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A PROPHYLACTIC APPROACH TO COMPACT CONSTITUTIONALITY

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From COVID-19 to climate change, immigration to health insurance, firearms control to electoral reform: state politicians have sought to address all these hot-button issues by joining forces with other states. The U.S. Constitution, however, forbids states to "enter into any Agreement or Compact" with each other "without the Consent of Congress," a requirement that proponents of much interstate action, especially around controversial topics, would hope to circumvent.

The Supreme Court lets them do just that. By interpreting "any Agreement or Compact" so narrowly that it is difficult to see what besides otherwise unlawful coordination qualifies, the Court has essentially read the Compact Clause out of existence. Scholars have offered substitute standards. But those efforts serve to corroborate the analytical point on which current caselaw rests: that the infinite variety of ways in which states can collaborate makes separating constitutionally suspect from safe agreements impossible.

This Article presents a prophylactic path forward focused not on what "any Agreement or Compact" means, but on how "the Consent of Congress" works. It argues that Congress should encourage possible-compact reporting by establishing a system where submission plus silence can equal consent. This approach is prophylactic because it avoids difficult constitutional questions by preventing debatable constitutional

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violations. And it does so while preserving much of the state-favoring functionality of the current system. The Article contends that this approach makes theoretical sense given situations supporting regulatory safe harbors and juridical and political sense given court and congressional precedent. It also argues that the proposed approach facilitates balancing the efficiency, democracy, and community values underlying regional-governance mechanisms better than the current system does.

INTRODUCTION

In a classic 1925 *Yale Law Journal* article, future Justice Felix Frankfurter and James Landis wrote that "in the creation" of the U.S. Constitution "lurked the seeds of inevitable contest between the new

Union and its constituent members."[1] As a solution, they trumpeted interstate compacts,[2] which subsequently became ubiquitous.

More than two hundred formal compacts—addressing topics as diverse as boundaries, natural resources, infrastructure, and criminal-law enforcement—exist today.[3] As one commentator puts it, "compacts are everywhere."[4] In fact, "[i]f you have ever flown to New York City, or taken a subway ride in Washington, D.C., you have experienced an interstate compact in action," for "those transit systems are both products of innovative compacts between neighboring states."[5]

Efforts to form interstate partnerships often spring from politically contested terrain.[6] Democrats responded to former President Donald Trump's abandoning the Paris Agreement on climate change by creating the United States Climate Alliance, through which two dozen states committed to advancing the original treaty's goals.[7] Republicans responded to President Barack Obama's immigration policies by attempting to enact a Border Security Interstate Compact and similar measures.[8] Democratic New Jersey Governor Phil Murphy floated a gun-control compact when federal reforms failed to materialize after the Parkland school shooting.[9] And in nine states,

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1 Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—a Study in Interstate Adjustments*, 34 YALE L.J. 685, 685 (1925).

2 *See id.* at 691 (stating that "the pressure of modern interstate problems has revealed the rich potentialities of this device").

3 Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2352 (2020).

4 Jacob Finkel, Note, *Stranger in the Land of Federalism: A Defense of the Compact Clause*, 71 STAN. L. REV. 1575, 1577 (2019).

5 *Id.* at 1578.

6 *See id.* at 1578, 1589–91 (discussing the examples mentioned here).

7 *See* Tara Lee, *Inslee, New York Governor Cuomo, and California Governor Brown Announce Formation of United States Climate Alliance*, WASH. GOVERNOR (June 1, 2017), https://www.governor.wa.gov/news-media/inslee-new-york-governor-cuomo-and-california-governor-brown-announce-formation-united/ [https://perma.cc/ES4B-2JY3]; U.S. CLIMATE ALL., 2020 ANNUAL REPORT: EXECUTIVE SUMMARY 1 (2020). When President Joe Biden announced that the United States would rejoin the Paris Agreement, the Alliance "applauded" the action and "vowed to forge a new kind of state-federal partnership to confront the climate crisis." *U.S. Climate Alliance Lauds President Biden's Order to Rejoin Paris Agreement, Commits to New Kind of State-Federal Climate Partnership*, U.S. CLIMATE ALL. (Jan. 20, 2021), http://www.usclimatealliance.org/publications/rejoiningparis/ [https://perma.cc/2BLG-63V2].

8 *See An Interstate Compact for Border Security*, SEN. BOB HALL (Apr. 1, 2015), https://senatorbobhall.com/an-interstate-compact-for-border-security/ [https://perma.cc/AG5Z-B5RR]; Finkel, *supra* note 4, at 1590 (discussing "a border wall compact enacted by the Arizona legislature and a birth certificate monitoring compact authored by Kansas's then-Secretary of State Kris Kobach" (footnote omitted)).

9 *See* Edward-Isaac Dovere, *Murphy: 'We Gotta Die Trying' on Gun Control*, POLITICO MAG.: OFF MESSAGE (Feb. 20, 2018), https://www.politico.com/magazine/story/2018/02/

Republicans succeeded in passing the Health Care Compact, which upon congressional approval would allow state-specific alternatives to the Affordable Care Act.[10]

Enthusiasm for addressing hot-button issues through interstate compacts is increasing. Consider the National Popular Vote Interstate Compact, which aims to eliminate some states' disproportional impact on presidential campaigns. Adopted (so far) by fifteen states and Washington, D.C.,[11] this effort illustrates the momentum that interstate coordination enjoys in the current political moment. The participants promise that upon acceptance by a critical mass of states, their Electoral College delegations will support the winner of the national popular vote regardless of whom their citizens back.[12] Indeed, one set of commentators contends that interstate agreements could embody a "Goldilocks" solution not only to the "ongoing effects" of the COVID-19 pandemic, but also to "political . . . and moral crises" as varied as "voting rights, racial justice, climate change, [and] gaping inequality."[13]

Interstate partnerships became especially pronounced during the early months of the COVID-19 pandemic. When groups of governors began agreeing to work together to lift lockdowns and reopen businesses, commentators inside and outside the legal academy formed a chorus of support for expanding such endeavors. Professor Aziz Huq wrote in the *Washington Post* that states "could go an important step further by establishing 'interstate compacts'" aimed at "[r]emedying testing shortages, solving the shortfalls of medical equipment and instituting measures to avoid the virus's resurgence."[14] Evan Schultz in *Slate* advocated a "ventilator compact" where states could "bid as a group, and then shuttle the lifesaving machines between the states to

20/governor-phil-murphy-gun-control-new-jersey-interview-217029/ [https://perma.cc/76JT-CD8C].

10 *See* Diane Stafford, *Some States Propose Compact to Give Them Free Hand in Running Health Care Programs*, KAN. CITY STAR (Aug. 26, 2014, 8:45 PM), https://www.kansascity.com/news/business/health-care/article1305382.html [https://perma.cc/2Y5N-354F].

11 *See* Elliott Ramos, *There's a Plan Afoot to Replace the Electoral College, and Your State May Already Be Part of It*, NBC NEWS (Nov. 10, 2020, 10:07 AM), https://www.nbcnews.com/politics/2020-election/map-national-popular-vote-plan-replace-electoral-college-n1247159/ [https://perma.cc/WTN4-NNZJ].

12 *See id.*

13 Jon Michaels & Emme Tyler, Just-Right Government 1, 5–6 (Feb. 11, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3894046 [https://perma.cc/9LL4-EPCS].

14 Aziz Huq, *States Can Band Together to Fight the Virus—No Matter What Trump Does*, WASH. POST (Apr. 15, 2020, 3:22 PM), https://www.washingtonpost.com/outlook/2020/04/15/states-coronavirus-agreements-reopen/ [https://perma.cc/A2WN-3S57].

whatever coronavirus hot spots are exploding."[15] In fact, he said, states could use compacts to allocate "everything from face masks to medicine to, if necessary, even food."[16]

No sooner had the virtual ink dried on suggestions like these than states began taking them up. Most prominently, then-New York Governor Andrew Cuomo announced a "joint multi-state agreement" to create a "regional state purchasing consortium" for obtaining personal protective equipment, testing materials, and other medical supplies.[17] The consortium members vowed, among other things, to "work together" to "aggregate demand" and "reduce costs."[18] The official announcement stated that beyond improving public health, one goal was to "promote regional economic development," with the media reporting that the participating governors wanted to locate suppliers nearby.[19]

Often overlooked in the scramble for meaningful solutions to difficult problems is a constitutional provision subjecting interstate partnerships to special scrutiny. In the so-called Compact Clause, Article I, Section 10 says that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power."[20] The Supreme Court, however, has never held that an interstate arrangement violates this command. In fact, scholars have located only a single case in the entire sweep of American history declaring an instance of interstate cooperation unconstitutional under the Compact Clause.[21] Even then, the case did not look like a typical

15 Evan P. Schultz, *Cuomo Says the Feds Will Not Rescue New York. He Should Start an Interstate COVID Compact.*, SLATE (Apr. 3, 2020, 12:59 PM), https://slate.com/news-and-politics/2020/04/cuomo-says-new-york-no-covid-supplies-interstate-compact.html [https://perma.cc/QLX8-7JDY].

16 *Id.*

17 *Amid Ongoing COVID-19 Pandemic, Governor Cuomo, Governor Murphy, Governor Lamont, Governor Wolf, Governor Carney, Governor Raimondo & Governor Baker Announce Joint Multi-State Agreement to Develop Regional Supply Chain for PPE and Medical Equipment*, N.Y. GOVERNOR (May 3, 2020) [hereinafter *COVID-19 Agreement*], https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-governor-murphy-governor-lamont-governor-wolf/ [https://perma.cc/49ZR-R5DB].

18 *Id.*

19 *Id.*; Michael R. Sisak, *NY Joining Six States to Buy Vital Coronavirus Gear in Bulk*, ASSOCIATED PRESS (May 3, 2020), https://apnews.com/cc471e533008b44dde775f6b3e4fb25d/ [https://perma.cc/5ZLF-P88R].

20 U.S. CONST. art. I, § 10, cl. 3.

21 *See* Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 1028 (2016) (citing Sauer. v Nixon, No. 14AC-CC00477, 2015 WL 4474833, at *1 (Mo. Cir. Ct. Feb. 24, 2015) (concerning Missouri's participation in the education-related Smarter Balanced Assessment Consortium)).

Compact Clause challenge[22]—and the merits never went beyond a Missouri trial court because the case was dismissed on appeal as moot.[23]

As it turns out, the Court has essentially read the Compact Clause out of existence.[24] In the 1978 case *U.S. Steel Corp. v. Multistate Tax Commission*, the Court affirmed that "application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'"[25] As Professor Michael Greve explains, because compacts that inhibit the just supremacy of the United States "are bound to be void in any case under a conventional constitutional or preemption analysis," this standard makes it "difficult to imagine a state agreement on which the Compact Clause would operate as a distinct constitutional requirement and obstacle."[26]

This anything-goes approach is far from ideal. By sidelining the Compact Clause, current doctrine more or less excises text from the Constitution; makes a hash of the broader constitutional context; and distorts the structural balance of power between the federal government and states, among states themselves, and vis-à-vis individual rights.[27] In particular, the growth in interstate coordination reflecting "state-based resistance" to federal-government policymaking process calls for a meaningful congressional say in compact implementation, just as the Constitution contemplates.[28]

Interpreting the Compact Clause gives rise to two fundamental issues: first, the meaning of "any Agreement or Compact," which we can call the "compact question"; and second, the meaning of "the Consent of Congress," which we can call the "consent question."[29] Scholarly efforts to restore content to the Clause have largely focused on the compact question, attempting to delineate what kinds of interstate partnerships should require congressional support to proceed.

This Article contends that scholarly alternatives to current doctrine are unworkable in significant part because of the legal and factual complexity surrounding the myriad and evolving ways states can collaborate. In both caselaw and commentary, the compact question has

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22 *See id.* at 1029; *infra* Section II.A.

23 *See* Sauer v. Nixon, 474 S.W.3d 624, 630 (Mo. Ct. App. 2015).

24 *See infra* Section II.A.

25 U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 471 (1978) (quoting New Hampshire v. Maine, 426 U.S. 363, 369 (1976) (quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893))).

26 Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 288 (2003).

27 *See infra* Section II.B.

28 Finkel, *supra* note 4, at 1578.

29 *See infra* Part I.

proved impossible to answer in any practically satisfactory manner.[30] This Article thus advocates shifting attention to the consent question by reimagining how congressional approval—as distinct from compact identification—works. In particular, the Article proposes that Congress should adopt a so-called report-and-wait mechanism where silence in the face of possible-compact submission can qualify as consent, thereby providing a safe harbor of sorts for states to pursue productive partnerships while honoring constitutional commitments.[31]

A couple clarifications may be helpful up front. First, this Article's proposal would act as a supplement to, not a substitute for, judicial review construing the Compact Clause. The proposal represents a partial political solution to both the legal problem inherent in the Court's emptying the Clause of meaning and the practical problem inherent in attempts to separate constitutional from unconstitutional interstate actions. Interpretive concerns inform the proposal, but the core contention is that Congress should assert greater policy control over interstate compacting, not that courts should apply the constitutional text in any particular way. Second, the proposal envisions an optional, not obligatory, intervention. States would not be required to report anything to Congress to interact as they wish. Instead, the proposal includes incentives for them to do so—and leaves room for the possibility of third-party submission as well.

The Article unfolds in three parts. Part I offers an overview of caselaw, first on the compact question and then on the consent question. Along the way, this Part outlines different incarnations of interstate agreements and different connections to American federalism.

Part II contends that stakeholders across the legal system could benefit from a prophylactic approach to implementing the Compact Clause—meaning an approach aimed at avoiding difficult constitutional questions by preventing debatable constitutional violations. This Part begins by explaining how current doctrine essentially makes the Clause gratuitous and proceeds to examine its text, context, and relationship to the wider constitutional structure. It then analyzes substitute standards proffered in previous scholarship, finding them flawed for the same reason that caselaw falters: because the compact question, on which both courts and commentators have focused, cannot realistically separate constitutionally suspect from constitutionally safe interstate actions.

Part III presents an alternative proposal for a prophylactic approach, first arguing that Congress should encourage possible-compact submission by establishing a report-and-wait system, meaning a

30 *See infra* Section II.C.

31 *See infra* Part III.

mechanism where submission plus silence can equal consent. This Part then canvasses supporting considerations, from the regulatory theory behind providing safe harbors to judicial and political precedent concerning creative forms of congressional consent. It next contends that the proposed system facilitates advancements in some of the central values underlying the case for regional-governance mechanisms—efficiency, democracy, and community—as compared to current conditions. This Part closes by addressing some potential concerns.

I. THE CASELAW

The Compact Clause appears in the third sentence of Article I, Section 10 of the Constitution, which reads as follows:

> *No State shall, without the Consent of Congress,* lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, *enter into any Agreement or Compact with another State, or with a foreign Power*, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.[32]

The Clause produces two obvious interpretive issues. First is the compact question: what is "any Agreement or Compact" sufficient to activate the provision? Second is the consent question: what is "the Consent of Congress" sufficient to satisfy it? This Part explains how the Supreme Court has worked through each of these issues. Along the way, it provides an overview of compact history and federalism connections.

Before proceeding, a note on terminology. The Compact Clause addresses both state partnerships with other states and state partnerships with foreign powers. Some commentators therefore distinguish between the "Interstate Compact Clause" and the "Foreign Compact Clause."[33] In referring to the "Compact Clause" without further elaboration, this project follows the lead of other work to mean the provision's interstate dimension.[34]

A. The Compact Question

Three major Supreme Court decisions define what counts as an agreement or compact necessitating congressional consent. The first

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32 U.S. CONST. art. I, § 10, cl. 3 (emphases added).

33 *See, e.g.*, Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 769 (2010).

34 *See, e.g.*, Greve, *supra* note 26, at 285 ("The Compact Clause (Art. I, Sec. 10 U.S. Constitution) requires congressional approval for 'any agreement or compact' among the states.").

is the 1893 case *Virginia v. Tennessee*.[35] The second is the 1978 case *U.S. Steel Corp. v. Multistate Tax Commission*.[36] The third is the 1985 case *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*.[37] As it turns out, each helps introduce a distinct kind of compact premised on a distinct conception of American federalism.

1. *Virginia v. Tennessee*

In *Holmes v. Jennison*, a case from 1840 about the foreign component of the Compact Clause,[38] four of eight participating Justices arguably (if indirectly) endorsed the view that all interstate arrangements are constitutionally cognizable. According to Chief Justice Taney's opinion, the Framers "anxiously desired to cut off all connection or communication between a state and a foreign power" and thus "use[d] the broadest and most comprehensive terms" possible.[39] The opinion reasoned that "we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties."[40]

Relative to that reasoning, *Virginia v. Tennessee* marked a major shift. The case centered around a boundary dispute between the two parties. Virginia traced the boundary back to a series of English charters.[41] Tennessee claimed that the states fixed a different boundary through the work of commissioners approved by joint state legislation at the turn of the nineteenth century.[42] Virginia attacked Tennessee's position on the ground that the interstate action violated the Compact Clause because of a lack of congressional consent.[43]

Parsing the Clause's text, the Supreme Court stated that "[t]he terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects."[44] But that literal interpretation could not be correct, the Court reasoned, for "[t]here are many matters upon which different States may agree that can in no respect

35 148 U.S. 503 (1893).
36 434 U.S. 452 (1978).
37 472 U.S. 159 (1985).
38 39 U.S. (14 Pet.) 540 (1840).
39 *Id.* at 572.
40 *Id.*
41 Virginia v. Tennessee, 148 U.S. 503, 504 (1893).
42 *Id.* at 504–05.
43 *Id.* at 517.
44 *Id.* at 517–18.

concern the United States."[45] What if "Virginia should come into possession and ownership of a small parcel of land in New York," and the latter should want to buy it to construct a public building there?[46] Surely Congress should not have to assent.[47] Or what if Massachusetts, "in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal" through a contract with New York?[48] The parties should not need to seek federal approval.[49]

In context, the Court concluded, "it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[50] Whether a boundary agreement qualified depended on its effects, the Court explained: it may "be within the prohibition of the Constitution or without it, according as the establishment of the boundary line may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority."[51]

The Court never decided whether Virginia and Tennessee's conduct amounted to a cognizable compact because it held that Congress had provided sufficient consent.[52] And the Court also declared that apart from any compact, "a boundary line between States or Provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive."[53] The case nevertheless became a landmark in assessing which interstate actions count under the Compact Clause.

Virginia v. Tennessee addressed the classic form of interstate agreement, the "boundary compact." These settlements "establish state boundaries" and "do no more."[54] In the 1838 case *Rhode Island v. Massachusetts*, the Court declared that "[n]o one has ever imagined that compacts of boundary were excluded" from the Compact Clause "because not expressly named."[55] Any "such exception," the Court said,

45 *Id.* at 518.
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.* at 519.
51 *Id.* at 520.
52 *See infra* Section I.B.
53 Virginia v. Tennessee, 148 U.S. at 522.
54 Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 9 (1997).
55 Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 725 (1838).

