Missouri Law Review

Volume 68
Issue 2 *Spring 2003*

Article 1

Spring 2003

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MISSOURI LAW REVIEW

VOLUME 68 SPRING 2003 NUMBER 2

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The Compact Clause (Art. I, Sec. 10 U.S. Constitution) requires congressional approval for "any agreement or compact" among the states. In the teeth of this wording, the Supreme Court held, in U.S. Steel Corp. v. Multistate Tax Commission, *(1978), that the Clause applies only to state compacts that "encroach" upon federal supremacy. Courts have followed this precedent in sustaining the 1998 multi-state agreement on tobacco litigation against Compact Clause challenges.*

Compacts, Cartels, and Congressional Consent *argues that* U.S. Steel *was wrongly decided. Congressional "negatives," including the Compact Clause, invert the default rule for constitutionally suspect classes of state laws. Whereas ordinary state laws are permitted to go into (and remain in) effect unless and until Congress or the courts exercise their authority under the Supremacy Clause, congressional negatives render state laws inoperative unless and until Congress takes affirmative action. By limiting the operation of the Compact Clause to state agreements that encroach on federal supremacy—which are unlawful in any event—the Supreme Court has re-inverted the constitutional presumption and emptied the Compact Clause of all content.*

This Article explains the forgotten constitutional logic and wisdom of the Compact Clause and argues for a Compact Clause jurisprudence that will safeguard constitutional purposes (in particular, the protection of equality and comity among the states). It shows that both the 1967 Multistate Tax Compact

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considered in U.S. Steel *and the 1998 tobacco settlement are clearly unconstitutional without congressional consent. It concludes that a re-invigorated Compact Clause is consistent with principled, constitutional federalism doctrines.*

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I. INTRODUCTION

A. The Upside-Down, Inside-Out Compact Clause

On November 17, 1998, the attorneys general of forty-six states and the major U.S. tobacco manufacturers signed an agreement governing the sale of cigarettes and other tobacco products in the United States. The so-called Master Settlement Agreement ("MSA"), which ended an unprecedented state litigation campaign against the tobacco industry, provides for the companies' payment of nearly a quarter of a trillion dollars, over a period of twenty-five years, in "damages" and other payments to the states.[1] In all but name, the payments are a national consumption tax, paid almost entirely by individual smokers.[2] No legislator at any level of government ever voted for (or against) that tax. Most importantly, the United States Congress did not approve the MSA.

The Compact Clause of Article I, Section 10 of the United States Constitution provides that "[n]o State shall, *without the Consent of Congress* . . . enter into any Agreement or Compact with another State, or with a foreign Power."[3] The MSA bears the signatures of forty-six state attorneys general and, by its terms, requires approval by eighty percent of the signatory states for its full implementation.[4] It would thus appear to be a state "agreement" and, as such, require congressional consent. In several lawsuits regarding the MSA, however, federal courts have dismissed Compact Clause claims, uniformly with little discussion.[5]

Perplexing at first sight, these rulings rely on Supreme Court precedents that have held, occasionally *in haec verba*, that the Compact Clause cannot possibly mean what it says.[6] The leading modern case, *U.S. Steel Corp. v. Multistate Tax*

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1. The Master Settlement Agreement [hereinafter "MSA"] cannot be found in any law library or statute book. It is, however, available online, and all references hereinafter are to the online text. MASTER SETTLEMENT AGREEMENT & AMENDMENTS, *at* http://www.naag.org/issues/tobacco/index.php?sdpid=919 (last visited April 3, 2003).

2. *See infra* notes 267-69, accompanying text, and sources cited.

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

4. MSA, *supra* note 1, art. II(u).

5. In the leading appellate case, the Fourth Circuit discussed the merits of the plaintiff's Compact Clause claim in five short paragraphs. Star Scientific, Inc. v. Beales, 278 F.3d 339, 359-60 (4th Cir.), *cert. denied sub nom.* Star Sci., Inc. v. Kilgore, 123 S. Ct. 93 (2002). For similarly cursory dismissals, see, e.g., PTI Inc. v. Philip Morris Inc., 100 F. Supp. 2d 1179, 1198 (C.D. Cal. 2000); and Mariana v. Fisher, 226 F. Supp. 2d 575, 586-87 (2002) (*appeal pending*). One court characterized the plaintiffs' (poorly-pled) Compact Clause claim as "plainly frivolous." Hise v. Philip Morris, Inc., 46 F. Supp. 2d 1201, 1210 (N.D. Ok. 1999), *aff'd*, No. 99-5113, 2000 U.S. App. LEXIS 2497 (10th Cir.), *cert. denied*, 121 S. Ct. 384 (2000).

6. The most important pronouncement to this effect is *Virginia v. Tennessee*, 148

Commission,[7] arose over a multi-state arrangement governing the taxation of interstate business income. In sustaining the arrangement against a Compact Clause challenge, the Supreme Court read the Clause, in the teeth of its clear language, to require congressional approval only when a state compact impinges upon the supremacy of the United States. Because such compacts are bound to be void in any case under a conventional constitutional or preemption analysis, it is difficult to imagine a state agreement on which the Compact Clause would operate as a distinct constitutional requirement and obstacle.

Extant compacts and their fate in the courts illustrate the emasculation of the Compact Clause. Prior to 1921, thirty-six compacts between states were put into effect with the consent of Congress; virtually all of these settled boundaries between contiguous states.[8] Modern compacts, in contrast, often address "tough national issues"[9] and establish expansive (and expensive) regulatory regimes. The 200-odd state compacts now in effect (excluding boundary agreements) cover a broad range of issues, from environmental and energy policy (39 compacts) to water allocation (38), traffic and transportation (28), crime control (16), and education (12), among other matters.[10] Many compacts are administered, on an on-going basis, by standing compact boards or commissions.[11] While most compacts operate with congressional consent (and,

U.S. 503, 519 (1893) (discussed *infra* notes 58-62 and accompanying text). In the same spirit, the Court has classified particular interstate arrangements as not really "compacts" in the relevant sense. *See* Bode v. Barrett, 344 U.S. 583 (1953); Massachusetts v. Missouri, 308 U.S. 1 (1939); S.F.R. v. James, 161 U.S. 545 (1896) (all holding that reciprocity agreements do not constitute compacts within the meaning of the Compact Clause); Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 175 (1985) (affirming that position, though possibly in dictum—*see infra* note 103). The Court has also held that congressional consent may be implied from congressional acquiescence. Virginia v. Tennessee, 148 U.S. 503, 521 (1893); Virginia v. West Virginia, 78 U.S. 39 (1870); Poole v. Fleeger, 36 U.S. (11 Pet.) 185, 209 (1837); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 85-87 (1823). For a brief discussion of the form and timing of congressional consent, see *infra* notes 356-67 and accompanying text.

7. 434 U.S. 452 (1978).

8. Brevard Crihfield, *Interstate Compacts, 1783-1977: An Overview*, THE BOOK OF THE STATES 1978-79, at 580 (Council of State Governments, 1978). Charles Warren, The Supreme Court and the Sovereign States 121-24 (Appendix E) (1924), lists twenty-nine congressionally approved compacts over that period.

9. Edward D. Feigenbaum, *Interstate Compacts & Agreements*, 26 THE BOOK OF THE STATES 453 (Council of State Governments, 1986).

10. The figures are derived from William Kevin Voit, Interstate Compacts & Agencies 1998 (Council of State Governments, 1998). An alphabetical listing shows 192 compacts. *Id.* at 11-14. The descriptive portion of the report shows 208 compacts. *Id.* at 15-133. In addition, the report lists fifty-one compacts that "may be" dormant or defunct. *Id.* at 159-60.

11. A precise count is hard to come by. William Voit lists 116 compact authorities,

in a few instances, subject to periodic renewal requirements),[12] some compacts have gone into effect without receiving congressional approval. The Multistate Tax Compact ("MTC") sustained in *U.S. Steel*, as well as the 1998 tobacco settlement, both went into effect after—and despite—unsuccessful attempts to obtain congressional consent.[13] The judicial decisions that have to date sustained those arrangements fit a consistent pattern: even though most compact litigation seems to have arisen over unapproved compacts,[14] it appears that no court has ever voided a state agreement for failure to obtain congressional consent.[15]

This Article argues that the judiciary should enforce the Compact Clause. The constitutional text alone might appear sufficient to sustain that argument: if the plain text of the Compact Clause means anything, it must mean that state agreements of the scale, complexity, and consequence of the MTC or the MSA require congressional consent. The record of judicial obtuseness and scholarly indifference,[16] however, warrants a more elaborate effort to recover the forgotten constitutional logic and purpose of the Compact Clause and its place in the federal architecture. The Compact Clause—a species of the congressional "negative" James Madison urged upon the Constitutional Convention[17]—inverts the general constitutional default rule for state enactments: whereas the ordinary supremacy arrangement of the Constitution allows state laws to become and remain effective until a court enjoins or Congress preempts them, the Compact Clause renders state enactments within its range *in*effective unless and until

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boards, commissions, and committees. *Id.* at 157-58. While some of these bodies may be dormant or defunct, some existing multistate bodies may have been omitted from the list. *Id.* at 157.

12. *See, e.g.*, Interstate Compact to Conserve Oil & Gas, 49 Stat. 939 (1935) (briefly discussed *infra* notes 154-56 and accompanying text); Northeast Interstate Dairy Compact, 7 U.S.C. § 7256 (2000).

13. *See infra* notes 69-74 and accompanying text (MTC); *infra* notes 234-38 and accompanying text (MSA). *See* David E. Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 70-71 (1965) [hereinafter Engdahl, *Interstate Arrangements*] (providing examples and describing states' increased insistence that certain types of compacts do not require congressional approval).

14. Seattle Master Builders v. Pac. Northwest Elec. Power & Conservation Council, 786 F.2d 1359, 1374 (9th Cir. 1986) (Beezer, J., dissenting), *cert. denied*, 479 U.S. 1059 (1987).

15. Engdahl, *Interstate Arrangements*, *supra* note 13, at 69 ("[I]n every case since *Virginia v. Tennessee* in which an interstate arrangement has been challenged for lack of congressional consent, it has been held exempt from the consent requirement") (footnote omitted). Thirty-plus years later, the statement is still accurate.

16. The literature on the Compact Clause is slim. To my knowledge, not a single law review article or textbook published during the past half-century has criticized the judicial emasculation of the Clause as questionable, let alone clearly erroneous.

17. *See infra* notes 110-23 and accompanying text.

Congress affirmatively validates them. By reserving the application of that rule to compacts that compromise federal supremacy, the Supreme Court has effectively re-inverted the default rule and brought state agreements under the very supremacy arrangement from which the Compact Clause exempts them.

That move constitutes a twofold constitutional error. The Compact Clause merits judicial respect not only because it is the constitutional default principle but also because it is the *correct* principle. Congressional approval for all state agreements, or something very close to it, is the only compact rule that is consistent with constitutional federalism.

B. Function and Form

A jurisprudence that has turned the Compact Clause on its head is, in its own way, a considerable judicial achievement. The fuel that propelled the case law on its ill-fated trajectory was an interpretive shift from the text and form of the Compact Clause to its purpose and function—more precisely, a gross misunderstanding of its function. From the Compact Clause, whose uncompromising language leaves no doubt about the Founders' "deep-seated and special fear of agreements between States,"[18] scholars and judges shifted to a functional view of interstate compacts as an efficient and underutilized institutional arrangement.[19] Their arguments come in full federalist regalia and portray state compacts as a pristine and constitutionally favored example of cooperative federalism in action.[20]

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

19. *See, e.g.*, VINCENT V. THURSBY, INTERSTATE COOPERATION: A STUDY OF THE INTERSTATE COMPACT 149 (1953) (recommending compacts as a means to protect the vitality of the states and to relieve an overburdened national government); FREDERICK ZIMMERMAN & MITCHELL WENDELL, THE INTERSTATE COMPACT SINCE 1925, 126 (1951) ("The interstate compact is a strong legal instrument for expanding cooperative federalism in situations to which other cooperative methods are not as applicable."); Richard C. Kearney & John J. Stucker, *Interstate Compacts and the Management of Low Level Radioactive Wastes*, 45 PUB. ADMIN. REV. 210, 214 (1985) (interstate compacts as an effective means to protect state sovereignty and cooperation where national government remains inactive); Jo M. Ferguson, *The Legal Basis for a Southern University—Interstate Agreements Without Congressional Consent*, 38 KY. L.J. 347 (1950); Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925) [hereinafter Frankfurter & Landis, *The Compact Clause*]; Note, *To Form a More Perfect Union? Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842, 858-59 (1989).

20. State officials and the leaders of state lobbying and umbrella organizations, such as the Council of State Governments and the National Association of Attorneys General, have been especially ardent in celebrating state compacts as a federalist arrangement *par excellence* and in denouncing perceived or real congressional

This intellectual tradition reaches back to an impressive 1925 law review article by (later) Justice Felix Frankfurter and James M. Landis, which celebrated "the imaginative adaptation of the compact idea" to increased regionalism and "[t]he overwhelming difficulties confronting modern society."[21] While Frankfurter and Landis did not argue for dispensing with the congressional consent requirement (quite the opposite),[22] they furnished the intellectual apparatus—and the soothing rhetoric of cooperation, flexibility, and localism—that later generations of scholars and judges would put to that purpose.[23] Their cheerful endorsement of state compacts partook of a broader intellectual and political effort to portray America's traditional, "dual" federalism as archaic and doctrinaire. The needs of a modern, complex, industrial society, the Progressives and their New Deal heirs argued, command government improvisation, experimentation, and cooperation. The New Deal and, after initial resistance, the Supreme Court embraced the best-known and perhaps most consequential form of "cooperative federalism"—vertical power- and revenue-sharing arrangements between the states and the national government.[24] The embrace of horizontal cooperation among states followed the same political and judicial trajectory. The Supreme Court sustained state agreements against a

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interferences. For a particularly strident example of states-rights chauvinism, see Ferguson, *supra* note 19. *See also* Feigenbaum, *supra* note 9, at 453 (Compact Clause intended to "facilitate" state agreements); and Robert G. Dixon, Jr., *Constitutional Bases for Regionalism: Centralization; Interstate Compacts; Federal Regional Taxation*, 33 GEO. WASH. L. REV. 47, 65 (1964) ("As a matter of first impression, it could be argued that the intent of the Framers . . . was to *enable* the states, by consent, to take joint action to solve problems which lay beyond the power and capacity of any one state.") (emphasis added) (describing state officials' views). One might as well argue that the Founders intended to "facilitate" and "enable" state duties on imports and exports by subjecting such imposition to approval by Congress. *See* U.S. CONST. art. I, § 10, cl. 2.

21. Frankfurter & Landis, *The Compact Clause*, *supra* note 19, at 729.

22. Since state agreements may affect non-party states, "Congress *must* exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions. The framers thus astutely created a mechanism of legal control over affairs that are projected beyond state lines and yet may not call for, nor be capable of, national treatment." *Id.* at 694 (emphasis added). Justice Frankfurter apparently considered congressional approval *de rigeur* for all state compacts. West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 27 (1951).

23. *Cf.* Seattle Master Builders v. Pac. Northwest Elec. Power & Conservation Council, 786 F.2d 1359, 1364 (9th Cir. 1986) (Frankfurter & Landis article "set[s] the tone for the modern use of compacts."), *cert. denied*, 479 U.S. 1059 (1987) .

24. The standard account of the transition from dual to cooperative federalism is Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950). *See also* EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY (1934).

variety of challenges[25] and, moreover, affirmatively encouraged states to utilize compacts as a means of resolving boundary disputes, water rights questions, and pollution problems.[26] By 1959, the Court waxed approvingly about "imagination and resourcefulness in devising fruitful interstate relationships" and about the "voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution."[27]

The most persuasive defense of this interpretation rests on what we now call a transaction cost model. Federalism poses problems of coordination (such as interstate pollution) and scale (such as the management of natural resource systems that span state jurisdictions).[28] Bargaining by the affected states may provide a more efficient solution to such problems than the alternative available channels—litigation or centralized, federal legislation and regulation.[29] From this vantage, the constitutional requirement of congressional approval for state agreements seems dysfunctional. In addition to creating delay and uncertainty, Congress might hold sensible and efficient state bargains hostage to logrolling and rent-seeking.[30] Experience has also shown that Congress may impose onerous conditions on state compacts and their administrators, thus dissipating the gains from flexibility and local control that compacts may produce.[31] So long

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25. *See, e.g.*, Hinterlider v. La Plata River Co. & Cherry Creek Ditch, 304 U.S. 92 (1938) (compact trumps private appropriation rights guaranteed by state constitution); West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951) (sustaining compact against allegedly conflicting state constitutional claims).

26. *See, e.g.*, Colorado v. Kansas, 320 U.S. 383, 392 (1943). Perhaps the earliest such encouragement can be found in *New York v. New Jersey*, 256 U.S. 296, 313 (1921) ("[T]he grave problem of sewage disposal . . . is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of . . . the States so vitally interested in it than by proceedings in any court however constituted"). *See also Dyer*, 341 U.S. at 27 (quoting that language).

27. New York v. O'Neill, 359 U.S. 1, 6 (1959). While Justice Frankfurter wrote those stirring words, for a unanimous Court, in the course of rejecting a challenge to a reciprocity agreement under the Fourteenth Amendment (but not the Compact Clause), his pronouncement has been quoted approvingly in compact cases. *See, e.g.*, U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 470 (1978).

28. *See, e.g.*, Dale D. Goble, *The Compact Clause and Transboundary Problems: "A Federal Remedy for the Disease Most Incident to a Federal Government,"* 17 ENVTL. L. 785 (1987); Richard O. Zerbe, *Optimal Environmental Jurisdictions*, 4 ECOLOGY L.Q. 193 (1974); Gordon Tullock, *Federalism: Problems of Scale*, 6 PUB. CHOICE 19 (1964).

29. Frankfurter & Landis, *The Compact Clause*, *supra* note 19, at 705-08.

30. *See* David N. Copas, Jr., *The Southeastern Water Compact, Panacea or Pandora's Box? A Law and Economics Analysis of the Viability of Interstate Water Compacts*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 697, 714-16 (1997).

31. Brevard Crihfield, *The States and the Council of State Governments*, 35 STATE GOV'T 20, 65 (1962); Robert C. Elickson, *Public Property Rights: A Government's Rights and Duties When Its Landowners Come into Conflict with Outsiders*, 52 S. CAL.

as Congress and the Supreme Court remain free to superintend and, if need be, void state compacts, "there is no danger of any misuse of the States' sovereign powers in their agreements with each other."[32]

State compacts, however, may not only enhance efficiency and federalism; they may also compromise those values. While states are capable of cooperating *with* one another, they are also capable of—and prone to—doing very bad things *to* one another. One state may exploit another. Two states may collude to exploit a third. Some or all states may (as we shall see) collude to exploit each other's citizens. The Founders were acutely aware of the need to protect states and their citizens from sister-state aggression; that is why they adopted the Compact Clause, among other constitutional provisions. One can say that the Clause also, and simultaneously, protects national interests. The most urgent among those "national" interests, however, is the protection of comity and equality among the states.[33] The judicial interpretation of the Clause has completely suppressed horizontal, state-to-state federalism concerns. That is its central flaw and error.

I shall argue that compacts pose four serious institutional risks: (1) state bargaining with federal rights and prerogatives and, consequently, infringements on the interests of the United States (especially the interest in preventing mutual state aggression); (2) third-party externalities, meaning infringements on the rights and interests of non-compacting states; (3) cartelization, meaning the creation, through compacts, of institutional regimes and arrangements that restrict policy competition among the states;[34] and (4) agency problems, including the transfer of state authority to unaccountable, irresponsible, extra-constitutional institutions. Because these risks affect even the most tenable account of state bargaining, the functional view of the Compact Clause is untenable on its own terms. But the risks just listed are not somehow separate and apart from the Compact Clause; they are jazzed-up accounts of the dangers that the Founders contemplated in enacting the Clause. Extant Compact Clause doctrine, in contrast, acknowledges only the first risk, and even that only in a highly attenuated form. It is oblivious to the risks of interstate externalities and exploitation, and it encourages the states to create, through the establishment of supra-state agencies, a Constitution parallel to the one we have.[35]

L. REV. 1627, 1654-55 (1979).

32. Ferguson, *supra* note 19, at 359.

33. Frankfurter & Landis, *The Compact Clause*, *supra* note 19, at 693-95.

34. The suppression of policy competition has been described as a potential virtue and advantage, rather than a problem, of state compacts. *See, e.g.*, Jill E. Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 7 (1997); Note, *To Form a More Perfect Union?*, *supra* note 19. For reasons explained *infra* notes 167-68 and accompanying text, this view rests on a misunderstanding of the purpose of a federal Constitution.

35. Since I will return to the theme of unapproved state compacts as a means of

A "federalism" that celebrates the exercise of state sovereignty, in derogation of the Constitution and at the risk of diminishing both political accountability and the rights of non-compact states, is federalism fubar—[messed] up beyond all recognition. That is the easy part of the analysis. The hard part is to distinguish between efficient compacts and those that inflict unwarranted costs on third parties (states, citizens, or the United States) and then to figure out a constitutional rule that promises *ex ante*, over the long haul and the general run of cases, to minimize the aggregate costs of institutional error on either side.[36]

One obvious candidate is the actual Compact Clause: *no* state agreement or compact without congressional consent, period. On this textualist view, all that remains is to define the essential elements of the Clause—what constitutes a "compact" and an "agreement"; what constitutes a compact or agreement of and by the state (as distinct from its officers or the state's acts in a proprietary, non-sovereign capacity);[37] and what constitutes timely congressional consent.[38]

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establishing an alternative Constitution (*see infra* notes 165-68, 308-09, and accompanying text), it is worth noting that others have perceived that potential—and not always as a menace. In 1937, the Council of State Governments, an interstate body established for the promotion and administration of state compacts, passed an ominously entitled "Declaration of Interdependence," stating as follows:

> When, in the course of human events, it becomes necessary for a nation to repair the fabric which unites its many agencies of government, and to restore the solidarity which is vital to orderly growth, it is the duty of responsible officials to define the need and to find a way to meet it. . . .
>
> Through established agencies of cooperation, through uniform and reciprocal laws and regulations, *through compacts under the Constitution*, through informal collaboration, and through all other means possible, our nation, our states, and our localities must fuse their activities with a new fervor of national unity.

2 COUNCIL OF STATE GOVERNMENTS & AMERICAN LEGISLATORS' ASSOCIATION, BOOK OF THE STATES, Book 2, 143-44 (1937) (emphasis added). For a similar What's-a-Constitution-Among-Friends celebration of "extraconstitutional forms of legal invention" and the "interplay of living forces of government to meet the evolving needs of a complex society," see New York v. O'Neill, 359 U.S. 1, 10-11 (1959).

36. The Supreme Court has tended to focus on the likely effects of each individual compact submitted for its consideration. Engdahl, *Interstate Arrangements*, *supra* note 13, at 68. This *ex post* perspective misconceives the constitutional enterprise.

37. The prevailing view, which I believe to be generally correct, holds that the Compact Clause extends only to compacts that involve the exercise of sovereign state power. Engdahl, *Interstate Arrangements*, *supra* note 13, 88 n.131. *But see* Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1270 (2000) (arguing that the distinction between "proprietary" and "sovereign" state actions "may be neither doctrinally sound nor easy to administer") (footnote omitted) [hereinafter Swaine, *Negotiating Federalism*].

38. *See infra* notes 357-58 and accompanying text.

As already suggested, the case for enforcing the Compact Clause as written is to my mind highly persuasive. Nonetheless, I will also articulate and defend a slightly more limited interpretation: a challenge to a state compact for lack of congressional consent should prevail if the plaintiffs establish a credible case that the challenged state agreement implicates one or more of the four specific risks identified above.[39]

The reasons for exploring this "functional" test are pragmatic. Cooperative state compacts and agreements have become an entrenched and judicially favored practice. It seems wise to push the demand for a re-examination and revision no further than is necessary to avert serious, identifiable risks to constitutional norms and values—not only in the interest of political feasibility and legal continuity, but also because abrupt doctrinal adjustments tend to produce undesired and often paradoxical consequences.[40] Modern Compact Clause theory, such as it is, is avowedly functional, not textual. Once that judicial move has been made, a persuasive attempt to confront the functional interpretation on its own terms seems a more promising argumentative strategy than foot-stomping textualism. With any luck, a re-interpretation on shared theoretical ground will generate a rule that more closely approximates the original constitutional norm. In the case at hand, the approximation proves close enough for comfort: a serious functional Compact Clause turns out to be a thoroughly Madisonian construct.

39. As further explained *infra* notes 315-20 and accompanying text, the proposed test turns on an examination of certain *types* of state compacts, rather than the effect or purpose of individual compacts. For instance, the test would require congressional consent for a state cartel-by-compact even if the cartel's empirical effects could be shown to be *de minimis*. For a similar approach to state bargaining with foreign governments—an issue with obvious structural similarities to the domestic Compact Clause—see Swaine, *Negotiating Federalism*, *supra* note 37, at 1261 (arguing for an "act-oriented approach [that] tries to delimit a class of activities that exceeds the limits of state authority under the Constitution, eschewing any attempt at measuring effects, balancing, or focusing on governmental purpose").

40. These consequences arise principally from the fact that political institutions, including courts, may respond to new and improved rules in unexpected ways. *See, e.g.*, Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325 (2001) (arguing that "decentralizing" Commerce Clause decisions may induce centralization). A literal Compact Clause interpretation might well produce such effects: confronted with a rule that requires congressional approval for all state agreements and compacts, courts would further narrow the definition of what constitutes an agreement or compact for constitutional purposes. The functional interpretation urged in this Article seems less likely to prompt such a response.

C. Outline

Part II of this Article provides a brief overview of the historical development and the current state of Compact Clause doctrine. Part III outlines the forgotten constitutional logic of the Compact Clause, and Part IV applies that logic to a simple transaction cost model of state compacts. Parts V and VI illustrate the serious risks posed by state compacts with, respectively, the 1967 Multistate Tax Compact of *U.S. Steel* fame and the 1998 Master Settlement Agreement between the states and tobacco manufacturers. Both agreements are unconstitutional under any reasonable reading of the Compact Clause. Part VII sketches a functional Compact Clause doctrine that would account for those risks without unduly compromising useful state cooperation. The Part compares that functional account to its close textual cousin and, moreover, argues that the judicial enforcement of the congressional consent requirement—especially in the proposed functional version—is consistent with the contemporary Supreme Court's federalism doctrines. The concluding Part VIII argues that a Compact Clause revival presents an opportunity to re-enforce federalism's horizontal, state-to-state protections. That modest step would strengthen the Supreme Court's federalism, and ours.

II. FROM TEXT TO FARCE

For a federal republic, and especially for a nascent federal republic, the prospect of separate, unsupervised agreements among its member-states and between a member-state and a foreign nation must constitute a cause for alarm. One obvious threat is dissolution through sedition and secession—which, as we have learned, states are more likely to commit collectively than individually.[41] A second threat is that states—of unequal size but equal sovereignty—may, through cooperation, imperil the interests of a sister state.

The Founders were painfully aware of these dangers. The Articles of Confederation barred any state from "enter[ing] into any confe[r]ence, agreement, alliance, or treaty" with foreign powers "without the Consent of the United States, in Congress assembled."[42] Likewise, the Articles required congressional consent for "any treaty, confederation, or alliance whatever"

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41. Of course, the Confederate states—in keeping with their theory of the Constitution as a "compact" among the states—seceded individually, not as a confederacy. States' rights advocates understood very well that a separate state compact within a federal republic was a perfect absurdity; secession had to come first. That accomplished, the Confederacy forbade internal state compacts as absolutely as treaties, save for a narrow exception for cooperative navigational improvements of interstate waterways. ARTICLES OF THE CONFEDERATE STATES OF AMERICA art. I, § 10, cl. 3.

42. *Id.* art. VI, §1.

between the states[43] and provided that the Congress shall be the last resort in disputes and differences between the states.[44] These arrangements, however, proved inadequate to prevent disruptive controversies over ill-defined boundaries, discrimination by some states against sister states, and infringements on the United States through state treaties and agreements—with foreign nations, Indian tribes, and among the states—without the consent of the Congress.[45]

The Founders responded to these problems by strengthening the national government's authority and, simultaneously, by explicitly precluding the exercise of certain powers by the states. Article I of the Constitution enumerates the powers of Congress, and, in its final Section 10, denies specific powers to the states. The first paragraph lists powers that the states may not exercise under any circumstances (i.e., with or without the consent of Congress), beginning with the provision that "No State shall enter into any Treaty, Alliance, or Confederation." The better-known injunctions against bills of attainder, the coinage of money, ex post facto laws, and laws impairing the obligation of contract are also listed here. The second and third paragraphs of Section 10 list powers that the states may not exercise *without the consent of Congress*. The second paragraph provides that "No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws." The third paragraph, containing the Compact Clause, provides in full:

> 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.

Agreements and compacts are subsumed under an injunction covering practices that constitute manifest threats to the Union and the Constitution—standing (state) armies, warfare, and actions conducive thereto; and duties of tonnage—like duties on imports and exports, a species of the state protectionism that so gravely concerned the Founders. Moreover, the constitutional language of the Compact Clause is broad and unqualified. A deal among states, or between a state and a foreign nation, is either a "treaty" (etc.),

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43. *Id.* art. VI, § 2.

44. *Id.* art. IX.

45. For James Madison's account of these problems, see James Madison, *Preface to the Debates in the Convention*, *in* NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 14 (Adrienne Koch ed., Ohio University Press 1984). For an instructive discussion of state interferences with "national" interests and diplomatic initiatives under the Articles of Confederation, see Swaine, *Negotiating Federalism*, *supra* note 37, at 1174-81, 1198-1210.

in which case it is absolutely prohibited; or else, it is a "compact" or "agreement" of some other kind, in which case it requires congressional approval. In short, the constitutional text and context of the Compact Clause clearly evidence the Founders' special concern over all—not just some—state agreements.

The "all-embracing"[46] nature of the Compact Clause has always been recognized with respect to state agreements with foreign nations. As Chief Justice Taney put it in *Holmes v. Jennison* (1840), a case arising over an extradition arrangement between the governor of Vermont and a Canadian official, the constitutional injunction against "*any* Agreement or Compact" appears to "prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties."[47] It is not entirely clear whether Taney derived his comprehensive understanding from the text of the Compact Clause itself or from an extra-textual "one voice" rationale for foreign relations—that is, a presumption that the Founders intended the nation to speak with a single, authoritative voice to other nations, leaving no room for the states in that arena.[48] (The phrase just quoted is preceded by a claim that the Framers "anxiously desired to cut off all connection or communication between a state and a foreign power.")[49] The text of the Clause, of course, treats state agreements with foreign powers on a par with state-to-state agreements. If it compels a rigid interpretation in the foreign dimension, it compels an equally rigid, forbidding interpretation in its domestic dimension. Even at the time, though, that reading seemed counterintuitive. States had concluded boundary agreements and made arrangements for public improvements of roads and waterways—apparently, without a thought that such agreements might require the explicit, *ex ante* consent of the Congress.[50] The understandable desire to facilitate useful cooperative ventures—without subjecting them to the potentially onerous congressional consent requirement—prevented several Justices from joining Justice Taney's opinion in *Holmes v. Jennison*.[51] Over time, it prompted a separation of the foreign from the domestic Compact Clause.[52] The Supreme Court followed Taney on a "one-

46. WALLACE R. VAWTER, INTERSTATE COMPACTS—THE FEDERAL INTEREST 6 (1954).

47. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 572 (1840).

