



## NOTE

**Stranger in the Land of Federalism:  
A Defense of the Compact Clause**

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**Abstract.** The Compact Clause of Article I, Section 10 of the U.S. Constitution has garnered little attention during its two centuries of existence. Designed to regulate cooperation among the states, the Clause requires that all interstate compacts be approved by Congress. Under current doctrine, this safeguard is consigned to near obsolescence. Hundreds of compacts of all shapes and sizes have been formed over the last century with limited accountability. Amid stagnation in Congress, compacts represent an increasingly appealing means of policymaking innovation outside of Washington. Yet such circumvention of the Compact Clause is not without risk.

This Note returns to the era before the Constitutional Convention when limitations on interstate compacts were first developed. It argues that the Compact Clause holds special significance in an age of politically polarized federalism and proposes a new theoretical approach for restoring the Clause's operation: "negative field preemption." Bringing the Clause back to relevance would both encourage the formation of beneficial compacts and prevent potentially dangerous compacts from being enacted without oversight.

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## Introduction

It might surprise attentive high school students nationwide that the venerable *Schoolhouse Rock!* narrative for a bill becoming a law<sup>1</sup>—bicameral legislative passage followed by executive presentment—has a lesser-known understudy, one that looks like a state law, acts like a federal law, and yet is neither. This substitute is the interstate compact.<sup>2</sup> An oddly amalgamated creature, the interstate compact roams uniquely through our constitutional system. It represents a vestige of the sovereign treaty-making powers abandoned by the thirteen colonies in their formation of the Union—providing states with the unique capability to act in concert without federal involvement. Compacts were originally governed by Article I, Section 10 of the U.S. Constitution, which provides: “No state shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . .”<sup>3</sup> However, the U.S. Supreme Court’s 1978 decision in *United States Steel Corp. v. Multistate Tax Commission* eviscerated the Compact Clause’s influence in constitutional law—perhaps without fully meaning to.<sup>4</sup> Today, compacts often take effect without any oversight from Congress.<sup>5</sup>

This should concern us because compacts are everywhere. If you are a Californian pulled over for speeding in Oregon, your California driver’s license

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1. See *Schoolhouse Rock! I’m Just a Bill* (ABC television broadcast Mar. 27, 1976).
  2. Interstate compacts are intrinsically mixed constructs. See MICHAEL L. BUENGER ET AL., *THE EVOLVING LAW AND USE OF INTERSTATE COMPACTS* 14 (2d ed. 2016). This frustrates any good-natured attempt to apply the so-called “Duck Test.” See, e.g., *Lake v. Neal*, 585 F.3d 1059, 1059 (7th Cir. 2009) (“The *Duck Test* holds that if it walks like a duck, swims like a duck, and quacks like a duck, it’s a duck.”).
  3. U.S. CONST. art. I, § 10, cl. 3. By offering an opportunity for approval via congressional assent, the Compact Clause stands in contrast to the otherwise similar State Treaty Clause, which firmly directs that “[n]o State shall enter into any Treaty, Alliance, or Confederation.” *Id.* art. I, § 10, cl. 1.
  4. See 434 U.S. 452, 459-60, 471-80 (1978) (restricting the Compact Clause to regulate only those compacts that expressly conflict with federal powers). This decision renders the Compact Clause superfluous—violating the tenet that “[i]t cannot be presumed that any clause in the constitution is intended to be without effect,” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)—as any compact directly conflicting with federal power would be invalid regardless due to the Supremacy Clause, see U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).
  5. See David E. Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 69-71 (1965) (highlighting the growing number of compacts proceeding without congressional approval). However, courts may finally be recognizing this danger; in 2015, a compact was found for the first time in recent history to violate the Compact Clause for lack of congressional consent. See *Sauer v. Nixon*, No. 14AC-CC00477, 2015 WL 4474833, at \*1 (Mo. Cir. Ct. Cole Cty. Feb. 24, 2015), *appeal dismissed as moot*, 474 S.W.3d 624, 626 (Mo. Ct. App. 2015).

may have points deducted thanks to the Driver License Compact between forty-five states.<sup>6</sup> If you have ever flown to New York City, or taken a subway ride in Washington, D.C., you have experienced an interstate compact in action—those transit systems are both products of innovative compacts between neighboring states.<sup>7</sup> Indeed, countless little-noticed compacts are the sine qua non backbone of interstate initiatives integral to our daily lives.