"would render the clause a perfect nullity for all practical purposes; especially the one evidently intended by the constitution."[56] Research traces the first boundary compact to a 1656 accord between Connecticut and New Netherlands, a Dutch colony comprising much of the mid-Atlantic area.[57] By 1921, thirty-six interstate agreements had received congressional consent: "virtually all" were boundary compacts.[58]

Boundary compacts reflect a conception of federalism rooted in relatively simple apportionment efforts. One could call this "coordinative federalism" on the idea that states can agree, potentially with the federal government's blessing, to divvy up disputed geographic or policy domains into discrete proprietary or regulatory zones.

2. *U.S. Steel*

The Supreme Court's 1978 decision in *U.S. Steel* started from the premise that "[a]t this late date, we are reluctant to . . . circumscribe modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy."[59] Finding "no effective alternative other than a literal reading of the Compact Clause," the Court settled on echoing *Virginia v. Tennessee*, decided almost a century before.[60] "[A]pplication of the Compact Clause," the Court said, "is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'"[61]

At issue in *U.S. Steel* was whether to extend the *Virginia v. Tennessee* standard from "bilateral agreements involving no independent administrative body" to "a multilateral agreement creating an active administrative body with extensive powers delegated to it by the States."[62] The Multistate Tax Compact established an administrative body called the Multistate Tax Commission for the purposes of "facilitating proper determination of state and local tax liability of multistate taxpayers," "promoting uniformity and compatibility in state tax systems," "facilitating taxpayer convenience and compliance," and "avoiding

56 *Id.* at 725–26.

57 *See* Frankfurter & Landis, *supra* note 1, at 730.

58 Greve, *supra* note 26, at 288.

59 U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460 (1978).

60 *Id.* at 460; *see id.* at 471.

61 *Id.* at 471 (quoting New Hampshire v. Maine, 426 U.S. 363, 369 (1976) (quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893))). *New Hampshire v. Maine*, which concerned a marine-border dispute occasioned by lobster-fishing clashes, reaffirmed *Virginia v. Tennessee*'s applicability in the boundary context. *See* New Hampshire v. Maine, 426 U.S. at 364 & n.1, 369.

62 *U.S. Steel*, 434 U.S. at 471.

duplicative taxation."[63] Among the Commission's powers were the abilities to "adopt uniform administrative regulations in the event that two or more States have uniform provisions relating to specified types of taxes," to perform audits for requesting states, and to "seek compulsory process in aid of its auditing power in [state] courts."[64] The Commission, in essence, administered a wide swath of state tax laws.

The *U.S. Steel* majority concluded that the Multistate Tax Compact contained "no provisions that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States."[65] No matter, to quote the Commission itself, that the Compact's "origin" was "intimately related and bound up with the history of the states' struggle to save their fiscal and political independence from encroachments of certain federal legislation introduced in Congress."[66] No matter, to quote the Commission again, that a "major goal[]" was to "guard against restrictive federal legislation and other federal action which impinges upon the ability of state tax administrators to carry out the laws of their states effectively."[67] And no matter, to quote the Commission a third time, that it had recently "taken the lead in stirring opposition" to provisions of proposed international tax treaties[68]—one of which, after negotiation by the President "in the diplomatic interest of the United States," was signed and awaiting Senate ratification.[69]

The Court cared about two aspects of the Multistate Tax Compact. First was the voluntary nature of some of its operations. The Compact involved no "delegation of sovereign power to the Commission," the Court reasoned, for "each State retain[ed] complete freedom to adopt or reject [its] rules and regulations."[70] Each member also remained "free to withdraw at any time."[71] The second aspect the Court deemed

63 *Id.* at 456.

64 *Id.* at 457.

65 *Id.* at 472.

66 MULTISTATE TAX COMM'N, FIRST ANNUAL REPORT: FOR THE PERIOD ENDING DEC. 31, 1968, at 1 (1969), http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY67-68.pdf [https://perma.cc/HU3T-SR8R], *quoted in U.S. Steel*, 434 U.S. at 487 (White, J., dissenting); *see also U.S. Steel*, 434 U.S. at 456, 458 n.8 (majority opinion) (noting that the Compact was drafted "[w]hile Congress was wrestling with the problem" and remarking that "[c]ongressional consent has been sought, but never obtained").

67 MULTISTATE TAX COMM'N, NINTH ANNUAL REPORT: FOR THE FISCAL YEAR OF JULY 1, 1975–JUNE 30, 1976, at 1 (1976), http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY75-76.pdf [https://perma.cc/4BVX-ZQ5Y], *quoted in U.S. Steel*, 434 U.S. at 487 (White, J., dissenting).

68 *Id.* at 3, *cited in U.S. Steel*, 434 U.S. at 488 (White, J., dissenting).

69 *U.S. Steel*, 434 U.S. at 488 (White, J., dissenting).

70 *Id.* at 473 (majority opinion).

71 *Id.*

significant was that the Compact did not "purport to authorize the member States to exercise any powers they could not exercise in its absence."[72] The Court returned to this theme again and again, reasoning that even if the Commission was acting unlawfully (say, by intruding into the federal government's power over foreign relations), the face of the Compact did not authorize conduct that states could not have undertaken on their own.[73]

The Multistate Tax Compact is an "agency compact." These compacts "create ongoing administrative agencies with jurisdiction over such varied and important domains as resource management, public transportation, and economic development."[74] The 1921 compact creating the Port Authority of New York and New Jersey has long provided the paradigmatic example.[75]

Rather than coordinative federalism, the Multistate Tax Compact reflects a more cynical approach to the American governmental system. Over the last few decades, interstate compacts have sounded in a new era of what one could call "competitive federalism," where "[f]ederal government action, or inaction, now routinely encounters state-based resistance."[76] The idea is not that states compete for citizens (as some have used the term[77]), but that states create ideologically consistent in-groups to challenge ideologically conflicting out-groups for control over issues the former have failed to dictate through federal governance mechanisms.[78] The National Popular Vote Interstate Compact, which arose after acknowledgements that reform would be impossible through the national constitutional-amendment process, represents a prime example.[79] So too does the COVID-19 purchasing

72 *Id.*

73 *See id.* at 472–78.

74 Hasday, *supra* note 54, at 4.

75 *See* David E. Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 63 & n.1 (1965).

76 Finkel, *supra* note 4, at 1578.

77 *E.g.*, MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 6–7 (2012); Owen Lipsett, Comment, *The Failure of Federalism: Does Competitive Federalism Actually Protect Individual Rights?*, 10 U. PA. J. CONST. L. 643, 643 (2008); *see* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (arguing that "[t]he consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods").

78 *See* Matthew Pincus, Note, *When Should Interstate Compacts Require Congressional Consent?*, 42 COLUM. J.L. & SOC. PROBS. 511, 521 (2009) (arguing that such agreements' "[s]upporters attempt to utilize the interstate compact device in a way that appears pretextual and designed to accomplish goals that they think they would be unable to accomplish by constitutional amendment or by federal legislation").

79 *See id.* at 520–21. For one such acknowledgement, see Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2d 241, 241 (2001).

consortium, which arose after failed attempts to convince the federal government to craft a national strategy for pandemic-related purchasing.[80]

3. *Northeast Bancorp*

Northeast Bancorp, the final significant decision defining what triggers the consent requirement, concerned laws regulating the banking industry. Connecticut and Massachusetts had enacted statutes allowing bank-holding companies based in other New England states to own in-state banking businesses on the condition that the institutions' home states granted businesses from Connecticut or Massachusetts, respectively, the same rights.[81]

The Supreme Court rejected the challenge that these statutes were void for lack of congressional approval. The Court said it harbored "some doubt as to whether there is an agreement amounting to a compact" in the first place.[82] (Never mind that the constitutional text covers "*any* Agreement *or* Compact.") The Court acknowledged that the laws were similar in substance; were motivated by a common policy of creating a regional New England banking system; and were apparently preceded by "cooperation among legislators, officials, bankers, and others in the two States in studying the idea and lobbying for the statutes."[83] But the Court concluded that "several of the classic indicia of a compact" were absent.[84]

In particular, the Court said, "[n]o joint organization or body" had been set up (notwithstanding that agency compacts, which give rise to such entities, a relative newcomer on the historical scene).[85] Neither provision was "conditioned on action by the other State" (notwithstanding that the schemes were indeed conditioned on action by *some* other state).[86] Both Connecticut and Massachusetts remained "free to modify or repeal" their statutes "unilaterally" (notwithstanding that court and congressional precedent cast doubt on this criterion for creating a compact).[87] And neither provision mandated "a

80 *See COVID-19 Agreement*, *supra* note 17 (quoting Connecticut Governor Ned Lamont as stating that he had "long been advocating for the federal government to get involved").

81 Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 472 U.S. 159, 164 (1985).

82 *Id.* at 175.

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*; *see* Hasday, *supra* note 54, at 45–46; *see also* Fahey, *supra* note 3, at 2361 & n.152 (discussing more recent cases suggesting that compacts may expressly allow unilateral amendment).

reciprocation of the regional limitation" (notwithstanding that not all compacts contemplate matching regulatory action).[88]

The Court proceeded to say that even if it were to assume the existence of a compact, the statutes still did not implicate the Compact Clause.[89] Because the Douglas Amendment to the Federal Bank Holding Company Act specifically permitted states to authorize out-of-state institutions to acquire in-state banks, the Court concluded that the challenged provisions could not have intruded on federal supremacy.[90] For the Douglas Amendment apparently amounted to "a renunciation of federal interest in regulating" the area.[91]

The important point for present purposes is the first line of reasoning, about what the Court called the "classic indicia of a compact." Given that the Court voiced mere "doubt" about whether Connecticut and Massachusetts had entered into a compact on this ground but said the states' statutes "c[ould] not possibly" have infringed federal supremacy,[92] the classic-indicia comments seem like dicta.[93] But other scholars appear to disagree,[94] and lower courts have treated this reasoning as binding.[95]

The parallel legislation under consideration in *Northeast Bancorp* introduces a third type of interstate compact, the "one-shot-project compact." These agreements may "most often involv[e] the allocation of natural resources (particularly water) or the building of bridges."[96] But discrete regulatory commitments like the one at issue in *Northeast Bancorp* can fit within this category too. When it comes to the history of interstate compacts, these collaborations act as a connection between the Founding Era's focus on boundary compacts and the Progressive Era's advent of agency compacts. A few examples include an

88 *Ne. Bancorp*, 472 U.S. at 175. The Health Care Compact, for instance, provides that "[t]he legislatures of the Member States have the primary responsibility to regulate Health Care in their respective States" and makes clear that the signatories may proceed based on their own "judgment and discretion." COMPETITIVE GOVERNANCE ACTION, THE HEALTH CARE COMPACT §§ 2–3 (2011), https://www.healthcarecompact.org/HCC_Final.pdf [https://perma.cc/3J2U-5SPF] [hereinafter HEALTH CARE COMPACT].

89 *Ne. Bancorp*, 472 U.S. at 175–76.

90 *Id.* at 163, 176.

91 *Id.* at 166 (describing the Federal Reserve Board's argument).

92 *Id.* at 175–76.

93 *See* Hasday, *supra* note 54, at 45 (calling the classic-indicia reasoning—or at least the part about whether a state may unilaterally modify or repeal its law—"dicta").

94 *See* Greve, *supra* note 26, at 309 n.103 (suggesting that the federal-supremacy reasoning should be treated as dicta).

95 *See, e.g.*, Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conservation Plan. Council, 786 F.2d 1359, 1363 (9th Cir. 1986); *In re* Manuel P., 263 Cal. Rptr. 447, 457 (Cal. Ct. App. 1989); *see also* United States v. California, 444 F. Supp. 3d 1181, 1194–96 (E.D. Cal. 2020) (reasoning along similar lines for the foreign component of the Compact Clause).

96 Hasday, *supra* note 54, at 4, 9 (footnote omitted).

1825 compact giving rise to the Chesapeake and Ohio Canal, an 1833 compact permitting New York and New Jersey to serve process throughout New York Harbor, and a 1918 compact providing that Washington and Oregon would preserve their fishing codes for Columbia River conservation purposes.[97]

The states' matching actions here, moreover, bear some relation to "cooperative federalism." This notion denotes a situation "whereby each [entity] recognizes the powers of the other while jointly engaging in certain governmental functions."[98] The label most commonly applies to vertical "[d]istribution[s] of power between the federal government and the states."[99] But states can also cooperate with each other in a horizontal manner, and *Northeast Bancorp* involved complementary federal-state conduct too (in the form of the Douglas Amendment).

Like agency compacts, the notion that interstate agreements could further cooperative-federalism ends traces back to the Progressive Era—and particularly to future Justice Frankfurter and Landis's influential 1925 article. Heralding the Port Authority of New York and New Jersey as a spectacular success, the authors argued that "[o]ur rapid industrialization is generating an insistent variety of interaction in the affairs of the several States," that "[t]he exclusiveness of the traditional choice" between state and federal governance "is becoming correspondingly inadequate," and that "[c]reativeness is called for to devise a great variety of legal alternatives to cope with the diverse forms of interstate interests."[100]

The Supreme Court, in sum, has limited the Compact Clause to interstate arrangements that threaten federal supremacy—and even then, it seems, to a subset of that subset. Compacts, moreover, come in at least three flavors (boundary, agency, and one-shot-project) and reflect at least three forms of federalism (coordinative, competitive, and cooperative).

B. The Consent Question

Once something qualifies as an agreement or compact, the Compact Clause conditions constitutionality on congressional consent. Like with the compact question, there is little binding Supreme Court caselaw on the consent question. Indeed, *Virginia v. Tennessee*—from

97 *See* Comment, *Congressional Supervision of Interstate Compacts*, 75 YALE L.J. 1416, 1425 (1966).

98 *Federalism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

99 *Id.*

100 Frankfurter & Landis, *supra* note 1, at 688, 697–98.

1893—is the most recent decision to confront the question head-on.[101] And even then, the discussion amounted to an alternative holding at most.[102]

In *Virginia v. Tennessee*, the Court explained that "[t]he Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied."[103] The Court filled these gaps with flexible standards. As for timing, the Court stated that while ex ante congressional consent may be more common, "it is not perceived why" ex post consent would not suffice "where the agreement relates to a matter which could not well be considered until its nature is fully developed."[104] As for form, the Court stated that in addition to express consent by "formal proceedings," "the consent may be implied, and is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them."[105]

In *Virginia v. Tennessee* itself, the Court found ex post and implied consent sufficient. Congressional approval was evident from "subsequent legislation and proceedings," the Court said, detailing various respects in which "[t]he line established" by the Commissioners "was treated by [Congress] as the true boundary between the States"—including in setting judicial, revenue, and electoral districts.[106]

Accordingly, current doctrine says that Congress can manifest consent to interstate compacts on an ex ante or ex post basis and through express or implied means. The Court, however, has never fleshed out the limits of what implied consent might involve, instead engaging in an ad hoc consideration of each case on its own facts. In *Virginia v. Tennessee*, multiple tacit acts of ex post ratification counted. In the earlier case *Virginia v. West Virginia*, congressional approval of a larger piece of legislation (seeking to admit West Virginia to the Union) that incorporated an interstate agreement (regarding under what conditions certain counties would join the new state) was adequate.[107] And to the extent *Northeast Bancorp* addressed the consent question at all,[108] the Douglas Amendment's ex ante enactment sufficed.

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101 *See* Greve, *supra* note 26, at 379.

102 *See supra* subsection I.A.1.

103 Virginia v. Tennessee, 148 U.S. 503, 521 (1893).

104 *Id.*

105 *Id.* at 521–22.

106 *Id.* at 522.

107 Virginia v. West Virginia, 78 U.S. (11 Wall.) 39, 59–61 (1871).

108 *See* Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 472 U.S. 159, 175–76 (1985). Professor Greve treats *Northeast Bancorp* as touching on consent. *See* Greve, *supra* note 26, at 380 n.358. But the passage he cites purports to explain why the legislation did not violate federal supremacy—the quintessential inquiry under the compact question.

At bottom, the scope of Compact Clause congressional consent is broad, but its contours remain blurry.

II. THE CLAIM

Relative to current circumstances, stakeholders across the legal system could benefit from a prophylactic approach to implementing the Compact Clause—meaning an approach aimed at avoiding difficult constitutional questions by preventing debatable constitutional violations. This idea draws inspiration from the concept of "prophylactic rules" in constitutional (and especially criminal-procedure) interpretative theory. As the Supreme Court indicated just last Term, prophylactic rules "protect against constitutional violations" in practice without "necessarily" delineating what "constitutes a constitutional violation" in substance.[109] Their purpose is to permit the overenforcement of certain constitutional provisions in service of values like administrability and deterrence.[110]

This Part supports the claim that a prophylactic approach would improve upon the present system first by explaining how current doctrine renders the congressional-consent requirement largely irrelevant to the constitutional order. This Part proceeds to argue that current doctrine essentially excises text from the Constitution; makes a hash of the broader constitutional context; and distorts the structural balance of power between the federal government and the states, among states themselves, and vis-à-vis individual rights. Finally, this Part demonstrates how substitute Compact Clause standards proffered in previous scholarship falter for the same reason that caselaw has not settled on a workable test: because of the practical impossibility of separating constitutionally-suspect from constitutionally-safe interstate actions.

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109 Vega v. Tekoh, 142 S. Ct. 2095, 2100 (2022).

110 *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 30–32 & n.115 (2004) (collecting definitions). Prophylactic rules have generated significant controversy when imposed by courts. *Compare, e.g.*, Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 101 (1985) (asserting that court-imposed prophylactic rules "raise a question of constitutional legitimacy"), *with* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) (arguing that "'prophylactic' rules are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law"). And the Court has held that Congress has limited authority to impose prophylactic rules on other actors when relying on its enforcement power under Section 5 of the Fourteenth Amendment. *See* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997).

A. The Effect of Current Doctrine

Though vague, the *U.S. Steel* test may seem like it would produce a sensible rough cut of the kind of interstate actions the Compact Clause should target. One could reasonably believe that "it would be 'the height of absurdity' to subject *all* interstate agreements" to congressional control.[111] And the Supreme Court's assertion that threats to the relationship between the federal government and the states constitute the Clause's "object" seems plausible at first glance.[112]

To start, however, two factors differentiate the current test in theory from the current test in practice. First, *U.S. Steel* construed *Virginia v. Tennessee*'s supremacy-focused standard far more stringently than it could have. The majority limited the standard's scope to arrangements that *contravene constitutionally exclusive federal powers* rather than (as the dissent argued it should have)[113] reading the test to encompass arrangements that *concern constitutionally cognizable federal interests.*[114] Second, *U.S. Steel* proclaimed that the "pertinent inquiry" was "one of potential, rather than actual, impact upon federal supremacy,"[115] but (as the dissent again pointed out)[116] that assurance was meaningless. For the Court's analysis turned not on whether member states *could have* crossed constitutional lines, but on whether they *already had* crossed constitutional lines—and even then, on whether the compact at issue specifically permitted them to do so.[117]

The upshot of *Virginia v. Tennessee*, *U.S. Steel*, and *Northeast Bancorp* is that the Court has rendered the Compact Clause a "virtual nullity."[118] As the *U.S. Steel* dissent argued, "[t]he Clause must mean that some actions which would be permissible for individual States to undertake are not permissible for a group of States to *agree* to undertake."[119] But as Professor Greve notes, agreements that violate the Court's cramped construction "are bound to be void in any case under a conventional constitutional or preemption analysis."[120] And they would be few and

111 Huq, *supra* note 14 (emphasis added) (quoting Virginia v. Tennessee, 148 U.S. at 518).

112 Virginia v. Tennessee, 148 U.S. at 519.

113 *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 489 (1978) (White, J., dissenting).