48. For an analysis of the "one voice" rationale in *Holmes v. Jennison* and subsequent cases, see Swaine, *Negotiating Federalism*, *supra* note 37, at 1224-36.

49. *Holmes*, 39 U.S. (14 Pet.) at 572.

50. Engdahl, *Interstate Arrangements*, *supra* note 13, at 66.

51. Engdahl, *Interstate Arrangements*, *supra* note 13, at 86.

52. That development parallels both the extra-textual separation of a foreign from a domestic (negative) Commerce Clause and the ostensibly textual but probably mistaken limitation of the Import-Export Clause to foreign rather than interstate trade. *See* Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1868). As for "probably mistaken," see Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 610-40 (1997)

voice" theory of the foreign Compact Clause[53] and, domestically, drifted toward the position that the Clause applied only to a relatively narrow class of agreements.

The unlikely starting point of the latter development can be found in Justice Joseph Story's attempt, in his influential *Commentaries on the Constitution of the United States*, to distinguish state "treaties," which the Constitution prohibits absolutely, from "agreements and compacts," which are permissible with the consent of Congress. Noting the dearth of contemporaneous evidence that would shed light on the Founders' distinction between treaties (etc.) and agreements (etc.), Story suggested—tentatively, and admittedly on little authority but his own speculation—that the absolute prohibition extends to "treaties of a political character" and the qualified prohibition, to agreements involving the exercise of "what might be deemed mere private rights of sovereignty."[54]

For reasons that will appear shortly,[55] Justice Story's distinction is the wrong starting point for a sensible understanding of the Compact Clause. The salient point here is that the Founders' or Justice Story's distinction (what- and whosever precisely it may have been) does not remotely suggest that some interstate agreements should be *exempt* from the Compact Clause. The Founders, obviously, believed no such thing. Neither did Justice Story—who, tellingly, joined Chief Justice Taney's opinion in *Holmes v. Jennison* and its expansive understanding of "agreements and compacts." Nonetheless, "[i]n a curious feat of judicial doubletalk, Story's distinction between 'treaties' and 'agreements or compacts' was applied to the new task of exempting all but a narrow class of 'agreements and compacts' from the requirement of congressional consent."[56]

That development, ably described by Engdahl,[57] found recognition by the U.S. Supreme Court in *Virginia v. Tennessee*,[58] an 1893 case involving a border dispute between the two states. "By its terms," Justice Field mused for a

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(Thomas, J., dissenting). *See also* Brannon P. Denning, *Justice Thomas, the Import-Export Clause, and* Camps Newfound/Owatonna v. Harrison, 70 U. COLO. L. REV. 155, 182-215 (1999). The general trend toward a restrictive view of state authority in matters affecting foreign affairs explains why the "domestic" Compact Clause should be somewhat broader than its foreign cousin. It does not, however, explain the wholesale emasculation of the domestic Compact Clause.

53. *See, e.g.*, United States v. Rauscher, 119 U.S. 407, 414 (1886) (suggesting that *Holmes v. Jennison* was based on a general principle of exclusive federal control over foreign relations and endorsing that position).

54. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1397 (1st ed. 1833) (in subsequent editions, § 1403).

55. *Infra* notes 126-30 and accompanying text.

56. Engdahl, *Interstate Arrangements*, *supra* note 13, at 66.

57. Engdahl, *Interstate Arrangements*, *supra* note 13, at 86-88.

58. 148 U.S. 503 (1893).

unanimous Court—alluding to, without citing, Chief Justice Taney's broad interpretation in *Holmes v. Jennison*—the Compact Clause is "sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects."[59] It extends to agreements:

> to which the United States can have no possible objection or have an interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.[60]

Nevertheless, Justice Field concluded that the Compact Clause cannot possibly be read to apply to "*any* agreement or compact." "[L]ooking at the object of the constitutional provision" rather than its text, Justice Field determined that the Clause 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."[61] State agreements, Justice Field argued, should be subject to the constitutional requirement of congressional consent only if they threaten to encroach upon the full and free exercise of federal authority.

Justice Field's discourse on the scope of the Compact Clause in *Virginia v. Tennessee* is dictum, because a later part of his opinion holds that Congress had in fact consented to the border agreement between the two states.[62] Subsequent cases, however, discussed Justice Field's opinion with approval.[63] In the 1970s,

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59. *Id.* at 517-18.

60. *Id.* at 518.

61. *Id.* at 519. A slightly different formulation appears *id.* at 517-18 (distinguishing agreements of no interest to the United States from those "which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control").

62. *Id.* at 521-22; *see also* Engdahl, *Interstate Arrangements*, *supra* note 13, at 67 and sources cited therein at n.22 (passages on scope of Compact Clause probably dicta); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 467 (1982) (characterizing those passages as dicta). *But see id.* at 489 (White, J., dissenting) ("*Virginia v. Tennessee* quite clearly holds that not all agreements and compacts must be submitted to the Congress") (footnote omitted).

63. *See, e.g.*, North Carolina v. Tennessee, 235 U.S. 1 (1914); Stearns v. Minnesota, 179 U.S. 223 (1900); Wharton v. Wise, 153 U.S. 155 (1894); *see also U.S. Steel*, 434 U.S. at 469, n.20 (citing state cases relying on the *Virginia v. Tennessee* "test").

Justice Field's dictum became the U.S. Supreme Court's authoritative holding.[64] In that light, two aspects of the opinion bear emphasis.

First, *Virginia v. Tennessee* views the Compact Clause entirely in its vertical, state-to-federal dimension. It is silent on the horizontal effects of state agreements on non-party states and their citizens. The omission marks a shift from the traditional understanding of the Clause. As Chief Justice Taney put it, the point of the Compact Clause is "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."[65] It is unlikely that Justice Field intended to devalue that consideration; his failure to mention it, and his language suggesting that the Compact Clause involves the balancing of state versus federal interests, probably flow from the posture and the legal issue of the case. Nonetheless, the shift in emphasis proved fateful and, over time, led to wholesale judicial indifference to the horizontal concerns that underpin the Compact Clause.

Second, even on the functional grounds urged by Justice Field—that is, wholly apart from textual considerations—the "object" of the Compact Clause warrants no inference to the effect that state agreements that hold no interest for the United States should be exempt from the congressional consent requirement. The institutional question is, who gets to say in the first instance what does or does not constitute an interference with the full and free exercise of federal authority? The constitutional rule, obviously, deprives the states of that authority in all cases. It also deprives the judiciary of an independent role in deciding whether or not state agreements are subject to, or should receive, congressional consent. In sketching the contours of a safe harbor for (presumably) run-of-the-mill state cooperation, *Virginia v. Tennessee* worked a shift both in the appraisal of the risks and dangers of state agreements and in the judiciary's role in addressing them.

The extent of that shift is not altogether clear. If the congressional consent requirement is maintained for all state agreements that *might* implicate federal supremacy concerns, the practical effects will be quite similar to those of the blanket constitutional rule.[66] If, on the other hand, the consent requirement is triggered only by state agreements that *demonstrably* encroach upon federal supremacy, the Compact Clause is rendered a virtual nullity: with or without the Clause, such agreements violate the ordinary rules of federal supremacy and

64. *See infra* notes 83-91 and accompanying text.

65. Florida v. Georgia, 58 U.S. (17 How.) 478, 494 (1855).

66. Engdahl observes that *Virginia v. Tennessee* has in political practice been understood "in terms of the possible, rather than the actual, effects of 'compacts.'" Engdahl, *Interstate Arrangements*, *supra* note 13, at 69. In particular, states have sought congressional consent for compacts where, under a strict reading of the precedents, no consent is required. As noted, however, the states have not always exercised such restraint and deference.

preemption. In the 1970s, the U.S. Supreme Court adopted this latter construction.

New Hampshire v. Maine,[67] like *Virginia v. Tennessee*, arose over the identification of a pre-existing state boundary line. The principal question was whether the judicial acceptance of a proposed consent decree between the attorneys general of the two states, without an independent judicial examination, was consistent with the Supreme Court's Article III functions. Having answered that question in the affirmative (over a dissent by three Justices), Justice Brennan's opinion for the Court devoted a slim two paragraphs to New Hampshire's "suggestion" that the acceptance of the consent decree without an independent judicial review might circumvent the Compact Clause. Those paragraphs cite *Virginia v. Tennessee* for the proposition that a state agreement that merely defines a "true and ancient boundary," as distinct from an "alienation of territory," is not an "Agreement or Compact" or at any rate, not a compact of the sort that would require congressional approval.[68]

A brief twenty months after *New Hampshire v. Maine*, the Supreme Court put that decision and *Virginia v. Tennessee* to astonishing use. In sustaining a multistate compact governing the state taxation of business income in interstate commerce, the Court effectively held that *no* otherwise constitutional state agreement or compact requires congressional approval.

The tax compact at issue in *U.S. Steel Corp. v. Multistate Tax Commission*[69] was formed in the aftermath of the Supreme Court's 1959 decision in *Northwestern States Portland Cement Co. v. Minnesota*.[70] Under a long line of Supreme Court precedents, a company's income from sales in foreign states constituted income from interstate commerce and could not be taxed in or by those states (so long as the company carried on exclusively interstate business). In *Portland Cement*, the Supreme Court departed from those precedents and held that states could, after all, tax interstate commerce and its proceeds, provided that the taxed entity has some kind of "nexus" to the taxing jurisdiction and the tax is "fairly apportioned" among the states.[71] Corporate America promptly urged Congress to overturn *Portland Cement*. Just as promptly, Congress slapped a nameless moratorium, Pub. L. No. 86-272, on the state taxation of interstate business income of firms whose foreign-state operations did not exceed minimal activities—such as solicitation and delivery—enumerated in the statute.[72] That

67. 426 U.S. 363 (1976).

68. *Id.* at 369-70 (quoting Virginia v. Tennessee, 148 U.S. 503, 522 (1893)).

69. 434 U.S. 452 (1978).

70. Northwestern States Portland Cement Co. v. Minnesota, *consolidated on appeal with* Williams & Stockham Valves & Fittings, Inc., 358 U.S. 450 (1959).

71. *Id.* at 464-65.

72. "Imposition of net income tax—Minimum standards," Pub. L. No. 86-272, 73 Stat. 555 (1959) (codified at 15 U.S.C. §§ 381-381dd (2000)).

"safe harbor" moratorium satisfied neither the states nor corporate America.[73] When the world's greatest deliberative body actually got around to deliberating, it proved unable to resolve the interest group conflict. Commissions and committees held numerous hearings and produced reams of paper, but none of the dozen bills introduced over the span of a decade received an up-or-down vote on the floor.[74]

The 1967 Multistate Tax Compact ("MTC") established a standing Multistate Tax Commission. The Commission, which is composed of the tax administrators from all member states, seeks to facilitate the administration of state taxation for multistate businesses. Specifically, the Compact's stated purposes are to facilitate the proper determination of multistate taxpayers' state and local tax obligations; to promote uniformity; to facilitate taxpayer convenience and compliance; and to avoid duplicative taxation.[75] To that end, the member states endowed the Commission with regulatory authority to determine rules for the allocation and apportionment of business income among member states and other multistate tax issues, subject to the member-states' participation in the proceeding and subsequent approval of the regulations;[76] with executive authority to conduct corporate tax audits, upon request by a member state or *sua sponte*;[77] and with judicial authority to adjudicate disputes, through compulsory arbitration, over the allocation of business income in disputes between taxpayers and member-states' tax authorities.[78] The MTC became effective, in accordance with its terms, upon the formal enactment by the legislatures of seven states.[79] The MTC's architects sought congressional

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73. *See* Jerome R. Hellerstein, *State Taxation Under the Commerce Clause: An Historical Perspective*, 29 VAND. L. REV. 335, 339-40 (1976) (noting that Pub. L. No. 86-272 largely immunized small multistate businesses, while leaving national corporations exposed).

74. The strenuous but unsuccessful congressional efforts to reach an accommodation on interstate business taxation in the wake of *Portland Cement* are described in vivid detail in Justice White's dissent in *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 486-89 (1982) (White, J., dissenting).

75. Multistate Tax Commission, MULTISTATE TAX COMPACT art. I, *available at* http://www.mtc.gov/ABOUTMTC/compact.htm (last visited April 3, 2003) [hereinafter MTC].

76. MTC, *supra* note 75, art. VII; IV.

77. MTC, *supra* note 75, art. VIII.

78. MTC, *supra* note 75, art. IX. Due to opposition by the State of California, however, this provision did not go into effect. Jerry Sharpe, *State Taxation of Interstate Businesses and the Multistate Tax Compact: The Search for a Delicate Uniformity*, 11 COLUM. J. LAW & SOC. PROBS. 231, 246 n.58 (1975) [hereinafter Sharpe, *State Taxation*].

79. *See* MTC, *supra* note 75, art. X(1).

approval for their creation, and numerous bills to that effect were introduced in Congress. None of them, however, received formal action.[80]

Business interests sued in state and federal courts, arguing that the MTC violated the Compact Clause because Congress had failed to consent to the arrangement.[81] In *U.S. Steel*, the U.S. Supreme Court decisively rejected that challenge.[82] Writing for a majority of seven Justices, Justice Powell held that the Compact Clause covers only state agreements that may affect federal supremacy. The MTC, according to the Court, posed no such danger.

After briefly describing the MTC's origin and purposes and the fate of the case in the courts below, the *U.S. Steel* majority devoted twelve heavily footnoted pages to a discussion of the constitutional origins of the Compact Clause and the congressional consent requirement in the Supreme Court's precedents. It described Justice Field's misinterpretation, in *Virginia v. Tennessee*, of Justice Story's *Commentaries* as just that—a misinterpretation;[83] characterized Justice Field's remarks on the limited applicability of the Compact Clause as "an extended dictum";[84] and conceded that subsequent endorsements of that dictum also constituted dicta. The opinion maintained, however, that Justice Field's dictum became an actual holding in *New Hampshire v. Maine*.[85]

Powell's characterization of the precedent is simply wrong.[86] Had the *New Hampshire* Court meant to endorse a broad proposition that it had theretofore treated as mere dictum, it would presumably have devoted more than two cursory paragraphs to the matter.[87] In point of fact, the *New Hampshire* Court explicitly

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80. Robert M. White, *The Constitutionality of the Multistate Tax Compact*, 29 VAND. L. REV. 453, 461 (1976).

81. In addition to *U.S. Steel*, see *Kinnear v. Hertz Corp.*, 545 P.2d 1186 (Wash. 1976) (sustaining interstate joint audit provisions of the Multistate Tax Compact against Compact Clause and other challenges) (discussed in White, *supra* note 80, at 453).

82. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 478 (1978). In addition, the *U.S. Steel* plaintiffs raised challenges under the Equal Protection, Due Process, and Commerce Clauses. The Supreme Court roundly rejected those claims. *Id.* at 478.

83. *Id.* at 468 n.19.

84. *Id.* at 467.

85. *Id.* at 459-60. None of the cases citing Justice Field's test with approval explicitly applied it. *Id.* at 469.

86. Powell probably knew it to be so. His claim that *New Hampshire v. Maine* constitutes a binding endorsement of *Virginia v. Tennessee*'s dicta appears at the beginning, not the end, of his *U.S. Steel* disquisition on the history of the Compact Clause. *See U.S. Steel*, 434 U.S. at 459-61. Had *New Hampshire* in fact established a binding precedent, in so recent a case, that entire discussion would have been redundant.

87. *See* New Hampshire v. Maine, 426 U.S. 363, 369-70 (1976). Certainly, the two dissenting Justices in *U.S. Steel* would have caught the point in *New Hampshire*. They did in fact dissent in that earlier case—without, however, even remarking on the congressional consent requirement and its interpretation in *Virginia v. Tennessee*. *See*

declined to rule on the scope of the Compact Clause and its congressional consent requirement.[88] Wisely, then, Powell rested the remainder of his opinion in *U.S. Steel* precisely not on the purported "holding" of *New Hampshire* but on the dictum of *Virginia v. Tennessee.* He quickly dismissed the petitioners' argument that *Virginia v. Tennessee* should be limited to "bilateral agreements involving no independent administrative body."[89] Powell conceded that states and the federal government had always thought compacts of comparable complexity and consequence to require congressional consent, but dismissed that fact as a political practice without precedential value.[90] He then proclaimed Justice Field's position, which he had earlier described as both misguided and dictum, as the "*Virginia v. Tennessee* rule"[91] and—without mentioning *New Hampshire v. Maine*—applied that so-called rule to the MTC.

In light of the manifest differences between the border-fixing agreement in *Virginia v. Tennessee* and the convoluted tax regime at issue in *U.S. Steel*, one ought to be skeptical about distilling Justice Field's musings into a mechanical "rule" that limits the application of the Compact Clause to arrangements that might compromise federal supremacy. Because a border demarcation between two contiguous states is unlikely to involve the interests of a third state, Justice Field's preoccupation with the vertical effect of compacts was, as noted, understandable, even though lamentable. In contrast, the application of that one-dimensional rule to the MTC—a regulatory regime that very obviously involves the interests of sister states—effectively excludes the protection of those interests, once thought to be a principal purpose of the Compact Clause, from judicial consideration. As Justice White observed in dissent, it was "obvious that non-Compact States can be placed at a competitive disadvantage by the Multistate Tax Compact."[92] Not bothering to deny the fact, the majority responded that states are similarly affected by any number of policies enacted by individual sister states.[93] The gross theoretical mistake behind this averment is discussed below.[94] Suffice it here to state the readiest reply: so what? Those other state policies are not constitutionally disfavored. State compacts are.

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id. at 370-72.

88. *Id.* at 366 (having sustained Maine's exception to rejection of proposed consent decree, on the grounds that entry is consistent with Article III, the Court had "no occasion to address the other exceptions filed by the States"). Those "other exceptions" cover New Hampshire's "suggestion" that the Compact Clause might bar the consent decree. *Id.* at 369.

89. *Id.* at 471-72.

90. *Id.* at 471.

91. *Id.* at 472.

92. *Id.* at 495.

93. *Id.* at 477-78.

94. *See infra* notes 148-57 and accompanying text.

Having effectively excluded the MTC's horizontal effects on sister states from constitutional consideration, the *U.S. Steel* majority proceeded to minimize the impact of the arrangement on federal supremacy. "[T]he pertinent inquiry" under the *Virginia v. Tennessee* "rule," the *U.S. Steel* Court observed in professed agreement with the petitioners' position, "is one of potential, rather than actual, impact upon federal supremacy."[95] But that is not the test the *U.S. Steel* Court actually applied. Of the MTC's *potential* impact, an abundance of evidence was before the Court. Much of it found its way into Justice White's dissent, which describes the protracted federal debate preceding and accompanying the creation of the MTC; the MTC's explicit organizational purpose to forestall federal tax legislation; and the sustained, serious political disputes between the MTC and the federal branches over international treaties affecting the taxation of income earned by foreign companies in the United States.[96] In light of the "hostile stalemate" between the MTC and the federal government, Justice White concluded, the MTC's potential impact on federal concerns was simply beyond peradventure.[97]

The *U.S. Steel* majority's response to these observations appears in the following passage:

> *On its face the Multistate Tax Compact contains no provisions* that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States. There well may be some incremental increase in the bargaining power of the member States *quoad* the corporations subject to their respective taxing jurisdictions . . . . But the test is whether the Compact enhances state power *quoad* the National Government. *This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence.* Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover . . . each State is free to withdraw at any time.[98]

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95. *U.S. Steel*, 434 U.S. at 472. The dissenting Justices commended the majority opinion on that recognition and couched the disagreement as merely a question of applying the "potential impact" standard to the MTC. *Id.* at 484 (White, J., dissenting). As shown in the text, the concession was unwarranted.

96. *Id.* at 486-89 (White, J., dissenting); *see also infra* notes 200-02 and accompanying text.

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

98. *Id.* at 472-73 (emphasis added).

Putting aside, for now, the highly questionable characterization of the MTC,[99] the italicized introductory phrase shows that the 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.[100] Consistent with this reading, the passage just quoted repeatedly formulates the "pertinent inquiry" as a question of affirmative, rather than potential, "enhancement" and "encroachment." Under that theory, no state compact requires congressional approval unless it declares an invasion of federal supremacy *in haec verba*—on its face, as it were.

The same conclusion flows from the just-quoted contention that the MTC did not "authorize the member States to exercise any powers they could not exercise in its absence," which forms the majority's principal defense of its ruling. Individual states may of course legislate in areas of concurrent authority, including especially interstate commerce (within the bounds of the dormant Commerce Clause), until Congress preempts them. Therefore, the *U.S. Steel* Court concluded, they may do so collectively and by compact. As Justice White pointed out, however, that conclusion cannot be right. "The [Compact] 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."[101] Otherwise, the Clause is empty.

The majority's curt reply to this objection is that it confuses federal *interests* with federal *supremacy*. The MTC plainly governs the taxation of interstate commerce, which the Constitution commits to the care and authority of the United States Congress. However, "every state cooperative action touching interstate or foreign commerce implicates some federal interest. Were that the test under the Compact Clause, virtually all interstate agreements and reciprocal

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99. *See infra* notes 182-93 and accompanying text.

100. A true "potential impact" test cannot distinguish between facial and as-applied validity. A discussion of this or that application and operation of a legal provision—along the lines of Justice White's *U.S. Steel* dissent—is simply a showing that the provision has, or has already had, the forbidden potential. That showing is not a basis for a separate "as-applied" challenge; it goes directly to the validity of the provision. The *U.S. Steel* Court ignored this logic. Throughout its opinion, the majority deflected the petitioners' and the dissenters' arguments about the operation of the Compact with references to the MTC's purportedly unobjectionable language. Justice Powell, the author of *U.S. Steel*, in a later case described his opinion as having upheld the MTC against a *facial* challenge. ASARCO v. Idaho State Tax Comm'n, 458 U.S. 307, 312 n.7 (1982). The suggestion of a meaningful distinction between an as-applied and a facial challenge to the MTC—and certainly the veiled suggestion that the former might have succeeded where the latter did not—illustrates that the *U.S. Steel* Court did not simply misapply the "potential impact" test; rather, it applied a different test altogether.

101. *U.S. Steel*, 434 U.S. at 482 (1982).

legislation would require congressional approval."[102] That, of course, is what the text of the Compact Clause provides. We know, however, that not *all* interstate agreements can sensibly be viewed as requiring congressional approval; *vide Virginia v. Tennessee*. Therefore, according to *U.S. Steel*, *none* should require approval save those that, "on their face," purport to exercise a power reserved exclusively to the federal government and those that conflict with a preemptive federal law. That syllogism is the sum and substance of contemporary Compact Clause doctrine.

III. CONSTITUTIONAL LOGIC

After *U.S. Steel*, one can hardly imagine a state compact that would run afoul of the Compact Clause without first, or at least also, running afoul of other, independent constitutional obstacles. But while *U.S. Steel* effectively declared the Compact Clause inoperative, it is the *only* Supreme Court decision in over two centuries to so hold. No case prior to *U.S. Steel* embodied such a holding, and while the Supreme Court has never questioned the *U.S. Steel* decision, it has never affirmatively relied on it, either.[103] Thus, unlike constitutional questions

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102. *Id.* at 479 n.33.

103. Supreme Court decisions contain the following citations to *U.S. Steel Corp. v. Multistate Tax Comm'n*: *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 57 (1994) (O'Conner, J., dissenting); *F. W. Woolworth Co. v. Taxation & Revenue Dept.*, 458 U.S. 354, 357 (1982); *ASARCO, Inc.*, 458 U.S. at 312; *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671 (1981); *Cuyler v. Adams*, 449 U.S. 433, 440 (1981); *Cuyler*, 449 U.S. at 451 (Rehnquist, J., dissenting); *Mobil Oil Corp. v. Commissioner*, 445 U.S. 425, 439 (1980); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 282 (1978) (Blackmun, J., dissenting). None of these cases relies on the *U.S. Steel* holding concerning the congressional consent requirement; only two even mention it. The first is Justice Rehnquist's dissent in *Cuyler*, 449 U.S. at 451 (Rehnquist, J., dissenting). The second, in *Hess v. Port Auth. Trans-Hudson Corp.*, contains a throw-away footnote that says, without explicitly holding, that "federal consent is not required" for compacts that do not implicate federal concerns. *Hess*, 513 U.S. at 40 n.10 (citing *Virginia v. Tennessee*, 148 U.S. 503, 517-20 (1893), but, curiously, not citing *U.S. Steel* for the proposition).

The only case that can be construed as an affirmation of *U.S. Steel* is the cavalierly reasoned decision and opinion in *Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159 (1985). The so-called Douglas Amendment to the Bank Holding Company Act of 1956 permitted the Federal Reserve Board to approve bank applications to purchase a bank in another state if, and only if, the acquisition was "specifically authorized by the statute laws of the [acquisition target's] State." *Northeast Bancorp*, 472 U.S. at 163; Bank Holding Company Act, § 3(d) ch. 395, 70 Stat. 133 (1956) (codified as amended at 12 U.S.C. § 1814 (2000)). Several New England states authorized acquisitions by banks headquartered in other New England states, provided those states enacted a reciprocal authorization (though not necessarily one limited to New that are effectively immunized from principled consideration by piles of precedents, the Compact Clause affords us the luxury of being able to take a single step back to the Constitution and its logic.

At first impression, that endeavor appears unpromising. Constitutional scholars from Justice Story forward have noted the dearth of contemporaneous evidence on the specific meaning of the Compact Clause. "The records of the Constitutional Convention furnish no light as to the source and scope" of the Clause.[104] Its only mention in the *Federalist Papers* appears in No. 44, written by James Madison. The prohibition against treaties, alliances, and confederations, Madison wrote, was "copied" from the Articles of Confederation into the Constitution, "for reasons which need no explanation."[105] The restraint on state imposts and duties "is enforced by all the arguments that prove the necessity of submitting the regulation of trade to the federal councils."[106] Further, the qualified prohibitions of the third paragraph of Article I, Section 10,

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England states). *Northeast Bancorp*, 472 U.S. at 164. New York banks argued that the reciprocal statutes permitting acquisitions by out-of-state New England banks, *but not* by banks outside that region, violated, *inter alia*, the dormant Commerce Clause and the Compact Clause. *Id.* at 162. The Supreme Court determined that the Douglas Amendment authorized the arrangement, which would otherwise have violated the dormant Commerce Clause. *Id.* at 174. As to the Compact Clause claim, Chief Justice Rehnquist expressed "some doubt as to whether there is an agreement amounting to a compact" and found "several of the classic indicia of a compact" missing. *Id.* at 175. However (continued the Court), "even if we were to assume" the existence of a compact, not all compacts require congressional approval. *Id.* The petitioners' contention that the regional agreements affronted the sovereignty of sister states outside New England was baseless: "We do not see how the statutes in question either enhance the *political* power of the New England States at the expense of other states or have an 'impact on our federal structure.'" *Id.* at 176 (quoting *U.S. Steel*, 434 U.S. at 471, 473).

On one reading, *Northeast Bancorp* stands for the following proposition: an economic "Fortress New England," to the exclusion of other states, violates (barring congressional authorization) the judge-made dormant Commerce Clause *but not* the Compact Clause, *because it has no impact on the federal structure. See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1245 n.40 (3d ed. 2000). Respectfully, the assertion—unsupported in *Northeast Bancorp* by any further argument or explanation—would have floored the Founders.

It is more plausible and charitable to read the *Northeast Bancorp* Court's pronouncements following the "even if" sentence as dicta. On that reading, the case holds that reciprocity agreements—as distinct from compacts—do not require congressional approval. That proposition is defensible, though not self-evidently or necessarily correct. *See infra* notes 317-20 and accompanying text. On the yet more difficult question of *selective* reciprocity agreements in *Northeast Bancorp* and in general *see infra* note 318.

104. Frankfurter & Landis, *The Compact Clause*, *supra* note 19, at 694.

105. THE FEDERALIST NO. 44, at 281 (James Madison) (Clinton Rossiter ed., 1961).

106. *Id.* at 283.

including the Compact Clause, "fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark."[107] And to all a good night. No record exists on the distinction between treaties and compacts. Some scholars have argued that the Founders derived it from then-extant theories and concepts developed by leading authorities on the Law of Nations, especially Vattel.[108] But if so, their understanding was lost even to the immediately following generation.[109]

The interpretive fog, however, is almost entirely a result of the misguided preoccupation with the distinction between treaties and compacts, between absolute and qualified prohibition. The distinction that preoccupied the Founders was the far more basic choice between two very different institutional means of federal control over centrifugal tendencies in the states—legal supremacy, and a (qualified or absolute) prohibition. On *that* fundamental choice, the historical record is as clear as sunlight. The adoption of a qualified prohibition, in lieu of a plain-vanilla supremacy arrangement, for state agreements is the key to the constitutional logic of the Compact Clause.

A. Congressional Consent and Supremacy

James Madison arrived at the Philadelphia Convention loaded for bear. The linchpin of his agenda was a national "negative" on state laws,[110] which should apply "in all cases whatsoever."[111] What Madison had in mind was not a federal veto over existing state legislation—a kind of *ex post* federal preemption. Rather, in advocating a negative "in all cases whatsoever," he insisted that no state law should go into effect without federal approval.[112] Madison intended to

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107. *Id.*

108. *See especially* the erudite discussion by Engdahl, *Interstate Arrangements*, *supra* note 13, at 75-81.

109. Chief Justice Marshall, for a prominent example, used the terms "compacts" and "treaties" interchangeably:

> A state is forbidden to enter into any treaty, alliance or confederation. If these *compacts* are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the constitution.

Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833) (emphasis added).

110. Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 634-35 (1999); *see also id.* nn.101-02 (describing a negative as the central element of Madison's plans).

111. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in 9 THE PAPERS OF MADISON 1786-87, at 317, 318 (Robert A. Rutland et al. eds., 1975) [hereinafter PAPERS OF MADISON].

112. Charles F. Hobson, *The Negative on State Laws: James Madison, the*

arm the national government with the means to arrest the states' proclivity "to invade the national jurisdiction, to violate treaties and the law of nations [and] to harass each other with rival and spiteful measures dictated by mistaken views of interest."[113] As the broad sweep of his proposal suggests, though, Madison also desired to protect the citizens of the various states from depredations *by their own state governments*. The Convention, Madison argued, should "seize the occasion of reforming the national government to treat the internal defects of the states."[114] The reason for Madison's vast ambition—seemingly absurd, considering that the Convention had more than its work cut out just in establishing a viable Union—was his conviction that the states' outward aggression and their internal defects had a common source: factionalism. In pressing for a comprehensive negative, Madison proposed to tackle that problem at the source, as opposed to curbing its particular, outward manifestations.[115]

The Convention debated Madison's negative, in somewhat different versions, on three occasions: during early June, in the first run-through of the Virginia delegation's plan for the Convention; in mid-July, when Madison's proposal got entangled in the debate over the Great Compromise on representation in the federal legislature; and again in August, when Madison, with an obduracy born of despair over the fate of the nation, re-introduced the proposal to an impatient Convention that had long moved on to constitutional minutiae.[116] On all three occasions, Madison's proposal for a blanket negative was rejected. Two arguments carried the day against Madison. First, his numerous opponents denounced the proposed negative as a nationalistic instrument that would (as Gouverneur Morris put it) "disgust all the States,"[117]

Constitution, and the Crisis of Republican Government, 36 WM. & MARY QUART. 215, 219 (1979).

113. Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 PAPERS OF MADISON, *supra* note 111, at 382, 384. Kramer, *supra* note 110, at 626-36, provides an excellent account of the genesis of Madison's views on the negative and its intended purposes and scope.

114. *Kramer*, *supra* note 110, at 634 n.99 (quoting JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 47 (1996)).

115. Kramer, *supra* note 110, at 648 *passim*. The Convention, of course, rejected Madison's proposal and instead subjected particular classes of state laws (compacts, duties, etc.)—those with obvious deleterious effects on sister states—to particularized prohibitions and negatives in the Constitution. *Id.* Kramer argues that the delegates never grasped Madison's point that those odious measures merely illustrated the more general problem of state factionalism. *Id.* For the purposes at hand, nothing hangs on the question of whether the delegates failed to grasp Madison's argument or whether they understood and rejected it. Either way, the Convention clearly apprehended the dangers that certain classes of state laws would pose to the harmony of the union.

116. Kramer, *supra* note 110, at 650.

117. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 28 (Madison's notes, July 17, 1787) (Max Farrand ed., rev. ed. 1937) [hereinafter RECORDS OF THE FEDERAL

thus dooming the constitutional venture.[118] Second, the proposed negative would sweep too broadly, rendering it both impracticable and unnecessary. The negative would compel states to obtain national consent for urgent matters, when the national legislature might not be in session. At the same time, the negative would compel Congress to concern itself with the states' "internal police," and thus, with state activities "to which the United States can have no possible objection or have any interest in interfering with," as Justice Field would later put it.[119]

The Convention rejected Madison's proposal for an all-encompassing negative and instead adopted federal supremacy—asserted either through the courts, in the ordinary course of deciding cases and controversies, or through congressional legislation—as the general constitutional arrangement. Strictly speaking, the negative and federal supremacy are not mutually exclusive alternatives. States may seek to evade a negative, or for that matter, an absolute prohibition, just as they may seek to evade an ordinary federal statute. One way or the other, federal supremacy depends on judicial enforcement.[120] The difference is the default principle on which federal supremacy operates: the negative renders state laws inoperative, pending affirmative congressional action, whereas the supremacy principle alone—let's call it "mere supremacy"—permits state laws to be enacted and to remain in effect until and unless a court or the Congress sets them aside. In that sense, the negative and mere supremacy *are* mutually exclusive alternatives. The Convention clearly understood them as such, and the adoption of the Supremacy Clause promptly followed the rejection of the negative.[121]

CONVENTION].

118. *Id.* at 391 ("Mr. Rutlidge. 'If nothing else, this alone would damn and ought to damn the Constitution. Will any State ever agree to be bound hand & foot in this manner.'") (Madison's notes, Aug. 23, 1787).

119. Hobson, *supra* note 112, at 227 (citing and summarizing the delegates' practical objections); *cf.* Justice Field's formulation in *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893).

120. In defending the need for federal supremacy and the prominent role of the courts in its enforcement, Hamilton illustrated his point by stressing the near-certainty of state violations of absolute and qualified constitutional prohibitions, as distinct from the exercise of concurrent powers. THE FEDERALIST NO. 80, at 475 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

121. Hobson, *supra* note 112, at 228. As for "clearly understood," Gouverneur Morris's comment immediately preceding the rejection of the negative proposal on July 17 is instructive: "Mr. Govr. Morris was more & more opposed to the negative. The proposal of it would disgust all the States. A law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. Law." 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 117, at 28 (Madison's notes July 17, 1787).

However, the Convention retained absolute prohibitions *or a congressional negative* for certain classes of state laws—those that are now listed in Article I, Section 10, including the Compact Clause. The congressional consent requirement for state agreements and compacts is the Madisonian negative, in a specified range of application. This decision was not some quid pro quo to appease the ornery Madison. Rather, even as the delegates rejected Madison's entreaties to use the Convention as an opportunity to reform state politics (preferring instead to leave that project for another time and place),[122] they emphatically agreed with his contention that certain species of state laws—the "rage" for paper money, debtor relief laws, import duties—posed alarming dangers to sister states and, hence, to the union. For these classes of state laws, including compacts, the Convention deliberately broke with mere supremacy and instead adopted either an absolute prohibition or the "disgusting" negative. Uniformly, the prohibitions and negatives are directed against classes of state laws with a manifest detrimental effect on sister states. As Madison might have put it, the Convention sought to arrest factionalism at the borders.

Before pursuing the logic of this constitutional choice, two points—one minor, the other of some significance—merit a brief mention. First, the nature of the congressional consent clauses in Article I, Section 10 sheds light on Madison's cursory discussion of those provisions, including and especially the Compact Clause, in the *Federalist Papers*.[123] While Madison may have genuinely believed that the dangers of state compacts were "too obvious" to warrant discussion, and while he may have expected his audience to share that view, his extreme brevity may also reflect an effort to deflect unwanted (Antifederalist) attention from the distinctly nationalistic resolution of the compact problem in the Constitution.[124] Having experienced the determined opposition to the general negative at the Convention, the Madison of the *Federalist Papers* was hardly inclined to boast that his "pet scheme"[125] was actually retained for certain classes of state laws.

The second, more consequential point concerns the fateful debate over the distinction between absolutely prohibited "treaties" (etc.) and "agreements and compacts," which are subject to the Madisonian negative. Putting aside its absurd turns, that debate misses the point that the constitutional choice between absolute and qualified prohibition is secondary, both logically and in terms of

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122. Kramer, *supra* note 110, at 647-48.

123. *See supra* notes 105-07 and accompanying text.

124. That interpretation is supported by a telling "mistake" in Madison's account in the *Federalist Papers*: contrary to his representation (quoted *supra* in the text accompanying note 105), the constitutional injunction against state treaties was not in fact "copied" from the Articles of Confederation but rather strengthened. "The prohibition in the Articles was conditional; in the Constitution it is absolute." Engdahl, *Interstate Arrangements*, *supra* note 13, at 75 n.59.

125. RAKOVE, *supra* note 114, at 435.

institutional significance, to the constitutional choice between federal legal supremacy and (qualified or absolute) prohibition. The distinction between treaties and compacts is of little practical import so long as, and because, *neither kind of bargain can be concluded without the approval of Congress.*[126] Congress might mis-classify a compact as a treaty and declare itself constitutionally barred from approving it. That mistake is tantamount to a simple rejection of a compact and, therefore, without consequence. Conversely, Congress might mis-classify a treaty as a compact and proceed to approve it. That is conceivable, but highly unlikely. The question has never arisen in an actual case and, in light of its unequivocal commitment to the Congress, is quite probably non-justiciable.[127] In any event, a judicial ruling to the effect that Congress mistakenly approved a constitutionally prohibited state treaty would afford more, rather than less, protection against divisive state agreements.

The distinction between treaties and compacts is not altogether irrelevant. Legislative deliberations on the point should be informed by the Founders' understanding of the constitutional distinction, obscure though it may be.[128] But

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126. *Cf.* Frankfurter & Landis, *The Compact Clause*, *supra* note 19, at 694-95 (identifying constitutional commitment to Congress as the central feature of the Compact Clause).

127. S. 2467, *GATT Implementing Legislation: Hearings Before the Senate Comm. on Commerce, Science and Transportation*, 103d Cong., 2d Sess. 319 (1994) [hereinafter *GATT Hearings*] (testimony by Professor Laurence H. Tribe) (suggesting that the classification of particular international agreements as Article II "treaties" or something else may not be justiciable and characterizing the question as "tough"). The case against justiciability is even stronger under Article I, which clearly commits treaties *and* compacts to Congress (regardless of where the distinction is drawn), than under Article II, which provides for the approval of "treaties" without specifying how and by whom they are to be distinguished from other sorts of agreements.

128. To my mind, the most natural interpretation is that treaties (and the like) are something more formal, lasting, and consequential than mere "agreements and compacts." In particular, treaties (and the like) threaten to compromise the parties' sovereignty to a greater extent than mere one-shot agreements. *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1266-68 (1995). At some point, state agreements may effect such a departure from the original constitutional design that even Congress may not permit them. This view of a constitutional continuum is buttressed by the progression from the less to the more formal within each clause ("Treaties, Alliances and Confederations"; "Agreements and Compacts"). *GATT Hearings*, *supra* note 127, at 288 (letter from Professor Anne-Marie Slaughter submitted into the record by Professor Tribe). Assuming that the word "treaty" means the same in Article II as it does in Article I, the Treaty Clause of Article II, Section 2, Clause 2, requiring the concurrence of two-thirds of the Senate to treaties made by the President, further supports the interpretation just sketched. While that Clause (unlike Article I) does not explicitly distinguish between treaties and other kinds of agreements, the idea of subjecting treaties, but not (unspecified) other agreements, to a requirement of approval

one should not search for a hard-and-fast rule where some play in the joints can easily be tolerated, and may in fact be preferable. The purpose of precluding divisive state agreements has been accomplished, so far as possible, once any and all state agreements have been exempted from mere supremacy and instead been subjected to a negative or to an absolute prohibition. No serious institutional risk or consequence attends to an erroneous congressional identification of a compact as a treaty, or vice versa.

Only in August, *after* the Convention had made the basic choice on supremacy (in the general run of cases), did the delegates turn to the question of whether the exceptions to that rule should be governed by a negative or an absolute prohibition. Considering the delegates' discussion of the parallel provisions of Article I, Section 10, it may be just as well that the record at this point falls silent on the Founders' Compact Clause. For example, the delegates engaged in a rambling discussion on the distinction, if any, between duties and imposts.[129] The Import Clause eventually came to contain an exception for state charges that are "absolutely necessary" to carry out a state's inspection laws; a parallel qualification for the Tonnage Clause was introduced and discussed (on the day of the Convention's adjournment, and to Madison's obvious irritation), but voted down.[130] The discussions accompanying those choices have an air of pedantry, impatience, and sheer exhaustion. A learned disquisition on the niceties of "compacts" and "treaties" under the Law of Nations, one feels, might well have earned its author a public flogging—and a deserved one at that: the crucial decision against mere supremacy had long been made.

B. *Why Mere Supremacy Is Not Enough*

The fact that the very same delegates who so resolutely rejected the Madisonian negative deliberately adopted that instrument for state agreements and compacts should carry some constitutional weight. In light of the modern Supreme Court's obtuseness on the point, the reasons for the Convention's decision warrant further exploration.

The most obvious reason has already been suggested: if one rejects, along with the great majority of delegates, Madison's endeavor to remedy the internal defects of state politics at and through the Constitutional Convention, then a general negative is grossly overinclusive. It covers a vast array of state activities

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by two-thirds of the Senate makes sense only on the assumption that treaties are something more formal, something more threatening to state and popular sovereignty, than other sorts of arrangements. *Id.* at 287-88 (letter from Professor Slaughter).

129. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 117, at 305-08 (Madison's notes, Aug. 16, 1787).

130. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 117, at 625-26 (Madison's notes, Sept. 15, 1787).

that pose no risk to the Union, at considerable institutional cost. As Thomas Jefferson tweaked Madison in a pre-Convention letter from Paris, the proposal "mend[s] a small hole by covering the whole garment."[131] Time and again, Madison's opponents at the Convention turned to this argument. As George Mason put it—again, foreshadowing Justice Field's language in *Virginia v. Tennessee*—it would be highly impracticable and onerous to obtain congressional consent every time a state decides to build a bridge within its own territory.[132]

The overinclusiveness argument obviously does not apply to the use of the negative in areas of state activity that constitute manifest threats to sister states and to the union. That observation does not quite explain, though, why the negative is *necessary* in those areas—in other words, why the ordinary exercise of legal supremacy, through the courts or by Congress, is not enough. The answer lies in a comparative analysis of institutional risks and benefits.

Supremacy, in the area of enumerated congressional powers, is plenary, but its exercise is somewhat uncertain. Supremacy must be asserted by courts, in the ordinary course of deciding cases and controversies. Cases may materialize late, or never, and courts may neglect to enforce the rightful supremacy concerns of the United States.[133] Congress can, within its enumerated powers, preempt state

131. Letter from Thomas Jefferson to James Madison (June 20, 1787), in 10 PAPERS OF MADISON, *supra* note 111, at 64.

132. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 117, at 390 (Madison's notes, July 17, 1787).

133. *See* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 117, at 27 (Madison's notes, July 17, 1787); *see also* Kramer, *supra* note 110, at 653 n.180 (discussing Madison's sentiment and citing non-Convention sources). It bears emphasis that "courts," to the Founders, principally meant *state* courts, subject to Supreme Court review. The very real possibility that parochial judicial interpretations of compacts might create strife rather than harmony among the states is an additional reason against reliance on mere supremacy in the compact context. In the twentieth century, that possibility prompted the Supreme Court to characterize compact law, first, as some kind of "law of the Union" and, later, as unequivocally federal law. *See* Delaware River Joint Toll Bridge Comm'n v. Colburn, 310 U.S. 419, 427 (1940) (approved compact constitutes federal law); Dyer v. Sims, 341 U.S. 22, 26 (1950) (state court interpretation of state constitution in conflict with compact presents federal question); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 278 (1959) (federal law governs interpretations of compacts); Cuyler v. Adams, 449 U.S. 433, 441-42 (1981) (congressionally approved compacts present federal question regardless of parties' understanding of compact terms); New Jersey v. New York, 523 U.S. 767, 782 n.4 (1998) (federal courts not bound by state court interpretation of compact). The broad extension of federal law and jurisdiction has problems of its own and has been widely criticized. *See, e.g.*, Note, *Charting No Man's Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts*, 111 HARV. L. REV. 1991 (1998); L. Mark Eichhorn, Note, Cuyler v. Adams *& the Characterization of Compact Law*, 77 VA. L. REV. 1387 (1991); David E. Engdahl,

legislation and correct errors by displacing inconvenient state laws and (sub-constitutional) judicial decisions, but—to anticipate a point that will shortly emerge as the central justification for the negative—it may not always muster the will or the energy to do so. Supremacy, in short, will produce a number of "false negatives"—that is, unredressed offenses against national rights and prerogatives.

Those institutional mistakes, however, are tolerable in the general run of cases where inconvenient state laws might call for federal intervention.[134] The institutional alternative would generate an unacceptable number of false positives and, moreover, unacceptable institutional transaction costs. That, in a nutshell, was the case against the general negative. The analysis flips, however, when we have good grounds to suspect that a particular class of state activities spells trouble. Under that scenario, the supremacy arrangement would produce huge error costs, whereas the negative would produce few false positives. Consider an obvious example, the exercise of concurrent state authority within the ambit of the Commerce Clause: states will often enact protectionist measures disguised as "police power" regulation. Such menaces to sister states and the Union, however, are relatively rare compared to the great mass of police power regulation. Under the supremacy arrangement of the Commerce Clause, we permit those incursions—pending judicial or congressional intervention—because the costs of subjecting *all* state legislation to congressional preapproval are unacceptably high. Not so, however, with state duties on tonnage or import tariffs. While these measures, too, fall under the general description of "interstate commerce"—and, therefore, barring special constitutional treatment, under the operation of the supremacy principle—they are extremely likely to be protectionist and exploitative. Hence, the Constitution subjects them to the negative.

While even a negative (or for that matter an unqualified prohibition on state laws) cannot entirely preclude evasive state maneuvers, it does provide an added safeguard. The evasion of an unequivocal negative by state legislatures or judges requires more cleverness, factious spirit, and willfulness than does the ordinary "police power" interference with interstate commerce. A state legislature that violates the Import-Export Clause—or the Compact Clause, as

Construction of Interstate Compacts: A Questionable Federal Question, 51 VA. L. REV. 987 (1965); *see also* Petty, 359 U.S. at 283-89 (Frankfurter, J., dissenting); Cuyler, 449 U.S. at 450-55 (Rehnquist, J., dissenting).

134. The paragraph in the text explicates the constitutional choice, not Madison's position. Madison himself believed—based on his experience in the Virginia Assembly—that the typical state legislature "enacted scores of laws, of which a few had genuine merit but the rest were either inconsequential or positively harmful." Hobson, *supra* note 112, at 224. The assumption that state legislatures churn out mostly garbage might well warrant a comprehensive negative, so long as it can be provided at reasonable cost. For reasons noted, though, the Convention rejected Madison's proposal.

written—is unlikely to have done so inadvertently; it should be presumed to have pushed the constitutional envelope. Likewise, a negative or absolute prohibition disciplines courts, so far as possible. The sorting of competing state and federal powers in areas of concurrent authority is a difficult task, and judicial mistakes will be common. Misinterpreting a constitutional injunction against state duties of tonnage or, for that matter, against *any* unapproved state agreement requires willfulness or massive intellectual confusion.[135]

The greatest and central difference between the negative and mere supremacy, however, lies in the federal legislative dynamics. The failure of Congress to assert federal supremacy in all or at least most instances where that might be needed is a matter of institutional design, rather than an occasional lack of will. The constitutional cure to the dangers of factionalism, famously described in Madison's *Federalist No. 51*, is to extend the sphere within which factions must operate and to further hamper their operation, in that extended sphere, through the separation of powers and elaborate supermajoritarian safeguards—prominently, in the form of bicameral consent and a presidential veto. These ingenious precautions are worth having—even at the price of sacrificing some good laws[136]—so long as the task at hand lies, as mostly it does, in preventing federal legislation from interfering with beneficial or at least harmless activities. (Private orderings are the classic example: occasional market failures are bound to pale in comparison to the horrors of an institutional system that facilitates interest-group driven government intervention.) The precautions fail, however, and in fact have the opposite of the intended effect, when the objects of federal legislation spell trouble and energetic affirmative action is called for—for instance, because partial legislation at the state level endangers the interests of sister states. Put more directly, the constitutional obstacles that prevent partial laws at the federal level will, under a mere supremacy arrangement, hamper the national government's ability to redress piggishness at the state level.

135. Moreover, an explicit constitutional prohibition (qualified or absolute) will suppress a broad range of state activities that would otherwise become the stuff of litigation. Marginal cases and judicial misinterpretations will occur under any rule; what matters in choosing and evaluating the legal rules is the stuff that never makes it into court.

136. The necessity of safeguarding against partial legislation is a principal defense of bicameralism and the presidential veto in the Federalist Papers. For example, see Hamilton's defense of the presidential veto as a safeguard against:

> the mischiefs of that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments. . . . The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.

THE FEDERALIST NO. 73, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The constitutional solution we have inherited is to invert the default rule for problematic classes of state laws. Mere supremacy must rely on the ability of the political branches to stitch together a supermajority in defense of national interests. With respect to the great mass of state legislation, that arrangement will (hopefully) minimize institutional error on either side.[137] The negative, in contrast, compels the *advocates* of proposed state legislation, rather than their opponents, to find the requisite supermajorities.[138] It is appropriate that they should have to do so, for the state laws on which the negative operates come with a heavy suspicion of menacing sister states and, hence, the Union. In this fashion, the Constitution makes the safeguards against faction work once more against factionalism's most dangerous tendencies at the state level.

C. *Risk-Free Federalism?*

The Supreme Court has never denied the *existence* of the institutional risks that induced the Founders to subject any and all state agreements to a congressional negative. Rather, the functionalists on and off the bench have minimized those risks by painting the congressional negative as grossly overinclusive even in the areas to which the Founders limited it.

The *locus classicus* is Justice Field's dictum in *Virginia v. Tennessee.* By way of illustrating that a literal interpretation of the Compact Clause would sweep far too broadly, Justice Field adduced four examples—one state's purchase of a "small parcel of land," within its own boundaries, that is owned by another state; a state's shipment of goods belonging to it through another state, on mutually agreeable terms; an agreement among neighboring states to drain a

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137. That, at any rate, is Madison's sanguine conclusion at the end of THE FEDERALIST NO. 51: "In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good." THE FEDERALIST NO. 51, at 325 (James Madison) (Clinton Rossiter ed., 1961).

138. Arguably, this overstates the point. Whereas affirmative federal legislation is of course subject to presentment and presidential veto, the state activities listed in Article I, Section 10 are subject only to the consent *of the Congress*, thus rendering approval of compacts somewhat easier to obtain than ordinary legislation. The language, though, has been interpreted, at least by the political branches, as requiring executive as well as congressional consent. President Franklin D. Roosevelt vetoed a congressional consent resolution to a state compact, whereupon the resolution was amended and re-submitted to the President in an acceptable form. ZIMMERMAN & WENDELL, *supra* note 19, at 93-94. In other words, the Compact Clause has been understood to require approval by Congress, *acting in the way in which Congress ordinarily enacts legislation*—i.e., subject to presentment, veto, and possibly judicial review. On that interpretation, the constitutional negative fully reverses the burden of producing a supermajority.

"malarious and disease-producing district" that crosses the border separating the states; and state cooperation for the purpose of preventing a "threatened invasion of cholera, plague, or other causes of sickness and death."[139] In such cases, Justice Field proclaimed, congressional consent can "hardly be deemed essential"; indeed, to require it under a literal reading of the Compact Clause would be "the height of absurdity."[140]

Justice Field's examples fall remarkably short of making their intended point. In the first two examples, the states act as market participants and as parties to a private-law contract, not as sovereign political entities. Such activities should not fall under the Compact Clause under any construction.[141] The fourth example—the aversion of an imminent health threat—can be plausibly construed as falling under an implied necessity exemption to the Compacts Clause, in analogy to the clause of Article I, Section 10, immediately following the Compact Clause, that permits the states to wage war, without congressional consent, when they are under attack.[142] As for the drainage of a border-crossing swamp, one need not be an unreserved supporter of federal wetlands regulation to recognize that the activity might very well be of interest to the Congress. The swamp, for instance, might well surround a navigable stream, in which case it would be of interest to, and under the jurisdiction of, the federal government, and, moreover, of interest to downstream states.[143]

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139. Virginia v. Tennessee, 148 U.S. 503, 518 (1893).

140. *Id.*

141. Engdahl, *Interstate Arrangements*, *supra* note 13, at 88 n.131.

142. Madison, in advocating an across-the-board negative, was willing to grant an exception in cases of urgency. *See e.g.*, 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, 168 (Madison's notes) (Max Farrand ed., 1911). Arguably, the explicit constitutional provision for a "necessity defense" in case of war is an argument against inferring or implying it in the Compact Clause. I do not find that objection fully persuasive: the need for such an exception is simply more obvious in the case of physical attack. In any event, Justice Fields' example has force only if the Compact Clause is read to require *prior* congressional consent. At the time of *Virginia v. Tennessee*, however, it was well established that congressional consent may be given after the fact. *See, e.g.*, Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823). That holding was explicitly reaffirmed in *Virginia v. Tennessee*, 148 U.S. at 521 ("[W]here the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given.").

143. *Cf.* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) (federal jurisdiction under the Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000), extends to all waters connected to navigable waters but not to isolated ponds or wetlands). Justice Field clearly intended to supply an example of a state agreement that no sensible person could possibly oppose. The fact that we now see valuable wetlands where Justice Field and his contemporaries saw murderous swamps should caution against exempting state arrangements from the Compact Clause on the grounds of their "obviously" beneficial effects.

Justice Field's difficulty in identifying more compelling examples is a sign of the times, or perhaps the Justice's limited imagination. *Virginia v. Tennessee* was decided before the uniform state law movement; before the Progressive endeavor to marry local control with national ambitions; before the emergent efforts to find "regional solutions for regional problems," such as metropolitan areas that transcend state boundaries; before the distribution of federal income tax proceeds under grants-in-aid programs to the states—in short, before the cooperative enthusiasms that would soon mow down federalism's forms and formalities. Justice Field's re-interpretation of the Compact Clause in *Virginia v. Tennessee* is at bottom committed to a dual federalism: it seeks to separate the federal government from the states, by discouraging a Compact Clause interpretation that might prompt needless entanglement. The examples that purport to make the case for a limited, functional analysis of the Compact Clause are thoroughly traditional ones—police power stuff that states had done since the founding and, indeed, before the founding. Precisely not the sorts of activities that states might want to undertake in a modern society beyond the Founders' ken and contemplation. For all its flaws, *Virginia v. Tennessee* sought to capture the Founders' intention, not to re-interpret the Compact Clause for the perceived needs of a modern society.

Later generations conveniently overlooked the context of *Virginia v. Tennessee* and instead instrumentalized its dictum for cooperative ends. The idea that Justice Field, that diehard common lawyer and dual federalist, should be mobilized for the Progressive enterprise is ironic, but not altogether unintelligible: if the Compact Clause is overbroad even with respect to the sorts of state agreements the Founders did have in mind, why should the Clause apply to new, emerging state agreements, spawned and necessitated by an increasingly complex and interdependent industrial society, that the Founders could not possibly have contemplated?

To put the rhetorical question into its most tenable declarative form: the universe of unproblematic state agreements has expanded to the point of justifying a turn from the congressional negative to ordinary supremacy. If the Compact Clause negative operates—contrary to the Founders' fears—on a universe of transactions that, on balance, do more good than harm, then the objections that were successfully voiced at the Convention against the general negative may also apply to the narrower negative for state compacts—undue and unnecessary interference with affairs that concern only the states; useless demands on an already over-extended Congress; a needless nationalization of regional problems.

On that theory, the *U.S. Steel* Court may have been right, in a functional (though obviously not a textual) sense, to revert to the supremacy arrangement. If, on the other hand, state agreements do pose special risks, the calculus becomes more complicated: the functional inquiry turns into a search for a Compact Clause rule that would excise those special risks without, at the same time, wiping out the gains that might be had from state cooperation.

IV. THE RISKS OF COOPERATION

The most plausible case for lifting the congressional negative, I suggested at the outset, rests on a transaction cost model. States, no less than individuals, can strike Coasean bargains and realize gains from trade, provided the transaction costs are sufficiently low.[144] The Compact Clause negative, the argument goes, drives up transaction costs; it should therefore be jettisoned. Instead of erecting obstacles, the central authority should define the states' property rights, enforce their bargains, minimize the transaction costs, and otherwise stay out of the way.

Upon inspection, this functional case for a latitudinarian Compact Clause proves untenable. The transaction cost model embodies non-trivial assumptions about property rights, externalities, competition, and agency. In government bargains, those assumptions cannot be taken for granted and are in fact quite unlikely to obtain. We therefore have no reason to assume that state agreements will automatically enhance efficiency. That observation alone casts doubt on a sanguine functional view of the Compact Clause.

One can go further, though: a sensible transaction cost perspective suggests that state agreements pose special risks—that is, risks over and above those that attend to the individual, uncoordinated exercise of state sovereignty in a federal republic. Those risks are interrelated and partially congruent. For purposes of exposition and analysis, I classify them as follows: (1) state bargaining with federal rights and prerogatives; (2) the imposition of externalities on third-party states; (3) cartelization, meaning state agreements in restraint of economic and political competition; and (4) agency problems, meaning a diffusion of political accountability (often, though not always, through the creation of multistate authorities). Jointly and severally, these distinct risks warrant something more in the way of federal safeguards than mere supremacy—something like the Compact Clause. Though couched in the language of modern transaction cost and public choice theory, the analysis vindicates the Founders' constitutional intuitions.

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144. The theoretical origin of "Coasean" bargains that re-arrange entitlements relative to the legal background norms is of course Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 2-8 (1960). The general assumption is that minimal transaction costs will routinely generate Coasean bargains. For a critical discussion of this assumption, see Robert D. Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 15-20 (1982). For an explicit (and appropriately circumspect) application to interstate compacts, see Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931 (1997). For a sophisticated analysis of horizontal jurisdictional cooperation, coupling a Coasean analysis with a game-theoretical approach, see ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 108-15 (2000).

A. Compact Risks

1. Uncertain Rights

Coasean bargains presume that actors bargain with what they own. Put differently, efficient bargaining presupposes clearly defined property rights. "States' rights," however, are not so defined, and cannot be so defined. Federalism means that the national government and the states exercise sovereign authority over the same citizens and territory, which in turn means that their respective rights overlap. State compacts and agreements, therefore, pose a risk that states will bargain with assets that belong not to them but rather, or also, to the federal government.

Boundary settlements—for much of American history, the most common form of state compacts—provide an example. A bilateral bargain through which the Commonwealth of Virginia acquires half of West Virginia's territory may be best for all concerned (at least in the party states), but it would also affect the allocation of seats in the House of Representatives. (For all we know, the seats may have been a bargaining chip in the transaction, if not its point.)[145] The bargain need not run afoul of the *U.S. Steel* test: it does not enhance the power of "the states," collectively, quoad the national government, and it does not adversely affect the political power (in the House of Representatives) of any state except West Virginia—which explicitly agreed to the deal. That, however, proves only that the test is wrong. West Virginia's seats in the House are hers, but not in the same sense in which Coase's farmer owns his cattle. They are part of a larger institutional arrangement and agreement, and, therefore, may not be alienated or acquired without congressional consent. The same is true of all powers in the federal domain, including those that are concurrently exercised by the states.

To be sure, states may also encroach upon the federal domain when acting individually—for instance, by erecting obstacles to interstate commerce under the guise of police power regulation. The danger of incursion, however, is particularly pronounced when those powers are exercised by agreement. States are naturally disinclined to surrender their own sovereignty—that is, rights that are indisputably and exclusively theirs—to another state or to a compact agency.

145. The point of the admittedly unrealistic hypothetical is simply to illustrate the unworkability of the *U.S. Steel* test. As a matter of curious historical fact, the possibility of a state-sponsored leveraged buy-out of a sister state was raised in a nineteenth century boundary case arising under the Compact Clause: "By the compact of 1820, Tennessee acquired nearly half a million of acres . . . ; if she could go ten miles north, she might two hundred, and purchase out a sister state, sapping the foundations of the Union." Poole v. Fleeger's Lessee, 36 U.S. (11 Pet.) 185, 206 (1837) (John Catron, counsel for defendant in error), *quoted in* Engdahl, *Interstate Arrangements*, *supra* note 13, at 81 n.82.

They are much more likely to bargain with rights which they exercise at the national government's sufferance. The MTC, for a splendid example, does not attempt to harmonize the tax treatment of wholly domestic transactions, or for that matter the tax credits and abatements through which states attempt to attract business—even though a reciprocal agreement on such matters might well improve locational efficiency, reduce transaction costs, and improve the affairs of state governments.[146] Instead, the Compact governs only the taxation of interstate transactions—the concurrent domain of the federal government.

Concurrently held rights are not only worth less than full sovereignty rights (because they may be abrogated at any time); their exchange also holds a prospect of defeating the national government's claims through a kind of joint preemption in reverse. State regulatory compacts very often come about under the threat of impending federal legislation—in other words, when (and because) a sluggish Congress is approaching the point of exercising federal supremacy. The creation of the MTC, for a prominent example, "was more a reaction to the 'evils' of possible federal intervention than a pure reaction to the problems of diversity."[147] Almost by definition, such "defensive" state compacts regulate issues that, in the language of the *U.S. Steel* Court, are of "interest" to the national government both in a theoretical and in an immediate, practical sense—and precisely not matters that arguably lie in the states' own exclusive domain.

There is no reason to expect that (state) bargaining with non-exclusive rights, without the consent of the co-owners, is efficient. Precisely when states' rights are non-exclusive, however, they are most likely to become a subject of state bargaining. For that reason, state agreements are, as a class, more suspect than ordinary, unilateral exercises of state powers. Unclear property rights assignments imply that the co-owners of those rights must be consulted on their exchange. The Compact Clause, as written, ensures that consultation. Its modern interpretation does not.

