Choper and Herbert Wechsler, is Kramer, *supra* note 6, at 1491–92. See generally Heather K. Gerken, The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4, 14 (2010) (discussing process federalism).

<sup>132</sup> See, e.g., Calabresi, *supra* note 128, at 797–98; Levinson, *supra* note 119, at 938–43.

<sup>133</sup> The underlying idea of the Federalism Executive Order, after all, is that consultations with states will prompt agencies to be more responsive to federalism principles, including being “deferential to the States” when taking action that affects state policy discretion. See *supra* text accompanying notes 68–72. For academic work echoing the notion that the administrative process can help safeguard federalism, see, for example, Sharkey, *supra* note 88, at 2129–30, and Kramer, *supra* note 6, at 1544. Kramer notes that the federal bureaucracy's dependence on states for administration of federal programs impels agencies to “tak[e] state interests into account.” *Id.* For other scholars, the concept of process federalism within fed-

sion a more robust judicial role in protecting the federal balance in the administrative context, states' inconsistency in advancing their institutional needs is worrisome, because many federal actions will not be subject to judicial review,<sup>134</sup> and because courts have not emerged as reliable federalism watchdogs even when such cases are brought.<sup>135</sup>

As detailed in the next Section, state interest groups provide a unique alternative to the problem at hand: They are bodies devoted to speaking for "pure" federalism values, or for states as institutions.<sup>136</sup>

### *B. The Prowess of State Interest Groups in Advancing States' Institutional Interests*

Much more so than individual states, state interest groups actively and frequently focus on state institutional interests, particularly state autonomy and regulatory flexibility.<sup>137</sup> As explained in Part I, the groups often have long-term resolutions advocating principles of state autonomy,<sup>138</sup> the groups then channel these principles through comments, letters, or

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eral agencies seems misplaced almost by definition because, to some, only Congress has any hope of representing state interests. See, e.g., Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 Tex. L. Rev. 1321, 1433 (2001).

<sup>134</sup> Cf. Ernest A. Young, Executive Preemption, 102 Nw. U. L. Rev. 869, 881–82 (2008) (arguing that "the likelihood that many agency interpretations may go unreviewed" is a reason that agencies should themselves follow the presumption against preemption).

<sup>135</sup> Cf. Metzger, Administrative Law as the New Federalism, *supra* note 114, at 2028–29 (noting that although recent Supreme Court decisions at the intersection of federalism and administrative law indicate that the Court may be relying on administrative law to address concerns regarding state authority, the decisions' "lack of clarity and reflection on how federalism concerns should factor into application of administrative law limit their generative potential").

<sup>136</sup> I thank Daryl Levinson for helpful comments on this point.

<sup>137</sup> My point here is comparative: I argue that state interest groups focus on state institutional prerogatives more devotedly and consistently than any individual state acting alone. I do not argue that state interest groups reach the "right" amount of resistance to the federal government, a claim that would depend on contested and unresolved questions regarding the appropriate roles of the state and federal governments. See Roderick M. Hills, Jr., The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 Mich. L. Rev. 813, 821 (1998) ("It is impossible to know . . . whether the protection provided by the political process is 'adequate' until one has some sort of normative theory defining the proper role of the federal and nonfederal governments."). A variation of this difficulty has also led Professor Elizabeth Garrett to question whether the intergovernmental lobby will side with federalism interests *enough*, and on the right types of issues, to safeguard the federal system. See Garrett, *supra* note 15, at 1128–31. But because so many scholars posit that state power needs greater protection than states acting alone provide, it suffices to speak in relative terms here.

<sup>138</sup> See *supra* text accompanying notes 26–30.



work groups. In some instances, the groups take a lead role in opposing a federal regulation that would threaten state autonomy or flexibility, and on occasion ultimately sue an agency.<sup>139</sup> It is worth elaborating a bit more on how the groups achieve this holy grail for process federalism better than states alone.<sup>140</sup>

To begin, state interest groups have achieved collective action in the first place. Because the groups were organized as professional associations at the time they took up lobbying, they had already overcome the challenge of group formation, often identified as the most significant obstacle to collective action.<sup>141</sup> And because the groups offer members (private) benefits like professional development, data, and camaraderie, in addition to public goods shared by all states, they largely deter free-riding.<sup>142</sup> Moreover, the groups address the collective-action obstacle that arises from the lack of some assurance that other states will also pursue institutional interests:<sup>143</sup> By paying dues to a state interest group, states effectively *agree* to switch the default and presumptively pursue institutional interests as a collective. This does not mean that individual states will never defect, that groups will never pursue interests other than institutional interests, or that the groups will always agree on the same *degree* of institutional protection. I discuss these variations in the pages that follow. But the group bargain does mean that group operations, un-

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<sup>139</sup> For example, the National Association of Regulatory Utility Commissioners recently petitioned for review of an FCC order pertaining to Universal Service Reform. See Petition for Review at viii, In re: FCC 11-161, No. 11-9900 (10th Cir. July 15, 2013); see also Press Release, Nat'l Ass'n of Regulatory Util. Comm'rs, Universal Service Reform Preempts States, Countering Congressional Intent: Litigants (Oct. 24, 2012), <http://www.naruc.org/News/default.cfm?pr=333&pdf=>.

<sup>140</sup> Professor Nina Mendelson has suggested that state interest groups “may not consistently espouse federalist values, because state views may differ on whether federal regulation is appropriate.” Mendelson, *supra* note 85, at 765. To be sure, the groups will not *always* espouse such values, and I discuss exceptions in Part III. My argument here, again, is that the groups do pursue state institutional interests quite consistently, and do so more than individual states.

<sup>141</sup> See Garrett, *supra* note 15, at 1121. For the classic explication of obstacles to group formation and the need for special incentives to overcome these obstacles, see Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups 2* (1965).

<sup>142</sup> See Garrett, *supra* note 15, at 1122; see also Arnold & Plant, *supra* note 12, at 20–21 (describing the appeal of state interest group opportunities for camaraderie and professional development).

<sup>143</sup> Cf. Hills, *supra* note 128, at 1244 (arguing that protection of state autonomy requires cooperation among various interest groups, but “each group will be tempted to defect from any deal to cooperate . . . absent an unattainable guarantee that others will respect state autonomy in the future”).

like individual state operations, begin from a norm of prioritizing states' institutional preservation.

Having overcome obstacles to formation and membership, the groups reap the benefits of collectively pursuing shared interests.<sup>144</sup> The groups do this in part by reducing the cost of supporting institutional interests: Paying annual dues to a state interest group is cheaper for many states than launching an independent lobbying effort, which might involve hiring and training new staff members. Some state agencies seldom file independent comments on federal rules due to resource constraints. Yet after joining a group, member states can often support institutional interests without any effort at all. Member states can thus prioritize autonomy and the like through a "wholesale" decision rather than needing to invest at the "retail" level on each issue. And members also get more bang for their lobbying buck by backing state interest group positions. This is true both because state interest groups speak with one voice—a weightier collective voice—and because the groups' staffs have become expert in, and efficient at, dealing with the federal government.<sup>145</sup>

These pre-commitment devices make it easy for state members to put their names behind (which is to say, not remove their names from) institutional prerogatives on a variety of issues of varying political significance. The simplest case is federal proposals that are not politically salient but have clear effects on state interests. Member states might not have the bandwidth or willingness to make such proposals "their" issue. But groups can. This may be the dynamic behind state interest groups' frequent opposition to federal regulations that would impose significant costs on state or local coffers. To take just one example, consider state interest group involvement in a 2011 consultation on a drinking water rule that the EPA planned to propose.<sup>146</sup> The Safe Drinking Water Act

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<sup>144</sup> See generally Note, *State Collective Action*, 119 *Harv. L. Rev.* 1855, 1859 (2006) (stating that "collective action may provide opportunities for economies of scale or rent-seeking behavior that states cannot achieve independently").

<sup>145</sup> Cf. Matthew C. Stephenson & Howell E. Jackson, *Lobbyists As Imperfect Agents: Implications for Public Policy in a Pluralist System*, 47 *Harv. J. on Legis.* 1, 6 (2010) (noting that "a professional lobbyist's familiarity with the policymaking process allows them to be more efficient monitors of emerging issues and more accurate predictors of the consequence of proposed reforms").

<sup>146</sup> Although the rule ultimately was not proposed, details about the contemplated proposal are available in communications documenting the pre-proposal consultations. See, e.g., Letter from Cynthia C. Dougherty, Dir., EPA Office of Ground Water & Drinking Water, Notification of Consultation and Coordination on Proposed Regulatory Revisions to the Lead and

requires the EPA to review certain drinking water standards every six years.<sup>147</sup> As of 2011, scientific data suggested that the EPA's existing rule for lead and copper (known as the Lead and Copper Rule) was ineffective at reducing lead levels in drinking water.<sup>148</sup> The EPA was contemplating several options for a rule revision, including a version that could require replacing water lines in a very large number of homes at state or local expense.<sup>149</sup> State interest groups used the consultation process to oppose vigorously this aspect of the proposal on the ground that the cost would "cripple local governments who are already struggling financially."<sup>150</sup> As of this writing, the rule has not been proposed.

State interest group membership may also make states willing to support (or again, not obstruct) institutional initiatives on issues that affect sister states but that scarcely affect their own state at all. In his study of the National Association of Attorneys General, Professor Cornell Clayton describes a dynamic in which member states were willing to sign on to briefs that did not directly affect them because they knew other states were doing so and were convinced by the group that there was a "shared stake" in sticking together.<sup>151</sup> This dynamic is apparent in recent initiatives of state interest groups vis-à-vis federal agencies.

For example, not all fifty states have an equal interest in limiting the EPA's regulation of coal ash, a prominent issue in the Obama administration's environmental agenda. But a broad coalition of state interest

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Copper Rule (July 27, 2011), available at <http://water.epa.gov/lawsregs/rulesregs/sdwa/lcr/upload/LCR-Tribal-Consultation-Letter-Dec-1-2011.pdf>.

<sup>147</sup> Safe Drinking Water Act § 1412(b)(9), 42 U.S.C. § 400g-1 (2006); see also Six Year Review of Drinking Water Standards, EPA, <http://water.epa.gov/lawsregs/rulesregs/regulatingcontaminants/sixyearreview/> (last updated July 23, 2013) (providing an overview of the Six-Year Review requirements and efforts).

<sup>148</sup> See Science Advisory Board, EPA, SAB Evaluation of the Effectiveness of Partial Lead Service Line Replacements (2011), available at [http://yosemite.epa.gov/sab/sabproduct.nsf/0/964ccdb94f4e6216852579190072606f/\\$FILE/EPA-SAB-11-015-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/0/964ccdb94f4e6216852579190072606f/$FILE/EPA-SAB-11-015-unsigned.pdf); see also Sheila Kaplan & Corbin Hiar, How an EPA Project Backfired, Endangering Drinking Water With Lead, NBC News Investigations (Aug. 8, 2012, 5:08 AM), [http://investigations.nbcnews.com/\\_news/2012/08/08/13179335-how-an-epa-project-backfired-endangering-drinking-water-with-lead](http://investigations.nbcnews.com/_news/2012/08/08/13179335-how-an-epa-project-backfired-endangering-drinking-water-with-lead).

<sup>149</sup> See Letter from Donald J. Borut, Exec. Dir., Nat'l League of Cities, and Tom Cochran, CEO & Exec. Dir., U.S. Conference of Mayors, to Cynthia C. Dougherty, Dir., EPA Office of Ground Water & Drinking Water (Jan. 13, 2012), available at <http://www.nlc.org/Documents/Influence%20Federal%20Policy/Advocacy/Regulatory/nlc-comments-epa-lead-copper-jan2012.pdf>.

<sup>150</sup> *Id.* at 2.

<sup>151</sup> Cornell W. Clayton, Law, Politics and the New Federalism: State Attorneys General as National Policymakers, 56 Rev. Pol. 525, 543–44 (1994).

groups, ranging from the National Governors Association to the Environmental Council of the States to the American Association of State Highway and Transportation Officials, has been instrumental in fighting the EPA proposal to regulate coal ash as a hazardous waste.<sup>152</sup> These groups have marshaled institutional arguments, including that coal ash regulation is best handled at the state level, that existing state regulation is sufficient, and that the proposed federal regulation would burden state resources. Each group has been able to present a unified front, despite the fact that not all states have a comparable interest in opposing the EPA's proposal. Coal states surely have a strong interest, but it is unlikely that other states, particularly those that traditionally pursue environmentally protective agendas or support the administration's environmental priorities, would independently rise in opposition to the EPA's proposal.<sup>153</sup> States traditionally aggressive on environmental protection were presumably not drivers of this movement among sister states, but neither did they apparently fight it.