114 *See id.* at 473, 479 n.33 (majority opinion); Bulman-Pozen, *supra* note 21, at 1025–26.

115 *U.S. Steel*, 434 U.S. at 472.

116 *See id.* at 480–81 (White, J., dissenting).

117 *See* Greve, *supra* note 26, at 307 ("[T]he majority's test is not the 'potential impact' rule of *Virginia v. Tennessee*; the test is an *actual* conflict between the language of some compact provision and a federal (constitutional or statutory) norm.").

118 *Id.* at 301.

119 *U.S. Steel*, 434 U.S. at 482 (White, J., dissenting).

120 Greve, *supra* note 26, at 288.

far between given *Northeast Bancorp*'s restrictive indicia anyway. So "it is difficult to imagine a state agreement on which the Compact Clause would operate as a distinct constitutional requirement and obstacle."[121]

Corroborating this understanding, scholars appear to have located only a single case in the entire sweep of American history holding an interstate arrangement unconstitutional under the Compact Clause. Commentators used to assert that "no court, at any level, has ever found an interstate agreement lacking congressional approval to encroach on federal supremacy."[122] But a recent "exception" exists in the form of an unreasoned, two-paragraph order from 2015 holding that Missouri's participation in the education-related Smarter Balanced Assessment Consortium (SBAC) violated the Clause.[123] Even then, the merits never went beyond a state trial court, for an appellate tribunal dismissed the matter as moot after Missouri terminated its membership on other grounds.[124]

Professor Jessica Bulman-Pozen has argued, moreover, that while the trial court declared the SBAC "an unlawful interstate compact to which the U.S. Congress has never consented, whose existence and operation violate the Compact Clause of the U.S. Constitution," the challengers were "not actually advancing an argument about the Compact Clause" at all.[125] For their contention was that the SBAC arose from the U.S. Department of Education (DOE) incentivizing interstate collaboration in violation of a congressional provision prohibiting the DOE from overseeing states' education-policy decisions—such that the alleged threat to federal supremacy came first and foremost from a different branch of the federal government itself.[126]

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121 *Id.* The Court has suggested, it bears noting, that affirmative attempts to "adjust[]" state boundaries—as opposed to merely "locating" them—could require congressional consent. *See* New Hampshire v. Maine, 426 U.S. 363, 370 (1976) ("The proposed consent decree plainly falls without the Compact Clause . . . . New Hampshire and Maine are not here adjusting the boundary between them; the boundary was fixed over two centuries ago by the 1740 decree, and the consent decree is directed simply to locating precisely this already existing boundary.").

122 Hollis, *supra* note 33, at 766.

123 Bulman-Pozen, *supra* note 21, at 1028 (citing Sauer v. Nixon, No. 14AC-CC00477, 2015 WL 4474833, at *1 (Mo. Cir. Ct. Feb. 24, 2015)); *see* Sauer v. Nixon, 474 S.W.3d 624, 627 (Mo. Ct. App. 2015) (explaining that under the SBAC, Missouri committed to employing "Common Core" standards, using specific assessments, accepting centralized supervision, following schedules, assisting with decisionmaking, and attempting to address state-government impediments).

124 *See Sauer*, 474 S.W.3d at 629–30.

125 Bulman-Pozen, *supra* note 21, at 1028–29 (alteration omitted) (quoting *Sauer*, 2015 WL 4474833, at *1).

126 *See id.*

In short, as far back as *Virginia v. Tennessee*'s publication in 1893, the Supreme Court began throwing up its hands when asked to separate what counts as a constitutionally cognizable interstate compact requiring congressional consent from what does not. With the express extension of the just-supremacy standard from the classic boundary-compact and coordinative-federalism contexts to the more complex agency-compact and competitive-federalism contexts, *U.S. Steel* completed the surrender. The compact question, the Court has signaled, is incapable of producing principled and practical guidance for differentiating between constitutionally suspect and safe interstate actions.

B. The Case for a New Approach

Current doctrine makes the Compact Clause more or less meaningless. The case for a new approach starts from a historically informed look at the Clause's text, the contextual implications of the nearby Treaty Clause, and the larger constitutional structure. The ensuing discussion addresses these areas in turn.

1. The Compact Clause Text

The fact that current doctrine essentially excises words from the Constitution should trouble those with a rule-of-law commitment to the document's text. And that is especially so given that the Compact Clause's language seems "broad and unqualified."[127]

The Supreme Court declared early on that "the terms compact and contract are synonymous."[128] The Compact Clause applies not only to any "Compact," however, but also to any "Agreement," providing (contrary to some constructions) a strong reason to understand its sweep as extending beyond contracts alone.[129] Four Justices suggested as much before *Virginia v. Tennessee* in *Holmes*, stating that "[t]he word 'agreement,' does not necessarily import any direct and express stipulation."[130] All this casts considerable doubt on the Court's suggestion that the Clause covers only arrangements that violate federal supremacy (under *U.S. Steel*)—let alone only arrangements where a "joint

127 Greve, *supra* note 26, at 297.

128 Green v. Biddle, 21 U.S. (8 Wheat.) 1, 92 (1823).

129 *See* Virginia v. Tennessee, 148 U.S. 503, 520 (1893) ("[T]he word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement'. . . ."). *But see, e.g.*, Roderick M. Hills, *Keeping the Compact Clause Irrelevant*, 44 HARV. J.L. & PUB. POL'Y 29, 30 (2021) (arguing that because "[t]he text refers to compacts or contracts," "[i]t is a reasonable reading of these words to argue that mere coordination among states does not amount to a compact or contract unless such coordination is accompanied by some sort of an enforcement mechanism").

130 Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 572 (1840) (opinion of Taney, C.J.).

organization or body has been established," that are "conditioned on action" by another state, where each state is not "free to modify or repeal its law unilaterally," and that "require[] a reciprocation" of substantive provisions (all under *Northeast Bancorp*).[131]

At the same time, common sense suggests that "Agreement" within the text of the Compact Clause cannot (or at least should not) be understood to include every conceivable interstate action. While the ways that states could cooperate were comparatively limited early in the nation's history, increased opportunities for communicative and commercial discourse make it imprudent, even impossible, to require congressional consent for each and every interstate action. Should Congress have to approve all amicus briefs filed by two or more states in litigation affecting their interests? What about all sandwiches purchased on a state account from another state's public-university cafeteria? Surely not.[132]

Unfortunately, the constitutional drafting and ratification history says little expressly about the Compact Clause. As future Justice Frankfurter and Landis put it, "[t]he records of the Constitutional Convention furnish no light as to [its] source and scope."[133] *The Federalist* simply asserts that the Clause "fall[s] within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark."[134] And the Court has declared that "[t]he records of the state ratification conventions also shed no light."[135]

With the Compact Clause's text and express history providing only the sketchiest clues about its meaning, the constitutional context and structure assume added importance.

2. The Treaty Clause Context

No consideration of the Compact Clause would be complete without weighing the implications of the nearby Treaty Clause. The first sentence of Article I, Section 10 states that

> *[n]o State shall enter into any Treaty, Alliance, or Confederation*; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit;

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131 Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 472 U.S. 159, 175 (1985).

132 *See* Hills, *supra* note 129, at 35 (offering the example of two public universities making a deal to play a football game).

133 Frankfurter & Landis, *supra* note 1, at 694.

134 THE FEDERALIST NO. 44, at 283 (James Madison) (Clinton Rossiter ed., 1961).

135 U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 461 n.11 (1978); *see also* Abraham C. Weinfeld, Comment, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?*, 3 U. CHI. L. REV. 453, 454 (1936) (stating that "there appears to have been no discussion or reference to 'agreements or compacts'" there).

> make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.[136]

Just like the Compact Clause, interpreters have long read the Treaty Clause as encompassing both associations between states and foreign entities and associations between states and other states.[137]

This dovetails with the Articles of Confederation provision that served as a model. The Articles provided first that "[n]o State, without the Consent of the united States, in congress assembled, shall . . . enter into any conferrence, agreement, alliance, or treaty, with any King prince or state."[138] The Articles provided second that "[n]o two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the united states, in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue."[139] James Madison said that "[t]he prohibition against treaties, alliances, and confederations makes a part of the existing articles of Union; and for reasons which need no explanation, is copied into the new Constitution."[140]

Accordingly, the Constitution establishes a *qualified* proscription against states entering into *agreements or compacts* with each other: they may do so only with congressional consent. And it establishes an *absolute* proscription against states entering into *treaties, alliances, or confederations* with each other: they may not do so at all.

There must be some difference, then, between agreements and compacts on the one hand and treaties, alliances, and confederations on the other. But as one scholar puts it, "the founding documents provide little evidence as to just what these terms meant," such that "no modern consensus exists on how to differentiate the prohibited 'Treaty, Alliance, or Confederation' from Congress's power to approve 'any Agreement or Compact.'"[141] Or as the Supreme Court has declared, "[w]hatever distinct meanings the Framers attributed to the terms in Art. I, § 10, those meanings were soon lost."[142]

Nevertheless, three classic theories of the treaty–compact distinction bear mentioning.[143] The first—and seemingly best supported[144]—

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136 U.S. CONST. art. I, § 10, cl. 1 (emphasis added).

137 *See, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1396–97, at 270–72 (Boston, Hilliard, Gray, & Co. 1833).

138 ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1.

139 *Id.* art. VI, para. 2.

140 THE FEDERALIST NO. 44, *supra* note 134, at 281 (James Madison).

141 Hollis, *supra* note 33, at 772–73.

142 U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 463 (1978).

143 *See* Hollis, *supra* note 33, at 773–79 (discussing these theories).

144 *See generally* Weinfeld, *supra* note 135.

traces back to Emmerich de Vattel's 1758 treatise, *The Law of Nations*—a source familiar to the Constitution's Framers.[145] As translated, Vattel specifically distinguished "treaties" on the one hand from "agreements" on the other (all of which he called "compacts").[146] "A treaty," he said, "is a compact made with a view to the public welfare by the superior power, either for perpetuity, or for a considerable time."[147] By contrast, he continued, "[t]he compacts which have temporary matters for their object are called agreements, conventions, and pactions" and "are accomplished by one single act, and not by repeated acts."[148] To Vattel, therefore, one difference was of iteration: treaties required continuing action to fulfill their terms; agreements did not. Another difference was of concentration: treaties could relate to public affairs only; agreements could (apparently) relate to public or private affairs.[149]

The second theory of the treaty–compact distinction comes from Justice Joseph Story, who (perhaps misunderstanding it)[150] rejected Vattel's model—as applied to the Constitution in St. George Tucker's edition of *Blackstone's Commentaries*[151]—as "at best a very loose, and unsatisfactory exposition, leaving the whole matter open to the most latitudinarian construction."[152] Citing nothing and admitting that "[w]hat precise distinction is here intended . . . is nowhere explained;

145 *See* Hollis, *supra* note 33, at 774–75, 774 n.162; *see also* Engdahl, *supra* note 75, at 75–76, 76 n.62; Weinfeld, *supra* note 135, at 458–59.

146 "Vattel's definitions appear to build on the scholarship of Christian von Wolff, who had little exposure in the nascent American Republic." Hollis, *supra* note 33, at 775 n.165; *see also* Weinfeld, *supra* note 135, at 463. As translated, Wolff called one kind of arrangement "treaties" and the other "compacts" (using "stipulations" as a catch-all). 2 CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM § 369 (Joseph H. Drake trans., Clarendon Press 1934) (1764), *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 191, 191 (James Brown Scott ed., 1995).

147 EMER DE VATTEL, THE LAW OF NATIONS § 152, at 338 (Béla Kapossy & Richard Whatmore eds., Liberty Fund, Inc. 2008) (1758).

148 *Id.* § 153, at 338.

149 *See id.* § 154, at 338 ("Public treaties can only be made by the superior powers, by sovereigns who contract in the name of the state. Thus conventions made between sovereigns respecting their own private affairs, and those between a sovereign and a private person, are not public treaties."). Later in the same work, Vattel acknowledged the existence of some "treaties" that "have no relation to the performance of reiterated acts, but merely relate to transient and single acts which are concluded at once"—but suggested that it may be preferable "to call them by another name," expressly referencing his discussion of "agreements, conventions, and pactions." *Id.* § 192, at 360 (citing *id.* § 153).

150 *See* Weinfeld, *supra* note 135, at 462–63.

151 *See* 1 BLACKSTONE'S COMMENTARIES app. at 310 (St. George Tucker ed., New York, Augustus M. Kelly 1803).

152 3 STORY, *supra* note 137 § 1396, at 271.

and has never as yet been subjected to any exact judicial, or other examination," Story ventured his own explanation.[153]

"Perhaps," Justice Story posited, the Treaty Clause should be interpreted as "apply[ing] to treaties of a political character," which could include "treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty; and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges."[154] And, Story said, the Compact Clause "might" be interpreted as applying to "mere private rights of sovereignty; such as questions of boundary; interests in land, situate in the territory of each other; and other internal regulations for the mutual comfort, and convenience of states, bordering on each other."[155] Story continued that "[i]n such cases, the consent of congress may be properly required, in order to check any infringement of the rights of the national government."[156]

The last classic theory of the treaty–compact distinction comes from future Justice Frankfurter and Landis. They contended that while "Story and other writers have attempted an analytical classification," "[t]here is no self-executing test differentiating 'compact' from 'treaty.'"[157] So they proposed a more practical approach: let Congress draw the distinction. "[O]nly Congress," they contended, "is the appropriate organ for determining what arrangements between States might fall within the prohibited class of 'Treaty, Alliance, or Confederation,' and what arrangements come within the permissive class of 'Agreement or Compact.'"[158] Constitutionality under the Compact Clause, Frankfurter and Landis suggested, should be treated as a political question.

So Story rejected Vattel's approach to the treaty–compact distinction for being unworkable, and Frankfurter and Landis rejected Story's approach for the same reason. The Court's caselaw does not provide any additional clarity. Chief Justice Taney's opinion in *Holmes* relied on Vattel's conception,[159] and the Court in *Virginia v. Tennessee* relied on a perverted version of Story's distinction (essentially treating what

153 *Id.* § 1396, at 270; *see* Engdahl, *supra* note 75, at 65 ("Story made no pretensions of having deduced this interpretation of article I, section 10, from any source other than his own imagination.").

154 3 STORY, *supra* note 137 § 1397, at 271.

155 *Id.* § 1397, at 271–72.

156 *Id.* § 1397, at 272.

157 Frankfurter & Landis, *supra* note 1, at 695 n.37.

158 *Id.* at 694–95.

159 Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 572 (1840) (opinion of Taney, C.J.).

he called treaties as compacts and what he called compacts as nothing), which other decisions have replicated.[160] But very few cases have actually grappled with how the Treaty Clause applies to interstate arrangements. The most prominent is probably *Williams v. Bruffy*, an 1878 case that invoked the Clause to declare the Confederate States of America unconstitutional.[161]

Critically, however, the conflicting ideas presented by Vattel, Story, and Frankfurter and Landis all share a core commonality. As Professor Duncan Hollis has observed, each "assume[s] the Constitution prohibits states from certain types of deal making, while giving Congress the power to authorize states to conclude other types of deals."[162] The key point is that "[n]one of them support a third category—like that which exists in [current doctrine]—where states can make agreements without any federal say whatsoever."[163] Indeed, Christian von Wolff, whom "Vattel considered it his task to popularize,"[164] went so far as to include among "compacts" situations where "one nation permits another, on account of the high price of grain, to purchase in its territory."[165]

As a potential counterpoint, some of the Court's reasoning suggests that the survival of certain interstate collaborations under the Articles of Confederation without congressional consent indicates that the Constitution was understood to leave some forms of cooperation alone.[166] But James Madison seems to have refuted that logic, writing that some of the same arrangements—including the Mount Vernon Compact, a complex regulatory agreement between Virginia and Maryland with which he was intimately familiar[167]—constituted "compacts witht. the consent of Congs." by which "*the Fedl authy was violated.*"[168]

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160 *See* Virginia v. Tennessee, 148 U.S. 503, 519–20 (1893), *cited in, e.g.*, Wharton v. Wise, 153 U.S. 155, 169–70 (1894); *see also* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 465–67 (1978) (discussing how *Virginia v. Tennessee* followed an approach of "transferr[ing] [Story's] description of the Treaty Clause to the Compact Clause").

161 Williams v. Bruffy, 96 U.S. 176, 182 (1878) (stating that because "the Constitution of the United States prohibits any treaty, alliance, or confederation by one State with another," the Confederate States of America "cannot, therefore, be regarded in this court as having any legal existence").

162 Hollis, *supra* note 33, at 778.

163 *Id.*

164 Weinfeld, *supra* note 135, at 463.

165 2 WOLFF, *supra* note 146 § 369, at 191; *see also supra* note 146.

166 *See* Wharton v. Wise, 153 U.S. 155, 163–71 (1894).

167 *See* Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 492–93 (1995).

168 James Madison, *Preface to Debates in the Convention of 1787*, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 app. A, at 539, 548 (Max Farrand ed., 1911) (emphasis added) (discussing "compacts . . . as between Pena. and N. Jersey. and between Virga. & Maryd." and noting that "From the Legisl: Journals of Virga. it appears, that a vote to apply

And Tucker—Vattel's expositor and "a contemporary of the men who drafted the Constitution"[169]—appears to have referenced this agreement as an example of interstate action that would have been subject to the Compact Clause.[170]

In any event, the Articles of Confederation arguably restricted fewer interstate arrangements than the Constitution does, which would make sense given the latter's overarching purpose of strengthening the national government.[171] For as the Court explained of the Articles: "Congressional consent clearly was required before a State could enter into an 'agreement' with a foreign state or power or before two or more States could enter into 'treaties, alliances, or confederations.'"[172] But "[a]pparently . . . consent was not required for mere 'agreements' between States."[173]

3. The Broader Constitutional Structure

Beyond (or as the Supreme Court has sometimes reasoned, because of)[174] the breadth of its textual form, the Compact Clause's structural functions are also important—and also argue in favor of a new approach. The Clause composes part of the constitutional balance of power between the federal government and states, among states themselves, and arguably vis-à-vis individual rights. Current doctrine, however, accounts for only the first, vertical aspect of the Clause's

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for a sanction of Congs. was followed by a vote agst. a communication of the Compact to Congs."). One set of scholars discounts Madison's judgment on the ground that he "was more predisposed to find a violation of Federal prerogative" than most other Framers or the general population were. James F. Blumstein & Thomas J. Cheeseman, *State Empowerment and the Compact Clause*, 27 WM. & MARY BILL RTS. J. 775, 781 n.51 (2019).