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146. Unlike protectionist measures that discriminate against outside parties, state favoritism (such as subsidies and selective tax exemptions) is generally not thought to violate the dormant Commerce Clause, on the theory that the costs of such measures fall entirely, or very nearly so, on the state's own citizens. Few economists, however, consider this industrial-policy race to the bottom efficient, and state officials have long complained about the effects on their treasuries. *See, e.g.*, Walter Hellerstein, *Commerce Clause Restraints on State Tax Incentives*, 82 MINN. L. REV. 413 (1997); Melvin Burstein & Arthur J. Rolnick, *Congress Should End the Economic War Among the States*, 10 STATE TAX NOTES 1895 (1996). Even so, the MTC has confined its mandate to *interstate* taxation.

147. Sharpe, *State Taxation, supra* note 78, at 244.

2. Externalities

Consistent with a regime of clearly assigned property rights, the Coasean model assumes that the parties will bargain over externalities and assign responsibility and costs one way or the other—as distinct from fobbing them off on a third party. A federal system of three or more states, however, enables two (or more) states to inflict externalities that neither of them, acting on its own, may be able to induce. Consider Justice Field's example of draining a malarious bi-state swamp: while the benefits of that bargain would (by definition) not be attainable by compacting States A and B, acting individually, neither would a possible externality—water loss—to downstream State C.[148] Put differently: the qualified prohibition on state compacts provides protection against state collusion and exploitation. A compact-free environment permits the downstream state to obtain water from one of several upstream states at something close to a competitive price, whereas an upstream state compact creates a monopoly and a high risk of exploitation.

3. Cartelization

The externalities attendant to state agreements in restraint of trade preoccupied the Founders. For instance, New Jersey, lacking a viable port, was at the mercy of New York and Philadelphia, both of which taxed goods destined for New Jersey. Alluding to a then-current metaphor, Madison compared the state to "a cask bottled up at each end" and North Carolina, likewise lacking a deep-sea port, to a "patient bleeding at both arms."[149] By virtue of their resources, location, or history, some states will always be in a more advantageous position than others; that cannot be helped. What *can* be helped is the anti-competitive and, in particular, the collusive exploitation of that advantage.[150]

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148. The analysis holds under any assumption about political dynamics at the state level. States A and B may want to push the externalities downstream for any number of reasons—local producer demand; an authentic reflection of domestic voter demand for public goods; or the sheer impossibility of ascertaining third-party externalities. *See* Copas, Jr., *supra* note 30, at 722-23.

149. Madison, *supra* note 45, at 7.

150. *See* Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983) [hereinafter Levmore, *Interstate Exploitation*]. Levmore argues that the prevention of interstate exploitation (as distinct from non-exploitative state interferences with interstate commerce) should serve and, by and large, has served as the foundation of the Supreme Court's jurisprudence under the dormant Commerce Clause and related constitutional provisions. *Id.* Levmore notes the Compact Clause "can be interpreted to reflect the theme of [his] article." *Id.* at 570 n.17. When states collude, exploitation of sister states is so likely "that Congress is called in to review the

New Jersey's particular predicament was remedied through the Import-Export Clause,[151] rendering the Compact Clause redundant in this case. (If New York and Pennsylvania may not individually levy duties on goods destined for or coming from New Jersey, they may not do so by agreement, either.) State cartels to the detriment of third states need not, however, involve practices that are forbidden by an independent constitutional provision. When a particular commodity—say, oil—is available in ten states but vital to all fifty, the producer states' advantage may cause a problem of a constitutional magnitude even when competition among the supplier states prevents the exploitation of consumer states.[152] If the suppliers form an oil compact to restrict output and raise prices, the problem is clear and manifest.

Such a domestic OPEC did in fact exist, complete with its own Saudi Arabia—Texas, which at the time of the formation of the Interstate Compact to Conserve Oil and Gas in 1935 controlled about half of all then-known U.S. oil reserves. That state compact, like other natural resource compacts,[153] was formed with congressional approval,[154] and its history nicely illustrates the purposes and effects of the Compact Clause negative. Under the *U.S. Steel* rule, the oil-producing states could have established and managed their cartel unless and until Congress affirmatively exercised its powers under the Commerce Clause and the Supremacy Clause. The benefits of the arrangement, though, were more concentrated—on the producer cartel's member-states—than the costs to the consumer states. Affirmative legislation would have forced anti-cartel states to overcome that hurdle, as well as the federal supermajority requirements. The Compact Clause negative, in contrast, forced the supplier states to attract votes from consumer states (through logrolling, or by diluting the cartelizing

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arrangement at the outset." *Id.* The exposition, here and below, of interstate exploitation as a Compact Clause risk is consistent with Levmore's suggestion and analysis.

151. U.S. CONST. art. I, § 10, cl. 2 ("No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws."). *See also* Michelin Tire Corp. v. Wages, 423 U.S. 276, 283-84 (1976).

152. The clearest example is the imposition of severance taxes for raw materials. *See, e.g.*, Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (sustaining coal severance tax against constitutional challenge). The constitutionality of such taxes under the dormant Commerce Clause is a difficult question. For excellent discussions see Levmore, *Interstate Exploitation*, *supra* note 150, at 611-18; Stephen F. Williams, *Severance Taxes & Federalism: The Role of the Supreme Court in Preserving a National Common Market for Energy Supplies*, 53 COLO. L. REV. 281 (1982).

153. For example, three marine fisheries compacts were formed during the 1940s. For an account of the first and largest of these compacts, establishing the Atlantic States Marine Fisheries Commission, see WELDON V. BARTON, INTERSTATE COMPACTS IN THE POLITICAL PROCESS 22-33 (1965).

154. Interstate Compact to Conserve Oil and Gas, 49 Stat. 939 (1935).

effects). That dynamic prompted earnest and vigorous assurances, on the part of the producer states, that their arrangement was not a price-fixing cartel (which is of course precisely what it was, though not a terribly successful one).[155] Nonetheless, a requirement for periodic congressional reapproval contained in the Compact generated increasingly stringent federal oversight and control over the Compact and its administration.[156]

The threat of cartelization extends not only to the exploitation of natural resource advantages and bottlenecks (such as deep-sea ports) but also to policy arrangements. Suppose that fifteen labor-dominated states in a nation of twenty states wish to maintain "living wage" requirements within their own jurisdictions. Suppose further that they agree, by compact, to "harmonize" their living wage requirements and moreover, to purchase goods exclusively from manufacturers that (a) pay the agreed-upon wage and (b) refuse to do business with suppliers that do not. Under suitable conditions—for example, substantial market power and high exit costs—the cartelists may succeed in wiping out the competitive advantages that the five dissenting states have chosen to preserve. Or suppose several states—those that are not domiciles for large, integrated insurance companies—agree to deny a business license to any insurance company that refuses to write policies, for any business line (such as car insurance), in any state of the union.[157] The exercise of federal supremacy to trump such cartels would have to overcome supermajoritarian obstacles. The Compact Clause reverses that burden and, in doing so, provides a measure of security against collusive interstate exploitation.

4. Agency and Delegation Problems

Pure transaction cost models presuppose a symmetry of incentives, if not actual identity, between principals and agents. Transactions among governments, however, may involve significant agency problems. Such problems are particularly likely to arise under intergovernmental cartel arrangements. In fact, every such cartel will present agency and delegation issues.

155. BARTON, *supra* note 153, at 12-17. The cartel's effectiveness was hampered by the emergence of new oil-producing states, which undermined the chief producer state's (Texas) ability to maintain supply and price discipline. *Id.* at 16-17.

156. BARTON, *supra* note 153, at 14-15. While the compact still exists, the radically different market conditions of the early 1970s rendered its output ceilings superfluous. 1 ROBERT L. BRADLY, JR., OIL, GAS, & GOVERNMENT: THE U.S. EXPERIENCE 104-06 (1996).

157. Several individual states have imposed equivalent exit restrictions on insurance companies. *See* Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 161-65 (1992).

Agency problems are probably negligible when state bargains are one-shot deals. An agreement by two states to demarcate more precisely an agreed-upon boundary—the subject of *Virginia v. Tennessee*—is an example: the benefits—such as the avoidance of needless disputes in the future—are roughly symmetrical. Barring unusual circumstances, neither side has reason to expect that the other side will benefit disproportionately. Legislative approval in the compact states confirms a final assignment of mutual rights and obligations. The deal can be implemented without extensive cooperation and monitoring by the parties. Under those circumstances, there is no reason to suspect an asymmetry of incentives between the governors and the governed.

Regulatory state bargains, in contrast, often involve the allocation of funds and, consequently, disputes over the parties' relative (financial and institutional) contributions.[158] Such compacts typically attempt to regulate complex arrangements that are subject to change, either because natural circumstances change (as is often the case in compacts dealing with water rights) or because private actors adjust their conduct in response to new (compact) law. Moreover, questions may arise as to how the gains from cooperation are to be distributed. *Ex ante*, the distributive question invites strategic gamesmanship;[159] *ex post*, it compels the parties to monitor each other's performance and to establish formulas and mechanisms for the periodic allocation of contributions and gains. The costs of doing so rise in proportion to the number of players and the complexity and duration of the cooperative venture.

The monitoring costs are high even for the agents, meaning state legislatures. For the citizen-principals, the costs are prohibitive. By way of a simple example, let five states (A-E) be the exclusive producers of consumer good "X." Powerful producers in each state would very much like their government to increase the price of X, but cannot do so because consumers would purchase more X from one of the four rival states. Suppose, however, 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. All consumer-citizens will be worse off.[160]

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158. Dixon, Jr., *supra* note 20, at 58.

159. COOTER, *supra* note 144, at 60-62, 110-12.

160. Agricultural compacts establishing minimum price regulations fit this pattern. *See, e.g.*, Northeast Interstate Dairy Compact, 7 U.S.C. § 7526 (2000), *amendment & reauthorization pending*, H.R. 324, 108th Cong. (2003). Those compacts provide another fine illustration of the salience and the dynamics of the congressional consent requirement. Opponents of the regulations—competing states and consumers in compact states—would be unable to mobilize a majority for their dismantlement. Dairy compacts, however, are generally understood to require congressional consent, and that circumstance has compelled the producers interests in compact states to find the requisite majorities in Congress. They have not always managed to do so. The Northeast Dairy Compact, for example, expired in 2001 and is still awaiting reauthorization.

Rent-seeking at the state level, of course, is an ordinary phenomenon, as is the temptation of beggar-thy-neighbor policies. State agreements, however, exacerbate those risks. First, state cartels will on some margin dampen jurisdictional competition and dilute the citizens' exit rights that would otherwise discipline rent-seeking. Second, a state (A) that intends to beggar its neighbor (B) does not really intend to beggar B, *as a state*; it intends to beggar B's citizens. State B, meanwhile, has the same purpose in mind vis-à-vis A. The agents of A and B, in other words, have symmetrical incentives to exploit each other's citizens.[161] Unless government agents are perfectly monitored, state agreements provide them with opportunities to procure, for governments, benefits that neither state could procure individually—while exposing citizens to risks that they would not incur if such agreements were subject to special impediments, or prohibited altogether.

Compacts seeking to establish an on-going cooperative regime—as distinct from agreements that conclusively settle mutual claims and rights—virtually always require a standing board or commission, because somebody must monitor the parties' performance, secure their cooperation, and allocate and distribute the gains. Such bodies exhibit delegation problems in a particularly acute form and, in practice, have consistently been found to elude democratic control and accountability. Beginning with the scandal-plagued New York-New Jersey Port Authority—the first compact commission, and Frankfurter's and Landis's paradigmatic example of fruitful state cooperation[162]—compact commissions have proven to be poorly supervised even by state legislatures (not to mention voters) and thus prone to mismanagement and bureaucratic empire-building.[163]

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161. They also have symmetrical incentives to exploit *their own* citizens by disguising the true cost of government programs. The imposition of a sales tax (more precisely, use tax) collection obligation on out-of-state sellers is an example of this stratagem.

162. *See* Frankfurter & Landis, *The Compact Clause*, *supra* note 19, at 697-98. On the scandals and mismanagement at the Port Authority, which prompted a congressional investigation and an acrimonious political confrontation between the Authority and the Congress, see Emmanual Celler, *Congress, Compacts and Interstate Authorities*, 26 LAW & CONTEMP. PROBS. 682 (1961).

163. The most impressive empirical demonstration of the diffusion of accountability and loss of public control that characterizes compact commissions is MARIAN E. RIDGEWAY, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM 308-09 (1971); *see also* Hasday, *supra* note 34; and Note, *Charting No Man's Land*, *supra* note 133, at 1995, n.29.

Compact commissions somewhere between the national government and the states pose serious constitutional questions even when they are created or, as the case may be, approved by Congress. *See* Virginia v. U.S. EPA, 108 F.3d 1397 (D.C. Cir. 1997) (discussing constitutional questions presented by Ozone Transport Commission established under Clean Air Act, 42 U.S.C. Section 7511c; case decided on independent statutory grounds). In these instances, however, the commission's life can be terminated

The notion that a state legislature can bind its successors by consenting to a state agreement that can be terminated only with the consent of other states—as is the case under compacts that do not provide for the option of a unilateral withdrawal—raises additional problems of democratic governance and accountability.[164]

B. Constitutionalism

The risks just identified are hardly unique to state compacts. Congressional legislation—not just compact approval, but legislation *per se*—poses very similar risks. Federal statutes routinely favor some states over others, substitute policy cartels for state competition, and exploit through (vertical) schemes of intergovernmental cooperation the "slack" that is produced by the imperfect monitoring of state and federal politicians.[165] Nor has Congress proven immune to the temptation of establishing interstate agencies off the constitutional charts, from the Tennessee Valley Authority to the Ozone Transport Commission.[166]

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by the single, superior body that created it in the first instance. (States may, by virtue of the same logic, create inferior counties and districts and delegate their police powers to those entities.) In contrast, states cannot unilaterally terminate the life of an interstate agency they have helped to create. Thus, such agencies pose a special and particularly urgent delegation problem. Dixon, Jr., *supra* note 20, at 73-75.

164. Hasday, *supra* note 34, at 2-3. Some scholars have argued that cooperative state arrangements requiring continuous cooperation and standing compact commissions are beyond the purview of the Compact Clause. The Founders, those commentators claim, intended the Clause to apply to agreements that conclusively determine the rights between the parties; agreements that fail to do so should *ipso facto* be exempt from the Clause. *See, e.g.*, Engdahl, *Interstate Arrangements*, *supra* note 13, at 97-101; White, *supra* note 80, at 458-59, 462. The Multistate Tax Commission advanced this argument in the *U.S. Steel* litigation. Brief for Appellee at 36, U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978) (No. 76-635). That, however, was the one argument that the Supreme Court opinion (which was, in virtually all other respects, a toned-down recitation of the MTC's brief) did not endorse—perhaps, because the Court had already held state compacts of whatever description to be effectively exempt from the congressional consent requirement; perhaps, because the claim was too much even for a Court that was otherwise unperturbed by constitutional considerations. Off-the-charts compact commissions are obviously more problematic than run-of-the-mill boundary settlements. The fact that such fourth-branch-of-government constructs would have blown the Founders' minds cannot justify their exclusion from the Compact Clause.

165. The potential for bilateral exploitation of agency problems and collusion between state and federal officials is the central argument against the federal "commandeering" of state officials. *See* New York v. United States, 505 U.S. 144, 183 (1992); Printz v. United States, 521 U.S. 898, 929-30 (1997). For the application of this argument to the Compact Clause, *see infra* notes 347-53 and accompanying text.

166. *See* Tennesse Valley Authority Act of 1933, 16 U.S.C. §§ 831-831dd (2000); Clean Air Act, 42 U.S.C. § 7511c (2000) (Ozone Transport Commission); *see also*

Obviously, Congress cannot trample on federal prerogatives, but that advantage is compensated, in a manner of speaking, by comparable disadvantages attendant to federal legislation—for instance, the undesirability of a uniform national solution for problems that may be regional in scope. In that light, we may wish to tolerate high-risk state bargains, rather than cramming compacts, or issues that could be addressed through compacts, into the United States Congress.

The objection has a certain surface plausibility, but it misses constitutionalism's point. Under any federal system, states will tend toward parochialism and mutual exploitation. No constitution can suppress political gamesmanship without abolishing states as quasi-autonomous entities. What a constitution can and must do, however, is to coordinate the games, such that the equilibria remain within a range that is generally perceived as tolerably fair and efficient.[167] To that end, a constitution allocates powers and specifies the composition and procedures of the coordinating institutions.

Our own Constitution ameliorates the specific risks of state compacts in two related ways. First, the congressional approval requirement guarantees that every state will be informed of, and be heard on, sister states' agreements. In this manner, the Compact Clause reduces the costs each state would otherwise incur in monitoring and countermanding cartels, collusion, and combinations adverse to its own interests. Second, supermajority requirements provide a measure of protection against parochial state combinations to the detriment of the non-consenting states.

One can plausibly argue that these are the rules that states would choose behind a pre-constitutional veil of ignorance. The protections are not cost-free, because they preclude some bargains that some states might at some future time find in their interest. That price, however, may be worth paying for effective protection against the horrendous risk of becoming a victim of collusion among (supposedly) sister states. In any event, the Compact Clause negative is the coordination mechanism that the Founders did in fact choose, and if constitutionalism means anything, it means that the players may not defect to some other mechanism when that happens to be in their short-term interest. A federal constitution must ensure that bargains among states are made in the agreed-upon place and manner, *and nowhere else.* A constitution that fails to hold the players to their pre-commitment strategy is a mere treaty of convenience.[168]

Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (creating incentives for formation of state insurance regulatory compacts).

167. On the notion of a constitution as a means of coordination see Peter C. Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137 (1992).

168. No federal system permits unsupervised, separate side-agreements among member-states. *See, e.g.*, German Constitution art. 32(3) (authorizing states to conclude treaties on matters within their legislative competence and "with the consent of the federal government" [Bundesregierung]. Although the article speaks of treaties with

V. MULTISTATE TAXATION: A SECOND LOOK

This Part applies the preceding analysis of compact risks to the Multistate Tax Compact of *U.S. Steel* fame; the following Part VI performs the same operation on the 1998 Master Settlement Agreement between tobacco manufacturers and state attorneys general. Both agreements are cartels; both entail—and are in fact driven by—the imposition of substantial externalities;

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foreign countries, it is commonly understood to apply also to treaties among the *Laender*). Even looser, non-constitutional confederations typically preclude such defections. A highly instructive contemporary example is the European Union. EC Treaty art. 11 (ex 5a) provides as follows:

> 1. Member States which intend to establish closer cooperation between themselves may be authorized [by the European Council] to make use of the institutions, procedures and mechanisms laid down by this Treaty, provided that the cooperation proposed:
>
> (a) does not concern areas which fall within the exclusive competence of the Community;
>
> (b) does not affect Community policies, actions or programmes;
>
> (c) does not concern the citizenship of the Union or discriminate between nationals of Member States;
>
> (d) remains within the limits of the powers conferred upon the Community by this Treaty; and
>
> (e) does not constitute a discrimination or restriction of trade between Member States and does not distort the conditions of competition between the latter.

Id.

See also TEU art. 43, 44 (ex K.15, K.16). Art. 11 is a kind of Compact Clause-plus. *All* member-state cooperation within the scope of the European Treaties is subject to approval by the Council, and even the Council may approve cooperative ventures only under very limited conditions. *See, e.g.*, Jo Shaw, *The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy*, 4 EUR. L.J. 63 (1998). The universe of unapprovable cooperative ventures is equivalent to the U.S. Constitution's absolute prohibition on state treaties. The list of features that render proposed cooperation unapprovable, and especially the injunction against cartel arrangements in restraint of interstate trade, runs parallel to the compact risks explicated in this Part.

Article 11—most of which was added to the EC Treaty in the Treaty of Amsterdam (1999)—attempts to facilitate closer cooperation among EU members so inclined, without having the pace of integration dictated by the slowest member. (For a brief discussion see STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW 23-27 (3d ed. 1999) and sources cited therein at nn.74-79). That endeavor, though, runs up against the baseline premises and purposes of the European Treaties—non-discrimination, equality among member-states, and the supermajority requirements and other procedural protections that the established European institutions afford dissident member-states. The narrow scope of EC Treaty Article 11 reflects a jealous effort to safeguard those protections. In the same fashion, the Compact Clause precludes states from creating a constitution at variance with the one we actually have.

both pose massive agency and delegation problems; both infringe on the constitutionally protected interests of the union and of sister states. Both agreements, and all similar state agreements present and future, are unconstitutional under any reasonable Compact Clause analysis.

A. Compact Risks

1. The MTC as a Tax Cartel

Like any decentralized tax system, the state taxation of interstate business income abounds with coordination problems.[169] The Supreme Court's decision in *Portland Cement*,[170] permitting the "fair apportionment" of interstate business income in every state where the taxed entity has a "nexus," entailed that a single sale might be taxed in four different states, each time under a different allocation and apportionment formula.[171] Thus, business income could easily be taxed on more than 100 percent of its base. Paradoxically (and worse, from the states' perspective), taxable income could escape taxation altogether.

The MTC's stated mission, as noted, is to address these problems through political harmonization. From the outset, though, the Compact was widely viewed as an attempt to establish a tax cartel. By the time of the *U.S. Steel* litigation, the MTC Commission had acquired an "image as the agent of a group of small states trying to increase their revenues by 'feeding off' 'eastern' businesses,"[172] meaning businesses commercially domiciled in the eastern states. A simple thought experiment suggests that these impressions accurately reflect the MTC's nature and raison d'etre.

Tax coordination problems can in principle be solved without a political supra-state regulatory institution: states could agree, on a reciprocal basis, to tax all business income only in the company's domicile state, meaning the company's principal place of business or its state of incorporation.[173] Such a rule of origin or "mutual recognition" (as it is called by the European Union, which applies the principle to certain regulatory matters)[174] largely obviates the need for

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169. Long before the Multistate Tax Compact, Frankfurter and Landis discussed state tax administration as a fruitful area for state cooperation. Frankfurter & Landis, *The Compact Clause*, *supra* note 19, at 704. For an identical, contemporaneous suggestion, see WARREN, *supra* note 8, at 72.

170. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) (briefly discussed *supra* notes 70-71 and accompanying text).

171. Sharpe, *State Taxation*, *supra* note 78, at 238.

172. Sharpe, *State Taxation*, *supra* note 78, at 274 (footnote omitted).

173. I assume for purposes of illustration that all taxed businesses are U.S. corporations and that all their income is earned in the U.S. Multinational corporations and operations complicate but do not materially change the analysis.

174. The literature on mutual recognition within the European Union has reached

continuous political harmonization. While secondary questions (such as the definition of corporate subsidiaries) may require coordination, the origin rule is essentially self-enforcing: a company that receives a tax claim from a non-domicile state would obtain an injunction, and that would be the end of the matter. Mutual recognition, however, implies uninhibited tax competition. States would compete for business by lowering taxes and, all else equal, taxes would drop everywhere. If the domicile rule is the state of incorporation, the equilibrium tax rate is zero.

Naturally, states do not desire that outcome. In fact, it was precisely the traditional allocation of business income to domicile states that prompted the creation of the MTC by mostly small states west of the Mississippi. (Those "market states," whose leading role earned the Compact its reputation as a tax cartel, have remained the backbone of the MTC's membership. Eastern corporate domicile states—New York, Massachusetts, Pennsylvania, Delaware, Virginia—never became full MTC members.)[175] Market states benefit from tax apportionment (rather than allocation), which subjects corporate income to taxation in any destination jurisdiction where a company does business, regardless of the company's domicile and structure. Complete apportionment of business income will completely eviscerate tax competition with respect to firm location. Theoretically, uniform apportionment will also capture, for taxation purposes, no less (and no more) than 100 percent of total business income. A corollary of the full apportionment rule is a principle of unitary taxation, which treats a corporation's subsidiaries as a single entity for purposes of taxation. This device prevents corporations from escaping taxation through clever corporate restructuring. Put less charitably, unitary taxation enables a state to capture a foreign corporation's income even if the corporation's subsidiary in the state earned no income or even incurred losses.

The Multistate Tax Commission has favored apportionment and unitary taxation *ab ovo*.[176] It has pushed these principles to the outer limits permitted by

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torrential proportions, especially in European journals. A readily accessible overview is Wolfgang Kerber, *Interjurisdictional Competition Within the European Union*, 23 FORDHAM INT'L L.J. 217 (2000).

175. Over time, the MTC developed "associate" and "sovereignty" memberships, which do not require enactment of—or compliance with—the Compact. For the MTC's description see http://www.mtc.gov/ABOUTMTC/Aboutmtc3.htm (last updated Jan. 27, 2003). Some non-Compact states have availed themselves of these opportunities. *See* Multistate Tax Commission, *at* http://www.mtc.gov/#membership (listing current membership) (last visited Apr. 8, 2003).

176. Article IV of the Multistate Tax Compact in substance constitutes the Uniform Division of Income for Tax Purposes Act ("UDITPA") and, with it, a destination test for the calculation and apportionment of retail sale business income. Grossly oversimplifying a complicated reality, if a New York company earns twenty percent of its income from sales in California, its income will for tax purposes be apportioned on

federal law and constitutional constraints, and occasionally beyond those limits.[177] The MTC's purpose, in other words, is not tax harmonization *simpliciter*. Rather, its purpose is to achieve tax harmonization, *while suppressing (locational) tax competition*. One can quarrel over the extent to which the MTC has achieved that objective, and one can plausibly argue that the compact *cannot* fully succeed.[178] But the MTC's nature as a tax cartel is beyond peradventure.

2. Externalities

Obviously, the MTC Commission cannot impose its rules on non-member states. It can, however, dissipate some of the non-member states' competitive advantages. The *U.S. Steel* Court understood this point; Justice White's dissent made it explicitly.[179] Non-business dividend income, for instance, had traditionally been allocated to domicile states for purposes of taxation. Many of the big domicile states (such as New York) exempted such income from taxation. The MTC moved toward apportionment of dividend income among the states, thereby diluting tax competition on this margin and dissipating the non-taxing states' advantage.

Justice Powell's majority opinion readily conceded the point, but responded that the economic effects of the MTC's dividend regime on non-member states were no different from the "pressure" that states routinely experience as a result of regulatory or tax decisions made by other states.[180] That is a lot like saying that a private firm need not fear price-fixing among its competitors because the competitors are permitted to take unilateral actions that might put the firm out of business anyway. If the private market analogy fails to persuade, re-consider the analogy of physical interstate externalities: the unregulated use of a waterway may leave a downstream state dry, because upstream states will individually over-exploit the resource. It does not follow, however, that the upstream states may *agree* on an allocation that deprives the downstream state of water.[181] Interstate externalities are one thing. Externalities imposed by state agreement are a different beast altogether.

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that basis—even if the company has only a nominal presence in California.

177. *See, e.g.*, JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, 1 STATE TAXATION 9-85 (3d ed. 1998) (MTC definition of business income "in the context of dividends appears overbroad both from a statutory and constitutional standpoint").

178. *See infra* notes 221-24 and accompanying text.

179. "[N]on-Compact States can be placed at a competitive disadvantage by the Multistate Tax Compact." U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 495 (1978) (White, J., dissenting).

180. *Id.* at 477-78.

181. *See infra* notes 324-25.

3. Agency and Delegation

Under the MTC's joint audit and enforcement provisions, the Commission may subpoena any person beyond the borders of a member state requesting such a subpoena; under certain circumstances, it may also conduct joint audits *sua sponte*.[182] These powers—which, contrary to the *U.S. Steel* Court's representations,[183] "clearly exceed those of any member acting alone"[184]—create a situation in which political responsibility for a highly coercive exercise of sovereign authority gets lost in an intragovernmental shuffle.[185] The MTC plaintiffs provided compelling, unrebutted evidence of proceedings in which companies confronted a bewildering array of MTC and state auditors with uncertain and conflicting claims of authority.[186]

Similar problems characterize the Commission's regulatory authority. In the *U.S. Steel* litigation, the MTC described its regulations as inconsequential "recommendations." After all, the Commission argued, MTC regulations have no legal force unless they are adopted by the appropriate state officials through ordinary rulemaking procedures under state law. The Commission exercised no power the member-states could not also exercise individually, and each state remained in any event free to withdraw from the Compact at any time.[187] The ready acceptance of those arguments by the *U.S. Steel* Court, however, betrays a lack of realism or, more likely, willful blindness.[188]

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182. MTC, *supra* note 75, art. VIII(3).

183. *See supra* note 180 and accompanying text.

184. White, *supra* note 80, at 465 (footnote omitted). The author defends the arrangement as inconsequential and akin to a reciprocity arrangement. *Id.* at 465-66; *see also U.S. Steel*, 434 U.S. at 492-93 (White, J., dissenting) (arguing that the MTC possesses some coercive force over member states).

185. Sharpe, *State Taxation*, *supra* note 78, at 260 ("Another tier of tax administration . . . makes it easier for responsibility for tax decisions to be 'lost' somewhere between the states and the MTC."). A long footnote to the quoted sentence provides mind-boggling examples of abuses that the diffusion of responsibility invites. *Id.*

186. Petitioners' Brief at 43 n.58, *U.S. Steel*, 434 U.S. 452.

187. MTC, *supra* note 75, art. VII(3); Defendant's Brief at 40-44, *U.S. Steel*, 434 U.S. 452.

188. *Cf. supra* notes 98-101. It also betrays a misunderstanding of the delegation point. No governmental body can "delegate" a power that it cannot exercise individually. A purported attempt to do so poses an *ultra vires* problem, not a delegation problem. Similarly, if the mere possibility of withdrawal sufficed to avert delegation problems, there could be no delegation of power by Congress, which can always revoke a delegation of its powers. An irrevocable "delegation" is not a delegation but a constitutional amendment. A rule against delegation necessarily implies that governmental bodies may not transfer their constitutional powers to another body even for a limited duration.

Joining the Compact requires an act of state legislation; withdrawing from it requires a repeal of that statute.[189] This all-or-nothing quality lends genuine regulatory force to the Commission's rulings,[190] and the adoption of a particular MTC "recommendation" says next to nothing about the member-states' authentic preferences. The adopting is typically done by the tax commissioners who compose the MTC in the first instance, and the state legislature that consented to the MTC may never hear of a "recommendation" and its consequences. The effect of the Commission's "extremely influential" regulations[191] has been to enhance the fiscal policy-making authority of tax commissioners, who have adopted and enforced MTC "recommendations" at the outer limits and, at times, in contravention of applicable state law.[192] Even at the time of the MTC litigation, prominent tax experts complained that member-states viewed the MTC as a kind of "constitution" for a tax confederacy and its regulations, as akin to confederate statutes that preempt local law. They likewise worried about the attendant expansion of tax commissioners' fiscal authority.[193] Experience since has confirmed their apprehensions.

4. Federal Rights

Recall the *U.S. Steel* Court's refrain: the MTC might well affect the *interests* of the United States, but not the federal government's legal *supremacy*.[194] As explained, however, the Constitution subjects state compacts to a negative, rather than mere supremacy, because constitutional supermajority requirements will render the exercise of federal supremacy insufficiently protective of federal interests. That argument applies with particular force to interstate taxation.

Over the course of American history, Congress has intervened in the state taxation of interstate commerce only a handful of times[195] and under very

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189. MTC, *supra* note 75, art. X.2.