Furthermore, because the groups operate opaquely, they provide cover for states to take positions they would not be willing to take alone for fear of unfavorable attention. Taking a stand against the federal government can be politically costly for a state acting alone, raising the possibility of retribution from citizens, interest groups, federal officials, or other members of the same political party. When states speak as a group, however, their individual exposure is all but eliminated. This dynamic has been observed in the context of trade associations, which similarly allow members to advance (or not oppose) positions without attaching

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<sup>152</sup> See Seifter, *supra* note 6, at 485–88; Letter from R. Steven Brown, Exec. Dir., Env'tl. Council of States, to Mathy Stanislaus, Assistant Adm'r, EPA Office of Solid Waste & Emergency Response (Oct. 15, 2009), available at [http://www.ecos.org/files/3923\\_file\\_ECOS\\_CCW\\_Consultation\\_Comments\\_to\\_EPA.pdf](http://www.ecos.org/files/3923_file_ECOS_CCW_Consultation_Comments_to_EPA.pdf); Letter from John Horsley, Exec. Dir., Am. Ass'n of State Highway Transp. Officials, to Lisa Jackson, Adm'r, EPA (Nov. 23, 2009), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/oira\\_2050/2050\\_121509-7.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/oira_2050/2050_121509-7.pdf); Letter from Governors Brian Schweitzer and Jim Robbins, Nat'l Governors Ass'n, to Mathy Stanislaus, Assistant Adm'r, EPA Office of Solid Waste & Emergency Response (Nov. 16, 2009), available at [http://www.nga.org/cms/home/federal-relations/nga-letters/natural-resources-committee-lett/col2-content/main-content-list/title\\_november-16-20.html](http://www.nga.org/cms/home/federal-relations/nga-letters/natural-resources-committee-lett/col2-content/main-content-list/title_november-16-20.html).

<sup>153</sup> The argument that has been advanced that might apply to non-coal states is that coal ash can be "beneficially reused" in other products, and that although the EPA proposal would exempt beneficial reuse, a "stigma" would nonetheless attach. Scholars have criticized this contention. See, e.g., Douglas A. Kysar, Commentary, Politics by Other Meanings: A Comment on "*Retaking Rationality* Two Years Later", 48 *Hous. L. Rev.* 43, 54 (2011).

their names to them.<sup>154</sup> So too state officials may join (or not oppose) a politically sensitive resolution because they think it will benefit their state individually, or because they can “stick together” with sister states at no political cost.

In addition, members of state interest groups generally regard the groups as fostering a spirit of compromise. Thus, even when multiple states *do* have different stakes in an issue, they may be willing to find a middle ground. This occurred when the National Governors Association reached its 1996 agreement on welfare reform, bringing together states that favored federally determined requirements with those that favored block grants that would allow states more discretion.<sup>155</sup> And even where states are polarized on an issue in a way that divides them over the extent of state autonomy that is desirable, the groups may be able to achieve the requisite support for *some* federalism-infused stance on the issue. For example, states that have long been seeking federal regulation of greenhouse gases joined states that deny that climate change is occurring in passing a resolution stating that any federal regulation of greenhouse gases should not preempt existing state programs.<sup>156</sup>

Finally, as other literature suggests, state interest groups often have few distractions from institutionally-oriented positions, as these may be the only issues on which the groups can garner substantial internal agreement. As Professor Donald Haider explained in his seminal study, the groups’ “incorporation of nationwide cleavages and factions within their organizations” means they tend to shy away from “narrow, precise claims”; they instead advocate “the autonomy, fiscal viability, and integ-

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<sup>154</sup> See Lee Drutman, Trade Associations, the Collective Action Dilemma, and the Problem of Cohesion, *in* Interest Group Politics 74, 85 (Allan J. Cigler & Burdett A. Loomis eds., 8th ed. 2012) (describing trade associations as vehicles for advancing positions on which an individual company does not want to be “up front” or where “going it alone might make companies look greedy and narrow”).

<sup>155</sup> See Robert A. Rankin & R.A. Zaldivar, Medicaid, Welfare Plans Win Praise, *Phila. Inquirer*, Feb. 7, 1996, at A3; see also Dave Leshner, Governors’ Agreement Fell Short On Welfare Reform, Wilson Says, *L.A. Times* (Feb. 12, 1996), [http://articles.latimes.com/1996-02-12/news/mn-35124\\_1\\_welfare-reforms](http://articles.latimes.com/1996-02-12/news/mn-35124_1_welfare-reforms) (describing California Governor Pete Wilson’s explanation that he joined the National Governors Association’s agreement on welfare and Medicaid reform “only reluctantly” in order to reach a deal).

<sup>156</sup> See Env’tl. Council of the States, Resolution No. 09-3, Preserving States’ Rights to Regulate Greenhouse Gas Emissions (2012), available at <http://ecos.org/section/policy/resolution> (follow “Preserving States’ Rights to Regulate Greenhouse Gas Emissions” hyperlink).

rity of the particular level of government they speak for.”<sup>157</sup> Others have made the same observation decades later.<sup>158</sup> Literature from other disciplines—on treaties<sup>159</sup> and group decision making<sup>160</sup>—supports the intuitive notion of a tradeoff between the breadth of the groups’ membership and the depth of the terms on which members can all agree. This is sometimes framed as a criticism of state interest groups because it means they cannot take a lead role, or a policy-specific role, in many contemporary debates.<sup>161</sup> As one governor explained upon withdrawing from the National Governors Association: “[E]verybody is lovey-dovey [at NGA meetings] and no decisions are ever made. There are some tough decisions that need to be made in this country and we need to start making them.”<sup>162</sup> Yet from the perspective of prevailing federalism goals, finding a state entity that regularly advances state institutional concerns rather than wavering based on political or ideological winds is desirable.

With all of that said, state interest groups’ commitment to a federalism agenda is not absolute. Sometimes, perhaps because of congressional instruction, the groups will venture into policy questions that touch only minimally on federalism interests—as when Congress instructs the National Association of Insurance Commissioners to develop methodol-

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<sup>157</sup> Haider, *supra* note 11, at 214–15.

<sup>158</sup> See, e.g., Cammisa, *supra* note 21, at 29–30; Sharkey, *supra* note 15, at 583 n.374 (“[W]hen state government groups do intervene in preemption disputes, they generally assert an antipreemption position that focuses on protection of state autonomy and issues of structural concern to all states but does not stake out narrower policy positions on specific conflicts between state and federal law.”).

<sup>159</sup> See Timothy Meyer, *Codifying Custom*, 160 U. Pa. L. Rev. 995, 1043 (2012) (“[S]cholars have recognized that there is a tradeoff between the breadth of an agreement’s membership and the depth of its substantive terms.” (citing, *inter alia*, Michael J. Gilligan, *Is There a Broader-Deeper Trade-Off in International Multilateral Agreements?*, 58 Int’l Org. 459, 461 (2004))).

<sup>160</sup> See James Surowiecki, *The Wisdom of Crowds: Why the Many Are Smarter Than the Few and How Collective Wisdom Shapes Business, Economies, Societies, and Nations* 203 (2004) (“[T]he search for consensus encourages tepid, lowest-common-denominator solutions which offend no one rather than exciting everyone.”).

<sup>161</sup> Troy E. Smith, *Intergovernmental Lobbying: How Opportunistic Actors Create a Less Structured and Balanced Federal System*, in *Intergovernmental Management for the Twenty-First Century* 310, 323 (Timothy J. Conlan & Paul L. Posner eds., 2008); Garrett, *supra* note 15, at 1124 (“In many cases, an organization must eschew playing a leading role on an issue that implicates federalism because its members can agree only on broad, rather vague statements of policy.”).

<sup>162</sup> See Leary, *supra* note 37 (quoting Maine Governor Paul LePage) (internal quotation marks omitted).

ogies for calculating the medical-loss rule.<sup>163</sup> In other instances, entrepreneurial leaders may try to push an agenda that is perceived as *contrary* to federalism values. These exceptions occur, and I discuss them below. It should also not be assumed that every state-power position is desirable to all states. As noted earlier, state interest groups sometimes, perhaps often, act without agreement from all states. The point so far is simply that state interest groups, much more than any other player in the administrative process, are devoted to pushing an institutionally-oriented agenda.

This devotion comes with tradeoffs. In the next Part, I explain how the practice of settling on a single “state” position inhibits state interest groups’ ability to serve another prominent aim of administrative federalism—informed decision making by federal agencies—and how the opacity and obscurity that facilitate groups’ institutional focus affect the accountability of the administrative process.

### III. THE COSTS OF STATE INTEREST GROUPS IN THE ADMINISTRATIVE PROCESS

#### *A. Costs to Expert Agency Decision Making*

The foregoing discussion has argued that state interest groups achieve unusual consistency when it comes to advancing “pure” federalism values centering on states’ institutional interests. This Section first explains a different administrative federalism goal—that of harnessing state knowledge and information in agency decision making—and then argues that state interest groups cannot currently deliver on this goal. As noted above, the groups’ practice of taking a single position facilitates their institutional focus by leading members to cohere around shared interests. Below, I argue that the same single-position approach tends to squelch the diversity of state perspectives and the varied results of state experimentation. This practice obstructs the benefits of experimentation and diversity associated with federalism as well as the information acquisition and expert decision making thought to be pivotal in the administrative state.

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<sup>163</sup> The NAIC’s experience with the development of model laws also makes it adept at addressing substantive, not only institutional, concerns. See Jost, *supra* note 98, at 2048–50.

*1. Legitimacy and Information Inputs in Administrative Law*

As courts and theorists have wrestled over the years to rationalize the delegation of substantial policymaking authority to unelected bureaucrats, the expertise of federal administrators has emerged as both a defining element of, and an underlying justification for, the work of federal agencies. Agencies are expected to do more than count noses or tally interest group votes, as a now-discarded theory once imagined;<sup>164</sup> they are called upon to apply specialized knowledge to questions of fact and policy. Expertise is not the whole story, of course. Difficult questions require judgment calls, and for these, the reigning theory of administrative legitimacy understands agencies as accountable to the President and thus answerable to the people.<sup>165</sup> Moreover, the Administrative Procedure Act requires much of federal administration to be transparent, open to public participation, and reviewable in court.<sup>166</sup> These values have become pillars of the administrative state. In conjunction with them, administrative expertise remains a dominant theme and *raison d'être* of federal agencies—and with it comes the need for agencies to develop or acquire information pertinent to any given decision.

Indeed, although stylized accounts sometimes characterize agency expertise as a relatively fixed (exogenous) property—one that is not dependent on agencies' organization or incentives—recent scholarship and administrative law doctrines recognize that it is not.<sup>167</sup> Instead, agency expertise is acquired—through research, consultation, and data gathering—and is thus variable, dependent on a number of factors.<sup>168</sup> Subject

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<sup>164</sup> The “interest representation” model envisioned agencies as quasi-legislatures that would tally participant input. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1723 (1975); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2266 (2001) (describing the model's demise).

<sup>165</sup> Kagan, *supra* note 164, at 2332. Another body of work notes the potential for Congress to control agency behavior. See, e.g., Jack M. Beerhmann, *Congressional Administration*, 43 San Diego L. Rev. 61, 66–68 (2006); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va. L. Rev. 431, 432–34 (1989).

<sup>166</sup> See, e.g., 5 U.S.C. § 553 (2012) (requiring public notice and an opportunity for “interested persons” to participate in notice-and-comment rulemaking); *id.* § 557 (limiting ex parte contacts in formal adjudication); *id.* § 702 (providing for judicial review); see also *id.* § 552(b) (providing requirements of the Government in the Sunshine Act regarding open meetings, originally enacted as amendments to the APA).

<sup>167</sup> See Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 Harv. L. Rev. 1422, 1425–26 (2011).

<sup>168</sup> See Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 Sup. Ct. Rev. 201, 212 (“[A]gency expertise is itself a function of many factors,



to an outer limit, the administrative quest to acquire more and better information is thought to be desirable.<sup>169</sup> As Professor Cary Coglianese and his coauthors have written, “Information is the lifeblood of regulatory policy.”<sup>170</sup> Greater and more robust consultations are likely to expand an agency’s knowledge base, producing better decisions.<sup>171</sup> And as the ideal of the administrator as “unbiased, technical super expert” has given way to the acknowledgment that many problems are complex and contingent, and lack “right” answers, greater emphasis has been placed on agencies’ acquisition not just of more information but also of information providing varied perspectives.<sup>172</sup>

This value to administrative decision making of considering more (and more diverse) information translates into a goal of administrative federalism. The epistemic benefits of federalism are frequently acclaimed: States in a federal system possess useful information on local circumstances, on political and economic trends, and most famously, on

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including the degree of discretion given to the agency, the costliness of developing expertise, the degree of divergence between agency and congressional preferences, and other political influences like interest groups.”).