169 Weinfeld, *supra* note 135, at 461.

170 *See* 1 BLACKSTONE, *supra* note 151, at 310 (stating that "[t]he compact between this state and Maryland, entered into in the year 1786, may serve as an example").

171 *See* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 11–13 (2016) (summarizing flaws in the Articles of Confederation and the sentiments that led the Constitution's Framers to seek to strengthen the national government); *see also* Weinfeld, *supra* note 135, at 464 (arguing that "[i]t is reasonable to assume that when the framers of the federal Constitution used the words 'agreements or compacts' they had in mind" actual practices "under the Articles of Confederation," which "were a subject of general debate prior to the federal convention, specifically with reference to whether or not they had to be submitted to Congress for its consent").

172 U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460 n.10 (1978); *see also supra* notes 138–39 and accompanying text (reproducing relevant provisions).

173 *U.S. Steel*, 434 U.S. at 460 n.10.

174 *See, e.g.*, *id.* at 459–60 (stating that "[r]ead literally, the Compact Clause would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States").

import.[175] And even then, the Clause's hollowing at the Court's hands wipes away any real protection it could otherwise provide.

As for the relationship between the federal government and the states, consider the Compact Clause's placement. "Agreements and compacts," Professor Greve notes, "are subsumed under an injunction covering practices that constitute manifest threats to the Union and the Constitution," including "standing (state) armies, warfare, and actions conducive thereto."[176] So important are these subjects to the national interest that the Constitution specifically grants Congress authority over them. Article I, Section 8 provides that "[t]he Congress shall have Power" to "lay and collect . . . Duties," to "raise and support Armies," to "provide and maintain a Navy," and to "declare War"[177]—encompassing the same actions (besides entering compacts) that Article I, Section 10 says states cannot undertake without congressional consent.[178]

Arguing that we should view the Compact Clause "as a nonjusticiable part of the Constitution," Professor Rick Hills contends that it "was intended to address problems that no longer exist"—specifically, "the danger that the states will break into confederations that will ally themselves to a foreign power."[179] The Clause's positioning, he argues, supports this idea because "all of" the "forbidden powers" listed in the same sentence "focus on war and diplomacy."[180]

The historical record, however, provides little basis to think that the kinds of accords that Hills identifies were the only collaborations with which the Framers were concerned. Boundary compacts were common when the Constitution was drafted, and regulatory agreements were beginning to emerge.[181] Hills, moreover, calls the

175 *See* Greve, *supra* note 26, at 301.

176 *Id.* at 297.

177 U.S. CONST. art. I, § 8.

178 *See supra* text accompanying note 32.

179 Hills, *supra* note 129, at 29, 31.

180 *Id.* at 32 & n.18.

181 *See supra* text accompanying notes 54–58, 167; *see also* Frankfurter & Landis, *supra* note 1, at 694 (in arguing that "the history of the times furnishes an ample commentary" on "the source and scope" of the Compact Clause, stating that "'[i]t is a part of the public history of the United States . . . that at the adoption of the Constitution there were existing controversies between eleven states respecting their boundaries, which arose under their respective charters, and had continued from the first settlement of the Colonies'"—and that "[i]n addition, the States had resorted to agreements among themselves, adjusting controversies other than boundary disputes" (quoting Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 723–24 (1838))); Weinfeld, *supra* note 135, at 460–61 (arguing that "boundary disputes" "were familiar" to "not only the framers . . . but even the man on the street"); *id.* at 464 (discussing how "the agreements actually entered into between the States under the Articles of Confederation" not only settled boundaries, but also concerned "a variety of subjects, connected with boundaries," including "rights of fishery and jurisdiction

arrangements that he identifies "treaties," "alliances," and "confederations."[182] Yet the Treaty Clause—which expressly addresses "Treat[ies]," "Alliance[s]," and "Confederation[s]" but which Hills does not mention[183]—seems more squarely directed at those partnerships. In any event, the prohibition against laying any duty of tonnage without congressional consent in the same sentence as the Compact Clause does not seem to focus on war and diplomacy. The Court interprets it as "seek[ing] to 'restrai[n] the states . . . from the exercise' of the taxing power 'injuriously to the interests of each other.'"[184]

We can see the Clause's horizontal relevance, moreover, in the fact that states, alone or in league, "are . . . capable of—and prone to—doing very bad things to one another"—such that, Professor Greve says, the Framers were "acutely aware of the need to protect states and their citizens from sister-state aggression."[185] Indeed, in 1854, the Court declared that the Clause was "obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interest of the others."[186] In this sense, despite extending to additional contexts, the Compact Clause shares a commonality with the so-called Dormant Commerce Clause, which the Court says "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services."[187] It is ironic, though, that the Court has essentially ignored the Compact Clause, a textual part of the Constitution, while steadfastly invalidating state action under the Dormant Commerce Clause, an atextual interpretive product.[188]

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of criminal offenses," "navigation on boundary waters," "lighthouses," and "the right of the citizens of one State to remove their property from the other without payment of any duty, tax or charge").

182 Hills, *supra* note 129, at 31–33.

183 *See* text accompanying note 136.

184 Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 6–7 (2009) (second alteration in original) (quoting 2 STORY, *supra* note 137 § 1013, at 472).

185 Greve, *supra* note 26, at 293 (emphasis omitted). For additional discussion of how interstate agreements can endanger the horizontal dimension of federalism by harming noncompacting states, see Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 731–33, 740 (2007); Finkel, *supra* note 4, at 1597–98; Pincus, *supra* note 78, at 526–27.

186 Florida v. Georgia, 58 U.S. (17 How.) 478, 494 (1854).

187 Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019) (citing New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988)).

188 *See id.* ("'Although the [Commerce] Clause is framed as a positive grant of power to Congress,' . . . we have long held that this Clause also prohibits state laws that unduly restrict interstate commerce." (quoting Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1794 (2015))).

Especially when read in conjunction with Section 5 of the Fourteenth Amendment,[189] the Compact Clause may also impart to Congress a responsibility to defend individual rights against interstate incursions. Imagine a compact prohibiting contraception—like a more extreme version of the Texas S.B. 8 private-enforcement abortion scheme, but on a multistate basis meant to make accessing providers even more difficult.[190] Or imagine a compact prohibiting communal religious exercise during public-health crises—like the recent controversy in New York (and elsewhere), but on a multistate basis meant to make accessing places of worship even more difficult.[191] In addition to whatever protection courts may or may not provide (with states likely able to elude federal judicial review of private-enforcement regimes post-S.B. 8),[192] one could argue that Congress has a prerogative to review interstate programs implicating individual rights like these.

Why does all this argue in favor of a new approach to implementing the Compact Clause? There is little reason to think that the combination of "any Treaty, Alliance, or Confederation" on the one hand and "any Agreement or Compact" on the other bears a meaning anywhere near as constricted as the Court has concluded. The universe of interstate arrangements subject to some constitutional limitation, therefore, should be significantly more capacious than current caselaw recognizes.

The difference between the categories within this universe, however, is extremely uncertain, which produces two implications. First, given the good that interstate arrangements ranging from water-sharing accords to firefighting partnerships can achieve, the incongruent consequences of treating them as treaties, alliances, or confederations (complete proscription) versus treating them as agreements or

189 *See* U.S. CONST. amend. XIV, § 5 (providing that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article"); *see also* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (explaining how individual constitutional protections have been incorporated against the states through the Fourteenth Amendment's Due Process Clause).

190 *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 545 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part) (before *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), which eliminated the federal constitutional right to an abortion, stating that "[i]n open defiance of this Court's precedents, Texas enacted Senate Bill 8 . . . , which bans abortion starting approximately six weeks after a woman's last menstrual period" and that "[t]he chilling effect has been near total").

191 *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65–66 (2020) (per curiam) (describing "an Executive Order issued by the Governor of New York that imposes very severe restrictions on attendance at religious services in areas classified as 'red' or 'orange' zones" during the COVID-19 pandemic).

192 *See* Whole Woman's Health v. Jackson, 31 F.4th 1004, 1006 (5th Cir. 2022) (per curiam) (instructing the district court to dismiss "all challenges to the private enforcement provisions of the statute").

compacts (a congressional-consent condition) call for construing the former category relatively narrowly and the latter category relatively broadly. Second, the task of sorting specific instances of interstate cooperation into one or the other category appears impossible to accomplish in a way that is general, prospective, clear, consistent, and capable of commanding obedience—hallmarks of law qua law in some lights.[193] Together, these implications support implementing the Compact Clause in a way that tends toward overenforcement and enhanced administrability, both of which a prophylactic approach could permit.

C. The Problem with Previous Alternatives

Hoping to give the Compact Clause some meaningful content, scholars have striven to fill the void left by Supreme Court decisions. An exhaustive examination by Professor Greve represents the most prominent proposal, but others have appeared on the scene as well. As the ensuing discussion contends, these projects offer important lessons but have failed to make real headway. For they often serve to corroborate what the caselaw and constitutional analysis both suggest: that attempting to separate constitutionally suspect from constitutionally safe interstate actions—in essence, attempting to answer the compact question—is fundamentally futile.

1. Greve's Model

In an ideal world, Professor Greve suggests, Compact Clause doctrine might take a thoroughly textualist turn, subjecting everything that qualifies as an interstate agreement or compact to congressional consent.[194] But such a substantial paradigm shift, he acknowledges, would be neither politically realistic nor practically desirable.[195] Accordingly, Greve proposes a largely functionalist test where "a constitutional challenge for lack of congressional consent should succeed if the plaintiff makes a credible showing that the compact, reasonably construed, poses one of . . . four . . . risks."[196] These risks are (1) "an exercise of powers concurrently possessed by the Congress," (2) "interstate externalities," (3) "cartelization," and (4) "agency problems."[197]

193 *See* LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969) (stating that "[a] total failure in any of these [or certain other] directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all").

194 Greve, *supra* note 26, at 294.

195 *Id.* at 295.

196 *Id.* at 368.

197 *Id.*

A plaintiff need not prove that interstate action produces one of these effects: she must just evince that it entails one of these perils.[198] Then the burden shifts to the defendant, who "may rebut [the plaintiff's] case by proving that the proposed compact poses none of these risks."[199] The burdens are asymmetric by design. As Professor Greve explains: "In requiring plaintiffs to establish no more than a reasonable likelihood—while requiring defendants to prove that no such likelihood exists—the proposed test stacks the deck in favor of the plaintiff. That is intentional, and necessary to afford the Compact Clause any room at all."[200]

Professor Greve's work is masterful in many respects. But the test he suggests is unwieldy in operation and unreasonable in outcome. The compacting risks on which it turns are both broad and complex. The scope of concurrent state and federal powers, including over interstate commerce, is vast.[201] Externalities can arise any time interstate action has a meaningful effect on a sister state.[202] Greve defines cartelization to mean conduct "in restraint of economic and political competition,"[203] which describes a great deal of interstate coordination. Agency problems "includ[e] . . . dilution[s] of political accountability and . . . delegation[s] of state legislative or executive power,"[204] which can occur when a compact gives authority to an administrative agency and in many other situations too. And while Greve wants any reasonable likelihood that these dangers will obtain to satisfy the standard, there is no prospect that parties and judicial decisionmakers will readily agree on the location of that threshold or the contours of these categories.

All this promises to produce results that drastically depart from the current Compact Clause regime, preceded by protracted litigation and attended by tangled precedents. But the test is even more complicated than it appears at first glance. For instance, Professor Greve envisions the standard as differentiating between interstate agreements that "burden" interstate commerce on the one hand, which would require congressional consent, and interstate agreements that merely "affect" interstate commerce on the other, which would not.[205]

198 *See id.* at 368–69.

199 *Id.* at 368.

200 *Id.* at 369.

201 *See* Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 254.

202 *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 136, 138 (2010).

203 Greve, *supra* note 26, at 322.

204 *Id.* at 368.

205 *Id.* at 369–70.

This distinction might be obvious in some circumstances, but it would prove murky in others. Consider the illustration Professor Greve offers. Greve argues that harmonizing regulations to address variegated nurse-licensure schemes would run the risk of "restrain[ing]" interstate commerce.[206] But, he says, using reciprocity agreements instead would "affect[]" commerce by "liberating" rather than "burdening" it.[207] Accordingly, he argues, reciprocity agreements may not require congressional consent.[208] But wait. Greve acknowledges that because of their "discriminatory and exploitative potential," reciprocity agreements expressly "limited to selected states" probably burden interstate commerce after all.[209] In *Northeast Bancorp*, for instance, the Supreme Court made clear that Connecticut and Massachusetts' constraining their reciprocal banking endeavors to the New England region would have violated the Dormant Commerce Clause had Congress not authorized such programs.[210]

And that is just the tip of the iceberg. Professor Greve "assum[es] that a state agreement or compact, in the constitutionally relevant sense, must impose an enforceable contractual obligation, for the duration of the arrangement, on the participating states."[211] And his test would not apply when "states act as market participants and as parties to a private-law contract, not as sovereign political entities."[212] Likewise, Greve says that when states seek to ward off "an imminent health threat," they can take advantage of "an implied necessity exemption."[213]

Professor Greve also marries his Compact Clause proposal with a robust understanding of constitutionally inviolable state prerogatives. The Compact Clause, he says, ought to "accommodate a 'police power exemption'" where states regulate in areas beyond the federal government's enumerated powers.[214] Greve recognizes the "*de facto* renunciation of the enumerated powers doctrine" at a previous point in the Court's history, but he draws hope from its "partial rediscovery" during (what at the time of publication in 2003 was) "the past decade" of the Rehnquist Court.[215] Accordingly, Greve argues, interstate compacts on subjects ranging from domestic violence and drug possession to

206 *Id.* at 370.
207 *Id.*
208 *Id.*
209 *Id.* at 370 n.318.
210 *See* Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 472 U.S. 159, 174 (1985).
211 Greve, *supra* note 26, at 368.
212 *Id.* at 320; *see also id.* at 368.
213 *Id.* at 320.
214 *Id.* at 371.
215 *Id.* at 371–72.

isolated wetlands and child support may not trigger Compact Clause scrutiny.[216]

Professor Greve delineates details like these in an apparent attempt "to ameliorate the overbreadth concern that has driven judicial analysis since *Virginia v. Tennessee*."[217] But the rules he lays out are sure to become byzantine, are prone to extended disputes, and are unlikely to achieve the desired effect of striking a practical balance. Beyond the wrinkles discussed above, whether states have assumed enforceable contractual commitments, are acting as market or contract participants rather than sovereign governments, or have targeted urgent health problems instead of other goals would engender uncertainty and controversy in many cases.[218] And the limits of the federal government's powers are not well defined in caselaw or commentary. There is much less reason, moreover, to suspect that those limits would provide a significant hindrance to federal scrutiny of interstate compacts (or anything else) now than there was at the time of Greve's writing.[219]

2. Other Models

It is helpful to examine two additional scholarly substitutes—both products of impressive student notes—for the *U.S. Steel* test.

The first idea, by Matthew Pincus, contends that only interstate compacts centered on "traditional loci of state action" should escape the requirement of congressional consent.[220] As others have pointed out, this proposal risks confusion and other conceptual

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216 *See id.*

217 *Id.* at 371 (mentioning this motivation for the state-prerogatives reasoning).

218 On whether states have assumed enforceable contractual commitments, see Fahey, *supra* note 3, at 2356 (noting that "the task of finding 'contract' formation is no simpler in the governmental context than in the private one" and that "[a]s in the private context, courts must sometimes navigate complex modes of offer and acceptance"). On whether states are acting as market participants or governments, see *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 100 n.17 (9th Cir. 1970) ("The distinction between proprietary (private) and sovereign (governmental) functions is not often an easy or meaningful one to make."); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1270 (2000) (in the context of the foreign component of the Compact Clause, stating that a "possible bas[i]s for exemption" from the consent requirement "for state proprietary activities . . . may be neither doctrinally sound nor easy to administer" (footnote omitted)). As for an emergency health exception, some would view interstate action addressing problems as varied as "extreme poverty, climate change, and ideological extremism" as sufficiently "urgent." Robert M. Pestronk et al., *Improving Laws and Legal Authorities for Public Health Emergency Legal Preparedness*, 36 J.L., MED. & ETHICS 47, 47 (Special Supp. Spring 2008). But others would surely see such regulation as too attenuated from immediate health concerns.

219 *See* Young, *supra* note 201, at 261 (observing that "the law of federalism has generally moved on to a concurrent model").

220 Pincus, *supra* note 78, at 531.

complications.[221] There is little reason to expect that courts would be more successful at identifying "traditional loci of state action" in the interstate-agreement context than they have been in other contexts.[222] As one scholar argues in a different area, "approaches that privilege traditional subjects of state regulation" are "unworkable" because "[e]ither a regulated area is never of exclusive state concern, or else the answer will turn on arbitrary—and increasingly narrow—definitions of the breadth of the area at issue."[223] Or as another scholar puts a similar point, "over and over, in a wide range of federalism contexts, [the line focusing on objects of traditional state concern] has proved itself Maginot."[224]

Attempting to respond to concerns like these, Pincus accepts a wide scope of concurrent federal-state authority, acknowledges that "the contours of traditional state concern have not yet been fully and precisely drawn," and recognizes that doing so "is no easy task."[225] So, he says, the test would focus not just on whether "the compact's subject matter lay within the realm of traditional state concern," but instead on whether "it was in an area *widely agreed* to be within the states' particular purview."[226]

One problem is that "if 'traditional' is redefined to mean a subject of predominant, though not exclusive, state concern, then the inquiry will often prove indeterminate."[227] And like Professor Greve's model, this proposal came at a time (2009) that was much closer than today is to the Supreme Court's assertion of significant Commerce Clause constraints on congressional authority in *United States v. Lopez* (decided in 1995) and *United States v. Morrison* (decided in 2000).[228] Whether any regulatory fields were "*widely agreed* to be within the states' particular

221 *See* Finkel, *supra* note 4, at 1604.

222 *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546–47 (1985) (rejecting "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'").

223 Neil S. Siegel, Essay, *Distinguishing the "Truly National" from the "Truly Local": Customary Allocation, Commercial Activity, and Collective Action*, 62 DUKE L.J. 797, 801–02 (2012).

224 Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 206.

225 Pincus, *supra* note 78, at 538–39, 539 n.144 (quoting Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 754 (2003)).

226 *Id.* at 539–40 (emphasis added).