Compacts are increasingly important in an age of polarization, as they form between the lines of state and federal power—a space Rhett Larson has aptly dubbed “interstitial federalism.”<sup>8</sup> Federal government action, or inaction, now routinely encounters state-based resistance, often in the form of a proposed compact, which can lack meaningful oversight without enforcement of the congressional approval requirement. For instance, Democratic governors have sought to forge compacts mitigating President Trump’s withdrawal from the Paris Accords and the lack of congressional action on gun safety in the wake of the Parkland massacre.<sup>9</sup> Republicans did the same under President Obama, when they sought to enforce stronger federal immigration laws locally.<sup>10</sup> Meanwhile, forty-six states have established their own independent system to administer a multibillion-dollar annual revenue stream from a settlement with tobacco companies despite Congress’s failure to endorse such a solution, producing a nationwide increase in cigarette prices.<sup>11</sup>

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6. See Nat’l Ctr. for Interstate Compacts, *Driver License Compact*, <https://perma.cc/V49X-5BWD> (archived Apr. 18, 2019); see also NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., *THE DRIVER LICENSE COMPACT (GUIDELINES FOR MOTOR VEHICLE ADMINISTRATORS): ADMINISTRATIVE PROCEDURES MANUAL 1994*, at 1 (1994), <https://perma.cc/UTU6-J4V4> (reproducing the text of the Driver License Compact).
  7. See BUENGER ET AL., *supra* note 2, at 15 (describing the creation of the Washington Metropolitan Area Transit Authority by interstate compact); MARIAN E. RIDGEWAY, *INTERSTATE COMPACTS: A QUESTION OF FEDERALISM* 17 (1971) (same for the Port of New York Authority); see also *infra* text accompanying note 45. For the text of the Washington Metropolitan Area Transit Authority Compact, see Act of Feb. 4, 1966, ch. 2, 1966 Va. Acts 5 (codified as amended at VA. CODE ANN § 33.2-3100 (2019)).
  8. See Rhett B. Larson, *Interstitial Federalism*, 62 UCLA L. REV. 908, 912 (2015) (proposing compacts as the means for creating a “level of governance between federal and state jurisdiction”).
  9. See Edward-Isaac Dovere, *Murphy: “We Gotta Die Trying” on Gun Control*, POLITICO MAG.: OFF MESSAGE (Feb. 20, 2018), <https://perma.cc/PNX5-743M> (describing New Jersey Governor Phil Murphy’s proposal of a “state-level gun law compact of like-minded governors, modeled on the state climate alliance that formed after President Donald Trump withdrew from the Paris agreement”).
  10. See Terrence Stutz, *Senate Votes to Enforce Federal Immigration Laws with Interstate Compact*, DALL. NEWS (May 2015), <https://perma.cc/A6DP-7AB4>.
  11. See Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 346-54 (2003); see also NAT’L ASS’N OF ATTORNEYS GEN., *MASTER SETTLEMENT AGREEMENT* (2014), <https://perma.cc/25AS-ZYM7>; Tobacco Control Legal Consortium, *The Master Settlement Agreement: An Overview* (2015), <https://perma.cc/VU3U-WLTH>.

Yet compacts themselves are insufficiently studied and understood. Recent federalism scholarship has suggested that they are useful instruments,<sup>12</sup> but does not fully engage with their history and limitations, while the sparse record of recent compact scholarship is still siloed in an antiquated view of federalism with an incomplete relationship to on-the-ground realities.<sup>13</sup> Worse, states considering compact formation struggle to understand what they are permitted to do.<sup>14</sup> As one scholar has concluded, “the imperfect state of compact law has not been widely lamented; in fact it even has not been generally recognized.”<sup>15</sup>

Three factors contribute to this lack of attention. First, the national significance of compacts is relatively new. The compact form has grown more sophisticated with extraordinary speed in the past century—in part thanks to Felix Frankfurter, who first commended compacts to scholarly attention in 1925<sup>16</sup>—shifting from a method for resolving mostly local disputes into a substitute for national action.<sup>17</sup> Second, this growing complexity of form, combined with a lax doctrine, has recently mixed with growing political polarization to make compacts that serve as true alternatives to congressional action an appealing proposition. We can expect an increasing number of them

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12. See, e.g., Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 1025-30 (2016) (identifying compacts as a promising tool for interstate cooperation); Larson, *supra* note 8, at 918, 926-31 (calling for congressionally sanctioned compacts to address spillover commons inefficiencies in the management of public waterways and other such zones).