<sup>169</sup> See Stephenson, *supra* note 167, at 1430 (“As a general matter, we would like our public decisionmakers to invest in research up to the point where the marginal social benefit of additional research (in the form of improved policy decisions) is equal to the marginal social cost (typically the opportunity costs associated with the diversion of resources and delay).”). Stephenson explains that decision makers’ private costs often lead them to underinvest in this and other forms of information acquisition. *Id.* at 1430–31. But cf. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 *Duke L.J.* 1321, 1325, 1355–56 (2010) (arguing that judicial review incentivizes agencies to collect excessive information, to the detriment of administrative governance).

<sup>170</sup> Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 *Minn. L. Rev.* 277, 277 (2004).

<sup>171</sup> See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 *Nw. U. L. Rev.* 173, 185–86 (1997) (describing benefits of more information on the quality of agency decisions).

Professors Jody Freeman and Jim Rossi capture this dynamic in their study of coordination *between* agencies, noting that “[g]reater coordination is . . . likely to improve the overall quality of decisionmaking by introducing multiple perspectives and specialized knowledge and structuring opportunities for agencies to test their information and ideas.” Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 *Harv. L. Rev.* 1131, 1210 (2012). The authors also note that consultations can “force agencies to consider valuable information they might otherwise overlook, would prefer to overlook, or lack the expertise to produce themselves.” *Id.* at 1184.

<sup>172</sup> David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 *Geo. Wash. L. Rev.* 1095, 1098 (2008).

the results of their own regulatory experiments.<sup>173</sup> Although these forms of state knowledge are frequently mobilized as arguments in favor of state autonomy or against federal preemption, parallel logic extends to federal-state consultations: Federal administrators charged with developing national policy can learn from both the knowledge and experience of the states.<sup>174</sup> Phrased another way, federal agencies can work toward fulfilling their expertise-oriented role by harnessing the information production machine of the federal system<sup>175</sup>—not from abstract arguments regarding principles of federalism, which may well be beyond the administrative ken,<sup>176</sup> but from the specific, diverse experiences and information generated by individual states.

The expertise tenets of administrative law, then, point toward a different ideal for state consultation than do federalism goals focused on institutional preservation. An ideal state consultation in an expertise-driven vein should convey the distinct, perhaps diverse, experiences and data from multiple states, and it should emphasize objective information, da-

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<sup>173</sup> The now-classic recitation of this virtue is in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also, e.g., Akhil Reed Amar, Five Views of Federalism: “Converse-1983” in Context, 47 Vand. L. Rev. 1229, 1234 (1994).

<sup>174</sup> See, e.g., Robert L. Fischman, Cooperative Federalism and Natural Resources Law, 14 N.Y.U. Envtl. L.J. 179, 194 (2005) (describing states’ “capacity . . . to offer substantive expertise and clearly articulated policies” as one of the reasons for the “informal, administrative federalism” in federal land administration); Metzger, Federalism Under Obama, *supra* note 85, at 615 (describing rationale for state involvement in ACA implementation); Sharkey, *supra* note 88, at 2171–72; cf. Rachel E. Barkow, Federalism and Criminal Law: What the Feds Can Learn from the States, 109 Mich. L. Rev. 519, 522 (2011) (arguing that the federal government can learn from state “laboratories” on the issue of law enforcement allocation); Lawrence G. Sager, Cool Federalism and the Life-Cycle of Moral Progress, 46 Wm. & Mary L. Rev. 1385, 1389 (2005) (describing how ideas that originate in a minority of states become federal policy).

<sup>175</sup> Cf. Thomas W. Merrill, Preemption and Institutional Choice, 102 Nw. U. L. Rev. 727, 765 (2008) (stating that compliance with the Federalism Executive Order can “generate information relevant to the decision to preempt”). This is also an aim in new governance work. For example, Professors Michael Dorf and Charles Sabel call for a system of “democratic experimentalism,” in which, among other things, agencies should study and coordinate the results of state innovation such that “[t]he states would, finally, be true laboratories of democracy because many eyes would be turned to the outcome of the experiments.” Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267, 267, 431 (1998).

<sup>176</sup> See Merrill, *supra* note 175, at 755–56. As Nina Mendelson has argued, “Other institutions . . . may better assess issues such as the overall distribution of governmental authority and the intrinsic value of preserving core state regulatory authority.” Mendelson, *supra* note 85, at 742.

ta, or experience rather than abstract legal principles. Developing the best information is the aim.

## *2. The Effects of Group Decision Making: Trading Substance for Force*

State interest groups' practice of aggregating state views into a single position—a feature that facilitates the groups' frequent practice of tout-ing pure federalism values—tends to reduce their contributions to the just-described epistemic benefits of federalism.

Before elaborating on that point, however, it is worth underscoring that state interest groups' practice of aggregation or distillation *does* convey a particular sort of information, which may well have benefits. It is the unified nature of the groups' positions, after all, that gives state interest group lobbying its force.<sup>177</sup> Fifty different perspectives would not carry the same persuasive weight and would not as clearly direct the agency's attention to the most pervasive state concerns. In addition, a unified state position might help an agency avoid creating unfairness among states. On this point, Catherine Sharkey has written that the groups' "aggregate perspective has much to recommend it" because it accounts for "all (or some critical number) of states' perspectives, rather than . . . the unique (and perhaps idiosyncratic) interest of any one."<sup>178</sup> Thus, the group perspective is helpful, "especially when a key concern . . . is whether a particular state seeks to exploit its regulatory framework to impose negative externalities on other states."<sup>179</sup> In this way, we might view state interest groups as bulwarks against what Professors Lynn Baker and Ernest Young have called "'horizontal' aggrandizement"—the federal government's imposition of the position of a majority of states on minority states, which Baker and Young view as an under-examined threat to state autonomy.<sup>180</sup>

I want to suggest, however, that these advantages may fail on their own terms and that a good deal is lost even if they hold true. The putative advantages of aggregation fail on their own terms because, as Section III.B discusses, group positions can be used to mask interstate disagreement (and, if heeded, ultimately produce interstate externalities).

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<sup>177</sup> See Costain & Costain, *supra* note 32, at 269 (describing the "scant prospect" for success when a lobbying group is fragmented).

<sup>178</sup> Sharkey, *supra* note 88, at 2162.

<sup>179</sup> *Id.*

<sup>180</sup> Lynn A. Baker & Ernest A. Young, Federalism and the Double Standard of Judicial Review, 51 *Duke L.J.* 75, 110 (2001).

Before turning to that point, this Subsection notes that even if aggregation helped avoid interstate externalities, it would still obstruct federalism's information-producing benefits.

First, state interest group input is problematic for information gathering for the simple reason that a single group position mutes states' varied knowledge, experiences, and perspectives in favor of one generally agreeable viewpoint.<sup>181</sup> On almost every federal regulation, states will be affected differently and will face distinctive implementation obstacles or strengths—information that would be useful for federal regulators to understand *ex ante*. Infrastructure in the sprawling, arid southwest looks very different from the infrastructure in the dense but aging northeast. In some states, the problem underlying the federal solution may be worse than the norm; in other states it may not exist at all.<sup>182</sup> State interest groups, focused as they are on representing “the” state position, are not set up to catalog or detail individualized challenges or suggestions. With additional information about state differences, federal officials could potentially design more carefully tailored regulations that account for those differences. When states convey only one view, however, the complaint about “one-size-fits-all” federal intervention may become a self-fulfilling prophecy.

State interest groups also fail to harness the knowledge-producing benefits of state diversity where states are “out front” on a regulatory problem. Consider the example of climate change regulation. In the face of federal inaction, states began taking the lead in regulating greenhouse gases. California enacted a landmark cap-and-trade program for carbon<sup>183</sup> and also requires fuel producers to reduce the carbon content of

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<sup>181</sup> Cf. Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation As Evidence of an Evolving National Consensus*, 84 N.C. L. Rev. 1089, 1094 (2006) (making a similar argument in the context of judicial doctrines that tally state laws or policy positions to derive a national “consensus”).

<sup>182</sup> This criticism has been raised, for example, in the wake of proposed banking regulation reform. See, e.g., Letter from Mick Thompson, Comm’r, Okla. State Banking Dep’t, to Marty Gruenberg, Acting Chairman, Fed. Deposit Ins. Corp. (Oct. 12, 1997), available at [http://www.fdic.gov/regulations/laws/federal/2012-ad-95-96-97/2012-ad-95\\_c\\_74.pdf](http://www.fdic.gov/regulations/laws/federal/2012-ad-95-96-97/2012-ad-95_c_74.pdf) (critiquing the Basel III proposal as a “‘One-Size-Fits-All Reaction’ to a problem that never existed in Oklahoma”).

<sup>183</sup> California Global Warming Solutions Act of 2006, Cal. Health & Safety Code §§ 38500–38599 (West 2007); see also Air Res. Bd., *Cap-and-Trade Program*, Cal. Envtl. Prot. Agency, <http://www.arb.ca.gov/cc/capandtrade/capandtrade.htm> (last visited May 26, 2014) (documenting California’s cap-and-trade program). For discussion of California’s cli-

their fuels through its Low Carbon Fuel Standard.<sup>184</sup> In the northeast, nine states participate in the Regional Greenhouse Gas Initiative, another market-based program of carbon regulation.<sup>185</sup> These experiments and others are complex and important, and learning from their successes and failures seems an obvious opportunity for epistemic federalism. Yet state interest groups' positions on climate change have done strikingly little to channel the available information. The Environmental Council of the States has passed three resolutions on climate change in recent years. The first, without taking a position on federal legislation or regulation, resolved that any such federal action should preserve states' rights to regulate greenhouse gases.<sup>186</sup> The second, emphasizing the challenges of achieving significant greenhouse gas emissions reductions, called on the EPA to "conduct an analysis with state input and review" to provide at least one scenario, complete with costs, that would produce the emissions reductions identified in federal targets.<sup>187</sup> And the third—to which Section III.B will return—generally "[u]rges the U.S. Congress and U.S. EPA to work closely with the ECOS and the states" when implementing various climate initiatives.<sup>188</sup> Similarly, the National Governors Association's 2006 position stated that, although the connection between greenhouse gas emissions and "the natural greenhouse effect" remained "subject to . . . debate," "[t]he Governors [were] committed to working in partnership with the federal government, businesses, environmental groups, and others to develop and implement programs that reduce greenhouse gas emissions in conjunction with conserving energy, pro-

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mate-related programs, see, for example, Ann E. Carlson, Reaction, The President, Climate Change, and California, 126 Harv. L. Rev. F. 156 (2013).

<sup>184</sup> See Cal. Exec. Order S-01-07 (Jan. 18, 2007), available at <http://www.arb.ca.gov/fuels/lcfs/eos0107.pdf>; see also Air Res. Bd., Low Carbon Fuel Standard Program, Cal. Env'tl. Prot. Agency, <http://www.arb.ca.gov/fuels/lcfs/lcfs.htm> (last visited May 26, 2014) (documenting California's low carbon fuel standard program).

<sup>185</sup> See RGGI, Inc., Regional Greenhouse Gas Initiative, <http://www.rggi.org/rggi> (last visited Aug. 14, 2014).

<sup>186</sup> Env'tl. Council of the States, *supra* note 156.

<sup>187</sup> Env'tl. Council of the States, Resolution No. 12-1, Challenges of Achieving Significant Greenhouse Gas (GHG) Emissions Reductions (2012), available at <http://www.ecos.org/section/policy/resolution> (follow "Challenges of Achieving Significant Greenhouse Gas (GHG) Emissions Reductions" hyperlink).

<sup>188</sup> Env'tl. Council of the States, Resolution No. 07-2, Reducing Greenhouse Gas Emissions (2013), available at <http://www.ecos.org/section/policy/resolution> (follow "Reducing Greenhouse Gas Emissions" hyperlink).

tecting the environment, and strengthening the economy.”<sup>189</sup> As Professor Judith Resnik and her coauthors have noted, that vacuity reflects “the constraints that come with bipartisanship.”<sup>190</sup> One could tell a similar story about pockets of state innovation in other areas that are or might soon be subject to federal regulation and on which states might thus have very valuable information to share with federal agencies.