227 Siegel, *supra* note 223, at 802.

228 *See* United States v. Lopez, 514 U.S. 549, 559–61 (1995) (holding the Federal Gun Free School Zones Act of 1990 unconstitutional as exceeding Congress's commerce power); United States v. Morrison, 529 U.S. 598, 613 (2000) (holding the civil-remedy provision of the Federal Violence Against Women Act of 1994 unconstitutional as exceeding Congress's commerce power).

purview" even then is subject to dispute. Pincus states that "family law, criminal law, and education" qualify,[229] but roughly contemporaneous scholarship argues that "the federal government has . . . regulated extensively in the areas of criminal law, education, family law, and other traditional subjects of state regulation identified by the Court in *Lopez* and *Morrison*."[230] In any event, the assumption that widespread agreement marks some areas as particular corners of state concern seems especially incongruous with later trends in federalism caselaw and commentary, which deemphasize divisions between different levels of authority.[231]

A more recent idea, by Jacob Finkel, "relocates the analysis of the perceived harm from the compacts themselves to the intent of their drafters."[232] Inspired by the doctrine of federal field preemption, which determines the scope of federal law's superseding effects on state law, this "negative field preemption" test would ask whether a compact is "intended to supplant congressional action in the same field."[233] If so, it must receive congressional consent to operate. If not, it can proceed without running the gauntlet on Capitol Hill.[234]

To its credit, this proposal aims at addressing the harmful effects that compacts premised on competitive federalism can entail. But it still has drawbacks. As Finkel recognizes, federal field-preemption doctrine is itself far from robust or clear-cut.[235] In addition, controversy lies in understanding how a multimember body can form an "intent,"

229 Pincus, *supra* note 78, at 538–43.

230 Siegel, *supra* note 223, at 807–08 (footnotes omitted); *see also* JACK M. BALKIN, LIVING ORIGINALISM 172 (2011) ("[T]he federal government has regulated family law since at least Reconstruction, and it has regulated education heavily in the last fifty years. And of course, the federal government has attacked crime since the beginning of the Republic and with increasing frequency in the twentieth century." (footnote omitted)).

231 *See* Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2049–50 (2014) ("[T]he Supreme Court's 'federalism revolution' has taken on a new form. . . . Analytically, the Justices in the majority in these cases seem to be motivated more by a concern about the expansion of federal regulatory power itself, and somewhat less by a 'new federalist'-style belief in a categorical distinction between the proper spheres of state and federal power." (first quoting Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 430 (2002); and then quoting ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 97 (2011))).

232 Finkel, *supra* note 4, at 1606.

233 *Id.* at 1609.

234 *Id.* at 1609–10; *see also id.* at 1612 ("[A] compact can be judged by the scope of its proposed solution: Does it provide a complete fix to a national problem? If so, it should be submitted to Congress. If it merely addresses a regional or local problem, by contrast, or if it offers a partial fix to a national issue, with room remaining for complementary legislation, it can proceed freely.").

235 *See id.* at 1608.

let alone how one might find it.[236] Finkel argues that "[a] number of indicia" may help ascertain intent and that "[c]ourts have proven adept at applying such criteria in a variety of similar situations."[237] The indicia he seems to have in mind include (in addition to its language) a statute's legislative history and purposes, which are both controversial interpretive tools.[238] And the only comparable context he mentions (other than federal field preemption itself) is Dormant Commerce Clause doctrine, which is a famously incoherent field.[239]

The preceding alternatives for enforcing the Compact Clause differ from each other in details, upsides, and downsides. They all reflect a common problem, however, in that they mirror the Court's focus on the compact question, which the caselaw and constitutional analysis have shown to be unanswerable in any useful way. So while scholarly substitutes often target real problems with creative ideas, the ones addressed here fail to provide feasible solutions given the infinite means through which states can work together and the infinite ends to which such partnerships can be put. To be sure, proponents recognize that "there will have to be judicial review of close calls."[240] But close calls lie in the eye of the beholder, and by all appearances, the tests outlined above will necessitate convoluted and contested litigation in many cases. In short, "drawing a line between the bad compacts and the good compacts leads one down a path of chaos."[241]

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236 *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body. The different strands produce quite a playground—they give the judge discretion, but no 'meaning' that can be imputed to the legislature." (footnote omitted)); *see also* Pincus, *supra* note 78, at 537 (arguing that "a test that attempted to root out pretextual interstate compacts on the basis of their underlying motivations is unlikely to be successful" because "determining the intent behind a specific piece of legislation is extraordinarily difficult").

237 Finkel, *supra* note 4, at 1611.

238 *See id.* at 1609; Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign Against Legislative History*, 105 CORNELL L. REV. 1023, 1026 (2020) ("Textualism versus purposivism, and in particular the debate over the legitimacy of the use of legislative history, has been the biggest debate in statutory construction since the mid-1980s.").

239 *See* Finkel, *supra* note 4, at 1611; Dawinder Sidhu, *Interstate Commerce x Due Process*, 106 IOWA L. REV. 1801, 1825–26 & n.166 (2021) ("The incoherence of the Dormant Commerce Clause is well-established by the Court and leading scholars alike." (collecting sources)).

240 Finkel, *supra* note 4, at 1612.

241 Hills, *supra* note 129, at 35. An earlier attempt at construing the Compact Clause also merits mentioning. Writing before *U.S. Steel*, David Engdahl suggested an alternative to *Virginia v. Tennessee* that would involve determining whether "[f]ormal arrangements between states" are "transactional or cooperative" and then whether the former are "dispositive or nondispositive"—with only transactional, dispositive arrangements qualifying as agreements or compacts (and transactional, nondispositive arrangements qualifying as

This persistent intractability supports shifting the focus from the compact question to the consent question—from what "any Agreement or Compact" means to how "the Consent of Congress" works. Professor Greve addresses the latter briefly in a "note" at the end of his article, remarking that "[i]f state agreements require no congressional consent, the timing and form of consent are unlikely to become live issues."[242] Critically, however, the converse is also true, in that if Congress validly consents to an interstate collaboration, whether the Compact Clause required it to do so becomes irrelevant. The ensuing proposal harnesses this insight to advocate a system that balances constitutional interpretation with practical application.

III. THE PROPOSAL

The foregoing discussion supports adopting a new approach to implementing the Compact Clause. It also suggests that given the text's vastness, the new system should be relatively far-reaching, such that it can operate across a wide range of interstate programs. And it suggests that given the text's vagueness, the new system should be relatively flexible, such that productive state partnerships can proceed without getting stuck in interpretive quagmires.

This Part outlines a proposal for a prophylactic approach—meaning an approach aimed at avoiding difficult constitutional questions by preventing debatable constitutional violations—designed to accomplish these goals. It begins by delineating the proposal's core details, under which Congress would adopt so-called report-and-wait procedures allowing silence in the face of possible-compact submission to constitute passive consent. This Part proceeds to survey supporting considerations as to regulatory theory surrounding safe-harbor provisions, judicial precedent surrounding collective and conditional consent, and political precedent surrounding similar systems. It then links the model suggested here to the policy values of promoting efficiency, democracy, and community through regional-governance mechanisms more generally. Finally, the Part closes by addressing some potential concerns.

A. Core Details

The Compact Clause envisions Congress as the primary arbiter of interstate compacts. Supreme Court precedent, moreover, holds that Congress can manifest consent in this context whether ex ante or ex

treaties). Engdahl, *supra* note 75, at 101. This standard, which likewise focuses on the compact question, evinces the same workability issues that the others reviewed here do.

242 Greve, *supra* note 26, at 379.

post, express or implied.[243] Working within this adaptable framework, Congress could specify what counts as consent in a manner meant to facilitate not only greater submission, but also greater approval, of arguably cognizable interstate collaborations. By shifting responsibility for implementing the Compact Clause away from courts, by refocusing attention on the consent question, and by crafting a friendlier approval regime, this proposal could enhance the Clause's practical capacity to protect important federalism interests while still allowing states to fashion effective solutions to complex problems.

In particular, Congress could adopt a so-called report-and-wait system by declaring that silence in the face of possible-compact submission constitutes passive consent, simultaneously restoring content to the Compact Clause and providing something like a safe harbor for states to pursue productive partnerships. Report-and-wait systems call for "proposed actions [to] be referred to Congress for a period that is long enough to permit them to be studied and, if found wanting, to allow for the passage of a joint resolution of disapproval."[244] Here, for instance, each chamber could rely on protocols to receive and prepare proposals for votes within the normal course.[245] To provide finality and encourage stakeholders to report interstate arrangements in the first place, Congress could then dictate a fairly short timeframe (on the order of a few months, maximum) for affirmative approval or rejection, with a lack of action at the end of that period amounting to passive consent.

The scheme would presumably require presidential presentment.[246] Throughout history, presidents have viewed signing federal

243 *See supra* Section I.B.

244 Hechinger v. Metro. Wash. Airports Auth., 36 F.3d 97, 102 (D.C. Cir. 1994).

245 Current procedures seem generally to match those described in Richard C. Kearney & John J. Stucker, *Interstate Compacts and the Management of Low Level Radioactive Wastes*, 45 PUB. ADMIN. REV. 210, 212 (1985) ("Consent legislation, incorporating the text of the compact, is introduced in one or both houses of Congress, normally by a representative from a state which has ratified the compact. The bill is then referred to the appropriate committee for hearings and mark-up. Usually the judiciary committees of the House and Senate have jurisdiction over consent legislation for interstate compacts, but other committees may claim jurisdiction depending upon the subject matter."). *See* COMM. ON HOUSE ADMIN., 117TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES, Rule X, cl. 1, at 6–9 (granting the Committee on the Judiciary jurisdiction over "[i]nterstate compacts generally," the Committee on Energy and Commerce jurisdiction over "[i]nterstate energy compacts," and the Committee on Natural Resources jurisdiction over "[i]nterstate compacts relating to apportionment of waters for irrigation purposes"); COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 113–18, Rule XXV, cl. (1)(m)(9) (2013) (granting the Committee on the Judiciary jurisdiction over "[i]nterstate compacts generally").

246 *See* INS v. Chadha, 462 U.S. 919, 951–59 (1983) (discussing when congressional action is sufficiently legislative to require presentment); *see also infra* notes 314–15 and accompanying text (discussing *Chadha*).

legislation enacting interstate compacts as their prerogative, and Congress has "acquiesced" in the occasional veto.[247] The literature, however, reflects some doubt about whether the Compact Clause's reference to "the Consent of Congress" incorporates presidential participation,[248] and the proposed system could work either way.

The judicial regime for determining what sorts of interstate actions require consent would also presumably proceed as a backstop, meaning—importantly—that interstate arrangements could operate even without congressional approval, subject to the possibility of court challenges (and the possibility that the judiciary could someday start reining in unconsented compacts). But like presentment, whether judicial review remains available or courts come to treat Compact Clause issues as nonjusticiable political questions—like future Justice Frankfurter and Landis previously suggested and Professor Hills has recently advocated[249]—is largely tangential, such that the proposed system could appeal to people on either side of these debates.

Congress could additionally adopt a report-and-wait system for implementing the foreign component of the Compact Clause.[250] But given the different and often more sensitive considerations that attend foreign relations, this project does not explore that possibility in any depth.[251]

The proposed system would entail multiple advantages for multiple stakeholders. Consider a classic monitoring-cost conundrum. The federal government, sister states, and a given state's own citizens all have reasons arising from asymmetric incentives with the given state's government to monitor and potentially seek to block interstate collaborations. All these parties should want to ferret out and frustrate interstate behavior that inures to their detriment. But the costs of determining to what extent all fifty states may be pursuing harmful cooperative conduct for all these parties on an ongoing basis—the collective monitoring costs of interstate action—are doubtless duplicative and

247 Bulman-Pozen, *supra* note 21, at 1026 & n.298 (discussing two vetoes by President Franklin Delano Roosevelt).

248 *See* Greve, *supra* note 26, at 319 n.138; *see also* Blumstein & Cheeseman, *supra* note 168, at 792–826 (arguing against presentment).

249 *See supra* text accompanying notes 157–58 (discussing Frankfurter and Landis's argument); *supra* text accompanying note 179 (discussing Hills's argument).

250 *See infra* note 298 and accompanying text.

251 For a thorough examination of state commitments with foreign governments and related processes, including the possibility of a congressional reporting requirement, see Ryan M. Scoville, *The International Commitments of the Fifty States*, 70 UCLA L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4093092/ [https://perma.cc/YP67-X38Z].

extremely expensive.[252] A centralized repository of interstate partnerships would help address this conundrum, and as a body that represents all these parties' interests, Congress provides a natural location for such a collection.

Why might states want to subject collaborations to congressional scrutiny that caselaw allows them to avoid? Congressional approval can impart important benefits for compacting states. First, congressional approval transforms interstate arrangements into valid sources of federal law.[253] While compacts may constitute binding contracts either way, imbuing agreements with federal legal status renders them preemptive of conflicting state regulation under the so-called law-of-the-Union doctrine.[254] Even when it comes to relatively minor amendments, moreover, congressionally sanctioned compacts possess a permanency that their state-sanctioned counterparts do not, with any change requiring congressional approval in the former and not the latter case.[255] This could prove a double-edged sword in some circumstances,[256] but to the extent one member harbors suspicions about another's compact commitment or political prospects, a congressional check could provide a welcome constraint.

Second, congressional approval can confer practical pluses. It eliminates the possibility of future Compact Clause challenges, for instance, saving compacting states from potentially expensive and burdensome litigation.[257] And when it comes to preparing for large

252 *See* Greve, *supra* note 26, at 328 ("The monitoring costs are high even for the agents, meaning state legislatures. For the citizen-principals, the costs are prohibitive."); Hollis, *supra* note 33, at 798, 800–01 (discussing this problem in the context of the foreign component of the Compact Clause).

253 *See* Cuyler v. Adams, 449 U.S. 433, 438 & n.7 (1981). This holds true regardless of whether consent was required under the *U.S. Steel* test, so long as "the subject matter of th[e] agreement is an appropriate subject for congressional legislation." *Id.* at 440.

254 Regarding the contractual status of interstate compacts, see Schleifer, *supra* note 185, at 743. Regarding the law-of-the-Union doctrine, see Pennsylvania v. The Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 565–66 (1851) (holding that a state could not authorize a company to build a bridge that would violate an interstate agreement because "[t]his compact, by the sanction of Congress, has become a law of the Union"). *See also Cuyler*, 449 U.S. at 438 n.7 (reaffirming this principle).

255 *See* Kansas v. Nebraska, 574 U.S. 445, 472 (2015) ("[The interstate compact at issue] is the supreme law in this case: As the States explicitly recognized, they could not change the Compact's terms even if they tried. . . . That is a function of the Compact's status as federal law, which binds the States unless and until Congress says otherwise." (citation omitted)); *see also* Fahey, *supra* note 3, at 2361 (discussing the difficulty of amending interstate compacts).

256 *See infra* subsection III.C.2.

257 *See* Finkel, *supra* note 4, at 1601 (arguing that "the status quo is likely inhibiting even beneficial compacts due to uncertainty and confusion over the unclear framework for compacts' formation and approval"); *see also id.* at 1579 n.14 (stating that "[i]n early 2018, . . . Connecticut legislators considering the National Popular Vote Interstate

projects, the greater certainty inherent in congressional approval could contribute to better private-financing terms, enhanced ability to issue public bonds, and other administrative advantages.[258]

It is perhaps for reasons like these that states have long submitted compacts for congressional approval notwithstanding judicial indifference about the constitutional necessity of doing so.[259] The system proposed here, however, could increase the likelihood that these benefits will obtain for compacting states relative to the system in place now. For the suggested system involves a converse—and crucially, state-favoring—default compared to the current system.

Present procedure establishes an opt-*in* situation, where Congress must affirmatively *approve* an interstate agreement to *permit* its transformation into federal law. Lobbying to change the status quo involves considerable effort and material risk for states as for all advocates of legislative intervention, since "'[t]here are a hundred ways in which a bill can die even though there is no opposition to it'—assuming someone introduces a bill in the first place."[260] The procedure envisioned here, by contrast, would produce an opt-*out* situation, where Congress must affirmatively *disapprove* an interstate agreement to *prevent* its transformation into federal law. To achieve their desired outcome, then, compact opponents would have to jump through the hoops that compact proponents now face.

Whether decisionmakers confront opt-in or opt-out situations can result in drastically different consequences, with decisional inertia

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Compact . . . were bewildered by the conflicting dictates of the Compact Clause and the Supreme Court"). Indeed, Connecticut representatives repeatedly expressed concerns about the possibility of litigation over Compact Clause compliance when debating this agreement, which they ultimately adopted. *See The House of Representatives, Thursday, April 26, 2018*, CONN. GEN. ASSEMBLY (Apr. 26, 2018), https://www.cga.ct.gov/2018/trn/H/2018HTR00426-R01-TRN.htm [https://perma.cc/BJ48-2NCK]; Naitian Zhou & Robin Muccari, *The States That Have Joined the National Popular Vote Interstate Compact* (graphic), *in* Ramos, *supra* note 11.

258 *See* Hasday, *supra* note 54, at 9–10 ("[T]he permanency of agency compacts may facilitate long-term planning, property acquisition, and bond financing.").

259 *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 471 (1978) (stating that the "historical practice" whereby "most multilateral compacts have been submitted for congressional approval" could "simply reflect considerations of caution and convenience on the part of the submitting States"); *see also* Nat'l Ctr. for Interstate Compacts, *Compact Search Results*, THE COUNCIL OF STATE GOV'TS, https://apps.csg.org/ncic/SearchResults.aspx?&state=65 [https://perma.cc/DS3J-CD87] (database search results showing active compacts to which Congress has consented).

260 Katherine Mims Crocker, *Reconsidering Section 1983's Nonabrogation of Sovereign Immunity*, 73 FLA. L. REV. 523, 536–37 (2021) (quoting Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 538 (1983)).

playing a significant role in favoring inaction.[261] In short, default rules can produce real differences. And legislative-process theory supports the notion that these differences may be especially large for a body like Congress that deals with complex resource constraints and institutional dynamics including "interest-group politics, agenda-setting prerogatives, and veto-gate prevalence."[262]

There is reason to believe, therefore, that states would submit more interstate programs to undergo the proposed congressional approval process than they currently do. But there remains reason to suspect that states would forgo reporting many controversial partnerships, especially ones premised on competitive-federalism purposes. Congress could address this concern by encouraging third parties to report interstate collaborations as well. To be sure, compact opponents could object to the system outlined here on the ground that they would face disadvantages in the legislative process, primarily because of the flip from opt-in to opt-out approval but also because of softer factors like states' political power on the national stage.[263] Given the variety and unpredictability in the universe of interstate agreements, however, it is difficult to envision overwhelming pushback to the plan (if not from states themselves).[264]

Other advantages of the proposed system may be more obvious and widespread. At this time of party polarization and congressional gridlock (which may motivate resort to compacts in the first place), states and other stakeholders should benefit from the reduced risk of

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261 *Id.* at 545. For instance, "[o]ne study that compared rates of organ donation in opt-in countries with those in opt-out countries found that nearly 60 percentage points separated the two groups (the opt-ins versus the opt-outs)." Wendy Netter Epstein, *Nudging Patient Decision-Making*, 92 WASH. L. REV. 1255, 1293–94 (2017) (citing Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 SCIENCE 1338, 1339 (2003)). On the role of decisional inertia, see Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 17 (2013) ("To change the default rule, people must make an active choice to reject that rule. They have to focus on and answer the relevant question. . . . Especially (but not only) if the question is difficult or technical, it is tempting to defer the decision or not to make it at all. In view of the power of inertia and the tendency to procrastinate, people may simply continue with the status quo.").