190. *See U.S. Steel*, 434 U.S. at 493 (White, J., dissenting).

191. JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE AND LOCAL TAXATION CASES AND MATERIALS 578 (6th ed. 1997).

192. *See, e.g.*, John C. Blase & John W. Westmoreland, *Quill Has Been Plucked! MTC States are Slowly Eroding the Substantial Nexus Standard*, 73 N. DAK. L. REV. 685, 708-10 (1997) (describing state adoption of MTC interpretive regulations, the so-called "Bulletin 95-1," in contravention of state statutory and case law); and Kaye Caldwell, *"Dispassionate" Debate on Bulletin 95-1?*, STATE TAX NOTES, Aug. 27, 1996, at 20 (criticizing MTC's "total disregard for state law in asking the states to adopt" Bulletin 95-1).

193. Petitioners' Brief at 27 n.44, *U.S. Steel*, 434 U.S. 452.

194. *Supra* notes 101-02 and accompanying text.

195. Apparently, the 1959 "moratorium" enacted in response to the Supreme Court's *Portland Cement* decision, see *supra* notes 69-74 and accompanying text,

unusual circumstances.[196] Pleas for Congress to mend its ways, to mind its constitutional obligations, and to address a seemingly intractable subject-matter have been both common and futile. A congressional effort to find a general formula for the state taxation of interstate commerce *ipso facto* affects all states (in an existential fashion) and industries of every size and nature. Given the range and the intensity of the affected interests, the supermajoritarian difficulty becomes well-nigh insurmountable. [197]

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represented the very first congressional intervention in the state and local taxation of interstate commerce. DANIEL N. SHAVIRO, FEDERALISM IN TAXATION: THE CASE FOR GREATER UNIFORMITY 3-4 n.10 (1993) (quoting and citing JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE AND LOCAL TAXATION 324 (5th ed. 1988)). Congressional interventions have remained exceedingly rare. Walter Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAWYER 37, 37 (1987); and *see* Kathryn L. Moore, *State and Local Taxation: When Will Congress Intervene*?, 23 J. LEGIS. 171, 173 (1997) [hereinafter Moore, *State and Local Taxation*] (noting paucity of federal interventions between 1971 and 1996 and showing, "that the empirical evidence and public choice theory cast doubt on the likelihood of Congress ever enacting legislation mandating uniformity of state and local taxation.").

196. The few congressional interventions have typically come at the behest of individual, discrete industries or groups of taxpayers, such as railroads, pensioners, Internet companies, and, naturally, members of Congress. *See* Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 306, 90 Stat. 31, 54-55 (1976) (current amended version codified at 49 U.S.C. § 11501 (2000)); Act of Jan. 10, 1996, Pub. L. No. 104-95, 109 Stat. 979 (1996) (barring states from taxing pension income of nonresidents); Internet Tax Freedom Act, Pub. L. No. 105-277, 122 Stat. 2681-719 (codified at 47 U.S.C. § 151(2000)); Act of July 19, 1977, Pub. L. No. 95-67, 91 Stat. 271 (codified at 4 U.S.C. § 113 (2000)) (prohibiting state or local governments, other than jurisdictions from which a member of Congress is elected, from treating legislator as resident for income tax purposes). *See generally* Moore, *State and Local Taxation*, *supra* note 195, at 172-73 *passim* (evidence on congressional intervention in state and local taxation is broadly consistent with public choice theory; congressional abdication is overcome only by the public choice dynamics of concentrated benefits and dispersed costs). For a public choice perspective consistent with Moore's evidence and analysis, see Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990).

197. The exertion of congressional authority, moreover, would have to come in a crystalline fashion. *See, e.g.*, Mobil Oil Corp. v. Comm'r of Taxes of Vermont, 445 U.S. 425, 448 (1980) ("Concurrent federal and state taxation of income, of course, is a well-established norm. *Absent some explicit directive from Congress*, we cannot infer that treatment of foreign income at the federal level mandates identical treatment by the States." (emphasis added)); *see generally* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 64, 75-77 (1993) (inferring permission for a state tax from supposed congressional failure to issue explicit prohibition). Even in the foreign affairs context, where state power is at its nadir, state tax practice will stand barring an explicit

The Supreme Court's own post-*U.S. Steel* decisions come close to proving—so far as such things can be proven—that *judicial* oversight is likewise insufficient to safeguard constitutional values in the area of interstate taxation. Having downplayed federal interests in interstate taxation in *U.S. Steel*, the Court took up a series of constitutional cases involving state efforts to tax corporate subsidiaries under expansive notions of unitary taxation.[198] Those rulings had the advantage of conceding that interstate taxation did, after all, implicate federal (constitutional!) concerns. The attempt to develop manageable constitutional rules proved futile, however, and the Court eventually abandoned the field.[199]

In addition to leaving corporations without protection against exploitative state taxation,[200] the Court's surrender produced a diplomatic crisis with America's closest trading partners over the states' aggressive application of unitary taxation and worldwide combined income principles to foreign corporations doing business in the United States. Those corporations and their governments complained bitterly, through diplomatic and legal channels, about the states' tactics, which they—and, for the most part, the United States government—believed to contravene international tax treaties.[201] The long-

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congressional directive to the contrary. Barclay's Bank v. Franchise Tax Bd., 512 U.S. 298, 321-29 (1994) (lack of unambiguous indication of congressional intent to prohibit state tax regime constitutes implicit approval). The requirement of an explicit congressional preemption further narrows the room for legislative compromise and, hence, legislation over state taxation.

198. Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980) (sustaining state finding of "unitary business"); *Mobil Oil Corp.*, 445 U.S. at 439-45, 445-46 (1980) (sustaining state finding of "unitary business"); *see also* ASARCO, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982) (rejecting state findings and assessments) and F.W. Woolworth Co. v. Taxation and Revenue Dept., 458 U.S. 354 (1982) (same).

199. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 175 (1983) ("[C]ourt will, if reasonably possible, defer to the judgment of state courts in deciding whether a particular set of activities constitutes a 'unitary business.'"). Although Justice Brennan, writing for the Court in *Container Corp.*, struggled mightily to paint this broad deference as consistent with the painstaking judicial scrutiny applied in preceding cases, it is not. *See, e.g.*, *Container Corp.*, 463 U.S. at 176 n.15. The Supreme Court has over the past two decades largely ignored interstate tax problems, and its few interventions have, with exceedingly rare exceptions (e.g., Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995)), been highly deferential. *Cf.* SHAVIRO, *supra* note195, at 4 (lamenting the Supreme Court's "wholesale retreat from even its limited past efforts in the area").

200. State revenue departments will not find unitariness unless it means more revenue for the home team—which, in turn, means that state courts will rarely, if ever, upset such findings.

201. The foreign governments' long-running, progressively apoplectic complaints and the Executive's efforts to manage the diplomatic crisis are described, discussed, and shrugged off in Justice Ginsburg's majority opinion in *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 324-31 (1994). For an account of the controversy, the *Barclays*

running dispute was already brewing at the time of the *U.S. Steel* litigation; Justice White's dissent referenced it explicitly.[202] It was settled only well over a decade later, after much acrimonious litigation and diplomatic exertions.

Any judicial effort to define the constitutional boundaries of state taxation is fraught with enormous difficulties: the field is way too messy for rigid conceptual rules. The blunt instrument of due process will work, if at all, only on the very outer margins, such as the state taxation of enterprises that have no contacts with the taxing jurisdiction.[203] A more plausible policing tool is the dormant Commerce Clause. In contrast to the Due Process Clause or the Equal Protection Clause, the dormant Commerce Clause does not create rigid and irreversible constitutional rules but rather operates like a Madisonian negative: it puts state regulation out of operation, pending a congressional decision to the contrary. Beyond that structural similarity, however, lurk salient differences and difficulties.

First, the dormant Commerce Clause depends—unlike the Compact Clause negative—on judicial interposition: it kicks in only when plaintiffs bring a case and judges identify the challenged state enactment as belonging to the class of practices that should be subject to the negative. Good plaintiffs, however, are hard to find. States cannot be relied on to complain of sister-state aggression because they are repeat players in a game of exploiting each other's citizens.[204] For example, a state that suffers from the use of a particular tax apportionment formula by another state will still hope to benefit from applying a different, though equally discriminatory, apportionment formula for its own benefit. Unless the exploitation is very direct and visible—for example, by hitting powerful producer interests in the affected state—state governments will stay their hand.[205] Private plaintiffs, on the other hand, are likely to instrumentalize

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Bank litigation, and the resolution of the conflict, *see* Swaine, *Negotiating Federalism*, *supra* note 37, at 1159-61.

202. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 488-89 (1978) (White, J., dissenting).

203. The Supreme Court has recognized as much. *See, e.g.*, Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 305 (1992) (Due Process Clause imposes no restrictions on state taxation of interstate commerce).

204. As noted *supra* notes 160-61 and accompanying text, mutual exploitation will be the dominant strategy rule unless state government agents are perfectly monitored.

205. Of the sixty-one dormant Commerce Clause cases decided by the U.S. Supreme Court between 1970 and 1997, only five were brought by a state plaintiff. *See* Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 SUP. CT. ECON. REV. 233 (1999). In only eight additional cases did states lend *amicus* support to private plaintiffs (usually utilities, which enjoy preferred political access and in whose welfare state governments have a direct interest). *Id.*

The *U.S. Steel* litigation itself provides a stark example of the states' unreliability federalism arguments for extraneous purposes (such as profits). Because their complaints pose a high risk of "false alarms," the Supreme Court tends to treat them with a great deal of skepticism.[206] In short, it is highly likely that the dormant Commerce Clause will be underenforced.

Second, and compounding the risk of underenforcement, the Commerce Clause negative is problematic because it "is 'negative' not only because it negates state regulation of commerce, but also because it does *not* appear in the Constitution."[207] The construct may well bear lenient tests (such as a virtual *per se* rule against facially discriminatory state laws),[208] but such tests will permit state practices that everyone, including the deciding Justices, knows to be discriminatory and exploitative.[209] Stricter and more detailed constitutional tests

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in complaining of sister-state aggression. Thirteen states—including some that had never joined the MTC, or joined and then left it—filed an *amicus* brief in defense of state authority. Brief of Amici Curiae, *U.S. Steel*, 434 U.S. 452. Not one state argued against the MTC. None could do so without undermining, in the process, its own authority over interstate taxation.

206. Drahozal, *supra* note 205 (showing that the Supreme Court treats private dormant Commerce Clause complaints much less favorably than state complaints; articulating the explanation suggested in the text).

207. Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995) (Scalia, J., dissenting). Justice Thomas has quipped that the dormant Commerce Clause is more appropriately called the "negative Commerce Clause" because there is nothing "dormant" about the Supreme Court's jurisprudence in the area. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 609 n.1 (1997) (Thomas, J., dissenting).

208. Even Justice Scalia and Justice Thomas, the harshest negative Commerce Clause critics on the Supreme Court, endorse (or at least used to endorse) this test. *See* West Lynn Creamery v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., dissenting).

209. State taxation of interstate commerce provides a good illustration. The Supreme Court has developed a four-part dormant Commerce Clause test for state taxation, including a "fair apportionment" requirement demanding that a state's apportionment formula, if applied by all states, would not result in double taxation. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). For an overview of the Supreme Court's application of the test, see generally Walter Hellerstein, et al., *Commerce Clause Restraints on State Taxation After Jefferson Lines*, 51 TAX. L. REV. 47 (1995). The Court has refrained from imposing any particular apportionment formula, however, and it has permitted each state to adopt a "consistent" formula even if no other state in fact uses it. *See, e.g.*, Moorman Mfg. v. Bair, 437 U.S. 267 (1978) (sustaining single-factor sales formula despite widespread adoption of three-factor formula). Each state is, thus, free to adopt the formula that happens to maximize its own portion of the interstate tax take, with the result that taxation of more than 100 percent of some companies' income tax base is virtually a foregone conclusion. Even actual proof of double taxation, however, will not doom an individual state's apportionment scheme. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 187 (1983); Barclays Bank, PLC v. Franchise Tax Bd. of California, 512 U.S. 298, 318-19 (1991) (actual double

under the Clause might curb exploitative state practices. Such tests, however, would tax judicial competence and threaten to constitutionalize essentially legislative judgments, such as tax apportionment formulas. Most fatefully, they would put enormous pressure on what is essentially a functional justification of a judge-made doctrine of questionable provenance. In recognition of these considerations, even advocates of stringent dormant Commerce Clause doctrines make do with tests that leave considerable room for state tax exploitation and discrimination.[210]

The point of these observations, obviously, is *not* that enforcement of the Compact Clause in *U.S. Steel* would have addressed the problem of exploitative interstate taxation. (The Clause does not cover unilateral state exploitation.) The point, rather, is that the Supreme Court's own post-*U.S. Steel* case law confirms both the existence of federal interests in this area and the inordinate difficulty of protecting those interests by judicial means—that is, the enforcement of federal supremacy in the course of deciding cases and controversies. For precisely those reasons, the Compact Clause provides a comprehensive negative for a defined class of particularly dangerous state activities.

The conclusion that that protection ought to be enforced follows regardless of what one thinks of the legitimacy of the negative Commerce Clause and its proper scope and content. A renunciation of the negative Commerce Clause as an "intellectual adverse possession"[211] surely cannot dismiss interstate exploitation as constitutionally irrelevant. Rather, it must contend that the Constitution exhaustively lists the means by which such exploitation must be fought.[212] Conversely, if concerns over interstate exploitation warrant a judicially created negative, they most certainly warrant the enforcement of the constitutional negatives—including the Compact Clause.[213]

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taxation does not violate dormant Commerce Clause unless it is the "inevitable" result of state's tax regime).

210. *See, e.g.*, SHAVIRO, *supra* note 195, at 112-14; Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193, 211-12 *passim*.

211. Tyler Pipe Indus. v. Washington State Dept. of Revenue, 483 U.S. 232, 265 (1987) (Scalia, J., dissenting).

212. For a judicial argument along these lines, see *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting) (urging enforcement of the Import-Export Clause, rather than the negative Commerce Clause, as the constitutional means of policing state invasions on interstate commerce).

213. A plausible argument for the dormant Commerce Clause—a judge-made negative against state laws that discriminate against or exploit sister states in interstate commerce—must rest at least implicitly on the contention that the Madison of the Convention was right: the supermajoritarian obstacles that prevent Congress—in the ordinary course of events—from enacting harmful legislation will prove

B. Harmless Error?

Perhaps the best defense of the *U.S. Steel* decision is that the MTC's real-world effects are no big whoop. The argument comes in political and economic versions. Both possess a veneer of plausibility. Both, however, are untenable.

The political defense rests on the MTC's broad acceptance and modest role. Non-Compact states and business interests seem to have accommodated themselves to the MTC and the Commission.[214] While the Supreme Court's endorsement of the MTC may have further weakened Congress's will to tackle the state taxation of interstate business, that effect is probably marginal; one can argue with equal plausibility that the still-extant possibility of federal intervention has disciplined the MTC and its member-states. Serious quarrels over state taxation and conflicts with federal interests tend to be occasioned by actors other than the Commission. The driving force behind state unitary taxation and worldwide combined reporting, for example, was the California Franchise Tax Board,[215] and while the MTC may have spread and intensified state support for the Board's position,[216] California had adopted it long before the MTC's creation and would have pursued it in any event.[217] Similarly, relentless

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counterproductive when state parochialism calls for energetic national action. What is needed is an institutional vehicle to reverse the supermajoritarian burden—in other words, a negative. For an explicit argument to that effect, see SHAVIRO, *supra* note 195, at 70-71. One can debate whether this consideration warrants the interposition of a judicial negative over concurrent state legislation affecting interstate commerce, but it rather strengthens the case for enforcing the negatives that are actually in the Constitution.

214. For example, the Council on State Taxation, a business trade association, promotes cooperation with the MTC. *See* http://www.statetax.org (last visited Apr. 14, 2003).

215. Hellerstein, *supra* note 73, at 346; Barclays Bank, PLC v. Franchise Tax Bd. of California, 512 U.S. 298, 306 (1991) (California "nearly the last state" to confine combined reporting to U.S. waters' edge).

216. *See generally* James H. Peters, *Use of Combined Reporting Required by Increasing Number of States*, 41 J. TAX. 375 (1974). The frequency of the Supreme Court's "unitary business" and apportionment cases in the years after *U.S. Steel*, as well as the fact that all state defendants in those cases were members of the MTC, suggests that the MTC had a catalytic role in the spread of those tax practices.

217. Every cartel needs an exploitable advantage and, moreover, a leading member to enforce market discipline. California's exploitable advantage is its sheer size: no multi-national corporation can afford to withdraw from its huge market. Smaller MTC member-states from Kansas to North Dakota may collectively possess comparable market power, but the risk of defection precludes them from asserting it. As a condition of its MTC membership, California insisted on a modification, in favor of populous states, of the one-state, one-vote regime specified in the Compact and, moreover, on the non-enforcement of certain Compact provisions. In light of California's importance to the

efforts to extend state use tax collection obligations to "remote" Internet or catalogue sellers—that is, sellers that have no nexus, such as a store, in the taxing jurisdiction—have been led by some state courts and, in the political arena, by the National Governors' Association and other state and local lobbying organizations. The MTC has played a subordinate, supporting role.[218]

But while these considerations might and probably should impress members of Congress in a hypothetical debate over the wisdom of approving the MTC, they beg the constitutional question of whether the protection against state compacts and their adverse effects can be left to the uncertain exercise of ordinary federal supremacy. The answer to that question is "no." The Founders adopted the Compact Clause precisely because the *ex post* exercise of supremacy is too uncertain and, as to compacts, too demanding.

On economic grounds, it can (and has) been argued that the risk of state cartelization is too small to warrant judicial insistence on the Compact Clause negative. State policy cartels face the same difficulties that confront every private cartel—holdout problems; disagreement over the distribution of gains from cooperation; and the risk of defection. Barring central political intervention and organization, cartels ultimately cannot overcome these problems.[219] Thus, a Compact Clause that guards against unapproved state cartels guards against a negligible and possibly non-existent risk.[220]

The MTC's history certainly illustrates the difficulties attendant to state cartelization. From the outset, the MTC confronted hold-out opposition from

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functioning of the cartel, the MTC acceded to both demands. Sharpe, *State Taxation*, *supra* note 78, at 246 n.58, 272-73 n.211. It may be only a slight exaggeration to describe the MTC as a multistate stage for the California Franchise Tax Board.

California's dominant position may in a sense seem to confirm the *U.S. Steel* Court's averment that the MTC confers no power that a single state could not exercise on its own (*see* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472-73 (1978)); as a practical matter, the Compact arguably confers no power that *California* could not exercise on its own. Exploitable advantages, however, raise constitutional problems even when the exploitation is undertaken by individual states (e.g., through severance taxes on natural resources). The constitutional minimum is that states must do the exploiting on their own—or else, obtain congressional consent.

218. *See, e.g.*, David Cay Johnston, *A Decisive Time in Fights Over Sales Tax*, N.Y. TIMES, Dec. 18, 2000, at C10 (describing NGA's lead role).

219. Albert Breton, *The Existence and Stability of Interjurisdictional Competition*, *in* COMPETITION AMONG GOVERNMENTS 49 (Daphne A. Kenyon & John Kincaid eds., 1991). Consistent with this prediction, some states anticipated the need for central intervention as a prerequisite for effective state tax cartelization. In the early 1970s, for example, an ad-hoc group of state officials and business leaders proposed federal legislation that would enable the MTC to make binding decisions for all fifty states. Sharpe, *State Taxation*, *supra* note 78, at 266-67 n.172. That proposed compromise between state autonomy and national uniformity, however, was never acted upon.

220. Note, *To Form a More Perfect Union?*, supra note 19, at 842, 860-61.

eastern domicile states and from states such as Arizona, whose income from copper mines could, under traditional allocation principles, be fairly attributed entirely to the state.[221] That pattern has continued to this day. Similarly, the MTC has proven incapable of solving distributional conflicts among its members. Theoretically, complete apportionment and unitary taxation can capture an enormous stream of income that would otherwise escape taxation (due to coordination problems, "leakage" and "evasion," and locational competition). That prospect prompted the formation of the MTC. But even if the prospective gains were to make every state better off (relative to the pre-existing regime of uncoordinated tax competition), they still generate disputes over their distribution. An apportionment formula that is neutral with respect to the pre-existing distribution would lock in, rather than eviscerate, locational competition. It is therefore unacceptable to the market states that stand to gain most from cartelization. Conversely, an apportionment formula that changes the pre-existing distribution will generate hold-out problems. This baseline problem has no technocratic solution, for no apportionment formula is neutral.[222] For this reason, few if any MTC regulations are truly uniform; their application and interpretation in the member-states vary greatly. The inability to agree on a neutral baseline, in turn, means that the MTC must make continuous decisions that affect the distribution of apportioned tax income—an institutional feature that further increases the risk of hold-outs and defections.[223] The MTC has been compelled to minimize those risks by disavowing any power to make binding decisions for the member-states. The Commission can cajole recalcitrant members (other than California), and it can advance its "recommendations," in cooperation with state officials, by exploiting agency and monitoring problems at the state level.[224] But it cannot truly enforce any particular market order, even on its members.

Even so, the predictable failure of the MTC, or for that matter of most state cartels, to live up to their aspirations provides no good reason to refrain from enforcing the Compact Clause. Some state cartels might succeed in exploiting their advantages to a troublesome extent. (The tobacco tax cartel, to be examined shortly, is a clear example.) Judges are poorly equipped to determine, through a case-by-case examination of individual compact-cartels, just how much cartelization is too much, or whether a particular state cartel might wield

221. Sharpe, *State Taxation*, *supra* note 78, at 271.

222. For instance, the distribution of apportioned income under a commonly used three-factor formula (property, payroll, and sales) will favor states with high property values in direct proportion to the relative weight given to that factor.

223. Sharpe, *State Taxation*, *supra* note 78, at 271. ("[W]hat [holdout] states really fear is an organization with the power to *continually* make judgments that are binding on them.").

224. *See supra* notes 190-93 and accompanying text.

more or less market power in the future. Similarly, one can imagine some efficient state cartels; the cooperative management of a common pool (such as fisheries) through quotas may be an example. What looks like sustainable yield management to some, however, will look like a naked output restriction to others. A judicial inquiry into the purpose of the cartel arrangement will be a crapshoot, and the allocation and distribution of its costs and benefits are essentially a political judgment. All told, we are better off with a per se rule that commits the approval or rejection of state cartels to the Congress.

The functional argument for a lenient Compact Clause interpretation is that a judicial insistence on the congressional negative would thwart potentially beneficial state agreements, without averting any serious risk. That argument, though, cannot apply to policy cartels, for the promised benefits—harmonization and coordination—are merely the flipside of the cartel risk. If the risk is negligible (on account of the difficulties attendant to effective cartelization), the corresponding benefits, if any, are too small to justify a latitudinarian Compact Clause interpretation. Conversely, if the prospective benefits of spontaneous state coordination and harmonization are deemed large, then so is the cartel risk. Either way, the argument collapses under its own weight.

VI. THE MASTER SETTLEMENT AGREEMENT ON TOBACCO LITIGATION

The November 1998 Master Settlement Agreement ("MSA") provides for a comprehensive settlement of then-pending state lawsuits against the major U.S. tobacco manufacturers. The core provisions of the MSA obligate the participating tobacco manufacturers to pay very substantial sums, estimated at roughly \$206 billion through the year 2025,[225] to the forty-six signatory state governments.[226] In addition, the MSA establishes a massive regulatory regime governing the sale and marketing of tobacco products in the United States.

The MSA differs in several salient respects from any preceding interstate agreement, actual or contemplated. First, the Agreement aids none of the purposes that have traditionally served to justify a latitudinarian interpretation of the Compact Clause. The agreement does not respond to a regional problem that had escaped the attention of the Congress; it responds to a national problem and regulates a national industry. (Some aspects of tobacco marketing, such as

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225. Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 372-73 (2000). The financial provisions of the MSA are briefly described *infra* notes 256-64 and accompanying text. For an overview, see W. Kip Viscusi, *A Postmortem on the Cigarette Settlement*, 29 CUMB. L. REV. 523, 537-43 (1999).

226. The government signatories also include five territories and the District of Columbia. For reasons of convenience, I will simply refer to "states."

advertising, have been the subject of federal legislation and regulation for a considerable period of time.) Nor does the agreement address problems of scale, interstate externalities, or coordination that might affect the state regulation and taxation of tobacco. Purported "race to the bottom" problems do not affect the regulation of the consumption and marketing of cigarettes.[227] State competition does of course affect the taxation of tobacco products, and, as shown below, the MSA payments are structured as a uniform national tax so as to prevent cross-border arbitrage and tax leakage. It would be hard to argue, however, that individual states are incapable of taxing tobacco products. Over the two decades preceding the MSA, state and local tobacco taxes increased on average, and differences in state tax rates widened substantially.[228]

Second, the MSA is the first interstate compact to which private market actors—tobacco manufacturers—are an official party. While producer cartels in the guise of interstate agreements are not unprecedented,[229] the MSA is the first compact that constitutes both an agreement among the states and a legally binding agreement between the states and a specific group of producers.

This observation points to the MSA's third distinctive feature: it constitutes a cartel in the most pristine sense. Its convoluted provisions insulate the participating manufacturers from competition by new market entrants and, short of a tipping point at which price elasticities reduce tobacco consumption, ensure that consumers will pay virtually all of the costs associated with the MSA.[230]

227. Except perhaps in very extreme cases (such as complete local prohibition), smokers are unlikely to sort themselves in accordance with state or local smoking restrictions, let alone advertising regulations. The proliferation of restrictions over the past few decades belies any "race to the bottom" theory. *See* MARTHA DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS 21-24 (2002).

228. Kathy Kristof, *Border Crossers Sometimes Can Save a Fortune on Excise Taxes*, DALLAS MORNING NEWS, July 13, 1997, at 3-H (citing expert estimates and studies). The widening range of state tax rates generated substantial increases in cross-border purchases and smuggling, known as "buttlegging." *Id.* While neither producers nor state governments welcome those affects, the increased divergence of state policies over time belies any notion of a "race to the bottom" that deprived the states of autonomous policy choices. Congress had proven willing to address the buttlegging coordination problem. *See e.g.*, Contraband Cigarette Act, Pub. L. No. 95-575, 92 Stat. 2463 (1978) (codified at 18 U.S.C. §§ 2341-2346 (2000)). The MSA made no provision in that regard and may in fact have exacerbated the problem. Michael Beebe, *Seneca Indians Sending Electronic Smoke Signals Over the Internet*, BUFFALO NEWS, Dec. 12, 1999, at 1-A. In short, the notion of the MSA as a response to collective action problems and unresponsiveness on the part of national institutions is a canard. DERTHICK, *supra* note 227, at 212-18.

229. *See supra* notes 152-55 and accompanying text.

230. Dagan & White, *supra* note 225, at 382; Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 569 (2001) (stating consumers will pay roughly ninety

The "damages" paid under the MSA represent the states' share of the difference between the market price and the monopoly price.

Fourth, the MSA is one of only a handful of state agreements to be joined by all, or very nearly all, states. Since the entry of the agreement, moreover, no state has revoked its participation or demanded a significant revision of its terms. The architects of the MSA, in other words, found an effective mechanism to combat the holdout and defection problems that ordinarily bedevil state cartels. That mechanism is the deliberate imposition and exploitation of the interstate externalities against which the Compact Clause is meant to protect states and their citizens.[231]

A. A Brief History of the MSA

The first state lawsuit against tobacco manufacturers was filed in 1994, at the suggestion of an anti-tobacco trial lawyer (and subsequently with his cooperation) by Mississippi's enterprising Attorney General, Michael Moore.[232]

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percent of the cost of the MSA (citing interview with W. Kip Viscusi)). Price increases immediately followed the announcement of the MSA. *Id.*

231. Arguably, the MSA's manifest conflict with the Compact Clause is the least of its problems. Legal scholars and political scientists have harshly criticized the collusive and, in some instances, corrupt relations between the private plaintiffs' attorneys and state attorneys general who instigated the state lawsuits against tobacco manufacturers. *See, e.g.*, WALTER K. OLSON, THE RULE OF LAWYERS 29-62 (2003); and Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Government's Tobacco Litigation*, 33 CONN. L. REV. 1143, 1150-56 (2001). Scholars have also criticized the legislative abrogation in some states of the tobacco companies' common law defenses during the pendency of the state lawsuits. *Id.* at 1147. Additionally, the symbiotic relationship between state governments and the participating manufacturers that has resulted from the MSA has been criticized. *See, e.g.*, Dagan & White, *supra* note 225, at 378-81. Critics have further described the state lawsuits as essentially baseless. *See, e.g.*, DeBow, *supra* note 230, at 570; *see also* Dagan & White, *supra* note 225, at 354, 360-62. Critics also objected to the MSA on antitrust and economic grounds. *See, e.g.*, Thomas C. O'Brien, *Constitutional and Antitrust Violations of the Multistate Tobacco Settlement, in* POLICY ANALYSIS No. 371, at 1 (Cato Institute 2000); Jeremy Bulow & Paul Klemperer, *The Tobacco Deal*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 323 (1998). They also described the MSA as inconsistent with the basic principles of representative government. *See, e.g.*, DERTHICK, *supra* note 227, at 223-27; Jonathan Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 437 (2000). See also further references cited throughout this Part. In light of this litany, an insistence that the MSA also violates (of all things) the Compact Clause may seem pedantic. If so, the discussion may serve as a reminder that structural constitutional provisions, including such arcane provisions as the Compact Clause, often help to prevent big, unmanageable political problems—so long as the provisions are enforced.

232. The history of state tobacco litigation has been told often and well. *See, e.g.*,

The lawsuit included, *inter alia*, a claim for recovery of Medicaid costs allegedly attributable to smoking. Moore lobbied other state attorneys general to file similar recoupment cases. By mid-1997, thirty-one states had followed suit. These copycat suits alleged liability on a number of theories, including (in most cases) Medicaid recoupment, consumer fraud, antitrust violations, unjust enrichment, and violations of state consumer protection laws. Democratic attorneys general were much faster to sue than Republicans.[233] Major tobacco-manufacturing states (Virginia, North Carolina, Kentucky, and Tennessee) refrained from filing, as did Delaware and Wyoming.

Mississippi's lawsuit settled for $3.6 billion in July 1997; Florida's case settled a month later for $11.3 billion. At that stage, adverse developments—in particular, the defection of the Liggett Company, a particularly vulnerable tobacco producer, and the legislative abrogation of common law liability defenses in such states as Florida and Maryland—had already induced the tobacco companies to sue for peace. In June 1997, tobacco lawyers, plaintiffs' attorneys, and attorneys general met in Washington, D.C. to hammer out a comprehensive agreement, known as the "Resolution." A precursor to the MSA, the Resolution provided for a comprehensive financial settlement, projected to amount to $368.5 billion over twenty-five years,[234] of all pending state lawsuits, in return for expansive protections against civil liability (including bars to class action lawsuits, punitive damages in individual tort suits, and addiction claims) for the settling manufacturers.[235] The Resolution would also have conferred authority on the federal Food and Drug Administration ("FDA") to regulate nicotine, the active ingredient of tobacco, as an addictive drug.