The dilution of information caused by aggregation may be more than just a missed opportunity. Omitting diverse viewpoints from the official consultation channel may obstruct them from being conveyed at all. States that have other information to share can, to be sure, attempt to lobby or secure a consultation with federal agencies outside state interest groups. Indeed, such workarounds are to be expected. Yet from an institutional design perspective, they are not a systematic or reliable solution.<sup>191</sup> As noted, many states are strapped for resources and do not have staff members (or lobbyists) devoted to federal regulatory issues. Some states have valuable knowledge or experience but little political motivation to share it. Some states may marshal the resources and initiative to consult with an agency individually but may find it difficult to get a federal audience or may be too late in the process. And even when an individual state does manage to go it alone and is heard by federal officials, the individual state may still find it difficult to compete with the group position.<sup>192</sup> There is a risk, in other words, that alternative channels will not be meaningful, because the groups communicate what is regarded as an official state position.<sup>193</sup>

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<sup>189</sup> Resnik et al., *supra* note 11, at 751 (quoting Nat’l Governors Ass’n, Policy Position NR-11, Global Climate Change (July 17, 2008)) (internal quotation marks omitted).

<sup>190</sup> *Id.*

<sup>191</sup> Cf. Freeman & Rossi, *supra* note 171, at 1156–57 (describing the limitations of informal agency coordination).

<sup>192</sup> For ease of exposition, I focus here on the direct comparison between the positions of individual state officials and state interest groups before federal agencies. As noted at the outset of this paper, state officials may well have other government channels for voicing grievances, including through Congress. I bracket that broader issue for now.

<sup>193</sup> In this sense, the experience with state interest groups might be compared to that of professional associations like the bar. There, although “dissenting members remain free to express their views individually,” those members “are linked in the minds of many to views they do not espouse.” Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 Fla. St. U. L. Rev. 35, 71 (1994).

*B. Costs to Democratic Accountability**1. The Goal of Democratizing the Administrative Process*

A third goal associated with state involvement in the administrative process relates to democratic accountability. The accountability of federal agencies is, of course, one of the most foundational concerns in administrative law.<sup>194</sup> The conventional wisdom is that states' close involvement in agency decision making will uphold the democratic accountability sought in federal administration.

This goal is so entrenched that it is often taken for granted, but it lies behind all of the instruments and arguments for administrative federalism. Consider here the Federalism Executive Order and the UMRA, which require agencies to consult with states, and which exempt the state consultations from otherwise rigorous disclosure requirements.<sup>195</sup> Whereas decades of scholarship, laws, and regulations worry about private access to agency decision making, these legal instruments provide that collaboration with states is required and largely unsupervised. A key premise is that states, as public representatives themselves and "close[r] to the people" than federal agencies,<sup>196</sup> will not imperil agencies' democratic accountability.

Other accounts of state involvement go further, suggesting that states can not only maintain accountability norms but advance them. In this view, state actors can function as agents of accountability vis-à-vis federal agencies, making the administrative process *more* accountable by adding additional voices of public representatives.<sup>197</sup> This goal finds kinship with the common argument that state governments are more responsive to constituents than the national government.<sup>198</sup>

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<sup>194</sup> See, e.g., James O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 6 (1978) (identifying agencies' lack of direct accountability to the people as one of the core concerns regarding administrative legitimacy); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1684–85 (1975) (describing evolution of concerns regarding administrative accountability and legitimacy); Kagan, *supra* note 164, at 2251–52 (arguing that "accountability and effectiveness" are "the principal values that all models of administration must attempt to further").

<sup>195</sup> See *supra* Subsection I.B.1.

<sup>196</sup> See Exec. Order No. 13,132, 3 C.F.R. 206, 207 (2000), *reprinted in* 5 U.S.C. § 601 (2012).

<sup>197</sup> Cf. Resnik et al., *supra* note 11, at 768 (describing potential for state interest groups to "improv[e] deliberative democracy by bringing in not only more voices but a particularly interesting set of voices").

<sup>198</sup> See, e.g., Barry Friedman, *Valuing Federalism*, 82 Minn. L. Rev. 317, 395 (1997).

An assumption underlying either version of the accountability goal is that the groups designated by federal law as representing state views in fact do so. Members of state interest groups participate in group activities in their representative rather than personal capacities and pay for membership with state funds. The groups themselves purport to speak for the states, a motto that connotes the advancement of general rather than factional interests,<sup>199</sup> and the groups' access to and traction within the regulatory process rests on their status as public representatives.<sup>200</sup> If state interest groups do not act in representative fashion, such that access to the administrative process is granted on false or inaccurate grounds, the accountability of the federal process suffers.

In order to detect accountability shortfalls in state interest groups, transparency—the “availability of information about [the groups'] policies, structures, and actions”<sup>201</sup>—is necessary.<sup>202</sup> As thinkers from James Madison<sup>203</sup> to Louis Brandeis<sup>204</sup> have explained, transparency allows citizens to make informed decisions about the content of their leaders' actions<sup>205</sup> and helps make institutions responsive to relevant principals. State interest groups' involvement in agency decision making implicates a range of principals, including state interest group members and the

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<sup>199</sup> The National Association of Attorneys General explicitly embraces its duty to represent the constituencies of its members, urging the group “[t]o remember at all times that every member of the Association is accountable to the people of their state, territory, and district which carries over to the business and practices of the Association.” About NAAG, Nat'l Ass'n of Att'y's Gen., [http://www.naag.org/about\\_naag.php](http://www.naag.org/about_naag.php) (last visited Mar. 31, 2014).

<sup>200</sup> See, e.g., Resnik et al., *supra* note 11, at 729 (“[T]he political capital of the U.S. Conference of Mayors comes from the fact that its members are democratically elected, public-sector officials.”).

<sup>201</sup> Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 *Calif. L. Rev.* 1655, 1717 (2006).

<sup>202</sup> Scholars have pointed out that transparency can be overly romanticized, and that, like other values, it is subject to outer limits; excessive transparency can paralyze government and jeopardize important interests. See Mark Fenster, *The Opacity of Transparency*, 91 *Iowa L. Rev.* 885, 902–10 (2006). But as discussed in the text that follows, state interest groups do not seem to be near that limit.

<sup>203</sup> James Madison's oft-quoted line on this point is that “[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.” See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 728 (1972) (Stewart, J., dissenting) (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 *Writings of James Madison* 103, 103 (G. Hunt ed., 1910)).

<sup>204</sup> Louis D. Brandeis, *Other People's Money and How the Bankers Use It* 92 (1914) (“Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

<sup>205</sup> See Fenster, *supra* note 202, at 896–98 (discussing centrality of transparency to theories of social contract and deliberative democracy).



2014]

*States as Interest Groups*

1001

constituents to whom they ultimately answer, and the many principals of federal agencies, including Congress, the President, the courts, and the general public.

The next Subsection considers state interest groups' inevitably imperfect representation of the fifty states as well as the accountability limitations that their lack of transparency creates.

*2. State Interest Groups' Accountability Limitations*

State interest groups' lack of transparency both fosters and obscures the misleading use of the "state view" label. This Subsection first describes reasons that the groups are imperfectly representative<sup>206</sup> and then emphasizes how their limited transparency compromises accountability—of the groups themselves and of the administrative process in which they participate.

*a. The Mirage of a "State View" and the Inevitability of Imperfect Representation*

There are reasons to believe that state interest groups are imperfectly representative of the fifty states: (1) Not all states participate in (or are even members of) many of the groups; (2) the groups take positions despite internal dissent; (3) governance by the groups' staff members may lead to drift; and (4) the groups may experience capture by private interests. In addition to these internal issues, state interest groups may sometimes disagree with one another—yet, depending on an agency's consultation practices, the agency may not hear from both sides.

*i. Disengagement*

The first trait of state interest groups that inhibits the representativeness of their positions is state disengagement. For several reasons, a group's position is unlikely to reflect the input of all fifty states—and may not even reflect the views of a majority of them. The jumping off point is two facts noted in Part I: Many state interest groups do not represent all (or even almost all) states, and it is not always clear which or how many members are in each group.

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<sup>206</sup> Although Resnik and her coauthors generally champion state interest groups, they also note the risk of the type of representational confusion that I describe here, a phenomenon they compare to aggregate representation in class action litigation. See Resnik et al., *supra* note 11, at 783–84.

Even when states do join a group, there is no requirement that all members participate in any given group position. The bulk of the work the groups do vis-à-vis federal agencies involves communications that are driven by committees or staff members and do not require formal approval from the general membership: regulatory comments or letters, input on state-agency work groups, and day-to-day communications with agency staff. Some organizations, like the National Association of Medicaid Directors and the Association of State Drinking Water Administrators, circulate draft letters to all members and provide them with an opportunity to comment; the organizations then try to revise the letter to accommodate internal objections. The National Association of Attorneys General takes a somewhat different approach. A letter goes on standard NAAG letterhead and becomes official NAAG policy once a minimum of thirty-six states is reached, but the letter also includes the signatures of the states that support it.<sup>207</sup> Other organizations do not require input from the full membership before sending letters but rather rely on the approval of group leadership or staff. The bylaws of the Environmental Council of the States provide that “[n]ormally” letters will be reviewed by other ECOS leaders or the staff executive director “to assure consistency with ECOS resolutions.”<sup>208</sup> The National Association of Insurance Commissioners’ comments on federal regulations receive approval only from the government relations committee, not the entire body.<sup>209</sup> Moreover, even when a “membership” vote is required, quorum requirements in many groups—usually half of the membership—allow for member nonparticipation.<sup>210</sup>

The issue is not just that state interest groups *allow* for state disengagement; there are also a number of reasons to expect that member

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<sup>207</sup> The thirty-six-state minimum was added as part of a 2011 overhaul of NAAG’s bylaws. The new rules also require each sign-on letter to be co-sponsored by at least two attorneys general of different political parties before it can be circulated to the membership for signatures. See Blair Tinkle, *New NAAG Rules Ensure Bipartisanship*, Nat’l Ass’n of Att’y’s Gen., <http://www.naag.org/new-naag-rules-ensure-bipartisanship.php> (last visited May 26, 2014).

<sup>208</sup> *Env’tl. Council of the States, Organizational Structure and Bylaws 11* (2014), available at [http://www.ecos.org/section/\\_aboutecos](http://www.ecos.org/section/_aboutecos) (follow “ECOS By-Laws” hyperlink).

<sup>209</sup> See *Government Relations Leadership Council*, Nat’l Ass’n of Ins. Comm’rs, [http://www.naic.org/committees\\_ex\\_gov\\_rel\\_leadership\\_council.htm](http://www.naic.org/committees_ex_gov_rel_leadership_council.htm) (last visited Apr. 1, 2014).

<sup>210</sup> See Resnik et al., *supra* note 11, at 783–84.

states will in fact not engage in the groups' decisions.<sup>211</sup> At one end of the spectrum, large states may participate less frequently because they have their own successful lobbying channels.<sup>212</sup> On the other end of the spectrum, small or especially resource-strapped states may not have sufficient resources to actively keep tabs on group activities even if they would like to do so; they may join the groups, but do not actively monitor them. In the middle, there may be groups who could afford to participate, but for whom the incentive to do so is not sufficiently strong. After all, part of the perceived benefit of having the groups is that a single annual payment gets member states a persistent voice in federal administration whether they participate or not. Thus, where the group is addressing issues of primary import only to certain states, fewer affected members may abstain from internal deliberations. This sporadic participation is by no means unique to government organizations; it is also true in trade associations, advocacy groups, and corporations.<sup>213</sup> The point here is simply that one cannot know by looking at a group position how many states meaningfully considered the issue (or looked at it at all), and this undermines the notion that the groups advance a collective "state position."

*ii. Internal Dissent*

Even among states that do engage in group decisions, state interest group positions may mask internal dissent.

As described above, most group activity does not require approval by the full membership, and even official resolutions do not require unanimity. Resolutions are initially drafted by a subject-specific committee, an individual member state, or a staff member, and eventually make their way to the general membership for an up or down vote. Some organizations, like the National Governors Association and the National

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<sup>211</sup> See, e.g., Colin McEnroe, Let's Not Give Governor Her Dues, *Hartford Courant* (Mar. 7, 2010), [http://articles.courant.com/2010-03-07/news/hc-mcenroe-governors-associatio.artmar07\\_1\\_dues-abe-giles-butch-otter](http://articles.courant.com/2010-03-07/news/hc-mcenroe-governors-associatio.artmar07_1_dues-abe-giles-butch-otter) (reporting that then-Governor of Connecticut Jodi Rell had not attended four of the past five National Governors Association meetings despite paying dues); Dale Wetzel, Governors Back Group Despite Drop in Support, *Denver Post*, June 23, 1997, available at Factiva, Doc. No. DNVR000020011006dt6n00bhq (noting that only seven of twenty-one members of the Western Governors Association attended the opening day of its annual meeting).

<sup>212</sup> Resnik et al., *supra* note 11, at 732.

<sup>213</sup> See, e.g., Drutman, *supra* note 154, at 89–90 (describing how member companies vary in extent of participation in trade associations).