262 Crocker, *supra* note 260, at 545; *see* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 592 ("Any attempt to obtain a specific piece of legislation from Congress presents a nearly insurmountable task . . . given the realities of the federal legislative process.").

263 *See* Robert J. Reinstein, *Foreword: On the Judicial Safeguards of Federalism*, 17 TEMP. POL. & C.R. L. REV. 343, 345 (2008) (remarking that "States are powerful special interest groups and can lobby Congress with some success").

264 *See* Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. 1385, 1427 (2016) (noting that "[i]nterest-group theory predicts regulatory rules benefiting small, well-organized interest groups even if such rules present detriments to larger, more diffuse groups").

impasse inherent in the opt-out baseline.[265] Indeed, Professor Hills defends current doctrine's failure to enforce the Compact Clause in part on the ground that polarization and gridlock should not impede productive state governance arrangements, including interstate compacts.[266] The model suggested here responds to this concern by transforming the legislative default from inaction to action.

Congresspeople should favor the enhanced informal power the proposed system would provide them too. Besides increasing the opportunities to ensure compacts' compatibility with federal interests and their constituents' and caucuses' priorities, the more legislators have a say in interstate agreements, the more they can reap the political benefits and thwart the political costs. At the same time, the opt-out aspect provides some political cover to disclaim responsibility for the effects of specific agreements. And the judiciary would benefit from fewer cases presenting Compact Clause challenges for lack of congressional consent, which remain somewhat common notwithstanding the low chances of success.[267]

Some particulars would require further ironing out. Interstate compacts, especially cooperative-federalism ones, may involve

265 *See* Neal Devins, *State Constitutionalism in the Age of Party Polarization*, 71 RUTGERS U. L. REV. 1129, 1148–52 (2019) (documenting the recent rise in party polarization); Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1395–96 (2021) (same); Finkel, *supra* note 4, at 1596–97 ("Rising polarization and decreasing congressional productivity form a pernicious cycle. When coupled with efforts toward wide-ranging compacts, these trends feed upon, and likely exacerbate, one another: An unproductive Congress incentivizes advocates to push for compacts as a more responsive alternative. This increasingly extracongressional focus of advocacy further weakens Congress's capacity for effective legislation, reducing the pressure felt by members of Congress to act upon issues being handled instead by compacts.").

266 Hills, *supra* note 129, at 37–38.

267 *See, e.g.*, Kaul v. Fed'n of State Med. Bds, No. 19-cv-3050, 2020 WL 7042821, at *13 (D.D.C. Dec. 1, 2020) (rejecting the claim that actions related to implementing standards of conduct for medical-licensing purposes violated the Compact Clause); Bimber's Delwood, Inc. v. James, 496 F. Supp. 3d 760, 787–88 (W.D.N.Y. 2020) (rejecting the claim that "Governor Cuomo entered a compact with other regional governors to prevent the spread of COVID-19, in violation of the Compact Clause"); Fed'n of State Massage Therapy Bds. v. Mendez Master Training Ctr., Inc., No. 17-cv-2936, 2018 WL 3862101, at *1, *3–4 (S.D. Tex. Aug. 14, 2018) (rejecting the claim that the organization responsible for "develop[ing] and administer[ing] the national licensing examination that assesses competence in massage and bodywork in the United States and its territories" violated the Compact Clause); Mauricio v. Daugaard, 895 N.W.2d 358, 362–66 (S.D. 2017) (rejecting the claim that the SBAC was an unconstitutional interstate compact); *see also* United States v. California, 444 F. Supp. 3d 1181, 1193–98 (E.D. Cal. 2020) (rejecting the federal government's claim that California violated the foreign component of the Compact Clause by engaging in a cap-and-trade program with Quebec).

appropriations of federal funds, for instance.[268] It makes sense as a practical matter (and may be required as a constitutional one) that these agreements should still require more specific consent.[269] Compacts that seek to nullify existing federal law would also make prime candidates for continuing to require more specific consent. The legislation establishing the report-and-wait system could include express carveouts like these, as narrower federal compact legislation has done.[270] To be sure, this would remove some pressure to review some of the most problematic state partnerships. But perhaps a shift in the overall reporting culture would push the opposite way, and in any event, these compacts' proponents are likely to anticipate a need for federal approval. Congress could also establish a preliminary mechanism for setting aside submissions on vagueness or other procedural grounds without running the risk of passively approving the underlying partnerships. And Congress could grant blanket consent to uncontroversial categories of interstate conduct without requiring submission—like, perhaps, conduct that takes place entirely within the litigation context (not including settlements);[271] conduct that involves bilateral open-market transactions; and even conduct that implements parallel legislation or model laws.

B. Supporting Considerations

Three additional considerations support adopting a report-and-wait system for Compact Clause congressional consent. Regulatory theory suggests a safe harbor would be appropriate here. And both judicial and political precedent count in favor of the proposal too.

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268 For instance, Congress can exercise spending authority by requiring states to enter compacts to receive disbursals. *See* New York v. United States, 505 U.S. 144, 151–53, 171–73 (1992). And state-initiated agreements can also seek federal funding. *See, e.g.*, HEALTH CARE COMPACT, *supra* note 88 § 5.

269 The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7. The Court has stated that "Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates." Cincinnati Soap Co. v. United States, 301 U.S. 308, 321–22 (1937). But some scholarship pushes back against perceived excesses in this discretion. *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1345 (1988) ("Congress abdicates, rather than exercises, its power of the purse if it creates permanent or other open-ended spending authority that effectively escapes periodic legislative review and limitation.").

270 *See* Engdahl, *supra* note 75, at 67–68, 68 n.25 (explaining that "Congress commonly inserts provisos in its consent acts and resolutions specifically preserving full federal authority over the subject matter").

271 Interstate settlements can involve massive regulatory and market-moving provisions. *See infra* notes 341–42 and accompanying text (discussing criticisms of the Tobacco Master Settlement Agreement of 1998).

1. Regulatory Theory

Regulatory theory indicates that providing a safe harbor of the sort envisioned here should improve Compact Clause implementation.

The current regime for congressional consent is largely standard-based. Courts ask whether Congress has "authoriz[ed] joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined"[272]—and as for implied approval, whether Congress has "sanction[ed]" an interstate agreement's "objects" and "aid[ed] in enforcing them."[273] Standards give guidance about how to apply legal directives to factual conduct but defer compliance determinations to contextualized considerations of specific circumstances—as distinguished from rules, which dictate compliance determinations without contextualized considerations of specific circumstances.[274]

Although the current congressional-consent regime is largely standard-based, active ex post approval of specific interstate compacts always qualifies. One could see this aspect of the doctrine as a safe harbor—a concept that "provides by rule that particular facts comply with the law and will result in no penalty" while "leav[ing] other facts to be judged by a standard."[275] The system proposed here functionally expands the safe harbor for compacting states from obtaining active ex post approval only to obtaining passive ex post approval as well. But it formally does so through the mechanism of ex ante authorization. This maneuver provides the Compact Clause more rule-like content while (presumably) preserving the standard-based scheme as a state-favoring backstop.[276]

Indeed, safe harbors are valuable governance instruments precisely because they can involve many of the benefits of both rules and standards and fewer drawbacks than having to choose between them. Relative to standards, "the chief benefit of a safe harbor is a reduction in uncertainty," which can in turn reduce litigation costs and prevent overdeterrence of socially beneficial conduct.[277] Relative to rules, "safe harbors may be less arbitrary," "are more forgiving," and are therefore "more equipped . . . to serve the goal of fairness."[278]

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272 Cuyler v. Adams, 449 U.S. 433, 441 (1981).

273 Virginia v. Tennessee, 148 U.S. 503, 521 (1893).

274 *See* Morse, *supra* note 264, at 1387.

275 *Id.*

276 *See supra* text accompanying note 249 (discussing how the system proposed here could function even without judicial review).

277 Peter P. Swire, *Safe Harbors and a Proposal to Improve the Community Reinvestment Act*, 79 VA. L. REV. 349, 372 (1993).

278 Emily Cauble, *Safe Harbors in Tax Law*, 47 CONN. L. REV. 1385, 1398 (2015).

A safe harbor may prove especially appropriate in two situations implicated here. The first involves circumstances where "a heterogeneous regulated population contains a homogeneous subgroup."[279] In that situation, it may make sense to apply a standard to the general population while providing a safe harbor for the particular subgroup.[280] The reform advocated here allows states to self-sort into a readily identifiable homogeneous subgroup of voluntary reporters. Incentivizing this behavior by offering the safe harbor of potential passive consent would decrease monitoring costs for Congress and others and could entail the additional advantages addressed above.

Another situation supporting the use of a safe harbor occurs where "members of the regulated population vary widely in their estimates of the costs of meeting the uncertain standard."[281] Where that happens, some parties may abstain from socially beneficial action for fear of taking on too much regulatory risk but would have been willing to pay a premium to undertake the action if subjected to a more predictable rule.[282] A safe harbor may be appropriate because it can allow risk-averse parties to operate comfortably within its limits while leaving the standard in place to govern other actors.[283] Under the current system, the uncertainty surrounding the compact question and the rigamarole required to mount a campaign for active approval may overdeter some states from participating in compacts or submitting them for congressional review.[284] Under the proposed system, the lower costs expected to flow from permitting passive approval could convince some states to choose action over inaction. That, too, could produce the benefits identified above.

To be sure, the so-called safe harbor advocated here is more like a semisafe harbor. As an initial matter, a state could not guarantee compliance with the Compact Clause through conduct within its own control. In light of the relatively high likelihood of achieving success given the opt-out dynamics for congressional consent and residual

279 Swire, *supra* note 277, at 374.

280 *Id.*

281 *Id.* at 375.

282 *See id.*

283 *See id.*

284 *See supra* note 257 and accompanying text; Sean Collins Walsh, *Plan for Interstate Border Security Compact Met with Skepticism*, AUSTIN AM.-STATESMAN (Sept. 25, 2018, 5:42 PM), https://www.statesman.com/news/20160903/plan-for-interstate-border-security-compact-met-with-skepticism/ [https://perma.cc/MLA9-GZ8F] (reporting that "[a] plan to create an interstate compact that would allow Texas and other states to enforce federal immigration law got a splash of cold water at a state Senate hearing" in part because Professor Greve testified that "[o]btaining federal approval . . . will involve making concessions to partisans in Congress and bureaucrats in a dozen federal agencies who will have to weigh in on the structure of the compact").

autonomy to forgo reporting, though, the proposed system should produce overall gains for compacting states. The approach advanced here also cannot guarantee security for compacts from other forces of federal law. While congressional approval would shield agreements from challenges under the Compact Clause, it would not immunize them from constitutional challenges more generally or from future congressional displacement. Courts could still hold that the National Popular Vote Interstate Compact runs afoul of the normal constitutional-amendment process, for instance, and Congress could still supersede a gun-control compact with some preferred set of policies. Absent a clearer answer to the compact question, moreover, some interstate collaborations that have achieved consent could still face challenges arguing that Congress lacked jurisdiction to consider them at all.[285] But given the breadth of Congress's commerce and other powers, credible attacks on these grounds should be few and far between.

2. Judicial Precedent

Both judicial and political precedent also commend the wisdom and workability of a report-and-wait system for interstate programs.

On the judicial side, the Supreme Court has made clear that ex ante express approval can include legislation sanctioning broad classes of interstate agreements over broad periods of time. In *Cuyler v. Adams*, the Court applied the idea that "Congress may consent to an interstate compact by authorizing joint state action in advance" to the relationship between the federal Crime Control Consent Act of 1934 and the Interstate Agreement on Detainers.[286] The Act provides permission for states "to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies."[287] The Agreement "establishes procedures by which one jurisdiction may obtain temporary custody of a prisoner incarcerated in another jurisdiction for the purpose of bringing that prisoner to trial."[288] The *Cuyler* majority was not bothered by the generality of the federal legislation's language or by how long it predated the agreement's enactment. "There can be no doubt that the Detainer Agreement falls within the scope of this congressional authorization," the Court declared.[289]

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285 *See* Cuyler v. Adams, 449 U.S. 433, 440 (1981) (making clear that whether "the subject matter of th[e] agreement is an appropriate subject for congressional legislation" matters to the extent interstate action falls beyond the scope of the Compact Clause).

286 *Id.* at 441.

287 4 U.S.C. § 112 (2018).

288 *Cuyler*, 449 U.S. at 435 n.1.

289 *Id.* at 441 n.9.

The Court has also endorsed Congress's imposing conditions on consent.[290] This practice has come into play with ex post compact consideration.[291] The principle, however, should apply a fortiori in the ex ante context, and Congress has indeed crafted conditions there.[292]

Given the Court's receptivity to collective and conditional forms of ex ante consent, there is good reason to believe that the system proposed here—which would provide collective approval conditioned on reporting possible compacts and the passage of some timeframe without rejection—would pass constitutional muster.

3. Political Precedent

As for political precedent, report-and-wait systems are more common than many may assume. These procedures are especially important in administrative law. The Administrative Procedure Act requires publication of regulations "not less than 30 days before [their] effective date[s]."[293] The Congressional Review Act of 1996, moreover, requires agencies to report proposed rules directly to Congress and institutes a waiting period of sixty days before "major rule[s]" can become effective.[294] Congress has also established report-and-wait mechanisms for the Federal Rules of Practice and Procedure, for territorial laws, and in other areas.[295]

Of particular pertinence here, Congress already employs a report-and-wait system for limited classes of *international* agreements. Federal law provides, for example, that "[n]o governing international fishery agreement, bycatch reduction agreement, or Pacific Insular Area fishery agreement shall become effective with respect to the United States

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290 *See id.* at 439–40.

291 *See* Hasday, *supra* note 54, at 14–16 (discussing conditional consent generally and stating that in the ex post context, "it seems extremely problematic in democratic terms for a state to be tightly bound to a compact whose final form did not weather the state's formal democratic process and the public scrutiny that entails").

292 *See, e.g.*, 42 U.S.C. § 2021d(a)(2), (c)(1), (d) (2018) (granting consent for states to "enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste" but providing that "[a]ny authority in a compact to restrict the use of the regional disposal facilities under the compact to the disposal of low-level radioactive waste generated within the compact region shall not take effect before" a particular date and that "[e]ach compact shall provide that every 5 years after the compact has taken effect the Congress may by law withdraw its consent").

293 5 U.S.C. § 553(d) (2018).

294 *Id.* §§ 801–08.

295 *See* Rules Enabling Act, 28 U.S.C. §§ 2071–77 (2018) (regarding the Federal Rules of Practice and Procedure); Sibbach v. Wilson & Co., 312 U.S. 1, 15 & n.17 (1941) (discussing territorial laws); Curtis A. Bradley, *Reassessing the Legislative Veto: The Statutory President, Foreign Affairs, and Congressional Workarounds*, 13 J. LEGAL ANALYSIS 439, 460 (2021) (discussing nuclear-cooperation agreements).

before the close of the first 120 days (excluding any days in a period for which the Congress is adjourned sine die)" after the president submits the agreement's text to both chambers.[296] Federal law also requires the Secretary of State to "transmit to the Congress the text of any international agreement . . . , other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter."[297] Indeed, a few commentators have noted that Congress could act along similar lines to require states to submit agreements with other nations under the foreign component of the Compact Clause.[298]

Because of the unique federalism concerns, congressional procedures surrounding local laws governing Washington, D.C., are also highly relevant. Of popular interest lately with questions about D.C.'s unique structural status swirling, Article I, Section 8 of the Constitution grants Congress power "[t]o exercise exclusive Legislation in all Cases whatsoever" for the nation's seat of government.[299] In 1973, after almost two centuries of complex and contested arrangements, Congress enacted the District of Columbia Home Rule Act.[300] Subject to certain exceptions, this Act now says that provisions passed by the D.C. Council become effective only after submission to both houses of Congress and the end of a "30-calendar-day period" for most laws and a "60-day period" for criminal laws, both absent enactment of a "joint resolution disapproving such act."[301]

Except for its mandatory nature, this legislation establishes the kind of submission plus passive consent that the system envisioned here contemplates for interstate compacts. It bears noting, moreover, that Congress has only rarely rejected a local D.C. law under this scheme, likely speaking to the power of the opt-out consent

296 16 U.S.C. § 1823 (2018).

297 1 U.S.C. § 112b (2018).

298 *See* Thomas Liefke Eaton, *Reanimating the Foreign Compacts Clause*, 45 WM. & MARY ENV'T L. & POL'Y REV. 29, 43 (2020); Hollis, *supra* note 33, at 800–01 (also discussing the federal provisions mentioned here); Scoville, *supra* note 251 (manuscript at 42–48).

299 U.S. CONST. art. I, § 8, cl. 17; *see* Jessica Bulman-Pozen & Olatunde C.A. Johnson, *Federalism and Equal Citizenship: The Constitutional Case for D.C. Statehood*, 110 GEO. L.J. 1269, 1271–72, 1278 (2022); Jenna Portnoy, Ellie Silverman & Meagan Flynn, *Senate Votes to Reject D.C. Criminal Code Bill*, WASH. POST (Mar. 8, 2023, 9:06 PM), https://www.washingtonpost.com/dc-md-va/2023/03/08/dc-crime-bill-senate-vote/ [https://perma.cc/FC5F-3C5C].

300 District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified at D.C. CODE §§ 1-201.01–1-207.71 (2022)).

301 D.C. CODE § 1-206.02(c)(1)–(2) (2022).

mechanism.[302] To be sure, Congress retains budget authority over D.C.[303] And the Home Rule Act specifies that Congress "reserves the right, at any time, to exercise its constitutional authority as legislature for the District," including by moving "to amend or repeal any law."[304] Congress has used these powers more often than the report-and-wait system to thwart local D.C. provisions.[305] But that aspect of D.C.'s governance scheme also mirrors the present proposal, where passive consent would not insulate interstate agreements from later congressional alteration or retraction. In short, the workability of D.C.'s hybrid government structure should inspire some confidence in the advisability of the proposal advanced here.