The parties then submitted the proposed federal legislation to Congress. Under the leadership of Senator John McCain (R-AZ), then-Chairman of the Senate Commerce Committee, a bill based on the Resolution—but containing provisions for substantially higher industry payments and more limited liability protections—was debated and eventually reported to the Senate floor. In June 1998, however, the bill died after a failed cloture vote. The prevailing—though not uncontested—explanation for the failure is that anti-tobacco and public health advocacy groups, unwilling to brook a compromise with tobacco

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PETER PRINGLE, CORNERED: BIG TOBBACCO AT THE BAR OF JUSTICE (1998); CARRICK MOLLENKAMP ET AL., THE PEOPLE VS. BIG TOBACCO: HOW THE STATES TOOK ON THE CIGARETTE GIANTS (1998); MICHAEL OREY, ASSUMING THE RISK: THE MAVERICKS, THE LAWYERS, AND THE WHISTLE-BLOWERS WHO BEAT BIG TOBACCO (1999); DAN ZEGART, CIVIL WARRIORS: THE LEGAL SIEGE ON THE TOBACCO INDUSTRY (2000); and DERTHICK, *supra* note 227. Unless otherwise referenced, the account in the text follows Derthick's narrative.

233. More than two years passed before the first Republican attorneys general (of Kansas and Arizona) followed Mississippi's lead. DERTHICK, *supra* note 227, at 79.

234. Dagan & White, *supra* note 225, at 364-65.

235. Dagan & White, *supra* note 225, at 365-66.

companies, had loaded the compromise Resolution with provisions that proved unacceptable to the industry.[236] (The version of the bill that was reported out of the Senate Commerce Committee stipulated industry payments in the amount of $516 billion, and the civil liabilities provisions contained in the Resolution and earlier committee drafts had been dropped.)[237] In a massive advertising campaign that may have had a certain "bounce" on Capitol Hill,[238] the industry portrayed the bill as a tax hike and a boondoggle for trial lawyers, rather than a public health measure.

As the prospects for a federal enactment dimmed, nine state attorneys general—chosen to represent a spectrum of regions, degrees of hostility to the industry, and stages of progress in the lawsuits[239]—met in secret negotiations with trial lawyers and industry representatives to work out an agreement along the lines of the Resolution, though more modest in scope.[240] In November 1998, the parties reached an agreement. Total industry payments to the settling states were reduced to roughly $206 billion by 2025. Provisions for the FDA regulation of tobacco products, which obviously would have required federal approval and legislation, were stripped.[241] Likewise, the expansive civil liability limitations contained in the Resolution were jettisoned and replaced with narrower protections from state-initiated lawsuits against the industry.

The MSA was released on November 14, 1998, and all forty-six state attorneys general promptly approved it. Four non-participating states (Mississippi, Florida, Texas, and Minnesota) had reached earlier agreements with the industry (totaling $40 billion), which were preserved under the MSA. The MSA was not presented to the Congress for approval.

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236. DERTHICK, *supra* note 227, at 130-46, provides a balanced discussion of the factors that contributed to the failure of the proposed legislation.

237. Dagan & White, *supra* note 225, at 367.

238. DERTHICK, *supra* note 227, at 122-23.

239. DERTHICK, *supra* note 227, at 171.

240. For a useful comparison of the major provisions of the Resolution, the Senate bill, and the MSA, see Dagan & White, *supra* note 225, at 364-73.

241. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000) (FDA lacks statutory authority to regulate tobacco). While the Supreme Court's ruling of course postdates the MSA, the Fourth Circuit Court of Appeals' ruling in the same case, to the same effect, was issued in August 1998, during the negotiations over the MSA. Brown & Williamson Tobacco Corp. v. Food & Drug Admin., 153 F.3d 155 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000). While affirmance was not a foregone conclusion, the MSA negotiators were not so bold as to contrive to confer upon a federal agency, without the consent of the Congress, a regulatory authority that the agency may or may not have possessed.

B. The Structure of the MSA

In lawsuits challenging the MSA, defendants have averred that the MSA does not constitute an "agreement or compact" among the states at all.[242] Because the MSA must under its terms be implemented through a consent decree in each participating state's courts,[243] it supposedly constitutes nothing but a settlement of the lawsuits brought by each individual state against the tobacco companies. It just so happens that the defendants and the terms of settlement are the same in each case and state.

This hyper-technical argument is difficult to understand as anything but a joke. The MSA bears the signatures of state attorneys general who never filed, let alone prosecuted, a case against the defendants. Putting that aside, and further ignoring that even the *U.S. Steel* Court declined to grant a Compact Clause exemption based on mere formalities,[244] the MSA bears the "classic indicia" of a state compact even in the narrowest sense of that term.[245] The MSA establishes, authorizes, and funds several joint bodies for the administration and legal defense of the Agreement.[246] Unlike the earlier Resolution, the MSA divides a stream of industry payments among the participating states in accordance with an agreed-upon formula described in the Agreement,[247] an arrangement that looks very much like an agreement among the states.[248] Under

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242. *See* Star Scientific, Inc. v. Beales, 278 F.3d 339, 360 (4th Cir.) (briefly discussing and rejecting that contention), *cert. denied sub nom.* Star Scientific, Inc. v. Kilgore, 123 S.Ct. 93 (2002).

243. MSA, *supra* note 1, at II(ss) ("state-specific finality"); MSA Exhibit L.

244. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 470-71 (1978) ("[T]he mere form of interstate agreements cannot be dispositive . . . . The [Compact] Clause reaches both 'agreements' and 'compacts,' the formal as well as the informal.").

245. *Cf.* Northeast Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 472 U.S. 159, 175 (1985) (describing some of the "classic indicia" of a compact: establishment of a joint body, conditional action by other states and bar to unilateral modification or repeal, and mandatory reciprocity).

246. *See* MSA, *supra* note 1, at. VIII(c) (funding for the enforcement and implementation of the MSA through the National Association of Attorneys General ("NAAG")); *id.* at VI(a) (establishment of a national foundation, under the auspices of the NAAG and other state organization, for certain purposes); *id.* at IX(d)(2)(G) (authorizing private consulting group, ominously named "The Firm," to make "conclusive and binding" legal and financial determinations concerning payment allocation).

247. MSA, *supra* note 1, Exhibit A. The Resolution contained no distribution formula. Dagan & White, *supra* note 225, at 364-65, 373.

248. Industry payments are made, not to individual states but into an Escrow Fund under the administration of independent third parties. MSA, *supra* note 1, at IX(a). So long as the participating manufacturers make the appropriate aggregate payments, disputes over the distribution are entirely among the states. Such disputes are subject to mandatory arbitration. *Id.* at XI (c).

its terms, the MSA cannot be fully implemented without entry of consent decrees by state courts representing eighty percent of the number of states and of the aggregate payment allocations specified by the Agreement.[249] Receipt of the proceeds requires performance of specific duties by the settling states, including, but by no means limited to, entry of the MSA by a state court.[250] Withdrawal from the Agreement or failure to perform specified obligations—such as the enactment of a state model statute subjecting non-participating tobacco manufacturers to taxation—carries severe financial penalties, which are enforceable by the states that remain under the MSA's umbrella.[251] Amendments require the consent of all affected states and participating manufacturers.[252]

Most important for Compact Clause purposes, the central purpose of the MSA, the establishment of a national producer cartel and the distribution of the surplus proceeds to state governments, could not be accomplished without concerted state action. About the centrality of that purpose, the MSA leaves no doubt. The agreement features a lot of bells and whistles, from lobbying restrictions on tobacco manufacturers[253] to document disclosure mandates[254] to advertising and marketing regulations, all the way to Joe Camel and the Kool Jazz Festival.[255] But the financial terms form the hard core of the MSA. Those terms restrict market entry, suppress price competition within the industry, and ensure that the manufacturers' payment obligations are passed on to consumers.[256]

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249. MSA, *supra* note 1, at II(u). The original participating manufacturers may waive the requirement for final approval by unanimous written consent. *Id.*

250. *See, e.g.*, MSA, *supra* note 1, at VII (Enforcement); *Id.* at IX(d)(2)(E) (enactment, diligent enforcement, and full legal defense of "Qualifying Statute" that "effectively and fully neutralizes the cost advantages that the Participating Manufacturers experience vis-à-vis Non-Participating Manufacturers"; *id.* at XII(a) (mandatory releases); *id.* at XIII (consent decree and dismissal of claims); *id.* at XVIII (l) (best efforts to cause Agreement to become effective).

251. MSA, *supra* note 1, at IX(d)(2)(H); XVIII(g) ("Each Settling State and each Participating Manufacturer hereby represents that this Agreement . . . will constitute a valid and binding contractual obligation, enforceable in accordance with its terms, of each of them.").

252. MSA, *supra* note 1, at XVIII(j). Certain portions of the MSA are amendable by unanimous consent among the states, without the manufacturers' participation. *Id.* at XI(f)(6).

253. MSA, *supra* note 1, at III(m)-(r).

254. MSA, *supra* note 1, at IV.

255. *See, e.g.*, MSA, *supra* note 1, at III(a)-(j); II(l).

256. The following paragraphs describe the principal payment obligations stated in MSA IX, which account for an overwhelming portion of the total settlement amount. The MSA contains additional payment obligations concerning, *inter alia*, the establishment of a national anti-tobacco research foundation, (MSA VI); contributions to the NAAG's legal defense and MSA enforcement fund, (MSA VIII(c)); and plaintiffs'

In order to meet their payment obligations under the MSA, the four "original participating manufacturers" who, at the time, supplied close to ninety-nine percent of the U.S. cigarette market, had to increase prices. Because price competition would have precluded the requisite, dramatic price increase (of some thirty-five cents per pack),[257] the MSA allocates the manufacturers' share of the payments in proportion to current market share. A higher market share means higher "damage" payments, rendering price competition for a higher market share futile. In order to protect the original participating manufacturers against new market entrants, the MSA provides non-participating manufacturers with an incentive to join the MSA without incurring proportionate payment obligations—provided, however, that those small manufacturers agree to stabilize their sales at pre-MSA levels.[258]

For the regulation of producers who refuse to accept that bargain and for the suppression of new market entrants, the MSA imposes a regime of interstate transfer payments. If the participating manufacturers suffer sales losses exceeding two percent of their aggregate market share, they may reduce their base payments to the states by three percent for each percent market share loss above that level.[259] In other words, a ten percent decline in aggregate market share entitles the participating manufacturers to a twenty-four percent reduction in (adjusted) base payments to the states. Any state may, however, escape an adjustment by enacting a model statute that "fully and effectively neutralizes" the participating manufacturers' cost disadvantages attributable to the MSA.[260] While new market entrants have by definition caused none of the damages that the MSA is supposed to redress, the MSA Model Statute requires them to make payments, equivalent to roughly 150 percent of the "damage" payments they would incur under the MSA itself, into an escrow account, supposedly in anticipation of future costs and liabilities.[261] Should the participating manufacturers still lose market share, their payment reductions will be imposed on states that have failed to enact and enforce the model statute or an equivalent qualifying statute. Such states may lose their entire allocable share.[262] Due to

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attorneys' fees (MSA XVII).

257. Bulow & Klemperer, *supra* note 231, at 376-77.

258. MSA, *supra* note 1, at IX(i).

259. MSA, *supra* note 1, at IX(d)(1).

260. MSA, *supra* note 1, at IX(d)(2)(E); Exhibit T.

261. MSA, *supra* note 1, at Exhibit T Sec. 1(f); Sec. 3(b).

262. Enacting states whose model statutes are struck down by a court may still lose up to sixty-five percent of their allocable shares. MSA, *supra* note 1, at IX(d)(2)(F); *see also* Dagan & White, *supra* note 225, at 381-82.

these "diabolically clever"[263] provisions and incentives, virtually all states have enacted a model or qualifying statute.[264]

C. Compact Risks

All serious analysts agree that the MSA is a price-fixing cartel.[265] The MSA's effects on sister-state interests, political accountability, and federal supremacy are marginally more subtle, but no less egregious.

1. Cartelization

An agreement in pursuit of the MSA's ostensible purposes—punishment for past corporate misconduct, redress for past harms, the procurement of public health gains through future smoking reductions—would be structured very differently. For example, such an agreement would aim to capture manufacturers' profits, instead of protecting them. It would facilitate and encourage state action adverse to tobacco interests, instead of giving states a direct financial stake in the viability and financial health of four individual tobacco companies.[266] It would reflect some correspondence between individual defendants' past misconduct and their liabilities, and it would ensure that the proceeds are put to uses related to past and present injuries. The MSA payments, in contrast, are only tangentially (and, in the case of non-participating manufacturers, not at all) related to past misconduct,[267] and they flow into the states' treasuries as general receipts.[268] Notwithstanding their designation as

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263. Dagan & White, *supra* note 225, at 381.

264. The restrictions on market entry have proven not entirely effective; by the end of 1999, the market share of non-participating manufacturers had risen to over four percent. Gordon Fairclough, *Competition for Cheap Smokes Heats Up*, WALL ST. J., Feb. 15, 2000, at B-1. "The Firm" has adjusted the states' base payments accordingly. Considering the states' and the manufacturers' enormous stakes in the MSA's preservation, however, far more dramatic inroads into the cartel are needed to induce conflicts that might endanger the arrangement.

265. *See, e.g.*, Bulow & Klemperer, *supra* note 231, at 324; Dagan & White, *supra* note 225, at 425; Christopher Schroeder, *The Multistate Settlement Agreement and the Problem of Social Regulation Beyond the Power of State Government*, 31 SETON HALL L. REV. 612, 613-14 (2001); O'Brien, *supra* note 231; Ian Ayres, *Using Tort Settlements to Cartelize*, 34 VAL. U. L. REV. 595 (2000).

266. DERTHICK, *supra* note 227, at 221.

267. Bulow & Klemperer, *supra* note 231, at 378-79 (manufacturers' market share is a highly inaccurate proxy for past damages).

268. Dagan & White, *supra* note 225, at 372. The vast majority of states are using only a very small portion of settlement payments for tobacco prevention purposes. *See* Settlement Payments Received, Current Annual Funding & Minimum Recommendations

"damages," the MSA payments bear no resemblance to a damage payment that might settle a suit in tort or equity.[269] They act like a uniform (and perpetual) national tobacco sales tax. And in order to ensure that the tax will be paid by consumers, the MSA cartelizes the tobacco market. The MSA, in short, is not a wolf in sheep's clothing; it is a wolf in wolf's clothing.[270] Had tobacco manufacturers contrived to establish a comparable arrangement without the states' collusion, their agents and officers might all be in jail.[271]

Even the MSA's architects do not dispute that the MSA is a price-fixing agreement. Their defense of the MSA rests on the state action exemption to the antitrust laws and the related *Noerr-Pennington* doctrine.[272] But while those doctrines may render the MSA "not clearly illegal,"[273] state action—especially state action of a cartelizing, exploitative nature—is precisely what the Compact Clause targets. That does not render the MSA clearly illegal. It does, however, render it illegal without congressional consent.[274]

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for Tobacco Prevention, *available at* www.tobaccofreekids.org/reports/settlements/2002/appendixb.pdf (last visited Apr. 15, 2003).

269. DERTHICK, *supra* note 227, at 177; Dagan & White, *supra* note 225, at 426-28; O'Brien, *supra* note 231, at 2.

270. "[T]his wolf comes as a wolf." Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). The fit between Justice Scalia's fabulous phrase and the MSA has also occurred to the plaintiffs' attorneys challenging the MSA. *See* Star Scientific, Inc. v. Beales, 278 F.3d 339, 361 (4th Cir. 2002) (citing plaintiffs' brief), *cert. denied sub nom.* Star Sci., Inc. v. Kilgore, 123 S. Ct. 93 (2002). The Fourth Circuit panel rejected the wolf-as-a-wolf contention (advanced by plaintiffs under a due process and an equal protection theory), substantially on the grounds that any measure that sails under an anti-tobacco label—including an arrangement that confers monopoly profits on purported "defendants"—must *ipso facto* be rational.

271. Olson, *supra* note 231, at 47. *See* Sherman Act, 15 U.S.C. § 1 (2000) (criminalizing conspiracies in restraint of trade); FTC/DOJ Guidelines Antitrust Guidelines for Collaborations Among Competitors, § 3.2., *reprinted in* 4 TRADE REG. REP. (CCH) at 20,855 (2000) (defining "hard core cartel agreements" to be prosecuted criminally without regard to "claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects").

272. *See* respectively, Parker v. Brown, 317 U.S. 341 (1943); California Retail Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 105 (1980) (state action doctrine); and E. R.R. Conference v. Noerr Motor Freight, 365 U.S. 127 (1961); United Mineworkers of Am. v. Pennington, 381 U.S. 657 (1965) (limited antitrust immunity for mere attempts to influence the enactment or enforcement of laws). The applicability of the doctrine to the MSA has been questioned by commentators, *see* O'Brien, *supra* note 231, at 12-14, and by anti-MSA litigants, albeit to date largely without success. *See, e.g.*, PTI v. Philip Morris, 100 F. Supp. 2d 1179 (C.D. Cal. 2000); Bedell v. Philip Morris, 263 F.3d 239 (3d Cir. 2001) (finding defendants immune under *Noerr-Pennington* doctrine but not state action doctrine).

273. Ayres, *supra* note 265, at 598.

274. The point will appear particularly compelling to those who tend to the view

2. Externalities

Tobacco policies vary enormously from state to state and even among local jurisdictions. Rural Tennessee features smoke-filled diners; suburban Maryland counties prohibit smoking in restaurants, bars, and even some outdoor areas. Excise and sales taxes on cigarettes range from 2.5 cents in Virginia to $1.50 in New York—an astonishing range, considering the ease with which many consumers can evade sales taxes. These policy differences reflect stubborn political and cultural variations, as well as differing economic interests (such as the importance of tobacco farming and production in some states). In all other policy areas, including areas where collective action problems are real and state coordination would yield substantial benefits (such as insurance regulation), far smaller state-to-state differences have proven insurmountable. The obvious question is how the states, accustomed though they are to a prickly insistence on state sovereignty and to the defense of parochial interests, could possibly agree on a uniform scheme to tax and regulate tobacco sales and consumption.

The answer lies in the structure of the MSA payment provisions as a national sales tax or, put differently, the sequential (and eventually collusive) imposition of externalities. Consumers in each state will pay the tax regardless of whether or not their state joins the MSA. Because states can opt out of the receipts but not the taxes, a non-participating state would simply leave "its" share of the MSA proceeds on the table and available for distribution to the participating sister states.[275] Hence, the manifest political differences among the states affected only the timing of the states' participation and the degree of enthusiasm with which the attorneys general joined the campaign. Unanimity was a foregone conclusion once the first few states had made their move.

In principle, one can envision an uncoordinated state-by-state decision-making process that would produce a financial result comparable to the MSA:

(including, unsurprisingly, this author) that the antitrust state action doctrine itself should be confined, against the constitutional background, to state cartels, the costs of which fall principally on in-state residents. The classic formulation of this view is Frank Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & ECON. 23 (1983). *See also* Saul Levmore, *Interstate Exploitation & Judicial Intervention*, 69 VA. L. REV. 563, 626-29 (1983). The Compact Clause analysis expounded here and in Part IV, *supra*, tracks this analysis. If states gang up for exploitative purposes, we need not wait for courts to get antitrust (or for that matter the negative Commerce Clause) right; the likelihood of damage is so high that the Constitution calls for congressional review *ex ante*. *Id.* at 570 n.17.

275. DERTHICK, *supra* note 227, at 163-73 (identifying nation-wide imposition of MSA costs as the cause of state unanimity); William H. Pryor, *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TULANE L. REV. 1885, 1911 (2000) (Alabama Attorney General citing imposition of share of MSA costs on Alabama as reason for signing MSA despite his grave misgivings).

each state could impose an equivalent sales or excise tax on purchases *within its borders*. Alternatively, each state could sue manufacturers and settle on terms that impose the costs of the "damages" entirely on consumers within the state. To pose the hypothetical, however, is to reject it. Many states would refrain from taxing or suing at all; others might try and fail. Under those circumstances, neither the producer-defendants nor the states could control private price arbitrage at the borders. The costs of the MSA payments, in contrast, are imposed uniformly and nationwide. Instead of replicating a series of internal settlements that each state could have obtained on its own, the state lawsuits generated a stream of interstate externalities and, in the MSA, divvied up the proceeds among the states.

If one thinks of the MSA payments as "damages" (their official, though implausible, designation), the MSA amounts to a particularly rigorous application of the logic of modern products liability lawsuits. Under existing choice-of-law rules, defendant-manufacturers can be sued in a state and under a state's laws of the plaintiff's choice (usually, the plaintiff's home state). Because the manufacturers cannot control cross-border arbitrage (for example, by tailoring the price or design of a product to an individual state's liability regime and by preventing the import of "unsafe" versions of the product into a high-liability state), the costs of liability verdicts will be shared across the nation, while the benefits accrue entirely in-state. Each state has an incentive to expand liability.[276]

In a powerful article published a decade ago, Douglas Laycock argued that the choice-of-law doctrines that drive modern products liability litigation are unconstitutional.[277] A systematic preference for home-state law in interstate disputes, Laycock argued, violates the basic premise of equality among states and their citizens, a premise which underpins the structure and logic of the Constitution and several of its specific clauses. One need not accept Laycock's dramatic conclusion to acknowledge that joint cross-border exploitation under the heading of "liability" is sufficiently problematic to trigger the Compact Clause.[278]

The MSA, moreover (and in any event), systematizes cross-border exploitation in several ways. First, it ensures that the costs are paid by consumers, rather than the defendant-corporations' workers and shareholders. Second, it provides that the proceeds go into the states' treasuries, rather than to

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276. Michael McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, NEW DIRECTIONS IN LIABILITY LAW 90, 92 (Walter Olson ed., 1988).

277. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

278. As noted *ad nauseam*, the Compact Clause was meant to protect states against more than "sister"-state practices that are already unconstitutional under some other constitutional provision—for the excellent reason that such practices become more troublesome, not less so, when states exercise them collusively.

harmed individuals. In other words, while the MSA's price effects may reduce future consumption, the MSA severs liability from the state purposes of deterrence and compensation that might otherwise be thought to justify an incidental effect on interstate commerce. Third, the MSA imposes payment obligations on producers who were not parties to the litigation nor, for that matter, even in existence at the time of its instigation or conclusion.

The payments retain some attributes of damages. But those are trivial; it is more natural to think of the "damages" as a tax.[279] That tax would clearly be unconstitutional if any one state attempted to impose it. (An attempt by, say, Minnesota to impose a national excise tax would obviously be unconstitutional; the only question is whether the states, acting in concert, may bring about that feat.) Professor Ayres has identified "this extraterritorial due process challenge [as] the strongest grounds for attacking" the MSA and state settlements[280]—and identified its shortcomings: no competent plaintiff can be found. The case, moreover, would have to be litigated in front of a state court, and "we should not put great faith in state tribunals being able to make [a] disinterested determination of either th[e] standing question or the underlying substantive issue."[281] While that may be a slight overstatement,[282] Ayres is surely right on the larger point: supremacy alone is an uncertain business, and courts cannot be relied upon. That was James Madison's case for the negative, and with respect to state compacts, the Convention emphatically agreed. The MSA and its fate in the courts prove the Founders' wisdom.

3. Agency Problems

The MSA entrusts the National Association of Attorneys General ("NAAG") with continuing administrative and enforcement duties. These activities are financed through assessments on the Participating Manufacturers.[283] In addition, Participating Manufacturers must severally pay $50 million into a

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279. Dagan & White, *supra* note 225, at 426.

280. Ayres, *supra* note 265, at 603.

281. Ayres, *supra* note 265, at 603-04 (footnote omitted). An excellent reason for that suspicion, which Ayres does not fully spell out, is that a state court could invalidate only its own state's extraterritorial taxation. Other states' impositions on the state's citizens would remain unaffected.

282. One plaintiff has managed to maneuver an extraterritoriality claim against the MSA into federal court, but it was rejected by the court. *See* Star Scientific, Inc. v. Beales, 278 F.3d 339, 355-56 (4th Cir.), *cert. denied sub nom.* Star Sci., Inc. v. Kilgore, 123 S. Ct. 93 (2002). Star Scientific's claim differed from the theory sketched by Ayres in two respects: it was asserted under a dormant Commerce Clause (rather than Due Process) theory, and it concerned not the Settling Manufacturers' "damages" but the MSA provisions for Non-Participating Manufacturers' escrow payments.

283. MSA, *supra* note 1, at VIII(a); III(p)(3); VII(g); VIII(b).

NAAG-administered fund to supplement the states' enforcement and implementation efforts.[284] The NAAG's role under the MSA has been compared to that of a federal regulatory agency.[285]

The MSA displays, in a particularly drastic form, the same structural problem as the MTC: imperfectly monitored and controlled state agents—in this case, attorneys general—agree to a binding multistate scheme and its ongoing administration by a supra-state agency, whose decisions are then presented to state legislatures and state courts as a *fait accompli*.[286] NAAG decisions profoundly affect the states' general revenues, as well as the *disposal* of those revenues. "Agency problem" does not begin to describe the difficulties with this policy-making process: one wonders why states still *have* legislatures.

What distinguishes the MSA from the MTC is the pervasiveness of agency problems in its creation. The drafting of the MSA and the establishment of a national producer cartel in secret negotiations between industry representatives, trial lawyers, and selected state attorneys general illustrates that the dynamics of the MSA effectively left the citizens of many states, and their elected officials, without any voice. In the early stages of the state tobacco litigation, Alabama's attorney general refused to file a lawsuit in his state, sharply criticized the legal theories on which the lawsuits in other states were based, and argued vociferously against a comprehensive settlement.[287] In the end, he, too, signed the MSA. At that stage, Alabama's position no longer made a difference with respect to the collective policy choice and the attendant cost for (tobacco-consuming) Alabama citizens; the only question was whether or not the state should accept a proportionate share of the proceeds. The agency problem, in other words, is not that the MSA drove a wedge between the citizens of Alabama and their elected official.[288] The problem is that Alabama citizens' choice was

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284. MSA, *supra* note 1, at VIII(c).

285. *See, e.g.*, Charles Joseph Harris, Note, *State Tobacco Settlement: A Windfall of Problems*, 17 J.L. & POL. 167, 168, 192-93 (2002).

286. *Id.* at 191-94; *see also* DeBow, *supra* note 231, at 563. As to state "courts," recall that a state court refusal to enter a settlement and model statute entails the state's loss of a portion of its MSA proceeds; *supra* note 262.

287. Bill Pryor, *Litigators' Smoke Screen*, WALL ST. J., Apr. 7, 1997, at A14. *See* Pryor, *supra* note 275, at 1885.

288. Circumstantial evidence suggests that the official champions of the state anti-tobacco campaign, rather than the opponents, may have acted at variance with their constituents' preferences. Opinion polls in Mississippi—the first state to file suit—indicated public opposition to such a lawsuit, and the state's attorney general filed the case in an equity court so as to avoid a trial by jury. DERTHICK, *supra* note 227, at 75-76. The attorneys general of Minnesota and Massachusetts, who had vigorously championed the lawsuits, lost their subsequent bids for the governor's offices in their states; Mr. Pryor, who had fiercely resisted the lawsuits, was returned to his position as Alabama's Attorney General. *Id.* at 225-26.

made for them by the attorneys general of neighboring Mississippi and far-away Minnesota and Massachusetts.[289]

The agency problems just sketched are the political face of the dynamic that drives the entire MSA—the sequential imposition of externalities. Beyond some tipping point, joining the cartel becomes the dominant strategy for every state, and defection becomes impossible. That observation provides a conclusive objection to an already-rejected argument for a latitudinarian Compact Clause jurisprudence—to wit, the notion that the Compact Clause negative is unnecessary because collective action problems provide adequate protection against state cartels.[290] Unpersuasive, to my mind, even in settings where collective action problems do impede state collusion to the detriment of sister states, the argument cannot possibly apply when collective action dynamics *facilitate* state cartels.

4. Federal Interests

Star Scientific v. Beales[291] is to date the only appellate judicial decision on the MSA's compatibility with the Compact Clause. In an extremely cursory discussion, a panel of the Fourth Circuit Court of Appeals held that the MSA passes muster under the *U.S. Steel* precedent. The MSA, the court determined, does not encroach on federal power or interfere with federal supremacy, and it creates no authority that the states could not exercise in its absence.[292] The application of the *U.S. Steel* test to the MSA, however, is not remotely so straightforward. On Ayres' extraterritorial taxation theory, for instance, the MSA quite clearly exceeds every individual state's authority. The question becomes whether the states may do by collusion what they may not do alone. Putting aside that question and its blazingly obvious answer, the *Star Scientific* court dispensed even with the *U.S. Steel* pretense that the test is one of *potential* impact on federal authority[293] and instead looked exclusively to *actual* conflicts between the MSA's provisions and federal law. It found such conflicts lacking

289. Arguably, dissident states did still have a voice. Under its terms, the MSA requires the assent of eighty percent of the states, representing eighty percent of the allocable payment shares, to take full effect. Thus, a fairly small number of states, acting in concert, could have thwarted the deal. Any such concerted action, however, could have been thwarted by the participating manufacturers' unilateral waiver of the eighty-percent requirements. *See* MSA, *supra* note 1, at II(u)(2). In any event, an anti-settlement coalition would have encountered insurmountable coordination and defection problems.

290. *See supra* notes 219-20 and sources cited therein.

291. Star Scientific, Inc. v. Beales, 278 F.3d 339 (4th Cir.), *cert. denied sub nom.* Star Sci., Inc. v. Kilgore, 123 S. Ct. 93 (2002).

292. *Id.* at 360.

293. *See supra* notes 95-100 and accompanying text.

on account of the MSA's savings clauses, which render the agreement enforceable only to the extent that it is consistent with now and future federal law (such as the Bankruptcy Code).[294] But while it is certainly comforting to learn that the parties to the MSA did not intend to repeal the Supremacy Clause, the inclusion of savings clauses indicates a belief even on their part that the MSA might very well present conflicts with federal law.

Provisions of the MSA that were not before the *Star Scientific* court are equally problematic. For example, the MSA's advertising prohibitions and regulations appear quite clearly preempted by federal law.[295] The MSA's compatibility with federal antitrust law is a very close question.[296] And, in negotiating the financial terms of the MSA, the parties were—under the plaintiffs' own idiosyncratic theory—bargaining over the recovery of the federal government's money and its contractual claims under the federal Medicaid statute.[297] One could argue, on the authority of *U.S. Steel*, that the Compact Clause requires approval only for compacts that affect the federal government's *supremacy*, as distinct from its contractual rights vis-à-vis the states. Like so

294. *Star Scientific*, 278 F.3d at 360.

295. *Cf.* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (holding that Massachusetts tobacco advertising regulations are preempted by Federal Cigarette Labeling and Advertising Act) with MSA III (stipulating content restrictions on tobacco advertising). Of course, tobacco manufacturers may voluntarily agree to advertising restrictions. The entry of such an agreement by a state court, however, is more than a mere notarization of a private contract, especially when the agreement purports to govern the rights and obligations of third parties (in the instance of the MSA, non-participating manufacturers). It is an official state act that is subject to ordinary preemption analysis. To be technical about it, that analysis affects only the entry of the MSA in the various states, not the MSA itself. But since the MSA requires entry by state court consent decree in every state, the practical effect is the same.