Association of Medicaid Directors, require a “consensus” of voting members to approve a resolution, though consensus is a know-it-when-you-see-it phenomenon that is not construed to mean unanimity.<sup>214</sup> Other organizations, like the National Council of State Legislatures, require a supermajority of voting members to approve a resolution.<sup>215</sup> And in some groups, like the National Association of Insurance Commissioners and, until recently, the Environmental Council of the States, a resolution can pass with approval from a bare majority of voting members.<sup>216</sup> Because many groups’ quorum rules allow a vote to occur with only a subset of members participating, a minority of states can potentially carry a vote. For example, in a fifty-state group in which a majority of the membership constitutes a quorum and a majority of votes suffices to pass a resolution, a resolution can become the group’s official position with the approval of fourteen states.<sup>217</sup>

The advancement of positions with deeply divided votes is probably the exception due to the need to preserve group harmony, but there is no rule prohibiting the practice, and there is little way to detect it. There is no policy of reporting the number or identity of dissenting states, and not all organizations even keep track of votes. Thus, we cannot say with confidence how common internal divisions are. Yet intuition about the difficulty of coordinating dozens of states or thousands of cities, and the limited reports available, suggest that at least some dissent is common. Indeed, in extreme cases, even the decision to consult with the federal agency might be contentious. The National Association of Attorneys General, for example, has a committee of states working closely with the Consumer Financial Protection Bureau on consumer protection issues,

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<sup>214</sup> See Interview with Matt Salo, *supra* note 45.

<sup>215</sup> See NCSL Bylaws, Nat’l Conference of State Legislatures, <http://www.ncsl.org/aboutus/mission-and-governance/bylaws.aspx> (last visited May 26, 2014). The NCSL bylaws were last amended in August 2013. *Id.*

<sup>216</sup> See *Env’tl. Council of the States, Organizational Structure and Bylaws 13* (2012), available at <http://dl.dropboxusercontent.com/u/88343773/Bylaws%20-%20Current%20as%20of%2011-1-12.pdf> (requiring a majority of votes to pass a resolution); see also *infra* text accompanying notes 223–24 (describing an NAIC resolution passed by a bare majority vote). Shortly before this Article was finalized, ECOS amended its bylaws. The new bylaws increase the votes necessary to pass a resolution from 51% of voting members to 85% of voting members. *Env’tl. Council of the States, Organizational Structure and Bylaws 13* (2014), available at [http://www.ecos.org/section/\\_aboutecos](http://www.ecos.org/section/_aboutecos) (follow “ECOS By-Laws” hyperlink).

<sup>217</sup> In state interest groups that include districts and territories as members, a resolution could potentially pass with support from fewer than fourteen states.

2014]

*States as Interest Groups*

1005

while some of its members previously opposed the Agency's existence and joined a lawsuit challenging its constitutionality.<sup>218</sup>

Occasionally, internal dissent does receive quiet publicity, at least in trade press. Consider a question that divided the National Association of Insurance Commissioners: whether, in establishing definitions for the medical loss ratio rule under the Affordable Care Act,<sup>219</sup> insurance brokers' commissions should be classified as medical benefits rather than administrative expenses. The issue was divisive and political. The insurance industry, concerned that classifying commissions as administrative expenses was driving insurance companies away from using brokers,<sup>220</sup> lobbied the NAIC to exempt their commissions from the MLR.<sup>221</sup> Republican states generally embraced the industry's position, while Democratic states generally opposed it, perhaps in an effort to support the purposes of the President's landmark statute. The industry-friendly exemption ultimately passed, with the final vote split along red-blue lines. In total, there were twenty-six votes to exempt commissions, twenty

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<sup>218</sup> See Second Amended Complaint for Declaratory and Injunctive Relief at 6–7, *State Nat'l Bank of Big Spring v. Lew*, 958 F. Supp. 2d 127 (D.D.C. 2013) (No. 1:12-cv-01032); Carter Dougherty, *Republican State AGs Resisting Cooperation with CFPB*, Bloomberg Businessweek (Sept. 19, 2012), <http://www.businessweek.com/news/2012-09-19/republican-state-ags-resisting-cooperation-with-consumer-bureau>. Interestingly, although the private plaintiffs in the lawsuit challenged the “unconstitutional formation and operation” of the CFPB, the eleven state plaintiffs specifically challenged only the powers conferred under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Second Amended Complaint for Declaratory and Injunctive Relief, *supra*, at 6–7.

<sup>219</sup> See Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 74,864, 74,865–66 (Dec. 1, 2010) (to be codified at 45 C.F.R. pt. 158).

<sup>220</sup> See Suzanne M. Kirchoff & Janemarie Mulvey, Cong. Research Serv., R42735, *Medical Loss Ratio Requirements Under the Patient Protection and Affordable Care Act (ACA): Issues for Congress 19* (Sept. 18, 2012), available at <http://www.fas.org/sgp/crs/misc/R42735.pdf>.

<sup>221</sup> One industry group reported on its activities:

BenefitMall has actively supported efforts to persuade the NAIC of the crucial role the broker/agent community play [sic] in the health care process. With lobbyists on the ground in several of our local markets, BenefitMall has seized opportunities to attend, participate and testify in several meetings associated with the NAIC's review of the MLR.

NAIC Approves Resolution Calling for MLR Changes, BenefitMall, <http://www.benefitmall.com/News/Pages/Legislative-Updates/NAIC-Approves-Resolution-Calling-for-MLR-Changes> (last visited Apr. 1, 2014).

votes against the exemption, and five abstentions,<sup>222</sup> and the NAIC sent its resolution to HHS.<sup>223</sup>

Perhaps in part because of the publicity the resolution received, the NAIC took the rare step of acknowledging, to some extent, internal division. The group's press release announcing the resolution mentioned that "there is clearly not unanimous agreement on this issue," and the resolution itself listed the names of states that sponsored it (though not all of the states who ultimately voted for it).<sup>224</sup> Such an acknowledgement does not explain dissenting positions—indeed, the resolution itself is prefaced with the standard "We, The Members of the National Association of Insurance Commissioners, Therefore Resolve That"<sup>225</sup>—but it might have reduced any misperception that the states spoke with a single voice. This disclosure was, in any event, unusual. Media attention to state interest group actions is usually scarce, and the groups do not usually acknowledge internal dissent on their own. Consider, in contrast, a recent resolution by the Environmental Council of the States calling for attention to the reduction of greenhouse gases. Six to twelve participating states reportedly dissented from the resolution<sup>226</sup>—yet it is the group's policy not to record votes, and nothing in or connected with the resolution suggests it is anything but a uniform "state" position.

While internal dissent is hard to study, still other indicators suggest that it occurs. For example, states are clearly divided with respect to the desirability of federal regulation of fracking, yet the two leading state interest groups addressing the topic—the Interstate Oil and Gas Com-

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<sup>222</sup> See Timothy Jost, Implementing Health Reform: Fine-Tuning the Medical Loss Ratio Rules, Health Affairs Blog (Dec. 3, 2011, 9:51 AM), <http://www.healthaffairs.org/blog/2011/12/03/implementing-health-reform-fine-tuning-the-medical-loss-ratio-rules/>.

<sup>223</sup> The HHS Secretary has taken no action to reclassify broker commissions, and has apparently indicated a view that the NAIC's interpretation cannot be squared with the Act as currently written. A bill that would require the reclassification was recently introduced in the Senate. See Elizabeth Festa, Senate Introduces MLR Bill Excluding Agent Compensation from Formula, PropertyCasualty360 (Mar. 22, 2013), <http://www.propertycasualty360.com/2013/03/22/senate-introduces-mlr-bill-excluding-agent-compens.>

<sup>224</sup> Press Release, Nat'l Ass'n of Ins. Comm'rs, Statement from NAIC President Susan E. Voss (Nov. 23, 2011), [http://www.naic.org/Releases/2011\\_docs/statement\\_naic\\_president\\_voss\\_resolution.htm](http://www.naic.org/Releases/2011_docs/statement_naic_president_voss_resolution.htm).

<sup>225</sup> Nat'l Ass'n of Ins. Comm'rs, Resolution Urging the U.S. Department of Health and Human Services to Take Action to Ensure Continued Consumer Access to Professional Health Insurance Producers (Nov. 22, 2011), available at [http://www.naic.org/documents/committees\\_ex\\_phip\\_resolution\\_11\\_22.pdf](http://www.naic.org/documents/committees_ex_phip_resolution_11_22.pdf).

<sup>226</sup> Telephone interview with Carlos Rubinstein, Comm'r, Tex. Comm'n on Env'tl. Quality (May 8, 2013).

pact Commission, the state interest group representing governors in oil-and-gas-producing states, and the Ground Water Protection Council, representing state ground water agencies—vigorously oppose federal intervention. Both groups have relationships with federal agencies. An EPA administrator recently attended IOGCC’s annual meeting “on a goodwill mission” to “ease anxiety,”<sup>227</sup> and the Department of the Interior has proposed using the groups’ controversial disclosure platform, “FracFocus,” as the federal standard for fracking on public lands.<sup>228</sup> Yet at the same time that these groups advocate the “state view” on fracking, there are signs that a number of states—even members of the two groups—do not share the groups’ opposition to federal regulation. Seven eastern states, including IOGCC members New York and Maryland, recently filed a notice of intent to sue the EPA for its failure to regulate methane emissions associated with fracking.<sup>229</sup> In divisive contexts like these, it is difficult to imagine any state interest groups consistently speaking for all fifty states.

### *iii. Drift*

Third, there is the risk of policy drift. The staff members of state interest groups handle the groups’ day-to-day functions, and indeed are the voices of the groups at official federal consultations. The interests of the

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<sup>227</sup> See Ellen M. Gilmer, EPA Looks to Build Bridges at State Regulators’ Gathering, *EnergyWire*, May 21, 2013, available at <http://www.eenews.net/stories/1059981513>.

<sup>228</sup> See Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. 31,636 (proposed May 24, 2013) (to be codified at 43 C.F.R. pt. 3160). Eleven states now permit or require the use of FracFocus. See Kate Konschnik et al., Harvard Law Sch. Envtl. Law Program, Policy Initiative, Legal Fractures in Chemical Disclosure Laws: Why the Voluntary Chemical Disclosure Registry FracFocus Fails as a Regulatory Compliance Tool 3 (Apr. 23, 2013), available at <http://blogs.law.harvard.edu/environmentallawprogram/files/2013/04/4-23-2013-LEGAL-FRACTURES.pdf>.

<sup>229</sup> See Letter from Attorneys General of New York, Connecticut, Delaware, Maryland, Massachusetts, Rhode Island, and Vermont, to Lisa P. Jackson, Adm’r, EPA (Dec. 11, 2012), available at [http://www.ag.ny.gov/pdfs/ltr\\_NSPPS\\_Methane\\_Notice.pdf](http://www.ag.ny.gov/pdfs/ltr_NSPPS_Methane_Notice.pdf) (providing notice of intent to sue). Thirteen other states sent the EPA a letter urging it not to meet with the seven suing states without all states present. See Letter from Attorneys General of Alabama, Arizona, Indiana, Kansas, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Texas, West Virginia, and Wyoming, to Bob Perciasepe, Acting Adm’r, EPA, and Gina McCarthy, Assistant Adm’r, EPA Office of Air & Radiation (May 2, 2013), available at [https://www.oag.ok.gov/oagweb.nsf/3e67f1cee13bc090862572b2005ad559/23b407a5f6b5131886257b600077acf1/\\$FILE/FINAL%20-%20EPAMethane050213.pdf](https://www.oag.ok.gov/oagweb.nsf/3e67f1cee13bc090862572b2005ad559/23b407a5f6b5131886257b600077acf1/$FILE/FINAL%20-%20EPAMethane050213.pdf) (expressing “very great concern that [the EPA] may consider negotiations” with seven north-eastern states to resolve the notice of intent to sue).

staffs may diverge from those of some or all group members,<sup>230</sup> and the prominent involvement of staff members creates a risk of drift common to any principal-agent relationship.

There have recently been public accusations along these lines, arising out of a rift within the National Association of Clean Air Agencies. For over thirty years, NACAA<sup>231</sup> was the lead state interest group facilitating coordination between state and federal agencies on issues of air pollution. The group was closely involved in the development of numerous federal regulations<sup>232</sup> and has been active in pressing for regulation related to climate change and resisting efforts, like the 2012 TRAIN Act that passed in the House, to weaken the EPA's authority.<sup>233</sup> NACAA's membership, however, became divided on some of these issues. In 2012, a number of state air administrators left the organization to form a new group, complaining that the old group had been dominated by the agen-

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<sup>230</sup> Cf. Stephenson & Jackson, *supra* note 145, at 7–8 (noting that “the agency problem may be more serious with regard to broad-based trade associations, whose interests may be imperfectly aligned with those of their members or whose members themselves may have diverse or irreconcilable interests”).