The thirty days for most laws and sixty days for criminal laws set by the Home Rule Act may seem like a short timeframe for both houses of Congress to study and potentially act on a submission. In reality, though, the period often ends up being significantly longer—on the order of "months"[306]—given that (at least outside the criminal context) the Home Rule Act "exclud[es] Saturdays, Sundays, and holidays, and any day on which neither House is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days."[307] More straightforward phrasing would probably help set more accurate expectations. But a similar deadline of, say, three to six calendar months for Congress to withhold consent would likely make sense for interstate compacts. Indeed, a 1957 National Association of Attorneys General proposal "urged that Congress seek to simplify the [consent] process" for interstate agreements requiring congressional consent under caselaw by allowing passive approval "upon the expiration of the first period of ninety calendar days of

302 *See* Martin Austermuhle, *Schoolhouse Block: How a D.C. Bill Becomes a Law (and Sometimes Doesn't)*, WAMU 88.5 (Sept. 18, 2017), https://wamu.org/story/17/09/18/schoolhouse-block-d-c-bill-becomes-law-sometimes-doesnt/ [https://perma.cc/7ASU-U7M3]; *see also* Portnoy et al., *supra* note 299 (discussing how the recent crime-bill disapproval represents the first exercise of this power since 1991).

303 D.C. CODE § 1-206.03 (2022).

304 *Id.* § 1-206.01.

305 *See* Austermuhle, *supra* note 302 (stating that Congress has "banned D.C. from spending money to implement a voter-approved medical marijuana program, running a needle-exchange program, subsidizing abortions for low-income women, legalizing the sale of recreational marijuana, regulating when wet wipes can be marketed as flushable, and more"—and that congresspeople have also used the "normal" legislative process "to try and gut D.C.'s restrictive gun laws, trim occupational license rules and impose a flat tax on the city, to name a few [examples]").

306 *Id.*

307 D.C. CODE § 1-206.02(c)(1) (2022).

continuous session of the Congress following the date on which the agreement is transmitted."[308]

The way Congress has handled its express consent power under the Constitution's Foreign Emoluments Clause—which provides that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State"[309]—also provides the present proposal some support. The Foreign Gifts and Decorations Act provides consent to, and in some cases sets up specific procedures for, receiving items deemed relatively uncontroversial or otherwise advantageous to national interests[310]—including gifts of "minimal value" (currently pegged at $480)[311] and "gift[s] . . . in the nature of an educational scholarship or medical treatment or when it appears that to refuse the gift would likely cause offense or embarrassment."[312]

This Act does not involve a report-and-wait system but does involve collective, sometimes conditional ex ante consent to broad and general categories of actions subject to congressional supervision, like the present proposal encourages. And it sets aside actions likelier to prove problematic for more intensive scrutiny, also like the present proposal encourages. In addition, as parties to whom the Foreign Emoluments Clause arguably applies—especially former President Trump—have begun pushing the proverbial envelope, congresspeople have started

308 FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 25 (1961). This proposal was introduced in Congress in 1958 but appears to have died in committee. *See* Interstate Compact Consent Procedure Act of 1958, S. 3428, 85th Cong. (2d Sess. 1958). Other groups apparently sought "general consent-in-advance legislation" around the same time. RICHARD H. LEACH & REDDING S. SUGG, JR., THE ADMINISTRATION OF INTERSTATE COMPACTS 49–50 (1959) (stating that Congress "has not acted on the pleas of many groups that it enact general consent-in-advance legislation"); *see, e.g.*, 97 CONG. REC., pt. 15, app. at A6669 (1951) (reproducing certain resolutions adopted by the Forty-Third Governor's Conference in 1951, including one stating that "the governors' conference strongly urges that the Congress take prompt action granting consent to interstate compacts now pending before it, and that in the future there be enacted general consent in advance legislation permitting the States to enter into agreements among themselves in broad fields of action for which the States have primary responsibility under our Federal Constitution"). The Health Care Compact also contemplates future amendments becoming effective under a passive-consent model but would provide Congress a year to express disapproval. HEALTH CARE COMPACT, *supra* note 88 § 8.

309 U.S. CONST. art. I, § 9, cl. 8.

310 *See* 5 U.S.C. § 7342 (2018).

311 GEN. SERVS. ADMIN., GSA BULLETIN FMR B-52 FOREIGN GIFT AND DECORATION MINIMAL VALUE 1 (2023), https://www.gsa.gov/cdnstatic/GSA%20Signed%20-%20Bulletin%20B-52%20Foreign%20Gift%20Minimal%20Value_2023_0.pdf [https://perma.cc/3HSU-CEVR].

312 5 U.S.C. § 7342(c)(1)(A), (B) (2018).

attempting to assert greater control through their consent authority, again like the present proposal encourages.[313]

There should not be a "*Chadha* problem" here. The Supreme Court held so-called legislative vetoes, where either chamber or a committee of Congress acting alone could nullify executive action, unconstitutional in *INS v. Chadha* for failing to comport with Article I's bicameralism and presentment requirements.[314] Even assuming that congressional control over interstate compacts is sufficiently legislative for its requirements to apply, *Chadha* expressly distinguished report-and-wait procedures,[315] which the Court had previously endorsed.[316] And these systems have become increasingly common since.[317] One could argue that the compact context is different because the Constitution specifically requires congressional approval. But the proposal advanced here includes ex ante consent. And the Court declared of the Compact Clause in 1823 that "the constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law, and of right reason."[318] The Constitution, moreover, provides that "[e]ach House may determine the Rules of its Proceedings"—a power the Court has interpreted broadly.[319]

The D.C. precedent should also be instructive here. Like the statute at issue in *Chadha*, the Home Rule Act previously contained a one-house veto provision, which the D.C. Court of Appeals invalidated.[320] Congress, however, responded to *Chadha* by amending the Home Rule Act to subject all local D.C. legislation to a report-and-wait system

313 *See* Press Release, Richard Blumenthal, Sen., U.S. Senate, Blumenthal Introduces the Foreign and Domestic Emoluments Enforcement Act (Nov. 4, 2021), https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-introduces-the-foreign-and-domestic-emoluments-enforcement-act/ [https://perma.cc/28TR-4CVF].

314 INS v. Chadha, 462 U.S. 919, 956–59 (1983).

315 *See id.* at 951–59 (discussing when congressional action counts as legislative); *id.* at 935 n.9 (stating that the report-and-wait statute for the Federal Rules of Civil Procedure "did *not* provide that Congress could unilaterally veto the Federal Rules" but instead "gave Congress the opportunity to review the Rules before they became effective and to pass legislation barring their effectiveness if the Rules were found objectionable").

316 *See* Sibbach v. Wilson & Co., 312 U.S. 1, 15–16 (1941) ("The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose.").

317 *See* Bradley, *supra* note 295, at 459–60.

318 Green v. Biddle, 21 U.S. (8 Wheat.) 1, 85–86 (1823).

319 U.S. CONST. art. I, § 5, cl. 2; *see* Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1959–60 (2020).

320 *See* Gary v. United States, 499 A.2d 815, 817 (D.C. 1985) (en banc).

instead.[321] That system survives to this day. This strongly suggests that a similar system for interstate compacts would withstand not only *Chadha* challenges, but other structural constitutional objections (under, say, nondelegation principles).

C. Regionalism Values

Professor Richard Briffault describes "efficiency, democracy, and community" as the "theoretical underpinnings" of the normative case for regional governance mechanisms.[322] It is worth considering, therefore, to what extent interstate compacts advance or impede these values under the current system versus under the prophylactic approach proposed here.

1. Efficiency

Economic efficiency may be the most obvious and important benefit that interstate compacts can offer. But economic inefficiencies can also result.

A wide range of actions by any given state can affect sister states, producing either negative or positive externalities. Absent some mechanism that compels or permits states to internalize these externalities' respective costs and benefits, state decisionmaking processes are less likely to fully and fairly account for them.[323] This kind of market failure becomes more difficult to overcome when more states are involved.[324] Enter interstate compacts, which can "provid[e] a formal mechanism to reduce the jurisdictional component of the transboundary spillover problem."[325] This line of reasoning is especially powerful when it comes to issues that naturally and often necessarily cross state borders—like river-basin management and light-rail construction.[326] Put simply by future Justice Frankfurter and Landis, "regional problems call[] for regional solutions."[327]

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321 *See* Louis Michael Seidman, *The Preconditions for Home Rule*, 39 CATH. U. L. REV. 373, 374 n.6 (1990) ("In response to *Chadha*, Congress amended the Home Rule Act to require action by both Houses and the President to veto a District statute.").

322 Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 2 (2000).

323 *See* Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1, 3 (1985).

324 *See* Neil S. Siegel, *Collective Action Federalism and Its Discontents*, 91 TEX. L. REV. 1937, 1941 (2013) ("When states impose external costs on sister states, a solution to the problem will require collective action by the affected states . . . .").

325 Stephen David Galowitz, *Interstate Metro-Regional Responses to Exclusionary Zoning*, 27 REAL PROP., PROB. & TR. J. 49, 115 (1992); *see also* Cooter & Siegel, *supra* note 202, at 140.

326 *See* Hasday, *supra* note 54, at 5.

327 Frankfurter & Landis, *supra* note 1, at 708.

Consider also prisoners' dilemmas where the possibility of competition with other jurisdictions causes states to take regulatory positions that conflict with the perceived public interest.[328] One can think of this situation as a "race to the bottom (or top)," where "states share the same basic objective but have incentives to act in ways that make it difficult to achieve the objective."[329] Interstate compacts can alleviate this problem: "Rather than allowing the threat of lost business to make state environmental, labor, and regulatory policies far weaker than the people would like them to be, . . . agreements that extend beyond state boundaries" can assist in avoiding "downward spirals."[330]

Interstate agreements can produce more efficient policymaking, including by facilitating the collective action necessary to internalize externalities and escape prisoners' dilemmas. But for at least two reasons, the economics of compacting are more complicated than this initial understanding suggests.

First, just as interstate compacts can curtail the effects of externalities, they can also—through "collusion and exploitation"—shift externalities onto third parties or even create externalities in the first place.[331] Imagine a nation with only two states and a body of water that crosses their boundary. The Coasean paradigm would have the states bargain over the costs and benefits that could arise from consuming water to greater or lesser degrees.[332] But "[a] federal system of three or more states . . . enables two (or more) states to inflict externalities that neither of them, acting on its own, may be able to induce"—like "water loss" to sister states.[333] So rather than internalizing the relevant externalities to optimize water consumption, two states sharing a body of water in a larger governmental system could band together to foist the risks of imperfect utilization onto downstream neighbors. Or they could create new negative externalities by undertaking a joint project, like constructing a dam.[334]

Interstate agreements can also allow states to impose externalities on their own citizens. As Professor Greve explains, this is especially

328 Hasday, *supra* note 54, at 7.

329 Siegel, *supra* note 324, at 1941. As examples, Professor Neil Siegel cites "the historic problems of 'unfair competition' caused by the absence of laws in certain states banning child labor or requiring minimum wages and maximum hours." *Id.* at 1946.

330 Hasday, *supra* note 54, at 7.

331 Greve, *supra* note 26, at 325.

332 *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2–8 (1960); Greve, *supra* note 26, at 325; *see also* Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 935 (1997) ("The only advantageous structural feature of transboundary pollution disputes lies in the fact that, typically, only a small number of states (often two) are involved; this should facilitate the negotiation of Coasean bargains.").

333 Greve, *supra* note 26, at 325.

334 *See id.*

true where compacts enable states to create cartels,[335] which (again) are groups that agree to act "in restraint of economic and political competition."[336] Greve provides a striking example. "[L]et five states (A–E) be the exclusive producers of consumer good 'X,'" he says.[337] "Powerful producers in each state would very much like their government to increase the price of X," but they cannot lobby for this change "because consumers would purchase more X from one of the four rival states."[338] Now, Greve says, "[s]uppose . . . that the governors of A–E agree to impose a surcharge on X-sales, to be shared by the state government and the producers (in some proportion): all producers and all governments will be better off."[339] But "[a]ll consumer-citizens will be worse off," and the market for X will be inefficient.[340] Turning to the real world, Greve asserts that the Tobacco Master Settlement Agreement of 1998—a massive regulatory instrument through which forty-six states settled claims against the four largest tobacco manufacturers—created a cartel by locking in supracompetitive prices and passing them onto consumers, with "[t]he 'damages' . . . represent[ing] the states' share of the difference between the market price and the monopoly price."[341]

Cartelization—or conduct approaching cartelization—can harm other disfavored parties in competitive markets too. Critics point to the tobacco agreement's consequences for competitors of the settling manufacturers as an example.[342] And by creating a buying group, Governor Cuomo's "regional state purchasing consortium" was likewise designed to cause widespread effects in the market for COVID-19 supplies.[343] As Cuomo put it, "[t]he COVID-19 pandemic created a mad scramble for medical equipment across the entire nation—there was

335 *See id.* at 325–27.

336 *Id.* at 322; *see supra* text accompanying note 203.

337 Greve, *supra* note 26, at 328.

338 *Id.*

339 *Id.*

340 *Id.*

341 *Id.* at 346–48, 353.

342 *See, e.g.*, Christopher Schroeder, *The Multistate Settlement Agreement and the Problem of Social Regulation Beyond the Power of State Government*, 31 SETON HALL L. REV. 612, 612–13 (2001) (stating that statutes states had to enact "to receive the full benefits of the annual payouts from the settlement" essentially "cartelize, or protect the market share, of the existing tobacco manufacturers by imposing an advance payment on a per carton basis sold by any tobacco company that is not a part of the settlement," which had the effect of "negating whatever cost competitive advantage a new entrant might have").

343 *See* Peter C. Carstensen, *Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy*, 1 WM. & MARY BUS. L. REV. 1, 30 (2010) ("By marshaling a significant share of the market for an input, a buying group can . . . create a variety of competitive risks in both the upstream supply market(s) and the downstream market(s) in which its participants compete.").

competition among states, private entities and the federal government and we were driving up the prices of these critical resources."[344] The purpose of the consortium, he said, was "to increase our market power when we're buying supplies and help us actually get the equipment at a better price."[345] The governors also sought to leverage their collective market power to transact with local producers, thereby "promot[ing] regional economic development"[346] and avoiding dependence on "swamped manufacturers in China and other faraway places."[347]

Another reason critics argue that compacts can contradict efficiency ideals stems from the fact that as consideration in the bargaining process, states can put up concurrent powers they share with the federal government.[348] States, the thinking goes, may not feel the full costs of deals made with such powers, which could lead to market failures in the form of cost-unjustified compacts.[349]

One could counter that the omnipresent possibility of federal supersession converts concurrent powers into funny money, meaning that state expenditure injures no one and raises no efficiency concerns. Or one could counter that state officials would suffer political fallout from compacts that are not in their citizens' best interests, which should discipline their decisions. But these objections answer each other. As an initial matter, interstate regulation may not harm the federal government in a formal sense. It could, however, harm the federal government in an informal sense by shifting the status quo (and stakeholders' reliance interests), thereby increasing the political and perhaps other costs of future intervention.[350] More fundamentally, if citizens seek to oppose poorly conceived compacts on the state level, the responsible officials could point to the potential of federal takeover to argue better the devil in Denver (or Des Moines or Dover) than the one in D.C.—a classic agency problem.[351]

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344 *COVID-19 Agreement*, *supra* note 17.

345 *Id.*

346 *Id.*

347 Sisak, *supra* note 19.

348 Indeed, encouraging states to part with some of their shared power over interstate commerce was a prominent theme of Frankfurter and Landis's landmark article. *See* Frankfurter & Landis, *supra* note 1, at 703–04.

349 *See* Greve, *supra* note 26, at 323–24 (stating that whereas the Coasean model "presume[s] that actors bargain with what they own," "[t]here is no reason to expect that . . . bargaining with non-exclusive rights . . . is efficient").

350 *See* Pincus, *supra* note 78, at 533–34.

351 *See* Hasday, *supra* note 54, at 36–37 ("Again and again, compacting states and private advocates have made clear that their primary motivation was simply 'to forestall complete Federal domination,' to create 'a desperately [needed] alternative to federal control,' which they predicted would be a less favorable means of resolving the problem." (footnotes

Interstate compacts provide a powerful tool to promote economic efficiency. But that tool can turn into a double-edged sword for vertical, horizontal, and individual interests in our federalist system where states respectively transact in concurrent powers, collude to each other's detriment, and cartelize to produce competitive harms—to give just a few examples. The system would benefit from a check beyond the compacting states themselves to help separate good and bad agreements according to criteria like these. Congress is naturally positioned to play that role, rendering the system of increased congressional participation presented here preferable to the more decentralized system of today.

2. Democracy

Like efficiency, interstate partnerships can both further and frustrate democratic participation in American governance.

Interstate compacts, supporters contend, promote democracy because they are "responsive to local interests."[352] Among other things, "they can be used to address the interstate problems of particular metropolitan areas without invoking burdensome state administrative mechanisms," times two or more depending on the number of states involved.[353] And they can potentially keep matters as to which Congress might have asserted a heavy-handed federal presence within the purview of state or local officials, who are closer to the electorate than their federal counterparts are.[354]

Compacts, however, can also erode democracy because of accountability concerns and permanency problems. As for accountability, agency compacts can pose special conundrums. Democracy-related worries attend many increases in bureaucratic authority, and the entities created by agency compacts may prove "particularly autonomous from the democratic institutions of government."[355] Indeed,

omitted) (first quoting WILLIAM EDWARD LEUCHTENBURG, FLOOD CONTROL POLITICS: THE CONNECTICUT RIVER VALLEY PROBLEM, 1927–1950, at 200 (1953); and then quoting Richard H. Leach, *The Interstate Oil Compact: A Study in Success*, 10 OKLA. L. REV. 274, 284 (1957))).

352 Galowitz, *supra* note 325, at 115.

353 *Id.*

354 *See* Hasday, *supra* note 54, at 32. Future Justice Frankfurter and Landis expressed a belief that some matters "open to Congressional control" were better left to the states, including for democracy-related reasons. *See* Frankfurter & Landis, *supra* note 1, at 720–25 (emphasizing "the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants" (quoting Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 320 (1851))).

355 Hasday, *supra* note 54, at 22; *see also* Greve, *supra* note 26, at 329 (contending that the "standing board[s] or commission[s]" created by agency compacts "have consistently been found to elude democratic control and accountability").

there has been "a broad consensus that compact agencies are remarkably unconcerned about popular needs and desires, even compared to state and federal agencies" more generally.[356]

Accountability concerns also run deeper than the agency-compact context. Professor Greve offers an analogy to the 1992 case *New York v. United States*, where the Supreme Court invalidated under the Tenth Amendment a federal program that "offer[ed] state governments a 'choice' of either accepting ownership of [nuclear] waste" generated within their borders "or regulating according to the instructions of Congress."[357] Part of the Court's reasoning focused on the split, and therefore slippery, accountability arrangement that congressional control of state legislative choices would produce. The Court noted that "powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests."[358] It was easy to imagine that because most of the electorate would adopt a not-in-my-backyard attitude toward nuclear-waste disposal, both congresspeople and state legislators would prefer to shift the blame for siting decisions onto the other level of government.[359] The Court found it relevant that the hybrid federal-state model at issue in *New York v. United States* would have allowed each group to do that, thereby "diminish[ing]" the "accountability of both state and federal officials."[360] Interstate collaborations can provide the same kind of cover, allowing officials "to diffuse and obfuscate political responsibility" for unpopular outcomes.[361] Officials from partnering states, for instance, can pass the buck back and forth, condemning each other for problems in program formulation or management.