296. See the careful, extended discussion in *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239 (3d Cir. 2001). The obvious federal antitrust implications of a tobacco deal were a principal reason for the submission of the Resolution for congressional approval. Bulow & Klemperer, *supra* note 231, at 324. At the time, the Federal Trade Commission voiced grave reservations about the Resolution and its compatibility with federal antitrust law, and the proposed congressional legislation contained an explicit antitrust exemption. The equally problematic MSA itself has, of course, received no such dispensation.

297. The federal government affirmatively asserted its claims on the payments, to the shrill protests of the state officials who were doing the negotiating. *See, e.g.*, John Schwartz, *States Want U.S. Out of Tobacco Deal*, WASH. POST, Nov. 12, 1997, at A-21. In May 1999, months after the enactment of the MSA, Congress explicitly disavowed its interest in the funds and authorized each state to use MSA proceeds "for any expenditures determined appropriate by the State." 1999 Emergency Supplemental Appropriations Act, Pub. L. No. 106-31, 113 Stat. 57(1999) (amending Sec. 1903(d)(3) of the Social Security Act, 42 U.S.C. § 1396b(d)(3)). The need to disavow the federal government's claims only confirms that those claims were in fact affected by the MSA.

many tenets of Compact Clause doctrine, however, that claim cannot possibly be right.

D. Less Than Process

Star Scientific reflects the poverty and pathology of modern Compact Clause analysis. The court reduced the judicial inquiry to the enhancement of the power of the states, collectively, "quoad the national government" (in the *U.S. Steel* Court's weird phraseology). It then found such an enhancement only in the event of an actual conflict with federal law, thus rendering the Compact Clause wholly academic. The step from potential impact to actual conflicts is, for amply noted reasons, a clear error. The larger, more fateful error lies in the first step—that is, in the demise of federalism's horizontal, state-to-state dimension and of the purpose, central to the Compact Clause, of preventing states from ganging up on sister states. The MSA illustrates the dangers that attend the evisceration of that protection: a handful of states set in motion a process that drove all states, many of them unwilling and some bitterly opposed, into a uniform regulatory and tax scheme. The fact that all state governments benefit *ex post* does nothing to remedy the constitutional process failure.

The MSA is comparable to the spontaneous creation of a federal grant-in-aid system: the proceeds of a national tax on tobacco consumption are transferred to states that agree to abide by certain restrictions.[298] Such programs are the stock-in-trade of the American welfare state, but they are not entirely unproblematic. While states are nominally free to participate or not in a given program, the fact that each state's citizens will pay a share of the program costs even if their state declines to accept the benefits renders an autonomous choice illusory. In the absence of a credible constitutional commitment against interstate redistribution, the states' pre-enactment strategy is strongly biased in favor of legislation—lest the states that favor intervention in any event massage the distribution formula further to their advantage. *Post*-enactment, the states' default strategy is to change the mix of federal funds and obligations in their favor. Barring truly exceptional circumstances, defection becomes impossible even if the federal grant pays only a fraction of the program cost (the usual case), and even if the state pays a disproportionate share (relative to sister states) of the program cost.[299]

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298. The final negotiation of the MSA, Martha Derthick has written, "was as if the [negotiating] group had been constituted to perform legislative acts. . . . [L]itigants and tort lawyers would now sit down, much as Congress does when it legislates grants-in-aid, to distribute benefits among the states." DERTHICK, *supra* note 227, at 171.

299. Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355 (1993); Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 594-

While the asymmetry of costs and benefits that drives grants-in-aid and conditional funding statutes may not constitute "coercion" in a constitutionally significant sense,[300] some scholars have come to view those dynamics as so corrosive of constitutional federalism norms, and so conducive to horizontal exploitation, as to warrant judicially enforced controls.[301] While theirs is (still) a minority view, it is sufficiently powerful to merit a response. That response must rest on the ground that grants-in-aid schemes are legislated in and by the United States Congress, where states can mobilize and exercise opposition, and

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98 (2000). The empirical evidence overwhelmingly supports this analysis: one cannot readily think of a single case in which even a few states, let alone a majority of states, have advocated the abolition of a burdensome federal grants program.

300. That, of course, is the generally accepted view of the matter. In *Massachusetts v. Mellon*, 262 U.S. 447 (1923), the Commonwealth of Massachusetts and individual Massachusetts taxpayers challenged the federal Maternity Act, which extended federal funding to states that agreed to participate in a federal entitlement program. *Id.* at 479. Massachusetts argued that the statute effectively coerced the state into participating, since her citizens would be asked to pay a share of the federal tax revenue in any event. *Id.* The Supreme Court dismissed the state's and the taxpayers' cases on jurisdictional grounds. *Id.* at 488-89. (For a trenchant analysis of this aspect of the decision and its nexus with the merits, see Richard A. Epstein, *Standing and Spending—The Role of Legal & Equitable Principles*, 4 CHAPMAN L. REV. 1 (2001)). Having done so, the Court added that the state could avoid the "coercive" effects of the federal statute "by the simple expedient of not yielding." *Mellon*, 262 U.S. at 482. The Supreme Court has left open the possibility that some federal funding statutes may be unconstitutionally coercive. *See* South Dakota v. Dole, 483 U.S. 203, 210-11 (1987). The "coercion," however, lies in the disadvantageous mix of federal funding and state obligations and in the lack of a nexus between the two, not in the asymmetry between taxpayer burdens and receipts.

301. *See, e.g.*, Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 481-85 (2001) (arguing that virtually all federal grants programs to states are unconstitutional under *New York v. United States*, 505 U.S. 144 (1992), and for other reasons); Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 270-74 (1997) (arguing that general revenue sharing constitutes excessive delegation of legislative power); and *see especially* Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 219-20 (2001) ("While [process federalism] may well ensure that '*state interests as such*' are protected against federal oppression, *federal* oppression is not the problem. The problem, rather, lies in the ability of *some states* to harness the federal lawmaking power to oppress *other states*." (footnotes omitted)). Baker's contention that such oppression will occur with great regularity is buttressed by public choice theories that predict, on the basis of a very modest assumption of information asymmetries between state officials and their citizens, that the adoption of a re-distributive program in some states will eventually produce a federal mandate, by virtue of dynamics paralleling those that produced the MSA. Supermajoritarian obstacles at the federal level may not suffice to counteract that tendency. Zelinsky, *supra* note 299, at 1402-03.

where a multitude of competing interests may help to thwart excessively partial legislation *before* those schemes unfold their inescapable economic dynamics. Federalism's process protections constitute the bare constitutional minimum.

The MSA mirrors the *economic* dynamics of grants-in-aid legislation—but shortcircuits the process protections that, minimal though they are, provide a check on interstate exploitation. The MSA's precursor collapsed in Congress under the weight of interest group conflicts. In other words, it failed for the constitutionally envisioned reason. And so the MSA's architects moved to a less open and cumbersome process of negotiation, where the range of interests could be restricted and the hold-out states were left without a realistic chance.[302] The congressional consent requirement of the Compact Clause would provide a safeguard against that maneuver. In dismantling that safeguard, the judiciary has dismantled an enforceable constitutional protection for federalism. The courts' position smacks in that regard of a process federalism that recognizes no judicially enforceable federalism norms.[303] But that characterization is unfair to process federalism: extant Compact Clause theory, assuming it deserves that honorific, will not even protect the process.[304]

VII. TOWARD A CONSTITUTIONAL COMPACT CLAUSE DOCTRINE

A. James Madison, Functionalist?

The Compact Clause, I have argued, is the Madisonian negative in a specified range of application. Its purpose is to invert the ordinary supremacy

302. David S. Samford, *Cutting Deals in Smoke-Filled Free Rooms: A Case Study in Public Choice Analysis*, 87 KY. L.J. 845, 886-92, 899-900 (1999) (broader range of interests prevented approval of the Resolution in Congress; exclusion of many interests, including public health advocates, facilitated state-based settlement process).

303. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The most forceful articulation of a neo-Wechslerian perspective is JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). For one of the many critiques of the Supreme Court's "somewhat stunning" reliance on Wechsler and Choper—prior to its recent re-discovery of federalism—see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 325 (1997) (citing and briefly discussing those critiques). For a rare but valiant neo-neo-Wechslerian defense of process federalism as something different from rank nationalism, see Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994); and Larry Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

304. In this context, it is worth noting that even *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the high-water mark of the Supreme Court's process federalism, contemplated judicial protections of the political process itself. *See id.* at 554 (judicially enforced federalism norms should be "tailored to compensate for possible failings in the national political process").

rule operating on state enactments. One can argue with perfect justice that courts ought to respect and enforce that constitutional arrangement—and leave it at that. The structural argument for the Compact Clause can stand on its own, without the crutch of a functional analysis. The purpose and, as it were, the function of that analysis is simply to explicate the constitutional background presumption of the Compact Clause: state agreements, as a class, are problematic in a way that run-of-the-mill enactments by an individual state are not. The transaction cost analysis shows that presumption to be warranted, and the compact risks it delineates parallel the Founders' apprehensions.

No: James Madison did not anticipate the *specific* dangers and arrangements discussed in the preceding sections. Conversely, he and his contemporaries had every reason to contemplate dramatic compact risks that no longer concern us, including the fear that economic warfare among the states might engender actual war and the destruction of the Union. To deny these differences is to invite ridicule. One easily dismissed complaint against the MSA characterized the agreement as a "tax confederacy on American soil."[305] The phrase, and the fear it conjures up, seem grossly overwrought.

And yet, the image of a single-purpose confederacy captures, albeit awkwardly, the common theme of Madison's nightmares and modern-day compacts—the problem of factionalism in a federal republic. Factionalism was the central theme of Madison's campaign for a congressional negative. Factionalism, too, is the theme behind regulatory compacts. The dangers posed by regulatory compacts—compact formation at the behest of local interests seeking to thwart federal intervention; the deliberate infliction of externalities; cartelization and exploitation; the evasion of accountability and responsibility—are so many facets of interest group bargains and political accommodation.[306]

Madison proposed a comprehensive negative as an essential safeguard against faction. The Convention rejected that proposal and instead limited the negative to state actions that could be expected to have substantial effects on sister states and their citizens. Madison himself was, as noted, deeply skeptical of the attempt to divide state activity so neatly into largely harmless, internal measures and dangerous, external stuff. Its proponents, he thought, mistook the outward symptoms of factionalism for the disease itself, and the clever design of arresting factions at the state borders grossly underestimated the states' capacity

305. Hise v. Philip Morris, Inc., 46 F. Supp. 2d 1201, 1210 n.18 (N.D. Ok. 1999) (citing plaintiffs' complaint).

306. Empirical studies show that regulatory compacts are typically a response to interest group demands at the state level. *See, e.g.*, WELDON V. BARTON, INTERSTATE COMPACTS IN THE POLITICAL PROCESS 8-33, 164 (1967); WILLIAM E. LEUCHTENBURG, FLOOD CONTROL POLITICS: THE CONNECTICUT RIVER VALLEY PROBLEM 1927-1950, 250 (1953); PARRIS N. GLENDENING & MAVIS MANN REEVES, PRAGMATIC FEDERALISM 199 (1977).

for obstinacy and evasion. But the Convention's choice reflects Madison's fears to the extent that state factionalism is both more likely and more dangerous when it crosses borders—more likely, because schemes that impose costs on outsiders tend to face little internal opposition; more dangerous, because cross-border exploitation undermines the foundations of constitutional federalism.[307]

Federalism must start with a premise of formal equality among states—not because they are in fact equal, but because no other genuinely federal principle is plausible.[308] This in turn implies a principle of non-aggression and non-discrimination among states: in a world of equal (contiguous) states, limited territory, and scarce resources, no other principle makes sense. In protecting against unapproved state agreements to the detriment of sister states, the Compact Clause reflects both these principles. The inversion of the default rule—relative to the mere supremacy rule that operates on single-state enactments—is, admittedly and especially by Madisonian lights, an imperfect arrangement, because states may easily pursue factional schemes to the detriment of sister states even when they act alone. We have in recognition of that reality created a broader negative and called it the dormant Commerce Clause. As a constitutional first cut, however, the Compact Clause rule is perfectly reasonable. It guards against the distinct risks of collusion and, in so doing, ensures a rough equality and reciprocity.

The twin presumptions of equality and non-aggression in place, federalism must organize the exchanges that states may wish to undertake. Some exchanges (called treaties) threaten such a dramatic departure from the initial, equal allocation of entitlements that the Constitution subjects them to a *per se* prohibition. That rule, though, when applied to all state bargains, would suppress beneficial agreements along with nefarious ones. The constitutional task, then, is to allow mutually beneficial bargains, while guarding against the constitutional risk. To that end, the Compact Clause provides a monopolistic forum and procedure for all other exchanges. In that forum, under those procedures, states may cooperate. They may even change the original allocation

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307. The edifice need not tumble; we can prop it up in all sorts of ways. But it is then no longer the same building.

308. Some federal systems (such as Germany) have departed from formal equality and have instead constitutionalized principles principles of *material* equivalence and solidarity among states. Such systems entrust the central authority with an affirmative obligation to redress inequalities that might newly emerge from, among other things, the exercise of state autonomy. Unlike our federalism, however, this brand of federalism reduces the states' "autonomy" to the independent administration of federal programs. For a sophisticated defense of administrative federalism and a proposal to enshrine it in American law, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998). For a rather more skeptical perspective, see Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L. J. 557 (2000).

of entitlements and collude to exploit sister states. But they must do so within the constitutional bounds and through the established, agreed-upon procedures and institutions. A principle that would allow everyone to defect from that arrangement would satisfy the demand of equality; but it is a lottery for the states, not a principle on which they can rely. Therefore, equality requires the categorical rule of the Compact Clause: no one may defect.

By emasculating the congressional approval requirement, and by reducing Compact Clause analysis to its vertical, federal-state relation, the Supreme Court's Compact Clause invites defection—in the name of, of all things, "harmony" and "federalism."[309] The functional analysis just presented, in contrast, emphasizes federalism's horizontal dimension—the question of what equal states may and may not do to each other. Extant doctrine views federalism as a shorthand for the states' opportunistic agenda; the functional analysis insists that federalism must respect the states' equality and integrity. In so insisting, it tracks the logic of the Compact Clause and the larger federal architecture.

The functional analysis, then, is consistent with the conclusion that the Compact Clause ought to be enforced as written. But it does not quite compel that conclusion. The identification of discrete (though connected and overlapping) compact risks may allow a more nuanced and perhaps efficient Compact Clause rule than the Founders' congressional approval requirement for any and all state agreements. Unlike the Compact Clause, the functional analysis contemplates the existence of a set of exchanges that can, *ex ante*, be shown to pose no constitutional risk, and which should, therefore, be exempt from the negative. While this approach will turn out to have its own problems,[310] it merits exploration for pragmatic reasons. The Madisonian argument runs up against adverse Supreme Court precedent, cooperative enthusiasms, and entrenched interests. The perceived overbreadth of the Compact Clause has provided the impulse, as well as a patina of plausibility, for its emasculation. Insofar as a functional interpretation addresses that concern, it may aid in reviving the Clause.

To be sure, the conciliation can only go so far. Any Compact Clause doctrine that is remotely faithful to the constitutional text and structure, for example, will conclude that *U.S. Steel* was preposterous in its reasoning and wrong in its outcome. Any such doctrine will likewise compel the conclusion that the MSA is unconstitutional. Still, a serious functional Compact Clause doctrine can incorporate and explain many and perhaps most Compact Clause precedents. Moreover, such a doctrine is broadly consistent with, and may in fact reinforce, the two most attractive features of the modern Supreme Court's

309. *See, e.g.*, New York v. O'Neill, 359 U.S. 1, 6 (1959) (quoted *supra* in the text accompanying note 28).

310. *See infra* text accompanying notes 378-79.

federalism—the partial revival of enumerated powers, and the emphasis on political accountability.[311]

B. A Functional, Constitutional Compact Clause Test

1. The Test

I follow extant Compact Clause doctrine in assuming 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.[312] I assume, moreover, that an agreement or compact in the constitutionally relevant sense requires participating states to act in their official capacity *as states*, not in a proprietary or market-participant capacity.[313] Once such a state agreement has been shown to exist without congressional approval, 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 the four now-familiar risks—an exercise of powers concurrently possessed by the Congress; interstate externalities; cartelization; or agency problems, including a dilution of political accountability and a delegation of state legislative or executive power. Defendants may rebut that case by proving that the proposed compact poses none of those risks. Absent such a showing, the compact is void without congressional consent.

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311. I have argued elsewhere that enumerated powers and anti-delegation arguments—rather than "states' rights" protections under the Tenth and Eleventh Amendments—constitute the most attractive features of the Supreme Court's federalism. MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 79-82 *passim* (1999).

312. *See, e.g.*, Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 175 (1985).

313. State A's purchase of electric power from publicly owned utility in State B is an ordinary contract, not an agreement or compact requiring congressional consent. Similarly, and notwithstanding hysterical assertions that enforcement of the Compact Clause might lay waste to the National Association of Governors or the National Association of Attorneys General ("NAAG") (*see, e.g.*, Ferguson, *supra* note 19), *ex officio* lobbying and information-sharing associations of state officials are not agreements or compacts among states *as states*. Where such organizations play a role in negotiating, administering, and enforcing an agreement or compact, it is that instrument, not the sponsoring organization, that requires congressional approval. Likewise, the NAAG's enforcement guidelines and increasingly common multistate enforcement actions, especially for alleged antitrust and consumer protection violations, present a variety of political, economic, and legal problems. Barring an enforceable mutual obligation, however, they do not present a Compact Clause problem. Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2016-22 (2001).

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. Even the *U.S. Steel* Court purported to hold that the appropriate Compact Clause test goes to *potential* rather than real effects.[314] The Court proceeded, however, to ignore that pronouncement and effectively required the plaintiffs to prove that the MTC infringed on federal supremacy. Shifting the burden of proof in Compact Clause cases to defendants is a procedural means of re-orienting the judicial inquiry towards risks and potentialities, rather than certainties.

2. Precedents and Conceptual Lines

The Supreme Court has tended to scrutinize the effects of individual compacts on a case-by-case basis.[315] The proposed test, in contrast, turns on compact risks *per se*, rather than on the expected effects of any individual compact, and so substitutes a conceptual rule for a case-by-case inquiry. If a particular compact is shown to be a cartel, it requires congressional consent; the magnitude of the effects is irrelevant. Likewise, a compact commission cannot be a little bit pregnant with delegated state powers; if it exercises such powers to any extent, the compact requires congressional consent. A conceptual rule is appropriate to the structure of the Compact Clause, which commits an assessment of effects and consequences to the Congress rather than the courts. And in fact, leading Compact Clause precedents imply, even though they do not articulate, conceptual distinctions akin to the ones proposed here. Boundary compacts are one example; reciprocity agreements are another.

The precedents hold that a state agreement to demarcate more precisely a pre-existing boundary line does not require congressional consent,[316] whereas a boundary *change* does. That rule rests on a conceptual distinction, not on case-specific effects. One can easily imagine a (small, inconsequential) boundary change that would neither affect the supremacy of the United States nor entail adverse consequences for sister states. But it is *likely* that a boundary-changing agreement might have such consequences, and nothing more need be shown to bring the agreement under the ambit of the Compact Clause. The defendant state (or states), in contrast, must prove that those risks are non-existent, and the only way to do so is to show that the agreement does not in fact change a boundary.

Similarly, the functional test supplies a plausible rationale for the judicial exemption of so-called reciprocity agreements from the Compact Clause

314. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472 (1978).

315. Engdahl, *Interstate Arrangements*, *supra* note 13, at 68.

316. New Hampshire v. Maine, 426 U.S. 363, 369-70 (1976); Virginia v. Tennessee, 148 U.S. 503 (1893).

negative.[317] Reciprocity agreements pose no danger of cartelization or third-party externalities, and they delegate no powers to an interstate agency. Such agreements may affect areas where Congress is competent to legislate—foremost, interstate commerce. But they cannot burden that commerce and, in that sense, interfere with federal prerogatives.[318]

By way of illustration, varying and conflicting state regulations require nurses to obtain a license in the state where they wish to practice. Licensed nurses in each state attempt to restrict market entry by nurses licensed in another state,[319] thus creating a regulatory race to the bottom that requires some coordinated response. A state attempt to "solve" the coordination problem by means of regulatory harmonization, to be accomplished by an Interstate Nurse Licensing Commission, would pose dangers of cartelization, regulation in restraint of interstate commerce, and a delegation of state authority to a supra-state entity. Even if the arrangement could be shown to constitute a plausible policy response, it should require congressional consent. In contrast, if states solved the problem through reciprocal recognition—such that each participating state recognizes the nursing licenses issued by another state—no risk of cartelization, externalities, or delegation arises. And while mutual recognition affects interstate commerce, it solves the coordination problem through private arbitrage rather than political harmonization—thereby liberating, not burdening, interstate commerce. In short, reciprocity or mutual recognition arrangements pose none of the identified risks, and may, therefore, be exempted from the Compact Clause negative.[320]

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317. Bode v. Barrett, 344 U.S. 583 (1953); Massachusetts v. Missouri, 308 U.S. 1 (1939); St. Louis & San Francisco Ry. v. James, 161 U.S. 545 (1896).

318. A possible exception to this general proposition—and a difficult problem—is posed by reciprocity agreements that are by their terms limited to selected states. Such agreements might provide at least a piecemeal solution to state parochialism and interstate coordination problems, and a categorical, all-or-nothing non-discrimination rule might deter such advances. Still, the discriminatory and exploitative potential of selective agreements to my mind precludes an exemption from the congressional approval requirement.

As noted *supra* note 103, the Supreme Court confronted the problem of selective reciprocity in *Northeast Bancorp Inc. v. Bd. of Governors of Federal Reserve Sys.*, 472 U.S. 159 (1985). The most plausible defense of the state statutes there at issue—though not the Supreme Court's defense—is that the Douglas Amendment, as interpreted by the Federal Reserve Board, constituted an implicit congressional approval of selective state reciprocity agreements. If that understanding of the Douglas Amendment is untenable, *Northeast Bancorp* was wrongly decided as to the Compact Clause claim.

319. *See* Alex Maurizi, *Occupational Licensing and the Public Interest*, 82 J. POL. ECON. 399, 413 (1974) (see especially sources cited therein).

320. I have found one explicit judicial articulation of this rationale: *General Expressways, Inc. v. Iowa Reciprocity Bd.*, 163 N.W.2d 413, 420 (Iowa 1968) ("[T]his being a purely fiscal interstate agreement *which was intended to encourage rather than*

The fact that such disparate arrangements as boundary demarcations and reciprocity agreements should be found under the same, no-approval-required umbrella is explained by a thoroughly Madisonian argument. The dangers of compacts arise from the operation of faction. One-shot boundary demarcations do not implicate factions. Reciprocity agreements expose domestic factions to foreign competition, signaling that such factions have been crushed. The rare instances in which states manage to do so do not warrant the suspicion that attends to institutionalized interest-group bargains.

3. Enumerated Powers

In addition to "exemptions" for boundary demarcations and reciprocity agreements, a functional Compact Clause test can accommodate a "police power exemption" to ameliorate the overbreadth concern that has driven judicial analysis since *Virginia v. Tennessee.* The risk of state bargaining with rights that are held, solely or concurrently, by the national government does not arise in areas where the national government has no rights—that is, beyond the purview of the enumerated powers and the Supremacy Clause. Hence, states need not necessarily obtain congressional approval for compacts that fall outside the scope of federal enumerated powers.[321]

As suggested earlier, an implied "police power exception" to the Compact Clause was quite probably what Justice Field had in mind in penning his *dicta* in *Virginia v. Tennessee.*[322] The point was lost due to Justice Field's lack of clarity, the cooperative enthusiasms of later generations, and the *de facto* renunciation of the enumerated powers doctrine. Arguably, the latter development contributed to the wholesale inversion of the Compact Clause in *U.S. Steel.* Recall Justice Powell's rejoinder to the dissenters' observation that the MTC presented a grave interference with federal supremacy: the dissent, Powell averred, confused federal interests with federal supremacy.[323] At the time of *U.S. Steel,* virtually nothing fell beyond the reach of congressional power (with the lone and soon-repealed exception of government employment

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restrain commerce among the states, it is not the type of interstate contract which requires Congressional consent.") (emphasis added).

321. If the compact violates other constraints (e.g., by exposing sister states to externalities), it will still require approval.

322. *Supra* text at 321. One can find stray suggestions to the same effect in later cases. *See, e.g.,* New York v. O'Neill, 359 U.S. 1, 11 (1959) ("The Constitution of the United States does not preclude resourcefulness of relationships between states on matters *as to which there is no grant of power to Congress.*"). *New York,* however, is an extended exercise in adjudication by free association, and the quoted passage no more constitutes a holding than anything else in the opinion.

323. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 479 n.33 (1978).

conditions in areas of "traditional" state activity).[324] Under these circumstances, the Compact Clause would require congressional consent in literally all cases. Confronted with that conclusion, Justice Powell limited the scope of the Clause in the only way he knew: instead of requiring consent for all compacts that *fall under the umbrella* of federal supremacy (and in that sense, "interest" the federal government), he restricted it to compacts that actually *conflict with* it. For reasons discussed at great length, that conclusion is very wrong.

The Supreme Court's partial rediscovery of the enumerated powers doctrine over the past decade provides an opening for a supremacy exemption that is broadly consistent with the Compact Clause or, at least, does not turn it on its head. Under a functional test (though not, of course, under the original Compact Clause), states would need no congressional consent to form a compact on the prevention of gender-based violence, which we know to be beyond the jurisdiction of the United States Congress.[325] I also assume, although we do not yet know, that states are free to negotiate and enforce an interstate compact on the prosecution of purely in-state and non-economic crimes, such as the possession of drugs.[326] A state agreement regulating isolated wetlands (for instance, to facilitate cross-border swaps for mitigation purposes) may likewise be permissible without congressional approval.[327] The scope of compacts that require no congressional approval expands as the scope of enumerated powers contracts. If the federal government lacks the power to legislate on the interstate enforcement of child support obligations, state compacts to that end require no congressional approval. If Congress does possess that authority (as appellate courts have held), such compacts require approval.[328]

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324. Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

325. United States v. Morrison, 529 U.S. 598 (2000).

326. I assume that a federal provision of this type would fall outside the scope of the Commerce Clause as interpreted in *United States v. Lopez*, 514 U.S. 549 (1995), and *Morrison*, 529 U.S. 598. Lower courts have split on the question. *See* Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts* (unpublished law review manuscript, on file with author) (surveying post-*Morrison* case law).

327. *See* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173-74 (2000) (suggesting, but not holding, that regulation of wetlands isolated from waters of the United States exceeds scope of congressional authority under the Commerce Clause).

328. All appellate courts that have addressed the question have held that the federal Child Support Recovery Act, 18 U.S.C. § 228 (2000), constitutes valid Commerce Clause regulation. *See, e.g.*, United States v. Faasse, 265 F.3d 475 (6th Cir. 2001). *But see id.* at 494 (Batchelder, J., dissenting) (arguing that the statute does not regulate interstate commerce and therefore exceeds congressional authority). It bears mention that the states have adopted—without congressional consent—several compacts on closely related matters such as adoption, child custody, and foster-care placement. *See* VOIT, *supra* note

More controversially, the functional analysis suggests that state compacts that affect federal spending do not, by virtue of that fact alone, require congressional consent. A number of interstate arrangements, such as various education compacts to which many states are parties, regulate and coordinate state functions that are typically performed under federal spending statutes. These compacts are of obvious "interest" to the national government in the sense that they may affect the distribution of federal funds. Federal spending, though, is not an "interest" of the sort that should trigger the congressional consent requirement, because the exercise of the spending power is not an exercise of federal supremacy in the same way in which, say, a regulation of interstate commerce is an assertion of federal supremacy.[329] States must of course comply with the contractual obligations they have agreed to undertake in exchange for federal funding, but they cannot "interfere" with federal spending in the way in which they may—and often do—interfere with federal regulation under an enumerated power. Suppose the states agreed, one and all, to refuse federal funding for sexual abstinence education:[330] While that agreement would obviously frustrate federal objectives, it cannot be said to interfere with national supremacy. The states simply agree to restrict, by mutual agreement, their otherwise unlimited autonomy to accept or reject federal funds. They are bargaining with and over rights that belong to them exclusively, and no congressional approval may be required.[331]

10, at 27-32.

329. A federal Spending Clause statute trumps, supersedes, or preempts nothing. Its force stems entirely from the state's acceptance of the funds; if a state refuses to accept the money, nothing follows. For a forceful scholarly presentation of this view, *see* David Engdahl, *The Spending Clause*, 44 DUKE L.J. 1 (1994). The same perspective is implied by the U.S. Supreme Court's characterization of Spending Clause statutes as being "in the nature of a contract." Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); *see also* Gonzaga Univ. v. Doe, 122 S.Ct. 2268, 2275 (2002) (nothing "short of an unambiguously conferred right support[s] a cause of action" or remedy under 42 U.S.C. § 1983).

330. The federal program, 42 U.S.C. § 710 (2000), is one of the exceedingly rare federal funding programs for which states have refused to accept funding. *See* Lynn Smith, *Chastity Makes a Comeback*, L.A. TIMES, Aug. 10, 1999, at A1 (describing California's refusal to accept funding).

331. The proposition requires important provisos. The argument assumes, first, that Congress lacks the authority to regulate the funded state activities directly, under its enumerated powers. With respect to education, that assumption may be inferred, though with no great confidence, from *United States v. Lopez*, 514 U.S. 549 (1995). It assumes, second, that the state compact in question does not purport to violate or circumvent federal strictures with which the compacting states have agreed to comply as a condition of receiving federal funds. Finally, the argument assumes that the state compact at issue does not threaten other, independent federal interests. *See infra* note 335.

4. Agency and Delegation

Under a functional Compact Clause test, a credible showing that a compact poses a risk of delegating state power and of diluting the political accountability of state officials would trigger the congressional consent requirement. By that standard, state agreements that establish standing interstate commissions and administrative bodies should be subject to a *per se* requirement of congressional approval, at least to the extent that such agencies perform more than merely consultative or information-gathering functions:[332] any such body might wind up exercising delegated state powers, and that risk alone suffices to trigger the Compact Clause negative.[333] The special suspicion of compact commissions is broadly consistent with extant precedent,[334] and it dovetails with the Supreme Court's federalism decisions. In fact some of those decisions very nearly compel the *per se* rule.

In the course of its partial rehabilitation of the enumerated powers doctrine, the Court has also resurrected the principle that the states may not delegate their sovereign (police) powers to the Congress. That injunction is inherent in the notion of limited, enumerated powers.[335] Nothing follows from it, practically

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332. An exception for information-gathering functions finds some support in the Supreme Court's federalism jurisprudence. In *Printz v. United States*, the Court suggested that a constitutional prohibition against the federal "commandeering" of state officials does not extend to federal mandates requiring state data collection and maintenance. 521 U.S. 898, 917-18 (1997). The most plausible rationale for this exception is that data collection is merely a ministerial rather than a true sovereign state function. Analogously, a delegation of such functions to a state compact commission seems less troublesome than a delegation of sovereign, coercive powers.

333. Since state cartels almost invariably require joint administration, see *supra* notes 158-64 and accompanying text, a *per se* rule that subjects such instruments to congressional approval also buys protection against state cartels. That may be a considerable advantage, since the anti-joint-body rule is bound to be subject to fewer judicial errors than an anti-cartel rule.