<sup>231</sup> NACAA was formerly named the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officers (“STAPPA/ALAPCO”). The name change occurred in 2006.

<sup>232</sup> See, e.g., EPA, EPA-231-F-06-004, Solving Environmental Problems Through Collaboration: Case Study of Clean Air Nonroad Diesel Rule (2006), available at <http://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P10072YJ.PDF> (discussing the development of nonroad diesel rule and noting the Agency's “close interaction with concerned stakeholders”); Letter from Barry R. Wallerstein and Nancy L. Seidman, Co-Chairs, NACAA Mobile Sources & Fuels Comm., to Howard Shelanski, Adm'r, Office of Info. & Regulatory Affairs, and Gina McCarthy, Adm'r, EPA (Feb. 6, 2014) (urging the OMB and EPA to finalize the Tier 3 vehicle emissions and gasoline sulfur standards by February 28, 2014).

<sup>233</sup> The TRAIN Act—part of proposed House Bill 3409, the Stop the War on Coal Act of 2012—would have nullified certain rules that had already been proposed or issued by the EPA, required analysis of the cumulative cost of EPA rules, and imposed various limitations and requirements on new EPA rules. See H.R. 3409, 112th Cong. (2012); see also Press Release, Speaker of the House John Boehner, Bipartisan TRAIN Act Puts the Brakes on Job-Crushing Regulations (Sept. 23, 2011), <http://www.speaker.gov/press-release/speaker-boehner-bipartisan-train-act-puts-brakes-job-crushing-regulations> (arguing that the TRAIN Act “puts the brakes on several government regulations that threaten jobs”). NACAA opposed the TRAIN Act. See Letter from David Shaw and Lynne A. Liddington, Co-Presidents, Nat'l Ass'n of Clean Air Agencies, to the Hon. John Boehner, Speaker, U.S. House of Representatives, and the Hon. Nancy Pelosi, Minority Leader, U.S. House of Representatives (Sept. 21, 2011), available at <http://www.4cleanair.org/Documents/TRAINFINALNACAALetter092111.pdf> (describing NACAA's opposition to the TRAIN Act).



2014]

*States as Interest Groups*

1009

da of the group's staff rather than the interests of member states.<sup>234</sup> One departing member stated that it had been "frustrating to read . . . about an organization that said they were representing us and taking policy positions that we think are inconsistent with the science, and certainly with the positions of Indiana," noting that the new state group would represent "our policy and not the staff's policy."<sup>235</sup> A spokesperson from Clean Air Watch, an environmental organization, criticized the break-up as arising from "discontent among coal-related interests that NACAA has been so effective in reducing pollution."<sup>236</sup> At last count, the new group had seventeen members, eleven of which planned also to remain members of NACAA.<sup>237</sup>

*iv. Capture*

Capture has a range of connotations, and here I mean to refer to the outsized influence of regulated entities on decision making—the prioritization of private interests over the more general public interest.<sup>238</sup> Several state interest groups have been perceived as captured in this way. Yet the groups' opacity bars meaningful analysis or investigation of what influences state interest groups' decision making.<sup>239</sup> And arguably, the problem goes further: The groups do not just fail to disclose information, but their very reputation as state voices discourages the public from skeptical inquiry. The groups' identity could facilitate what we might call "state-washing"—that is, cloaking private agendas in the

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<sup>234</sup> See Dawn Reeves, Early Rift Develops over New State Air Group's Potential Political Agenda, Inside EPA Weekly Report, Feb. 8, 2013, available at 2013 WLNR 3055124 (quoting Carlos Rubinstein of the Texas Commission on Environmental Quality).

<sup>235</sup> Jacobs, *supra* note 43 (alteration in original) (quoting Thomas Easterly, Commissioner of the Indiana Department of Environmental Management) (internal quotation marks omitted).

<sup>236</sup> Jeremy P. Jacobs, Alternative Association of State Regulators Plans January 1st Launch, Greenwire, Aug. 28, 2012, <http://www.eenews.net/greenwire/stories/1059969300> (quoting Frank O'Donnell, President of Clean Air Watch).

<sup>237</sup> See Jacobs, *supra* note 43. Reports—supposedly confirmed by a state official who belongs to both groups—indicate an "early rift" in the new group over "signals that the group could adopt an overt political agenda to fight EPA rules" and "might seek to issue policy positions that are counter to NACAA." See Reeves, *supra* note 234.

<sup>238</sup> For recent contributions to the dialogue on capture, see generally Preventing Regulatory Capture: Special Interest Influence and How to Limit It (Daniel Carpenter & David A. Moss eds., 2014).

<sup>239</sup> See, e.g., Nicholas Bagley, Response, Agency Hygiene, 89 Tex. L. Rev. See Also 1, 4 (2010) (describing the importance of good information in detecting capture).

name and legitimacy of the states—such that the groups' bona fides seem beyond question.

The practices of several state interest groups provide reason to wonder. First, owing to its substantial industry funding and historically close ties with industry leaders, the National Association of Insurance Commissioners has long been attacked as too beholden to industry agendas.<sup>240</sup> Indeed, the NAIC historically afforded industry representatives an official role in the organization's decision making, and was reportedly viewed as being "accountable" to the industry.<sup>241</sup> Beyond the issue of broker commissions, the NAIC has been criticized for acting on behalf of industry interests on issues of state accreditation,<sup>242</sup> accounting rules,<sup>243</sup> and deregulation.<sup>244</sup> In recent years, the NAIC has implemented transparency measures and begun funding the participation of consumer protection advocates to guard against the risk of capture,<sup>245</sup> but these actions have not ended the debate. For example, a congressperson has charged that the NAIC opportunistically "fends off questions about its

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<sup>240</sup> See Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 Fla. St. U. L. Rev. 625, 639–40 (1999) (describing the NAIC as captured by the insurance industry). But see Jost, *supra* note 98, at 2057 ("Like consumers, insurers and other interested parties succeeded in securing favorable changes to model laws and regulations. However, the process on the whole was balanced and responsive to consumers as well as insurers. The insurance industry certainly did not capture the PPACA NAIC regulatory process.").

<sup>241</sup> See Randall, *supra* note 240, at 639–40 (noting that "members of the industry view the NAIC as part of the industry and accountable to the industry," and that "much of the NAIC's work often appears to be in direct response to the industry" (internal citations omitted)).

<sup>242</sup> *Id.* at 640.

<sup>243</sup> See *The Impact of Dodd-Frank's Insurance Regulations on Consumers, Job Creators, and the Economy: Hearing Before the Subcomm. on Ins., Hous. & Cmty. Opportunity of the H. Comm. on Fin. Servs., 112th Cong. 8* (2012) (statement of Birny Birnbaum, Executive Director, Center for Economic Justice), available at <http://www.financialservices.house.gov/uploadedfiles/112-150.pdf>.

<sup>244</sup> See Frank Norton, *Consumer Groups Take Aim at South Carolina Insurance Chief*, *Charleston Post & Courier*, Mar. 4, 2004, available at 2004 WLNR 12364792 (describing accusation by over 100 consumer groups that NAIC's president was inappropriately "advanc[ing] the industry's deregulation model").

<sup>245</sup> See, e.g., Letter from Roger A. Sevigny, President, Nat'l Ass'n of Ins. Comm'rs et al., to the Hon. Max Baucus, Chairman, U.S. Senate Fin. Comm. (Sept. 30, 2009), available at [http://www.naic.org/documents/testimony\\_0909\\_officers\\_to\\_baucus\\_healthcare.pdf](http://www.naic.org/documents/testimony_0909_officers_to_baucus_healthcare.pdf) (writing to "set the record straight with regard to recent misrepresentations made . . . by some consumer groups . . . , which questioned the openness of the NAIC model development process" and describing NAIC's transparency measures).

2014]

*States as Interest Groups*

1011

accountability and transparency” and claims to be a private group when “it suits its purposes.”<sup>246</sup>

Second, some state interest groups have been criticized for their private ties in connection with the recent regulatory proposals related to fracking. As earlier noted, the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission have spearheaded, with industry support and funding, a web-based platform for chemical disclosure called “FracFocus,” through which companies submit information about the chemicals they use in fracking operations.<sup>247</sup> Critics have argued that FracFocus is underinclusive and even misleading—because, for example, it does not direct companies to disclose all categories of chemicals and allows companies to decide for themselves which chemicals are trade secrets, without substantiation or review,<sup>248</sup> and that the GWPC and IOGCC themselves are unduly influenced by the oil industry. Criticism increased following the announcement of the Department of the Interior’s proposed rule to regulate fracking on federal lands, which would adopt the FracFocus platform.<sup>249</sup> Allegations of industry influence on fracking issues have also involved the American Legislative Exchange Council, mentioned earlier as a group comprising state legislators and corporations; the recent federal proposal parallels requirements in ALEC’s model bill on fracking.

*v. Intergroup Divisions*

Aside from these intragroup issues, another reason that a “state” position may be chimerical is that intergroup divisions sometimes arise. When that happens, even if an individual group could accurately articulate a single position of its own members, it is difficult to know how to sort through the vast landscape of groups. Regulators may find state interest groups (and perhaps individual states) on both sides of an issue, left with no obvious way to honor their obligation to work with “the states.” Some of these conflicts are relatively well-known and will

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<sup>246</sup> Letter from the Hon. Edward Royce, U.S. House of Representatives, to the Hon. Kevin M. McCarty, President, Nat’l Ass’n of Ins. Comm’rs, and Dr. Therese M. Vaughan, CEO, Nat’l Ass’n of Ins. Comm’rs (Feb. 28, 2012), available at [http://royce.house.gov/uploadedfiles/royce\\_letter\\_to\\_the\\_naic\\_2.28.12.pdf](http://royce.house.gov/uploadedfiles/royce_letter_to_the_naic_2.28.12.pdf).

<sup>247</sup> See About Us, FracFocus, <http://www.fracfocus.org/welcome> (last visited Apr. 1, 2014).

<sup>248</sup> See Konschnik et al., *supra* note 228.

<sup>249</sup> See sources cited *supra* note 228.

emerge through the consultation or comment process. For example, state and local environmental officials have been known to disagree with state and local oil and gas administrators, and state clean water officials diverge periodically from local wastewater and stormwater management officials.<sup>250</sup> Perhaps more commonly given the sheer numbers of state interest groups, regulators may hear from only some groups—those with whom they regularly consult—and may not hear the divergent views of other state officials. This question of intergroup division warrants more attention than I can provide here, and should be a subject of further study.

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In sum, there are multiple reasons—including state disengagement, internal dissent, drift, and capture—that a state interest group's position may not be shared by all states or all members. On top of those intragroup issues, groups may disagree with one another. As I have indicated throughout the discussion, these qualities are not unique to state interest groups; private interest groups may have similar tendencies.<sup>251</sup> The point here is that channeling state input through a group structure likely affects the positions that are ultimately taken and the extent to which those positions live up to the premises of state involvement in the administrative process. As the next Subsection describes, without greater transparency, state interest group positions may be misleading to agencies and the public.

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<sup>250</sup> See, e.g., EPA Drafts Numeric Nutrient Criteria 'Action Plan' As Industry Pushes Back, InsideEPA.com (Mar. 27, 2013), <http://www.insideepa.com/201303272429099/EPA-Daily-News/Daily-News/epa-drafts-numeric-nutrient-criteria-action-plan-as-industry-pushes-back/menu-id-95.html> (discussing disagreement between the Association of Clean Water Administrators and the National Association of Clean Water Agencies).

<sup>251</sup> Indeed, in many prominent advocacy associations that interface with the federal government—which Professor Theda Skocpol has labeled “memberless organizations”—the views of members may be an afterthought. Theda Skocpol, *Associations Without Members*, Am. Prospect, July–Aug. 1999, at 66, 72 (“Because today’s advocacy groups are staff-heavy and focused on lobbying, research, and media projects, they are managed from the top with few opportunities for member leverage from below.”). That said, it is not clear that other interest groups gain as much traction from the identity of their members as state interest groups do, as opposed to the persuasiveness of their positions or other factors. A more fine-grained comparison of state and other interest groups is a topic for future work.

*b. State Interest Groups' Limited Transparency and Accountability*

On one hand, state interest groups are frequently transparent about the content of their policies and positions. Nearly every group has a website on which it posts its formal resolutions; some groups also post their comments and letters to federal agencies. Many group websites also identify the group's key leaders.