Permanency presents another potential set of difficulties. This is especially true for interstate agreements that amount to binding contracts.[362] For the Constitution's Contract Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[363] And the Court long ago declared that "a State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals."[364] The ordinary levers of democracy, therefore, may be unable to transform or terminate compacts that

356 Hasday, *supra* note 54, at 24.

357 New York v. United States, 505 U.S. 144, 175 (1992); *see* Greve, *supra* note 26, at 376–77.

358 New York v. United States, 505 U.S. at 182.

359 *Id.* at 182–83.

360 *Id.* at 168, 182–83.

361 Greve, *supra* note 26, at 376.

362 *See* Hasday, *supra* note 54, at 2–3.

363 U.S. CONST. art. I, § 10, cl. 1.

364 Green v. Biddle, 21 U.S. (8 Wheat.) 1, 92 (1823).

fail to maintain public support. Permanency, moreover, works a threat to the entire federalist system: to vertical interests to the extent regulatory inertia keeps the federal government from acting to adjust or abolish compacts as changed circumstances demand, to horizontal interests to the extent compacts become more favorable or unfavorable to some states over time, and to individual interests to the extent interstate entities or other arrangements resist popular control.

When it comes to both accountability concerns and permanency problems, the Port Authority of New York and New Jersey, "the largest and most self-willed of the regional agencies," has troubled analysts perhaps more than any other interstate collaboration.[365] Initially authorized "to build, operate and coordinate transportation facilities," its functions quickly proliferated.[366] Within a few decades, the Port Authority could borrow money, issue bonds and subpoenas, negotiate contracts, run a police force, deal in all manner of industrial construction, and generally manage its own budget involving expenditures larger than those of four states and assets greater than those of all but fifty private companies in the country.[367] Commentators have attributed this trend to forces including financial incentives to continually expand operations and the fact that the enabling legislation "establishe[d] no remedial procedures to facilitate legal control if the agency stray[ed] from its compact."[368] At bottom, commentators have criticized the Port Authority as licensed to act historically "impervious to popular will."[369]

To be sure, policymakers and advisors have attempted to respond to some of these issues. For instance, the National Center for Interstate Compacts, a project under the auspices of the nonprofit Council of State Governments, seeks to "combine[] policy research with best practices" to "[f]acilitate . . . the consideration, creation and revision of interstate compacts" by acting as a "[c]learinghouse of information and provider of training and technical assistance to current and potential compact member states."[370] Upon the Center's founding in 2004, one goal was to "promote[] the use of interstate compacts as an ideal tool . . . to provide an adaptive structure . . . to meet new and changing

365 Comment, *supra* note 97, at 1419; *see also, e.g.*, Greve, *supra* note 26, at 329; Hasday, *supra* note 54, at 28.

366 Comment, *supra* note 97, at 1419.

367 *Id.*

368 Hasday, *supra* note 54, at 27–30.

369 *Id.* at 28.

370 *About Us*, NAT'L CTR. FOR INTERSTATE COMPACTS: THE COUNCIL OF STATE GOV'TS, https://compacts.csg.org/about/ [https://perma.cc/DTU4-8ZFJ].

demands over time."[371] But accountability concerns and permanency problems persist. The Supreme Court enjoined New Jersey from exiting a different compact with New York a few months ago and is set to decide the acrimonious dispute about the agreement's adaptability later this Term.[372] And complaints about the Port Authority's perceived lack of popular responsiveness have continued to pop up.[373]

Congressional remedies for accountability concerns and permanency problems are possible. As Professor Jill Hasday explains, states have formed compacts under "unusual circumstances" and through "pure chance," without "much of a theory about when and how they should" do so.[374] As a centralized node with some institutional memory, Congress (in addition to entities like the National Center for Interstate Compacts) could help compensate for such state-level shortfalls. Congress could, for instance, condition consent on whether states match the scope and duration of compacts to demonstrated necessity; limit agency discretion to the maximum extent feasible; and "facilitate democratic intervention" by including features like veto authority, reporting requirements, and liberal amendment and withdrawal allowances.[375] Congress would also "be wise," Hasday says, to examine competitive-federalism agreements especially closely in hopes of rooting out situations where states agree (perhaps inadvertently) to democracy-burdening mechanisms while seeking to avoid the alternative of federal regulation.[376] And even where interstate agreements are "last resorts" aimed at solving real regional problems, direct federal intervention may serve on-the-ground interests better than compacts can.[377]

Increased congressional participation, it bears noting, would not provide a panacea for accountability concerns and permanency

371 John J. Mountjoy, *National Center for Interstate Compacts: A New Initiative*, SPECTRUM: J. STATE GOV'T, Fall 2004, at 8, 8.

372 *See* New York v. New Jersey, 142 S. Ct. 1410 (2022) (mem.) (granting injunction); New York v. New Jersey, No. 22O156 (U.S. argued Mar. 1, 2023) (setting the case "for oral argument in due course").

373 *See, e.g.*, Nathan Newman, Opinion, *Move Over: Replace the MTA and Port Authority with a Regional Transit Agency Responsible to NYC*, N.Y. DAILY NEWS (Oct. 17, 2021, 5:00 AM), https://www.nydailynews.com/opinion/ny-oped-move-over-mta-port-authority-20211017-ziw6alm2svgpxpudsxaiofnu5e-story.html [https://perma.cc/6EA7-PB4S] (arguing that the Port Authority is a "tale of top-down control by appointees of governors from the two states, . . . with little local say" and stating that "[t]he arbitrary power of the governors over the PA became especially notorious in recent years when appointees by Jersey Gov. Chris Christie shut down local entrances to the George Washington Bridge as political punishment to Fort Lee Mayor Mark Sokolich, leading to multiple indictments").

374 Hasday, *supra* note 54, at 35.

375 *Id.* at 35, 41–46.

376 *Id.* at 35–37.

377 *Id.* at 37–38.

problems. In the event of congressional approval, state officials could transfer fault for poor compacting decisions onto the federal government by pointing out that Congress endorsed—and in some cases, encouraged—the agreements.[378] Federal officials could likewise deflect criticism onto state governments by arguing that state officials (in most cases) authored and (in all cases) adopted unpopular compacts.[379] And where congressional consent imparts agreements the force of valid federal law, precedent holds that "a compact takes precedence over the subsequent statutes of signatory states," at least absent a provision allowing unilateral changes.[380]

Increased congressional participation, which the proposal propounded here encourages, could nevertheless represent a partial solution to democratic drawbacks in the interstate-compacting process. By allowing states to bypass congressional consent in all but (at most) exceptional cases, the current system renders substantial improvement along these lines less likely to occur.

3. Community

Finally, consider the complex relationship between interstate compacts and community.

As a historical matter, the promotion of interstate partnerships appears to have roughly paralleled the periodic support for regionalism more broadly.[381] Writing in 1925, future Justice Frankfurter and Landis said that "nothing is clearer than that in the United States there are being built up regional interests, regional cultures and regional interdependencies."[382] A century later, the transformation they referenced seems complete, with many Americans experiencing their regions as their social and political homes: as their communities.

Indeed, "the geographic case for regionalism is often undeniable,"[383] with thirty-one of the largest metropolitan statistical areas

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378 Congress encouraged states to form interstate compacts providing for nuclear-waste disposal in the facts underlying *New York v. United States*, for example. *See* New York v. United States, 505 U.S. 144, 150–54 (1992).

379 *See* Hasday, *supra* note 54, at 21 (describing the compact-drafting process).

380 *Id.* at 3 & nn.8–9 (collecting citations); *see supra* note 255 and accompanying text.

381 There are two cross-cutting ways this concept can manifest. The first, what one could call "horizontal regionalism," focuses on shifting "power to institutions, organizations, or procedural structures with a larger territorial scope and more population than existing local governments." Briffault, *supra* note 322, at 1. The second, what one could call "vertical regionalism," focuses on "institutions or collaborations that would occupy the space 'between state and nation.'" Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 380 (2018) (quoting MARTHA DERTHICK, BETWEEN STATE AND NATION: REGIONAL ORGANIZATIONS OF THE UNITED STATES (1974)).

382 Frankfurter & Landis, *supra* note 1, at 708.

383 Hasday, *supra* note 54, at 5.

forming interstate communities in the United States as of 2010.[384] But the universe of interstate units is neither bounded by geographic necessity nor limited to metropolitan areas. The Bible Belt, the Corn Belt, the Rust Belt: larger expanses like these form a more metaphysical kind of multistate region too. To echo both classic and contemporary commentators, regions have become our "realities."[385] Regional governance mechanisms—including interstate compacts—can recognize and operationalize these realities in productive ways.[386]

As with efficiency and democracy, however, the community-enhancing upsides of interstate compacts may be accompanied by offsetting downsides. Now-Dean Heather Gerken and Ari Holtzblatt have expounded the danger of siloing ourselves within regulatory "enclaves" meant to avert interstate spillovers to the maximum extent possible. "Enclaves," they write, "encase us in a protective policymaking bubble and shield us from laws with which we disagree."[387] When regulatory enclaves are unavailable, "citizens of one state must accommodate the preferences of another's."[388] People are thus "reminded that they are not just part of a state but part of a union" and become "enlisted in the practice of pluralism."[389]

The bottom-up communities embodied by regulatory enclaves may feel quite comfortable.[390] But the project of American constitutionalism hinges on the coexistence of overlapping and multidirectional communities—and thus on an inevitable quantum of social and ideological discomfort.[391] "A vibrant democracy depends not just on

384 *See* U.S. DEP'T OF COM., U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 26–28 tbl.20 (2012), https://www2.census.gov/library/publications/2011/compendia/statab/131ed/2012-statab.pdf [https://perma.cc/D9DF-6ZUA]; *see also* Hasday, *supra* note 54, at 5 (presenting data from the 1990s).

385 Frankfurter & Landis, *supra* note 1, at 729; *see also* Parag Khanna, Opinion, *A New Map for America*, N.Y. TIMES (Apr. 15, 2016), https://www.nytimes.com/2016/04/17/opinion/sunday/a-new-map-for-america.html [https://perma.cc/7RUU-CSTX] (asserting that "socially and economically, America is reorganizing itself around regional infrastructure lines and metropolitan clusters that ignore state and even national borders" and that "[t]he problem is that while the economic reality goes one way, the 50-state model means that federal and state resources are . . . allocated with little sense of the larger whole").

386 *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 497–500 (8th ed. 2016).

387 Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 88 (2014).

388 *Id.*

389 *Id.*

390 *Id.* at 104 ("Every community would like to live according to its own preferences.").

391 *See id.* at 89 (arguing that "we should worry as much about inertia as brouhahas, as much about the comfort of enclaves as the discomfort of conflict" and that "[s]pillovers mitigate the problems associated with inertia and enclaves by generating other types of

choice but on accommodation, compromise, and engagement," Gerken and Holtzblatt argue.[392] Living in enclaves does not promote these capabilities.[393]

Interstate compacts—and especially competitive-federalism compacts—fit this indictment of regulatory enclaves in some circumstances.[394] As Jacob Finkel has observed, "[m]ost of the major regulatory compacts in recent decades have been preceded by some effort to gain congressional approval" of the underlying policy "before organizers resorted to a compact" designed to advance without federal support.[395] The problem is that if "compacts serve to supplant Congress when it chooses not to act, or when vetogates within the federal legislative process prevent action on a particular controversy," the "extra-congressional focus of advocacy" undermines democratic engagement across pluralistic lines,[396] elevating micro-level regional communities over the macro-level national community of the United States itself.

The decentralized and adaptable representation made possible by a federalist structure represents a feature, not a bug, of our governmental system. But so, too, does centralized superintendence—and centralized conflict—over cognizably national subjects. With interstate compacts as with so much else, the trick is trying to balance these contradictory yet complementary characteristics of American constitutionalism. "[E]xceptions to the national norm" are a critical component of our federalist structure.[397] But "self-interest and inertia" alone should not drive policymaking devolution.[398]

Applied to interstate compacts, one could characterize these community-related concerns as threatening harms to vertical, horizontal, and individual federalism interests. By leaving difficult issues to decentralized decisionmaking, congresspeople may relinquish their own influence and fail to allow federalism to "push us toward a national consensus on issues that matter to [the] people."[399] By declining to counter, compromise, and in some cases concede on a level political playing field, states and individuals may disclaim their constitutional roles as

problems—controversies and conflicts and costs that are far more likely to galvanize democratic engagement").

392 *Id.* at 88.

393 *Id.* at 88–89.

394 Finkel, *supra* note 4, at 1594–601 (discussing the relationship between Gerken and Holtzblatt's work and interstate compacts).

395 *Id.* at 1596.

396 *Id.* at 1596–97.

397 Gerken & Holtzblatt, *supra* note 387, at 86.

398 *Id.*

399 *Id.*

parts of a larger whole[400]—and disempower their cross-border counterparts.

Recall the National Popular Vote Interstate Compact, which indirectly seeks to subject presidential elections to a national popular vote without directly abolishing the Electoral College.[401] The most intuitive way to establish a national popular vote would be by amending the Constitution under Article V.[402] The Compact, however, is specifically aimed at bypassing these arduous procedures, which require amassing supermajoritarian—and thus pluralistic—support in both Congress and the states.[403] And here the community-related effects are even worse than in the classic regulatory-enclave context, for the whole system is designed to foist one group of states' preferences for how presidential elections should work onto the rest of the states without the latter's say.

The model proposed here would entail much different effects. A report-and-wait system would make meaningful congressional consideration—and potential rejection—more likely for community-harming agreements than the current regime does. And by facilitating the sort of centralized contestation that the current regime allows parties to elude, a report-and-wait system would decrease the incentives for states to create community-harming agreements in the first place.

In sum, there are good reasons to believe the prophylactic approach advocated here would promote the efficiency-, democracy-, and community-enhancing possibilities of interstate partnerships better than the present system does.

D. Potential Concerns

The proposal advanced here is political, not perfect. Beginning with an impressionistic interpretation of what "any Agreement or Compact" means (*something*, and probably a large proportion of interstate

400 *See id.* at 88.

401 *See supra* text accompanying note 12.

402 *See* Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, 2012 BYU L. REV. 1523, 1583 (arguing that Article V is the only constitutional way to subject presidential elections to a national popular vote).

403 *9.1 Myths About the U.S. Constitution*, NAT'L POPULAR VOTE!, https://www.nationalpopularvote.com/section_9.1#myth_9.1 [https://perma.cc/M76S-DBDT] (as part of the "quick answer" to the ostensible "myth" that "[a] federal constitutional amendment is the superior way to change the system," stating that "[b]uilding support from the bottom-up is more likely to yield success than a top-down approach involving a constitutional amendment"); *see* U.S. CONST. art. V (providing for constitutional amendment through a two-thirds initial vote in both houses of Congress followed by ratification in three-quarters of the states—or through a never-employed initial convention procedure followed by ratification in three quarters of the states).

partnerships), the proposal shifts the present system's focus to making "the Consent of Congress" more meaningful and practical. As in many legal areas, these concerns—constitutional interpretation and practical application—can push in opposite directions. The hope, however, is that the balance struck here proves preferable to the balance struck elsewhere, honoring constitutional meaning better than current caselaw does and achieving practical outcomes better than scholarly substitutes do.

True, much of the popular perception of this proposal's success, if adopted, would depend on as-yet-unknown empirics. Would the number of good interstate agreements, now with more legal force, increase? What about bad ones? Would activists take advantage of partisan dynamics to attain policy victories through interstate compacts that they could not have attained through the normal federal legislative process? And so forth.

There are a number of ways to respond to concerns like these. First, a lot of what makes an interstate agreement good or bad lies in the eye of the beholder. This proposal is ideologically agnostic in a way that deliberations about implementation need not be. But ideas for invigorating the Compact Clause deserve consideration—if not uncritical acceptance—for rule-of-law reasons antecedent to their ideological implications. And in any event, there are grounds to believe that greater congressional supervision could improve compact quality at least with respect to the efficiency, democracy, and community values discussed above.

Second, assessments should compare this proposal to actual realities rather than idealized conditions. Vast and varied interstate collaborations are already happening, whether congresspeople and academics want to acknowledge them or not. Activists are already exploiting polarization and gridlock to impose parochial preferences on subjects of national interest. To be sure, some of the most extreme examples of competitive-federalism compacts remain notional, and this proposal includes incentives to stimulate buy-in, which could benefit some lower-quality compacts. But as state politicians seek bigger and bolder ways to buck the outcomes of federal processes with which they disagree, federal decisionmakers should reflect on possible responses. To be fair, the prospect of meaningful federal oversight depends on Congress functioning more productively than the recent past suggests it might. But Congress would have to come together to pass a proposal like this in the first place; thoughtful safeguards could filter the most extreme interstate agreements away from an opt-out default; and the present system may actually exacerbate do-nothing congressional tendencies by shunting important responsibilities elsewhere.

Third, in a similar spirit, the proposal advanced here is highly adaptable to emerging empirics and changing circumstances. At the start and over time, Congress could exempt classes of possible compacts from any passive-consent default. It could also grant or withhold consent to or from particular classes of interstate agreements on an express basis or respond to on-the-ground affairs in any number of other ways. Indeed, if desirable, one can view this project's proposal as a thought experiment intended to encourage creative conversations around increasing congressional participation in interstate compacting. Using ideas like those discussed here as a flexible foundation, commentators and congresspeople can surely come up with a more constitutional and commonsensical system than the one in place now.

CONCLUSION

Interstate collaborations are becoming ever more prominent in American governance. These partnerships have been rightly celebrated as providing flexible tools for achieving efficient, democratic, and communitarian regulation in the face of incapacity by individual states or inaction by the federal government. But interstate collaborations can also injure vertical, horizontal, and individual federalism interests by undermining the same values.

The Constitution's Compact Clause—which says that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power"[404]—provides a ready and at least sometimes required mechanism for mediating between helpful and harmful interstate partnerships. But the question on which current caselaw and academic interpretations focus—what constitutes "any Agreement or Compact" sufficient to trigger the Clause?—is essentially intractable. All this begs for shifting attention to the other question embedded in the provision—what constitutes "the Consent of Congress" sufficient to satisfy it?

This Article has outlined a prophylactic approach—meaning one aimed at avoiding difficult constitutional questions by preventing debatable constitutional violations—where silence in the face of possible-compact submission can amount to congressional consent. The Article has also offered a variety of theoretical, juridical, and political support for a report-and-wait system. The time is ripe for reimagining Compact Clause congressional consent, including—potentially—along the lines sketched here.

404 U.S. CONST. art. I, § 10, cl. 3.