13. For example, Michael Greve, one of the leading scholars on compacts in recent decades, bases his approach on a decades-old view of federalism as a structure consisting of truly separate state and federal sovereigns. See Greve, *supra* note 11, at 290-92. That perspective is at odds with the more amalgamated view held by modern federalism scholars, who believe that “[n]either the federal government nor the states preside over their own empire.” See, e.g., Heather K. Gerken, Essay, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1722 (2017).

14. In early 2018, for example, Connecticut legislators considering the National Popular Vote Interstate Compact (NPVIC) were bewildered by the conflicting dictates of the Compact Clause and the Supreme Court, with one state representative ultimately concluding, “I guess we’ve got to keep the lawyers employed.” See Proceedings of the Connecticut House of Representatives (Apr. 26, 2018) (statement of Rep. Cheeseman), <https://perma.cc/Q5Y2-X377>; see also *infra* notes 87-93 and accompanying text.

15. David E. Engdahl, *Interstate Urban Areas and Interstate “Agreements” and “Compacts”: Unclear Possibilities*, 58 GEO. L.J. 799, 803 (1970). Indeed, compacts are so understudied that they are not included in *The Bluebook* or the *ALWD Guide to Legal Citation*—scholars have failed to develop even a standardized manner for referencing them. See BUENGER ET AL., *supra* note 2, at xxix.

16. See Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925); see also Greve, *supra* note 11, at 291 (describing the impact of Frankfurter and Landis’s contribution as “furnish[ing] the intellectual apparatus” for a new age of compacts).

17. See *infra* Part I.B.

to be created for this purpose.<sup>18</sup> Finally, while a few modern scholars have argued ably in favor of, and in opposition to, the Compact Clause's enforcement, and have proposed rationales for how and why it took its written form,<sup>19</sup> most observers have taken their cue from Justice Story, who effectively threw up his hands, declaring that "the whole matter [of the Compact Clause is] open to the most latitudinarian construction."<sup>20</sup> Thus, there has been little attention paid to whether part of the Founders' rationale for including the Clause may still hold relevance across either the vertical or horizontal axes of modern federalism.

In response, this Note proposes a twenty-first-century architecture for compact governance, uniting doctrines of modern federalism with Compact Clause jurisprudence. This new framework, which I term "negative field preemption," aims to revitalize the Compact Clause and to allow useful compacts to grow uninhibited, while preventing harmful compacts from evading congressional oversight. Part I introduces compacts and the judicial history of the Compact Clause, surveying proposed compacts that threaten to supplant Congress's role as policymaker. Part II evaluates why we should be concerned by such compacts in both the horizontal and vertical dimensions of federalism. This entails harnessing the latest scholarship on horizontal federalism, applying it at length to the Compact Clause, and then returning to the Constitutional Convention to analyze why first the Articles of Confederation and then the Constitution restricted intra-union agreements, and, more importantly, why those reasons should still matter today. It concludes that the Union can best be safeguarded by preserving the Founders' vision, not simply because it is their vision in an ipse dixit sense, but because they foresaw dangers for which they wisely prescribed the Compact Clause as a cure. Part III surveys previous proposals for reform and propounds the novel concept of negative field preemption as a method for returning the Compact Clause to responsible functionality.

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18. See Ann O'M. Bowman & Neal D. Woods, *Strength in Numbers: Why States Join Interstate Compacts*, 7 ST. POL. & POL'Y Q. 347, 364 (2007) ("Rather than embracing compacts as a defense against federal incursion, the states in our dataset actually join fewer new compacts during periods of national policy centralization. This implies that states use compacts to fill the void left by national government retrenchment, in effect as an alternative means to coordinate national policy from the bottom-up.").

19. For an in-depth analysis of James Madison's proposed congressional negative, and an argument that it represents an early predecessor of the Compact Clause, see Greve, *supra* note 11, at 310-15.

20. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1396 (Boston, Hilliard, Gray & Co. 1833); see, e.g., *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 467 (1978) (observing the Court's continued "puzzlement" over the meaning of the Clause as expressed by Justice Story).