Yet state interest groups' transparency is limited in important ways. First, there is an initial oddity: Few citizens are likely aware that their state officials are members of the groups, or that the groups play an active role in federal administration. As noted in Part I, the groups themselves generally do not disclose their membership rolls, and individual states do not publicize their decisions to join the groups.<sup>252</sup> Membership dues are generally not part of a specific or earmarked legislative appropriation; instead, they come out of general executive branch operating funds, or even more discreetly, out of regulatory fees that do not appear in state budgets.<sup>253</sup> Joining the groups requires no specific (or at least no publicly disclosed) approval from either the legislature or the public. Citizens are thus unlikely to divine from state officials whether their state has joined a state interest group or how much it is paying in dues.<sup>254</sup>

The obstacle imposed by this type of opacity should not be overstated. Not all state interest groups refuse to disclose their membership, and one imagines that a determined citizen could find out the membership of

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<sup>252</sup> See, e.g., Editorial, Group Fees, *Hutchinson News*, Feb. 21, 2010, at B4 (complaining that Kansas had paid hundreds of thousands of dollars in membership dues that "aren't an essential part of the government's work," that some of the groups "appear to be little more than lobbyist groups," and that many of the groups simply remain in budget allocations without "line-by-line" review).

<sup>253</sup> See, e.g., Opinion Letter from Wayne Stenehjem, Att'y Gen. of N.D., to the Hon. George Kaiser, N.D. State Representative 2-3 & n.15 (June 15, 2007), available at <http://www.ag.nd.gov/Opinions/2007/Letter/2007-L-09.pdf> (opining that in North Dakota, "[a] state agency may pay membership dues to an organization as long as a state agency's expenditures are within the terms of its appropriation," and noting that the existing appropriation to the state insurance commissioner for operating expenses easily covers the state's NAIC dues). On funding dues payments through fees, see Telephone Interview with Steven Thompson, Exec. Dir., Okla. Dep't of Env'tl. Quality (June 4, 2013).

<sup>254</sup> On rare occasions, this opacity has stirred isolated public reproach. In conjunction with a 2003 study of state interest group membership conducted by the newspaper *The Oklahoman*, for example, a spokesperson for the National Taxpayers Union characterized state interest groups as lobbying associations and lamented: "This is the dilemma that taxpayers face: The elected officials are free to join whatever association they want, but taxpayers aren't free to say, 'I don't want to pay for it.'" Tony Thornton & Ryan McNeill, Study Shows Taxpayers Fund Lobbying Dues, *Oklahoman*, Sept. 28, 2003, at 1-A.

most groups in any event. But because the groups (and their involvement in the federal process) are not more well-known, citizens likely do lack the information prerequisite to any subsequent attempts to hold the groups accountable. Take a citizen of New York who seeks federal coal ash regulation, or a citizen of Texas who opposes climate change regulation, or a citizen of California who believes that broker commissions should not be counted as medical expenses—none of these citizens has recourse against the contrary positions of state interest groups until she acquires the knowledge that her state officials are participating in state interest groups at all.

Second, and more important, state interest groups generally do not disclose information about their operations. As noted, the groups' internal deliberations and votes are not made public; some are apparently not even recorded. Nor could a citizen participate in decision-making processes by attending groups' membership meetings. Some groups have non-voting sessions that the public can attend for a price (often steep); many group meetings, like those of the National Governors Association, are entirely closed to the public.<sup>255</sup>

As Part I noted, this lack of voluntary disclosure cannot be remedied through any of the traditional legal tools for making government transparent. Indeed, a few state interest groups have recently resisted public requests for information. The Interstate Oil and Gas Compact Commission and Ground Water Protection Council, for example—the groups behind FracFocus—have asserted the privacy of their operations and data. When a news outlet requested information from the IOGCC regarding the FracFocus database and the group's financial information, the group replied with a letter—on stationery proclaiming “Collectively Representing the States”—that the group “is an interstate compact of its member states and is neither a state nor federal agency,” and “is not subject to either [FOIA] or the Oklahoma Open Records Act.”<sup>256</sup> The National Association of Insurance Commissioners, similarly, has denied requests for information on the ground that it is not subject to disclosure

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<sup>255</sup> Can the Public Attend NGA Meetings?, Nat'l Governors Ass'n (May 30, 2005), <http://www.nga.org/cms/home/about/faq/col2-content/main-content-list/e-can-the-public-attend-nga-meet.html> (“These are meetings for NGA members—not meetings for the general public.”).

<sup>256</sup> Letter from Carl Michael Smith, Exec. Dir., Interstate Oil & Gas Compact Comm'n, to Mike Soraghan, EnergyWire (July 26, 2012), available at [http://www.eenews.net/assets/2012/08/13/document\\_ew\\_01.pdf](http://www.eenews.net/assets/2012/08/13/document_ew_01.pdf); see also Soraghan, *supra* note 52 (noting that GWPC had already rejected a request for the database).

laws. In a letter exchange with another state interest group (the National Conference of Insurance Legislators), the then-president of the NAIC explained that, as a 501(c)(3) nonprofit corporation, the NAIC “is not subject to state Open Meetings or ‘Sunshine’ Laws,” and that “[w]hen individual insurance commissioners gather as members of the NAIC, they are not considered a governmental or public body . . . but rather are a private group.”<sup>257</sup> In addition, complaints have arisen that the NAIC does not disclose publicly the data it collects regarding the insurance industry.<sup>258</sup>

Federal agencies do little to fill these disclosure gaps. If the subject of the state-agency consultation ultimately blooms into a formal notice of proposed rulemaking, the Federal Register notice generally will state that a consultation occurred, but will rarely go further. The substance of the views exchanged—states’ concerns and the federal response—is traditionally omitted. Such information may sometimes be published in a “federalism summary impact statement,” (“FSIS”), which the Federalism Executive Order requires for a final rule that continues to have “federalism implications” under the Order’s definition.<sup>259</sup> Some scholars have observed, however, that the FSIS requirement is sometimes ignored. Even when agencies do comply fully with the FSIS requirement, the information conveyed to the public may be quite limited, in part because the requirement is triggered only infrequently. For example, of the twelve federalism consultations the EPA has held since 2009, only one has required an FSIS; only three of the rules have become final, and just one imposed sufficient monetary costs on states to trigger an FSIS.<sup>260</sup> In

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<sup>257</sup> Letter from Edward R. Royce to Kevin M. McCarty and Therese M. Vaughan, *supra* note 246 (alteration in original).

<sup>258</sup> See Letter from R.J. Lehmann, Deputy Dir., and Eli Lehrer, Nat’l Dir., Ctr. on Fin., Ins. & Real Estate, Heartland Inst., to Michael T. McRaith, Dir., Fed. Ins. Office, U.S. Dep’t of Treasury (Nov. 29, 2011), available at <http://rstreet.org/wp-content/uploads/2012/06/Comments-to-Federal-Insurance-Office.pdf> (stating that “the NAIC jealously guards the quarterly and annual statutory financial statements of insurance companies, using sales of that data to fund its operations,” and contrasting that practice with the SEC making filings available for free through EDGAR and the Federal Reserve publishing regular reports by bank holding companies).

<sup>259</sup> See *supra* note 80.

<sup>260</sup> See National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 76 Fed. Reg. 24,976, 25,086–87 (proposed May 3, 2011) (to be codified at 40 C.F.R. pts. 60 and 63) (providing a brief FSIS).

addition, communications between state interest groups and agencies outside the formal consultation process do not reliably become part of the rulemaking docket available at [regulations.gov](http://regulations.gov).

These limitations on state interest groups' transparency impede the accountability of the groups themselves and of the administrative process in which they participate. Without greater clarity regarding for whom the groups speak at any given time, neither agencies nor the public can assess the legitimacy of the "state" positions the groups advocate.

#### IV. TRADEOFFS AND DESIGN PRINCIPLES

In both the political and scholarly realms, the enthusiasm for a state voice in the administrative process has, to date, envisioned essentially unmitigated benefits. The central benefit sought—for example, in recent articles encouraging more robust state-agency consultations, and in the Federalism Executive Order itself—is greater sensitivity to state autonomy or state regulatory prerogatives.<sup>261</sup> Many scholarly accounts go further, suggesting that greater state input will also afford agencies the expertise bred by state "laboratories" and that state consultants will be more democratically legitimate (and thus merit greater access) than private actors.<sup>262</sup>

As the previous Parts have sought to show, this rosy image is inaccurate, or at least incomplete. Administrative federalism cannot champion all of its goals at once. Instead, attention to state interest groups reveals a basic tradeoff: The best structure for advancing the core federalism goal of protecting states as institutions will disserve agency expertise and democratic accountability. In this Part, I consider prospects for institutional design. I first describe administrative federalism's tradeoffs in further detail. These tradeoffs indicate that any attempt to eliminate state interest groups' costs will diminish widely sought benefits.

I then sketch principles that might guide institutional design moving forward. Although opinions may vary regarding precisely how to weigh the trio of goals—state power, agency expertise, and democratic accountability—the current balance holds little appeal; if each of the goals is important, as literature and commentary suggest, then a design that skews so heavily in favor of state power, at such expense to expertise and accountability, calls for some recalibration. The challenge is to seek

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<sup>261</sup> See *supra* Part II.

<sup>262</sup> See *supra* Part III.



2014]

*States as Interest Groups*

1017

greater balance in the groups' effects—to foster their virtues while limiting their vices. At a minimum, regulatory designers should require groups speaking on behalf of states to be clear about whether and how they represent state interests—who their members are, who participated in a decision, through what mechanisms the decision was reached, and who disagreed. And regulatory designers should seek channels for conveying state expertise to agencies, even if not through state interest groups. Toward these ends, I offer a preliminary suite of best practices for relevant audiences: agency actors and the OMB, state interest groups and their members, and courts reviewing agency action.

#### *A. Administrative Federalism's Tradeoffs*

To get at the tradeoffs latent in the administrative federalism project, it helps to return to the obstacle to process federalism described in Part II: that individual state officials, responsive to constituents and political forces and impeded by a collective action problem, will not reliably advance state institutional interests. State interest groups offer a sturdy solution: Remove the collective action problem, install a primary focus on shared interests, and insulate the group (largely) from constituents and party politics, and you get a new entity that *can* devote itself to states' institutional prerogatives. But these innovations should be expected to come with costs, and they do. Requiring member states to converge on a single common position strictly limits the information they can convey. And insulating the groups from constituents and politics naturally makes them less transparent and accountable. At the same time, “reforming” the groups along either variable—to emphasize informational breadth and depth over common ground, or to require alignment with constituents' preferences—would impede the groups' commitment to a state-power agenda; it would return states to the starting point of their individual limitations. I illustrate these tradeoffs through discussion of two possible categories of reform.

1. *Enhancing Agency Information Acquisition and Expertise.* First, consider what would happen if reforms sought to enhance the groups' substantive contributions to agency decision making. A potent reform here might convert the groups from information aggregators to conduits. Rather than receiving the groups' unified resolutions, federal agencies would ask the groups to collect and convey the individual viewpoints of all participating states, and to note which states did not participate. To

foster meaningful analysis, the agency would ask that each state's contribution be supported by its data and experiences.

At the same time that this type of reform would convey greater breadth and depth about state perspectives, needs, and experiences—and would eliminate state interest groups' muting of diversity and minority viewpoints—it would also diminish the groups' effectiveness as state-power advocates. Treating states as individuals and asking for the details of their particular experiences would weaken the collective approach that binds state interest groups to their institutional missions: Deprived of the assurance that sister states will focus on institutional concerns, the collective action problem would return, and states generally would lack incentives to prioritize institutional concerns above others. In addition, shifting groups from a single position to up to fifty positions would substantially blunt their lobbying force.

2. *Enhancing Transparency and Democratic Accountability.* Second, consider reforms focused on enhancing the groups' transparency and accountability to the public. A strong version of such reforms would transform state interest groups into more direct representatives of their state constituencies by requiring them to create opportunities for public comments, hold open meetings, comply with open records laws, and generally agree to be agents of the public will. Like the expertise-oriented reforms discussed above, these accountability-oriented reforms would likely diminish state interest groups' consistency and effectiveness in advancing institutional, federalism-oriented views. As discussed in Part II, the insulation that groups provide member states from public scrutiny allows them to sign on to (or not object to) positions in a spirit of state camaraderie. If member states had to cast their votes in state interest groups on the record and in public view, they would likely moderate those votes the way they do other public votes: with attention to various political currents, including the preferences of their home state supporters and opponents, of the higher-ups and lower-downs in their political parties, and so on. This would effectively reproduce the initial hang-up for process federalism: that state officials will *sometimes* pursue positions that resonate with federalism values, but will have many reasons not to do so. Furthermore, transparency regarding the internal operations of state interest groups would likely diminish the credibility of calling all state interest group positions the "state view."

*B. Best Practices: A Preliminary Sketch*

With these tradeoffs in mind, I turn next to a sketch of best practices that might guide relevant actors going forward. As earlier noted, this analysis assumes, consistent with existing literature, that each of the three goals discussed in the Article has value. The challenge, then, is to find a more satisfactory balance among the competing goals for state involvement—one that fosters greater transparency and information-sharing without disturbing the groups' institutional focus. The primary audience for these reforms is federal agency actors, but courts, states, and the groups themselves will also play a role.