334. *See* Northeast Bancorp, Inc. v. Bd. of Gov. of Fed. Reserve Sys., 472 U.S. 159, 175 (1985) (joint body "indicia" of compact); Star Scientific, Inc. v. Beales, 278 F.3d 339, 360 (4th Cir.) (administrative body created by MSA establishes compact), *cert. denied sub nom.* Star Sci., Inc. v. Kilgore, 123 S. Ct. 93 (2002).

335. The anti-delegation principle was stated explicitly in several cases decided in (dual) federalism's heyday. *See, e.g.*, Wilkerson v. Rahrer, 140 U.S. 545, 560 (1891) (citing Gunn v. Barry, 82 U.S. (15 Wall.) 610, 623 (1872); United States v. Dewitt, 76 U.S. (9 Wall.) 41, 45 (1869); and Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 304 (1851)). Contemporary cases acknowledge the principle by implication. For example, the endorsement of a federal civil remedy for gender-based violence by a large majority of states does not render such regulation constitutional. United States v. Morrison, 529 U.S. 598, 653 (2000) (Souter, J., dissenting) (noting states' *amicus* support for federal enactment). The majority opinion in *Morrison* does not respond to the dissent's

speaking, if congressional powers are not actually enumerated (or, what amounts to the same thing, enumerated but unlimited). But while that was pretty much the Supreme Court's federalism riff at the time of *U.S. Steel*, subsequent decisions have partially restored federalism's logic.

New York v. United States[336] invalidated a core provision of the 1985 Low-Level Radioactive Waste Policy Amendments Act.[337] Intriguingly, though of no direct consequence to the delegation point here at issue, the act encouraged the formation of state compacts for the disposal and storage of low-level nuclear waste. Through a convoluted statutory scheme, it essentially subjected states that failed, within a certain timeframe, to join a congressionally approved compact to a severe federal regulatory regime, obligating each state to provide for the disposal of waste created within its borders. That approach had been developed and urged upon Congress by the states, acting under the umbrella of the National Governors Association ("NGA").[338] In 1990, New York, one of the few states that had failed to join a regional compact, challenged the statute on Tenth Amendment and other grounds. While sustaining large portions of the statutory scheme, the Supreme Court found that a so-called "Take Title" provision—one of the statutory "incentives" to pressure states into implementing, by compact or on their own, acceptable waste disposal pôlicies—impermissibly "commandeered" the states' legislative processes.

In reaching that conclusion, Justice O'Connor's opinion for the Court confronted the argument, pressed forcefully in a dissent written by Justice White,[339] that New York had consented to the statute, including its contested incentive provisions. In enacting the statute, the dissent argued, Congress had merely "refereed" a process of state bargaining.[340] New York's participation in that process over a period of many years "fairly indicate[d] its approval of the interstate agreement process"[341] embodied in the statute. In the dissenters' view, New York's belated resistance to the incentive provisions constituted an impermissible attempt to welsh on a deal that had gone sour for the state.

The majority rejected this argument on the ground that New York *could not consent* to the federal commandeering of its legislative process, because the Constitution does not grant Congress such a power. Explicitly analogizing the

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observation—most likely, because the states' willingness to surrender their powers is of no constitutional consequence.

336. 505 U.S. 144 (1992).

337. Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified as amended at 42 U.S.C. §§ 202(1)(b)(1)-(14)).

338. For a colorful description of the states' and the NGA's agenda-setting role, see *New York*, 505 U.S. at 189-94 (White, J., dissenting).

339. *Id.* at 188 (White, J., dissenting). The dissent was joined by Justice Blackmun and Justice Stevens, who also dissented separately.

340. *Id.* at 194 (White, J., dissenting).

341. *Id.* at 196 (White, J., dissenting).

"consensual" transfer of state authority to the national government to the principles governing delegation in horizontal, separation of powers cases, the Court determined that "[s]tate officials . . . cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution."[342]

The application of this anti-delegation principle to the delegation of state authority to compact commissions is not altogether straightforward. First, the scope of the *New York* holding itself is unclear, and the broad statement just quoted cannot be quite right. For instance, while Congress lacks the power to abrogate state sovereign immunity under its Article I powers,[343] states may consent to such an abrogation by accepting federal funds, provided that the Spending Clause statute clearly states the congressional intent.[344] (*New York* itself, in a different part of the majority opinion, explicitly declared federal "conditional spending" programs constitutionally unproblematic.)[345] Second, *New York* can be read to suggest that states may delegate their sovereign power to anyone they want (including perhaps compact commissions)—except to the Congress.[346] The constitutional problem may be the augmentation of the powers of Congress, rather than the delegation of state sovereignty *per se*.

New York also suggests, however, that the enumerated powers doctrine and its anti-delegation logic occupy a central place in the larger constitutional architecture. In explaining the point of the anti-commandeering, anti-delegation principle, the *New York* Court articulated an accountability rationale: a "delegation" of state sovereignty to Congress would enable state officials to avoid political accountability for inconvenient decisions by "purport[ing] to submit to the direction of Congress."[347] *New York* rests on the recognition that "[t]he interests of public officials . . . may not coincide with the Constitution's intergovernmental allocation of authority."[348] Constitutional federalism, though, is not "for the benefit of public officials" but for citizens,[349] and citizens cannot avail themselves of federalism's protections if state officials are permitted to diffuse and obfuscate political responsibility in an end run around the constitutional forms.

342. *Id.* at 182.

343. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

344. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

345. *New York*, 505 U.S. at 158-59.

346. *See, e.g.*, *id.* at 182 ("*Where Congress exceeds its authority relative to the States*, . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." (emphasis added)).

347. *Id.* at 183.

348. *Id.*

349. *Id.* at 181.

The Supreme Court has applied and extended the *New York* accountability rationale in several subsequent decisions,[350] and while its reach and contours remain somewhat unclear,[351] an injunction against delegations of state sovereignty to compact commissions seems close to its core. It is true that the Supreme Court's federalism decisions indicate a pronounced respect for state autonomy, which is in large measure grounded in the belief that the states are—in the common phrase—"closer to the people," more accountable to them and more reflective of their diverse preferences, than the distant national government. Neither that respect, however, nor the presumption on which it is based, can possibly extend to state-created compact commissions.[352] It is likewise true that the Supreme Court's federalism reflects a preoccupation with the federal-state "balance," a consideration that may weigh against state delegations to Congress but *for* compact commissions as another line of defense against an overbearing national government. But if the accountability principle means anything at all, it must mean that delegations to extra-constitutional bodies created from whole cloth are far more problematic than a state-induced augmentation of congressional authority. To the extent that the Constitution leaves room for such bodies, their creation requires congressional approval under the Compact Clause.[353]

C. The Functional Compact Clause and the Real Thing

Like the actual Compact Clause, the test just sketched aims to establish an error-minimizing rule that guards against harmful state compacts, without unduly restricting fruitful and beneficial state cooperation. The functional test is more nuanced than the Compact Clause itself. It is more accommodating to "federalism" (in the primitive sense of uninhibited state activity), and it entails

350. *See, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997); Alden v. Maine, 527 U.S. 706, 759-60 (1999).

351. The accountability principle's uncertain reach and application have generated considerable academic criticism. *See, e.g.*, Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 109; Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998); William P. Marshall & Jason S. Cowart, *State Immunity, Political Accountability, and* Alden v. Maine, 75 NOTRE DAME L. REV. 1069 (2000).

352. Note, *Charting No Man's Land*, *supra* note 133, at 1995.

353. For reasons mentioned *supra* note 163, congressional approval would ameliorate the accountability problem. It would not, however, solve the delegation problem. The congressional approval of a state compact commission and its exercise of delegated state powers is on a par with the congressional creation of such a commission and a direct congressional delegation of federal authority. The difficult questions of whether and to what extent such delegations are permissible are beyond the scope of this Article.

lower institutional transaction costs in the formation of compacts. Unlike the judicial enforcement of the Compact Clause, as written, the functional test accommodates the great majority of precedents.

Against these advantages weighs a powerful Madisonian objection. The intended benefits—a reduction of the states' bargaining costs—are likely small: risk-free state agreements are unlikely to prompt any more acrimony or delay than the congressional declaration of National Dairy Goat Appreciation Week.[354] The compacts that are bound to trigger argument and delay are the ones that ought to do so, on account of their consequences for sister states or national concerns. On the other hand, the effort to strike the constitutional balance just so invites an awful lot of confusion, argument, and abuse. A Compact Clause with a police power or reciprocity exemption resembles a requirement that all candidates for president must be thirty-five years of age, except for persons of uncommon maturity: though consistent with the purpose of the Clause, it undermines its operation.[355]

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354. The contention that Congress is "too busy" to deal with thousands of state compacts is belied by experience. Thousands of military promotions each year are technically new "appointments" requiring congressional approval, and Congress has managed that workload. As for compacts, Congress may approve entire *classes* of state compacts *ex ante*, and has on occasion done so. For example, an Act of June 6, 1934, ch. 406, 48 Stat. 909 (codified at 4 U.S.C. § 112(a) (2000)) provides *ex ante* congressional consent to state "agreements or compacts for cooperative effort and mutual assistance in the prevention of crime." Numerous state compacts enacted pursuant to that authorization are listed in VOIT, *supra* note 10, at 45-58. Such advance-approval statutes are not entirely unproblematic. A congressional enactment providing for *ex ante* approval of any and all state compacts would put the Compact Clause itself out of operation and, for that reason, pose constitutional obstacles. Certainly, though, the *ex post* approval of an entire batch or slate of state compacts poses no such obstacles, and even a wholesale advance approval seems justifiable so long as Congress specifies the permissible subject-matter, purposes, and perhaps the duration.

355. For example, suppose that Texas were to grant Oklahoma students preferred access to its public universities, provided that Oklahoma extend comparable treatment to an equal number of Texans. Such an endeavor to enhance citizen choice and government efficiency (by expanding the applicant pool for educational fields with insufficient in-state demand) falls squarely within the states' domain. Suppose, though, that one state is covered by a direct judicial prohibition against non-remedial racial preferences (*see* Hopwood v. Texas, 78 F.3d 932, 962 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996)), whereas the other may and does continue to extend such benefits: it is at least possible that the covered state is enlisting the help of its luckier sister state to do indirectly what it may no longer do directly—that is, to grant affirmative preferences to minority students. Well short of a direct violation of the Fourteenth Amendment, that would implicate the authority of Congress to enforce the provisions of the Amendment.

The hypothetical is not entirely—well, hypothetical. A Southern Regional Education Compact in 1948 failed to obtain congressional approval because civil rights leaders, including Thurgood Marshall, feared that the compact was a ruse to escape

Too, a functional Compact Clause test invites the courts to police the boundaries and, relative to the actual Compact Clause, both expands and complicates the judicial function. Because a state compact designed to circumvent the congressional consent requirement will not declare that purpose but rather disguise it, the judicial inquiry will turn into a fact-intensive and error-prone examination. That does not sound like a good idea. The courts have made hash even of the actual Compact Clause; who knows what they might do with a four-prong test.

The potential for state evasion, coupled with the difficulty of policing such evasion through the judiciary, explains why the Compact Clause does not contain a police power exception or any other qualification but rather applies to "*any* agreement or compact"—to "any cases whatsoever," as Madison put it. The man's logic is at some level implacable. The most urgent task at hand, though, is to recapture the core purpose of the Compact Clause, and the functional test may do the job precisely because it does *not* restore the Clause to its original sweep and glory. Since the courts have mucked up the Compact Clause, the practical task is to figure out a doctrine that comports, so far as possible, with modern precedents and prejudices without compromising core constitutional purposes. That more limited doctrine might help to direct the states' search for cooperative gains into areas where the national government's competence is most limited, and it may alleviate the fears over unwarranted federal interference that have contributed to the judiciary's Compact Clause inversion. The courts just might get the functional doctrine right. In the process, they might even take a meaningful step towards the reassertion of a serious constitutional federalism. That cheerful prospect is examined below, immediately following the tying-up of a loose end.

D. A Note on Congressional Consent

If state agreements require no congressional consent, the timing and form of consent are unlikely to become live issues. For that obvious reason, *Virginia v. Tennessee* was the last case to address those questions directly.[356] A re-invigoration of the Compact Clause would raise the question anew. The Clause itself supplies no answer, and the presumptions with which one might want to approach the question cut both ways. The logic of the Compact Clause dictates that consent must ordinarily precede a compact; antecedent approval of state

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federal anti-discrimination requirements. BARTON, *supra* note 153, at 132-33. Marshall argued that the Compact did not require congressional approval: *unless* it were understood as a vehicle to perpetuate segregation, it did not involve national prerogatives. *Id.*

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

arrangements, as distinct from *ex post* preemption, is the point of the Clause.[357] Then again, the unequivocal commitment of all agreements and compacts to the Congress implies a case for some congressional license and corresponding judicial deference concerning the form and the timing of consent. Recognizing as much, the Supreme Court has held that congressional consent may be given after the fact and, moreover, may be implied, both for *ex ante* and *ex post* approval.[358] The most plausible and precedent-friendly way of reconciling the conflicting considerations is to require a clear statement of congressional intent at some point in the life of a compact or else, overwhelming evidence of congressional acquiescence.

The first, "clear statement" leg has a clear analogy: a clear statement is required for congressional validations of state activities that otherwise violate the negative Commerce Clause.[359] In that application, the clear statement rule reflects federalism's horizontal dimension: in applying the negative Commerce Clause, the Court acts as a line of defense against interstate exploitation. If Congress wishes to overrun that line, it must clearly say so. A clear statement rule for compact approval has the same structure and consequence, and it is particularly appropriate in that context. To the extent that the clear statement rule may seem suspect in the negative Commerce Clause setting, that is because the negative Commerce Clause itself is suspect. No such objection arises under the Compact Clause. The state enactments at issue are themselves suspect under the Constitution; they are not *made* suspect by a judicial construct.[360]

As noted, the Supreme Court has in the past inferred congressional approval even without a clear statement. These ancient rulings—issued without exception in cases involving state boundary compacts, where the courts viewed finality as

357. Madison clearly intended the negative to operate *ex ante*, and in adopting the negative in a limited range of application, the Convention understood and accepted that interpretation. *Supra* notes 110-12, 120-21 and sources cited.

358. For implied approval *ex ante*, see, e.g., *Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175-76 (1985) (possibly dictum). For implied approval after the fact, see *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893); *Virginia v. West Virginia*, 78 U.S. 39, 60 (1878); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 85-87 (1823).

359. New York v. United States, 505 U.S. 144, 171 (1992) (citing Wyoming v. Oklahoma, 502 U.S. 437, 458 (1992); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 427-31 (1946)).

360. Similarly, in its application in the ordinary statutory context, the clear statement rule has been criticized as a form of surreptitious judicial nullification: it imposes such inordinate legislative transaction costs that congressional bargains—also known as legislation—often become impossible. *See, e.g.*, William Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 409-14 (1991). That objection, too, is inapplicable in the Compact Clause setting, where affirmative legislation *ought* to be difficult and expensive. *See also* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 960 (1982) (stating the test and citing the cases).

supremely important[361]—do not readily yield a doctrine that fits the contemporary constitutional universe and compacts of a very different nature. The reach of the implied consent exception is hard to discern, because no case presents an instance of congressional acquiescence that *failed* to constitute implied congressional consent. The facts of the cases, though, suggest a standard comparable to the contemporary judicial approach to congressional acquiescence to administrative interpretations of federal statutes: where such interpretations implicate constitutional questions concerning the outer limits of congressional authority, the Supreme Court will infer acquiescence only "with extreme care" and in the face of "overwhelming evidence."[362]

Consistent with this standard, implied consent cases under the Compact Clause uniformly presuppose that prior (and explicit) approval is the constitutional baseline; otherwise, consent by implication would require no judicial explanation and justification at all. The exception for congressional approval after the fact covers (in dicta) emergencies[363] and (in holdings) instances in which the nature of the agreement does not permit of prior approval.[364] Uniformly, moreover, the judicial inference has been based on congressional actions that *necessarily* imply consent to a state agreement, such as the admission of a new state whose boundaries were earlier agreed upon by

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361. The cases consistently emphasize the importance of clear and settled boundaries—recognized as vital under the law of nations—as a reason for recognizing congressional consent *ex post* and by implication. *See, e.g.*, Virginia v. Tennessee, 148 U.S. 503, 522-23 (1893); U.S. v. Stone, 65 U.S. 525, 537 (1864); Rhode Island v. Massachusetts, 37 U.S. 657, 734 (1838); Boyd's Lessee v. Graves, 17 U.S. 513, 517-18 (1819).

362. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 169 n.5 (2001). The approach is predicated on constitutional problems; barring such problems, administrative interpretations of ambiguous statutory language are generally entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1987). For reasons that are not altogether evident, the *Solid Waste* Court applied both the "overwhelming evidence" and the "clear statement" rule. *Solid Waste*, 531 U.S. at 172-74.

363. *See supra* notes 139-42 and accompanying text.

364. *Virginia v. Tennessee*, 148 U.S. at 521 ("[W]here the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given.").

compact;[365] or on ample evidence showing that Congress affirmatively relied on a particular state agreement for a period spanning over a century.[366]

A rule requiring either a clear statement or else overwhelming evidence of congressional consent would save neither the Multistate Tax Compact nor the Master Settlement Agreement: Congress has never explicitly consented to those arrangements, and the evidence of implied consent is decidedly underwhelming.[367] Such a result would certainly distress states and private interests that have come to rely on those arrangements. They should direct their complaints and concerns to the forum that the Constitution provides—the United States Congress.

VIII. COMPACTS AND THE CONSTITUTION

Why does the Compact Clause matter? Why should its judicial evisceration concern us? One obvious and perfectly plausible answer is that we ought to care about representative government. It is not a good thing to be governed by obscure commissions somewhere between the states and the nation. Taxes should be levied by the legislative bodies that are authorized to do so. A decision to turn a major industry into a public utility and to exact the monopoly rents from consumers should be discussed and voted upon in an open, responsible fashion by the bodies that are authorized to make such decisions.

The emasculation of the Compact Clause could wreak yet more serious havoc. The Multistate Tax Compact may encourage states to extend tax cartels

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365. Virginia v. West Virginia, 78 U.S. 39, 60 (1878); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 87 (1823); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1405 (Carolina Academic Press 1987) (1833) stating:

> [T]he consent of congress . . . is always to be implied, when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them. Thus, where a State is admitted into the Union, notoriously upon a compact between it and the State of which it previously composed a part; there the act of Congress, admitting such State into the Union, is an implied consent to the terms of the compact.

366. *Virginia v. Tennessee*, 148 U.S. at 522-24.

367. Congress has occasionally acknowledged the MTC's existence and, for reasons of administrative convenience, relied on its standard-setting functions. *See, e.g.*, Mobile Telecomm. Sourcing Act, Pub. L. No. 106-252, 114 Stat. 626 (2000) (codified at 4 U.S.C. §§ 116-26 (2000)). Such acts of convenience hardly amount to a clear statement of congressional approval, let alone overwhelming evidence of congressional acquiescence. Similarly, the federal government's decision to surrender its claims on the states' Medicaid recoupment under the MSA constitutes only a (revocable) permission to use the funds in a particular fashion, not an acceptance of the MSA *per se*. *See* Pub. L. No. 106-31, 113 Stat. 57 (1999) (amending § 1903(d)(3) of the Social Security Act, 42 U.S.C. § 1396b(d)(3) (2000)). The recitation of congressional purposes in the statute contains no suggestion of such an acceptance.

to new forms of interstate commerce, such as Internet sales. The permissive doctrines developed under the domestic Compact Clause may spill over into foreign affairs.[368] The tobacco cartel may serve as a precedent for similar campaigns against other disfavored industries.[369] Harbingers of these developments are already upon us: insistent state demands for a compact-based "Streamlined Sales Tax Project" that would enable states to impose sales tax obligations on remote (Internet or catalogue) sellers in foreign states;[370] state efforts to pursue a foreign policy of their own, at variance with the foreign policy of the *United* States;[371] state attorneys general trolling for tobacco-style lawsuits.[372] The MSA has come to serve as a template for coordinated litigation campaigns not only against deadly and disreputable industries (such as gun manufacturers) but also, and with greater, against the manufacturers of pharmaceutical products (which have been known to *save* lives) and against once-reputable investment banks.[373]

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368. Swaine, *Negotiating Federalism*, *supra* note 37, at 1223 (articulating that fear).

369. The prediction is a staple in the literature. *See, e.g.*, Dagan & White, *Injurious Industries*, *supra* note 225, at 355; Ayres, *Tort Settlements*, *supra* note 265, at 607-08; MICHAEL I. KRAUSS, FIRE AND SMOKE: GOVERNMENT, LAWSUITS AND THE RULE OF LAW (2000).

370. *See, e.g.*, Jonathan Fried, *No Hype: Four Web Tools That Work and Save Money; of Marshmallows and Tax Agita*, N.Y. TIMES, June 13, 2001, at H-3; Christopher Swope, *States Approve Sales-Tax Pact*, GOVERNING MAGAZINE 44 (Jan. 2003).

371. *See, e.g.*, Swaine, *Negotiating Federalism*, *supra* note 37, at 1130-32; EARL H. FRY, THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS (1998).

372. *See, e.g.*, http://www.overlawyered.com/archives/99oct2.html#991026a (describing state attorney general proposal to sue lead paint and pigment makers in partnership with trial lawyers and to "go after" latex rubber industry for alleged health problems possibly caused by latex allergies) (last visited Apr. 15, 2003).

373. *See, e.g.*, Bryce A. Jensen, Note, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334 (2001); for a brief description of state attorney general-led campaigns against pharmaceutical firms and investment banks, see Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L & POL. 93, 100-04 & nn.41-61 (2002). I have argued in a more journalistic forum and vein that the exposure of industries to state litigation campaigns is determined primarily not by product characteristics and industry conduct but rather by industry structure. Highly concentrated industries with high entry barriers can be locked into regulatory cartels and, therefore, constitute particularly likely targets. Michael S. Greve, *States' Rights on Steroids*, AEI FEDERALIST OUTLOOK No. 14 (Sept. 1, 2002), *available at* http://www.aei.org/publications/pubID.14296/pub.detail.asp. (last visited April 4, 2003). That prediction is consistent with the analysis of the tobacco settlement provided by Ayres, *supra* note 265.

Modern economic realities lend special force to these temptations. The greatly increased mobility of capital, labor, and business enterprises puts the states' budgets and their ability to control their own affairs under enormous pressure. Increasingly, states will respond to that pressure through cartel arrangements that trump state competition. At the same time, the national government has proven increasingly unwilling to regulate—or incapable of regulating—large sectors of the economy. The political demand for regulation has consequently migrated to the state level and generated support for aggressive and creative state litigation to regulate problems, from antitrust to tobacco marketing to pharmaceutical pricing, that were once thought to be the province of the national government. The Compact Clause cannot stem this tide. Like most constitutional barriers, it will bend to overwhelming social demands. If a state-supported trial lawyer campaign against the fast food industry were to garner the support of the *New York Times*, the U.S. Surgeon General, and the trial bar's congressional patrons,[374] the Compact Clause would not save us. One must hope that the MSA precedent will encounter cultural and political obstacles before it plays itself out to its absurd extreme.

Among those obstacles, though, is a sense of the general constitutional order. (Or so one would hope.) Certainly, the MSA should generate unease: when a handful of state attorneys general and tobacco lawyers meet behind closed doors to impose a national sales tax, it ought to be obvious that something has gone quite wrong—and that the mistake cannot be a mere technicality. The agreement signals a *constitutional* crisis, and the fact that it has come to serve as a model confirms that assessment. A Compact Clause revival, all by itself, cannot restore constitutional order. It can, however, play an important and perhaps irreplaceable role in that endeavor.

While a competent appellate lawyer could easily distinguish the MSA from the MTC and argue that the tobacco agreement is unconstitutional even under *U.S. Steel*,[375] that lamentable precedent does not merit the exertion. It is a pristine exhibit of free-form adjudication,[376] marked by total indifference to the constitutional text and architecture; tendentious readings of the precedents; and a resort to functional arguments that collapse upon inspection. A judiciary that

374. *See, e.g.*, Shelly Branch, *Obese America: Is Fast Food the Next Tobacco*? WALL ST. J., June 13, 2002, at B-1 (describing lawsuits against fast food companies and efforts by Tobacco Products Liability Project to develop litigation strategies for obesity-related claims).

375. That brief would rely on the *U.S. Steel* Court's insistence that the Compact Clause is one of potential interference with federal interest and downplay—as fact-bound and case-specific—the analysis the Court actually applied in that case. *See supra* notes 95-100 and accompanying text.

376. The felicitous term is Professor Tribe's. *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

is committed to constitutionalism could do worse than to discard this particular bauble. Less obviously and immediately, the clean-up effort would render the Supreme Court's federalism more plausible and sustainable.

The restoration of judicially enforceable federalism norms has by all accounts been the Rehnquist Court's central project. That jurisprudence, though, has reached the theoretical and political limits. A bolder re-interpretation of the Commerce Clause, for example, would quickly bump up against *Wickard v. Filburn*[377] and threaten a confrontation with the regulatory state. Barring that extravagant undertaking, the Court can go only as far as it has already gone—which is to say, not very far.[378] Even the already-trod ground, moreover, is strewn with paradoxes and unintended consequences.[379]

While this facet of the Rehnquist Court's federalism has generated extensive comment and controversy, a second and arguably more serious problem has virtually escaped scholarly notice: in its preoccupation with the protection of "states as states" against federal intrusion, the Rehnquist Court has ignored—and at times denigrated—horizontal federalism doctrines that protect states against aggression by sister states.[380]

Stephen Gardbaum has traced horizontal federalism's demise to the New Deal's revolution and its continued dormancy, to a misunderstanding of that revolution.[381] Contrary to the prevailing interpretation (Left and Right), the New Deal did not simply unleash the national government on the states; it also

377. 317 U.S. 111 (1942).

378. *See* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000). The Rehnquist Court's Commerce Clause decisions effectively give a clean bill of health to all "economic" regulation. With the exception of symbolic federal statutes and, perhaps, federal criminal laws governing non-economic conduct, virtually all federal legislation passes Commerce Clause muster under that test.

379. The difficulty has generated a respectable body of law review comment. *See, e.g.*, Pamela Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311 (2001) (Supreme Court's Eleventh Amendment jurisprudence may prompt more rather than less judicial intrusion into state affairs); Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325 (2001).

380. For a lengthier analysis of the wholesale indifference to horizontal state aggression as a central problem of the Rehnquist Court's federalism, see Greve, *supra* note 373, at 93. By way of suggesting the dimension of the problem, it is difficult to think of a single decision by the Rehnquist Court that even mentions sister-state aggression as a constitutional concern. On one of the rare occasions when the Court dimly perceived that concern, it parked it under, of all provisions, the Due Process Clause. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568-77 (1996) (extraterritorial effect of state court award of punitive damages may pose constitutional problems). *See id.* at 598-607 (Scalia, J., dissenting) (deriding majority opinion).

381. Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997).

unleashed the states against each other. Among the central doctrinal innovations, Gardbaum lists the demise of the dormant Commerce Clause as a subject-matter limitation on state legislation; the contraction of diversity jurisdiction and, correspondingly, the enormous expansion of the extraterritorial reach of state court authority in the wake of *Erie*[382] and *Klaxon*;[383] and the weakening of federal preemption doctrines. Gardbaum's central insight is that the vertical distribution of power between the national government and the states does not exhaust the range of federalism's dilemmas. Given the right—or rather the wrong—constitutional doctrines, it is possible to suffer from federal overreach *and* pervasive state aggression.

The Rehnquist Court has addressed the former problem—in a fashion—and ignored the latter. One reason, certainly, is that the defense of "states' rights" against federal overreach looks unambiguously "federalist," whereas the defense of states against sister state aggression and exploitation—a necessary part of any coherent federal order—might sometimes seem to compromise states' rights. (That is so particularly when one confuses states' rights and federalism with "whatever the states may want to do"—such as forming compacts to exploit sister states.) But the judicial recognition of state aggression as a constitutional problem—a *federalism* problem—has also been impeded by the lack of a plausible starting point to address the problem. Gardbaum's list of the New Deal Court's state-unshackling doctrines suggests a revision of the negative Commerce Clause; a revision of diversity jurisdiction and a re-imposition of constitutional limits on state courts' choice-of-law rules;[384] and a need for preemption doctrines that re-establish a constitutional equilibrium between national and state authority. To that list, one could add comparably ambitious projects, such as a revamped Spending Clause jurisprudence.[385] A judicial reform effort in any of these venues is daunting. Each would affect an enormous range of state activities. Each would likely produce paradoxes and undesired consequences in another arena.[386]

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382. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

383. Klaxon Co. v. Stentor Elec. Mfr. Co., 313 U.S. 487 (1941).

384. For a powerful critique of constitutionally unconstrained state choice of law, see Laycock, *supra* note 277, at 249.

385. *See supra* note 301 and accompanying text.

386. By way of example, it is superficially attractive to argue for an "originalist" federal preemption doctrine that would eviscerate much of what we now call "implied" preemption. *See, e.g.*, Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000). The force of that argument, however, is undermined by the demise of practically all constitutional doctrines that once upon a time limited state aggression. In a post-*Erie*, post-*Klaxon* universe, expansive and seemingly "nationalist" preemption doctrines may be the last line of defense against state aggression, and their demise would spell a state-to-state state of nature that is the very opposite of the Founders' federalism.

It is much easier to reassert constitutional principles under the Compact Clause. As I hope to have shown, the Clause is an integral part of the constitutional logic and architecture. The intellectual confusions that turned the Clause on its head—a wholesale disregard of federalism's horizontal dimension; cooperative enthusiasms that mask state exploitation; the tendency to conflate the states' opportunistic agenda with federalism—are the same confusions that afflict our federalism. In short, Compact Clause analysis reflects the general constitutional pathology—*in a circumscribed universe.* Because doctrines developed in this corner can be compartmentalized, it is easier to get them right.

To that advantage, one can add others. Horizontal federalism's principal domains are cluttered with messy precedents; Compact Clause jurisprudence consists of a single shoddy opinion accompanying an incontrovertibly wrong decision. One can have a long and difficult discussion over the appropriate constitutional standards under the dormant Commerce Clause; one can even have an involved debate as to whether the beast exists in the first place. The Compact Clause, in contrast, is right there in the Constitution, and while it may not mean exactly what it says, it has been held to mean the opposite of what it says. Respectfully, that cannot be right.

A Supreme Court decision to put the Multistate Tax Commission or, more likely, the Master Settlement Agreement out of its misery would strike at something real without, at the same time, exposing the Court to a serious political backlash. Unlike a far-reaching ruling under, say, the Commerce Clause, a Compact Clause revival would not only be limited in scope; it would not even be a final word. Unlike federalism decisions that invite criticism on account of the Court's willingness to second-guess the Congress,[387] a constitutionalist ruling on the Compact Clause would send the opposite, deferential signal. Instead of choking off political deliberation, it would generate a public and congressional debate that we should have had before those monstrosities went into operation.

The dispersion of constitutional federalism doctrines would remain controllable. Even if litigants have the imagination to connect the dots between a judicial re-discovery of the Compact Clause and the larger constitutional universe, judges and Justices may disavow or deny that connection. If they wish to press it, they may do so at their own chosen speed, and under suitable conditions. The Compact Clause presents, in stark relief, the need for a more coherent federalism—and a splendid starting point for that journey.

387. For thoughtful criticisms of this aspect of the Supreme Court's federalism, see Michael McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997); Evan H. Caminker, *Appropriate Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127 (2001).