## I. The Compact Clause: Stranger in the Land of Federalism

Our interstate compacts are a unique creation within the common law tradition. In the early years of British control in North America, they emerged as a tool for resolving uncertainties between the new colonies over their borders.<sup>21</sup> Beginning in 1656 with a compact between Connecticut (merely twenty years after its founding) and New Netherlands on their shared border, compacts have been with us from the start.<sup>22</sup>

In his dictionary, Samuel Johnson defined a “compact” as “[a] contract; an accord; an agreement; a mutual and settled appointment between two, or more, to do or to forbear something.”<sup>23</sup> More enlightening is the earliest draft of the Articles of Confederation—propounded a week and a day after the issuance of the Declaration of Independence<sup>24</sup>—which included a provision specifically protecting the states’ right to craft mutual agreements between themselves with the assent of Congress.<sup>25</sup> However, during the seven years in which the Articles of Confederation governed, we know that the states routinely refused to submit these agreements to Congress for approval.<sup>26</sup> Therefore, as the Constitutional Convention drew near, it was unclear whether the provision might survive a transition away from the Articles.

James Madison had been watching the weakness of a Confederation beset by “political unrest, fiscal ruin, and sectional rivalry” with concern.<sup>27</sup> He read voluminously on previous attempts at federal power,<sup>28</sup> and found that the flaw

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21. See Frankfurter & Landis, *supra* note 16, at 692-93. Compacts were an innovative solution for the management of borders being delineated by a far-off sovereign across the sea. See *id.*

22. See *id.* at 730 (citing Resolution of Feb. 22, 1656, in LAWS AND ORDINANCES OF NEW NETHERLANDS, 1638-1674, at 215 (E.B. O’Callaghan ed. & trans., Albany, N.Y., Weed, Parsons & Co. 1868) [hereinafter LAWS AND ORDINANCES OF NEW NETHERLANDS]; and Edict of Jan. 23, 1664, in LAWS AND ORDINANCES OF NEW NETHERLANDS, *supra*, at 455).

23. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755).

24. See Minutes of July 12, 1776, in 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 545, 545-54 (Worthington Chauncey Ford ed., 1906) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS].

25. See *id.* at 549. These protections were incorporated into the final version of the Articles. See ARTICLES OF CONFEDERATION OF 1781, art. VI, paras. 1-2.

26. See Frankfurter & Landis, *supra* note 16, at 732-34. For the single exception to this status quo of nonsubmission, see Minutes of Dec. 27, 1779, in 15 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 24, at 1411 (Worthington Chauncey Ford ed., 1909).

27. See Alison L. LaCroix, *The Authority for Federalism: Madison’s Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 459-61 (2010).

28. See Letter from James Madison to Thomas Jefferson (Apr. 27, 1785), in 2 THE WRITINGS OF JAMES MADISON 132, 133-34 (Gaillard Hunt ed., 1901).

undoing many historical unions was the encroachment of local concerns upon national interests.<sup>29</sup> The Articles of Confederation he dismissed as “the evil of imperia in imperio” (states within the state).<sup>30</sup> He concluded that it was necessary in every united society to have a means “by which the general authority may be defended against encroachments of the subordinate authorities, and by which the latter may be restrained from encroachments on each other,” adding that “[t]he want of some such provision seems to have been mortal to the antient Confederacies, and to be the disease of the modern.”<sup>31</sup>

Upon encountering opposition at the Convention to his far-reaching plans, Madison forcefully addressed the gathering at a key juncture on June 19, 1787, and assailed the weaknesses of the existing Articles.<sup>32</sup> Federal authority, he complained, had been perilously encroached upon.<sup>33</sup> Madison then illustrated the dangers the Articles had failed to prevent: “[N]o two or more States can form among themselves any treaties &c without the consent of Cong[ress] yet Virgi[ni]a & Mary[lan]d in one instance—Pen[sylvania] & N[ew] Jersey in another, have entered into compacts, without previous application or subsequent apology.”<sup>34</sup> Only a federal government with the power to regulate such state activity, Madison was suggesting, could survive—as previous confederacies had failed to do.<sup>35</sup>

Soon after Madison’s speech, the first mention of what became the Compact Clause was inserted in draft language, in John Rutledge’s handwriting, against “any agreem[ent] or compact w[ith] (any other) State or Power.”<sup>36</sup> We cannot be certain that this addition was made in quiet acknowledgement of Madison’s concern—an effort to ensure that the new government would undoubtedly possess the power to approve compacts.