*1. Federal Agencies and the OMB*

Best practices for federal agencies might proceed along three paths: (1) developing guidelines regarding which state interest groups to consult and heed; (2) increasing the transparency of state-agency consultations; and (3) creating additional channels to facilitate the flow of information on issues that would benefit from state knowledge. The first two initiatives would seek to align state interest groups more closely with accountability norms; the third would facilitate states' contribution to agency expertise.

*First*, agencies should take greater care in determining which state interest groups to consult with and how to accord weight to the groups' input. Drawing such distinctions is not unprecedented in agency practice. For example, both statute and executive policy already direct agencies incorporating privately-set standards to use standards set by "voluntary consensus standards bodies"<sup>263</sup>—organizations that exhibit attributes of openness, balance, due process, and consensus.<sup>264</sup> The ex-

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<sup>263</sup> E.g., National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d), 110 Stat. 775, 783 (1996) (prior to 2001 amendment) (directing agencies to use "standards that are developed or adopted by voluntary consensus standards bodies" unless doing so would be illegal or impractical, in which case other standards can be used); OMB Circular A-119; Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8546 (Feb. 19, 1998). OMB policy does further state, somewhat ambiguously, that it does not create a basis for "discrimination" between standards developed by consensus bodies or other bodies. *Id.* at 8554; see also Nina A. Mendelson, Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards, 112 Mich. L. Rev. 737, 749–50 (2014) (discussing OMB Circular A-119).

<sup>264</sup> See OMB Circular A-119, 63 Fed. Reg. at 8554. "Consensus" is defined as:

ecutive branch could similarly develop criteria to sort among state interest groups. Relevant clarifications might come first from the OMB, which could revise the guidance interpreting the Federalism Executive Order; particular agencies could then draw more fine-grained distinctions among groups within their substantive area.

Revised guidance should give priority to state interest groups that uphold the accountability of the federal administrative process by providing clarity regarding their members and positions—that is, by making clear when the “state view” they convey is actually a sound proxy for state positions and when it is not. In particular, groups eligible for consultation and deference should be required to disclose who their members are, how they are funded, and which members support a particular position, along with information about how the group reaches decisions as a general matter. Judith Resnik and her coauthors support similar reforms, although they would prefer to see them come voluntarily from state interest groups rather than from federal regulators.<sup>265</sup> Where a “state” position turns out to be the product of only a plurality of states, or is opposed by other states, agencies should temper the deference the Federalism Executive Order currently calls for. (An agency might, of course, still adhere to the state suggestions if it independently finds them advisable.)

This reform would not call for agencies to decline to hear from non-qualifying state interest groups altogether. Those groups, like trade associations and other private entities, should remain among the chorus of input that agencies receive during the regulatory process. But a *privileged* role for state input—now institutionalized in statutes, executive orders, and agreements, and born of the notion that agencies should be deferential to state views—should be reserved for state groups that accurately represent states and are clear about how they do so.

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[G]eneral agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus body members are given an opportunity to change their votes after reviewing the comments.

Id.

<sup>265</sup> Resnik et al., *supra* note 11, at 783–84 (stating that “[r]egulatory regimes” could require state interest groups to “clarify how they formulate positions and whether the policies are the artifacts of their executive committees, fall within the purview of staff, or require affirmative assent from all members,” but that it would be preferable for the groups themselves or their members to develop such regulatory regimes).

*Second*, to further maintain the accountability of the federal administrative process, agencies should increase the transparency of their interactions with state interest groups. Subjecting consultations between agencies and the groups to the full panoply of Federal Advisory Committee Act requirements may be too burdensome, and may thus cut too far into the federalism-enhancing benefits of state input. But some transparency requirements would have salutary effects. As I have argued elsewhere, agencies could docket and document their consultations with state interest groups;<sup>266</sup> they could also be diligent about producing informative federalism summary impact statements, and could collect the correspondence between state interest groups and agencies on a central webpage. An agency's disclosures regarding consultations with state interest groups could also reveal information about the group, including its membership and the number and identities of states that took (or dissented from) a particular position.

*Third*, in circumstances where states' information and experience would be relevant to a contemplated federal regulation, agencies should create additional channels for states' individualized input outside of the state interest group structure. There is recent precedent along these lines. After the EPA's cross-state air pollution rule was struck down by the U.S. Court of Appeals for the D.C. Circuit<sup>267</sup>—in part because the EPA failed to inform states of the operative standards before issuing a federal implementation plan<sup>268</sup>—the EPA's return to the drawing board included attempts to obtain detailed state input.<sup>269</sup> To that end, the EPA organized two full-day meetings with state air directors and technical staff to facilitate the exchange of information and consider how to “maximize state

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<sup>266</sup> See Seifter, *supra* note 6, at 502.

<sup>267</sup> *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 33 (D.C. Cir. 2012). The Supreme Court later reversed the D.C. Circuit decision, holding that the EPA's cross-state air pollution rule is a reasonable interpretation of the Clean Air Act. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1610 (2014).

<sup>268</sup> *EME Homer City Generation*, 696 F.3d at 30–31.

<sup>269</sup> See Interstate Air Pollution Transport, EPA, <http://www.epa.gov/airtransport> (last updated Jan. 9, 2014) (stating that “[t]ogether with our state partners, EPA is assessing the next steps to address interstate air pollution transport”); Interstate Air Pollution Transport: Stakeholder Outreach, EPA, <http://www.epa.gov/airtransport/outreach.html> (last updated Jan. 9, 2014) (stating that the EPA is “seeking input from states on the next steps to address the transport of air pollution across state boundaries” and that the EPA convened two meetings with state stakeholders).

input while enabling timely reductions for attainment.”<sup>270</sup> Other agencies have also been engaging in relatively routinized check-ins with individual states. The Consumer Product Safety Commission reportedly hosted monthly calls with twenty to thirty-five state attorney general offices,<sup>271</sup> and HHS has noted in the Federal Register conference calls with individual states in addition to the NAIC.<sup>272</sup> The additional or divergent information gained through individualized consultations might undermine the force of a unified position conveyed by state interest groups, but it represents a more modest solution than excluding the groups or depriving them of the ability to convey a collective state voice.

## *2. State Interest Groups and Their Members*

The federal executive branch will likely be the primary driver behind reforms, as neither states nor state interest groups currently have incentives to be a first mover. As noted, states have ample incentives to participate in state interest groups as they are currently configured and governed. It will likely take federal action to prompt across-the-board reforms.

Still, as more light is shone on state interest groups, the groups and their members can follow suit with parallel changes—even changes not specifically mandated by federal reforms—to avoid losing credibility. In particular, the groups can amp up their recordkeeping and disclosure to the public, and member states can help disseminate the information. Groups can begin by voluntarily disclosing their membership and funding information; state members can pass that information on to their constituents through state government websites and clearer budgeting. The groups could also voluntarily record and make available their internal votes, and states could disclose to constituents their role in particular resolutions or policy matters. Those groups that have claimed immunity

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<sup>270</sup> Plans included, inter alia, further conference calls and “discussion at the commissioner level.” EPA, Transport Rule State Meeting (Apr. 8, 2013), [http://www.4cleanair.org/Spring2013/Materials-EPA\\_Transport\\_Rule\\_State\\_Mtg\\_Slides-040813.pdf](http://www.4cleanair.org/Spring2013/Materials-EPA_Transport_Rule_State_Mtg_Slides-040813.pdf).

<sup>271</sup> See Sharkey, *supra* note 15, at 589.

<sup>272</sup> See, e.g., Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Small Business Health Options Program, 78 Fed. Reg. 33,233, 33,238 (June 4, 2013) (to be codified at 45 C.F.R. pts. 155 and 156) (“HHS has engaged in efforts to consult with and work cooperatively with affected States, including participating in conference calls with and attending conferences of the NAIC, and consulting with State insurance officials on an individual basis.”).

from state and federal sunshine laws could make the requested disclosures voluntarily.

### 3. Courts

Courts reviewing agency action may also play a role in guiding the state consultation process. Because judicial doctrine in the administrative federalism context is still developing, this brief discussion addresses pending proposals for judicial review rather than reform of existing practices.

Leading scholars in administrative federalism have suggested encouraging state-agency consultations by making them a factor in determining judicial deference. Catherine Sharkey has suggested that judicial deference to an agency's decision might be conditioned on compliance with the Federalism Executive Order,<sup>273</sup> while Ernest Young has suggested making compliance with the Order "a variable in calibrating the degree of deference" granted under *Skidmore v. Swift*<sup>274</sup> in administrative preemption cases.<sup>275</sup> Along similar lines, Professor Gillian Metzger has written that "courts could," among other options she identifies, "strengthen administrative law's sensitivity to federalism through vigorous enforcement" of procedures that are "intended to ensure adequate attention to state interests."<sup>276</sup>

The tensions described in this Article call these proposals into question. Judicial reinforcement of the existing mode of state consultation—that is, consultations that by law or practice occur primarily through state interest groups—risks emphasizing certain federalism values at the expense of qualities that are not only important in their own right, but are usually thought to underlie deference to agencies. Agencies' expertise and accountability, after all, are traditionally thought to help ground the *Chevron* framework,<sup>277</sup> which guides judicial deference to agency legal interpretations, and agencies' thoroughness and care are key to standards of review that apply where *Chevron* does not—the *Skidmore*

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<sup>273</sup> See Catherine M. Sharkey, Preemption by Preamble: Federal Agencies and the Federalization of Tort Law, 56 DePaul L. Rev. 227, 256–57 (2007).

<sup>274</sup> 323 U.S. 134 (1944).

<sup>275</sup> Young, *supra* note 134, at 883.

<sup>276</sup> Metzger, Administrative Law as the New Federalism, *supra* note 114, at 2102.

<sup>277</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

framework for non-*Chevron* legal interpretations<sup>278</sup> and the arbitrary or capricious standard for questions of fact or policy.<sup>279</sup> Existing state consultations, prone as they are to cursory and even misleading information exchange and obstructed accountability, undermine these values. At least until the consultation process is reformed, making any deference decisions or calibrations based on the mere fact that a consultation occurred therefore seems improvident on balance. Courts can, in the meantime, consider state input in assessing the overall reasonableness of an agency's ultimate explanation and decision,<sup>280</sup> but they should not incentivize adherence to a consultation procedure that undermines central values in agency decision making. Future work should continue to explore the role of courts in administrative federalism.

#### CONCLUSION

Relationships between states and federal agencies now feature prominently in the American administrative process, receiving wide acclaim from scholars and politicians. By exposing the overlooked design of these relationships, this Article reveals that state involvement in federal administration has more complex and mixed effects than the conventional wisdom recognizes. In particular, the Article has sought to unmask the role and unseen pathologies of state interest groups and their implications for federal administration. These groups are legion, and their involvement in federal agency decision making is condoned by legal instruments and reinforced by administrative practice. Understanding these groups is essential to any account of federalism in the administrative state.

State interest groups' pathologies complicate the discourse bridging administrative law and federalism. Although scholarship and political commentary often herald state involvement in federal administration as

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<sup>278</sup> *Skidmore* analysis rests in part on the "thoroughness evident in [the agency's] consideration." *Skidmore*, 323 U.S. at 140; cf. *Gonzales v. Oregon*, 546 U.S. 243, 269 (2006) (denying *Skidmore* deference in part because of "the apparent absence" of consultation with "anyone outside the Department of Justice who might aid in a reasoned judgment").

<sup>279</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983).

<sup>280</sup> See Galle & Seidenfeld, *supra* note 114, at 1996–97 (proposing a multi-factor analysis for judicial review of agency decisions that displace state power, in which "the agency's decision process" is one factor); Metzger, *Administrative Law as the New Federalism*, *supra* note 114, at 2104–07 (suggesting an approach that "emphasizes the quality of agency reasoning and explanation").



2014]

*States as Interest Groups*

1025

simultaneously serving a trio of goals, a close study of state interest groups shows that administrative federalism's goals stand in tension with one another. While state interest groups excel at resisting federal power and advocating states' institutional interests, the groups disserve the goals of expert decision making based on state input and of maintaining democratic accountability. I argue that these mixed results reflect inherent tradeoffs: The operationalization of the most prominent federalism goal entails sacrifices for expertise and accountability.

By highlighting these tradeoffs, and by sketching best practices for balancing administrative federalism's competing goals, the Article has aimed to prompt reflection on the state role in federal administration. The path forward—the design of new channels for state involvement, the recalibration of existing channels, and the development of judicial review guiding state-agency interactions—should attend to both what is gained and what is lost through administrative federalism's institutional design.