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29. See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 5 THE WRITINGS OF JAMES MADISON, *supra* note 28, at 17, 23-25 (Gaillard Hunt ed., 1904) (describing how past civilizations were “unable either to maintain the subordination of the members, or to prevent their mutual contests & encroachments”).

30. See *id.* at 23.

31. *Id.*

32. See Minutes of June 19, 1787 (Madison), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 313, 314-22 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

33. See *id.* at 316-17.

34. *Id.* at 316.

35. See *id.* at 317.

36. See Committee of Detail Doc. No. IX, in 2 FARRAND’S RECORDS, *supra* note 32, at 163, 169; see also *id.* at 163 n.17. Yet it should be noted that a draft constitution by Alexander Hamilton prepared in early June had included a similar clause, while substituting “contract” for “compact” in its wording. See 3 FARRAND’S RECORDS, *supra* note 32, app. F at 630.

Yet Madison's remarks on June 19 unequivocally supported the view that was adopted: Compacts were significant risks to the federal structure being crafted, and accordingly, such agreements must fall within the ambit of the new Constitution.<sup>37</sup> Fearing member states' horizontal power to unite among themselves, the Convention crafted a vertical protection: the national government's acquiescence to such arrangements.<sup>38</sup>

#### A. Compact Jurisprudence

There is scant evidence that during the first hundred years of the Constitution, the Supreme Court conceived of any capacity for the states to engage in interstate compacts without congressional approval.<sup>39</sup> Then, in 1893, came a blow to this view that reverberates today.

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37. Madison's remarks have received surprisingly little attention in scholarship. Frankfurter and Landis appear unaware of the June 19 speech, claiming that "[t]he records of the Constitutional Convention furnish no light as to the source and scope of this compact provision." See Frankfurter & Landis, *supra* note 16, at 694; see also Greve, *supra* note 11, at 309 (citing Frankfurter and Landis for this conclusion). Multiple analyses of the Compact Clause have followed along with this line of thought. See, e.g., Engdahl, *supra* note 5, at 65 ("[Justice] Story made no pretensions of having deduced this interpretation of article I, section 10, from any source other than his own imagination."); Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 772 (2010) (observing that there is "little evidence" about what the terms "treaty" and "agreement" meant). The June 19 speech is tangentially referenced amid Duncan Hollis's overview of the Compact Clause, but the material is not singled out for its acute significance. See Hollis, *supra*, at 760 & n.78.
38. Much attention has been allocated to how the Founders differentiated between the State Treaty Clause and the Compact Clause. Compare U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . ."), with *id.* art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . ."). The Founders frustratingly used the terms "treaty" and "compact" interchangeably throughout the Convention. See, e.g., Minutes of June 28, 1787 (Madison), in 1 FARRAND'S RECORDS, *supra* note 32, at 444, 446 (statement of James Madison); Minutes of July 2, 1787 (Madison), in 1 FARRAND'S RECORDS, *supra* note 32, at 510, 514 (statement of Gouverneur Morris). Further, some references use the terms "compact" and "contract" interchangeably. See, e.g., Minutes of June 19, 1787 (King), in 1 FARRAND'S RECORDS, *supra* note 32, at 329, 330. The Framers' familiarity with the work of Emmerich de Vattel offers a plausible explanation for the difference. See Abraham C. Weinfeld, Comment, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?*, 3 U. CHI. L. REV. 453, 458-62 (1936).
39. See HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 169-81 (Da Capo Press 1970) (1837) (taking for granted that congressional approval was necessary); see also *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575-76 (1840) ("The [broader compacting] power now claimed for the states . . . would expose us to one of those dangers, against which the framers of the Constitution have so anxiously endeavoured to guard.")

1. *Virginia v. Tennessee*

Attempting to resolve a nearly century-old border dispute between Tennessee and Virginia, Justice Field's opinion for the Court in *Virginia v. Tennessee* engaged in extended dicta on the meaning of the Compact Clause.<sup>40</sup> The Founders, he assumed, could not have envisioned every agreement between separate states to warrant the lengthy process of congressional approval.<sup>41</sup> Although only dicta, this proved compelling to generations of jurists who followed.<sup>42</sup> Justice Field created a belief, followed to the present day, that the Founders could not have intended for Congress to approve a compact unless it would "encroach upon or weaken the general authority of Congress."<sup>43</sup>

In Justice Field's time, compacts were rudimentary instruments, primarily dealing with bilateral border disputes.<sup>44</sup> However, the early twentieth century soon witnessed the birth of a new mode of compact: agreements between states focused on joint administration. In 1917, New York came together with New Jersey to create a compact—approved by Congress in 1921—to form an autonomous administrative body, the Port of New York Authority, to directly manage their shared port.<sup>45</sup> During a subsequent 1922 congressional debate on the plan, Representative Martin Ansorge of New York was careful to stress that the compact was no threat to federal supremacy, both because of congressional approval and because "nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States."<sup>46</sup> Authorization was granted by Congress without notable opposition.<sup>47</sup>

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40. See 148 U.S. 503, 515-24 (1893).

41. See *id.* at 517-18 (describing the "many matters upon which different States may agree that can in no respect concern the United States," and taking as implicit the inference that the Framers did not intend the Clause to encompass every possible accord).

42. See Greve, *supra* note 11, at 300-01 ("Justice Field's discourse . . . is dictum . . . . Subsequent cases, however, discussed Justice Field's opinion with approval. In the 1970s, Justice Field's dictum became the U.S. Supreme Court's authoritative holding." (footnotes omitted)).

43. See *Wharton v. Wise*, 153 U.S. 155, 170 (1894).

44. Compacts in the nineteenth century almost uniformly dealt with border disputes or territorial issues. See, e.g., Frankfurter & Landis, *supra* note 16, at 735-38. One notable exception was a Civil War-era debt dispute between West Virginia and Virginia. See *id.* at 738-39.

45. See Comment, *The Significance of Dismissals "For Want of a Substantial Federal Question": Original Sin in the Federal Courts*, 68 COLUM. L. REV. 785, 785 n.5 (1968); see also Act of Aug. 23, 1921, ch. 77, 42 Stat. 174.

46. See 62 CONG. REC. 7975 (1922) (statement of Rep. Ansorge).

47. See *id.* at 7945 (passage in the Senate); *id.* at 7977 (passage in the House).

Four years later, Felix Frankfurter coauthored a landmark article with James Landis heralding the potential of compacts for innovative policy solutions to the types of regulatory problems the states were beginning to confront, in particular, electric power distribution.<sup>48</sup> Calling the Compact Clause a “vehicle for . . . fruitful possibilities,” Frankfurter and Landis recommended it to legal scholars and to a rising generation of progressive state leaders, such as Pennsylvania’s iconic Governor Gifford Pinchot, for whom, Frankfurter and Landis reported, it was already the object of great interest.<sup>49</sup>

This Frankfurter and Landis article arrived at a pivotal moment, following a “turning point” for Compact Clause doctrine with the establishment of the Port of New York Authority.<sup>50</sup> Whether it contributed to or merely foreshadowed a growing prevalence of complex compacts, the Frankfurter and Landis article preceded a wave of compacts. While it envisioned compacts being formed with the approval of Congress, not all of the compacts that followed in fact garnered congressional assent.<sup>51</sup> In the two decades after the Frankfurter and Landis article was published, more than twenty-five new compacts were formed, compared with forty total that had been formed up to that point.<sup>52</sup> Then, from 1940 to 1970, more than a hundred new compacts emerged,<sup>53</sup> and an additional ninety-two have been created in the years since.<sup>54</sup>

## 2. *United States Steel Corp. v. Multistate Tax Commission*

One of these advanced new formulations was the Multistate Tax Compact (MTC), created to address the problem of duplicate taxation of businesses operating across state lines.<sup>55</sup> Since 1965, forty-nine states have become either full or affiliated members.<sup>56</sup> The MTC operates through a commission endowed with the power to apportion the income of multistate businesses between different member states.<sup>57</sup> The commission can audit member states

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48. See Frankfurter & Landis, *supra* note 16, at 708-18.

49. See *id.* at 717-18.

50. See Matthew Pincus, Note, *When Should Interstate Compacts Require Congressional Consent?*, 42 COLUM. J.L. & SOC. PROBS. 511, 518 (2009).

51. See BUENGER ET AL., *supra* note 2, at 74-75 (providing examples of compacts that were permitted to proceed without congressional approval).

52. See *id.* at 275.

53. See *id.* at 276.

54. See *Chart of Interstate Compacts*, BALLOTPEdia, <https://perma.cc/5PAS-QQCY> (archived Apr. 21, 2019).

55. For the text of the MTC, see *Multistate Tax Compact*, MULTISTATE TAX COMMISSION, <https://perma.cc/77M6-PT5S> (archived May 15, 2019).

56. Today, only Nevada has no involvement. See *Member States*, MULTISTATE TAX COMMISSION, <https://perma.cc/A6DY-K924> (archived Apr. 23, 2019).

57. See Greve, *supra* note 11, at 303.

and resolve disputes.<sup>58</sup> States are free to withdraw from the compact at any time.<sup>59</sup> The compact's proponents initially sought congressional approval, but opposition prevented a floor vote, and its supporters proceeded without authorization.<sup>60</sup>

Representing a consortium of businesses suffering from the compact, Erwin Griswold argued before the Supreme Court in *United States Steel Corp. v. Multistate Tax Commission* that Justice Field's language in *Virginia v. Tennessee* was only intended for simple state boundary disputes, and a new jurisprudence was necessary for complex agreements such as the MTC: "We have limped along too long on [*Virginia v. Tennessee*]," Griswold concluded.<sup>61</sup> "It is time for the Court to bring the compact clause into the modern age."<sup>62</sup>

Instead, Justice Powell's opinion for the Court in *U.S. Steel*—as Michael Greve has described—used confused logic and unclear reasoning to uphold the MTC without congressional approval and effectively consigned the Compact Clause to irrelevance.<sup>63</sup> Justice Powell began by noting his hesitation to require congressional approval for all compacts: "At this late date," he admitted, "we are reluctant to . . . circumscribe modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy."<sup>64</sup> Although recognizing that Justice Field's treatment of the Compact Clause in *Virginia v. Tennessee* was merely "extended dictum,"<sup>65</sup> and observing in a footnote that Justice Field may have misapplied Justice Story's conclusions regarding compacts,<sup>66</sup> Justice Powell refused to limit that holding to the simple bilateral compacts with which Justice Field had been concerned (for example, two states seeking to resolve a border dispute). Instead, while conceding that multilateral contracts had always traditionally been submitted to Congress for approval, Justice Powell held that this was merely "historical practice, which may simply reflect considerations of caution and convenience."<sup>67</sup>

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58. *See id.*

59. *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 473 (1978). In fact, New Hampshire has withdrawn in recent years (although it has indicated an interest in returning to the compact in the future). *See* JOSEPH F. ZIMMERMAN, *THE SILENCE OF CONGRESS: STATE TAXATION OF INTERSTATE COMMERCE* 181 (2007).

60. *See* Robert M. White, Note, *The Constitutionality of the Multistate Tax Compact*, 29 VAND. L. REV. 453, 461-62 (1976).

61. Transcript of Oral Argument at 43, *U.S. Steel*, 434 U.S. 452 (No. 76-635).

62. *Id.*

63. *See* Greve, *supra* note 11, at 304-08; *see also U.S. Steel*, 434 U.S. at 454-79.

64. *U.S. Steel*, 434 U.S. at 460.

65. *See id.* at 467.

66. *See id.* at 468 n.19.

67. *Id.* at 471.

Lacking an “effective alternative other than a literal reading of the Compact Clause,”<sup>68</sup> Justice Powell settled on the very *Virginia v. Tennessee* “rule” whose shaky rationale he had himself highlighted earlier.<sup>69</sup> Analyzing the instant case, he noted that the MTC increases the power of the member states only against multistate corporations and insisted that “the test is whether the Compact enhances state power *quoad* the National Government.”<sup>70</sup> Although nominally accepting that even a potential conflict with federal supremacy is enough to require a compact to go to Congress for approval, Justice Powell failed to apply his own rule in analyzing the MTC.<sup>71</sup> As Justice White complained vigorously in dissent, the Court “is not true to this view.”<sup>72</sup> Instead, the majority approved the MTC despite clear potential conflicts, insisting that these were mere intrusions on federal interests, not true threats to supremacy that would clearly run afoul of the Supremacy Clause.<sup>73</sup>

As the dissent observed, if the Clause existed only to invalidate state actions that already ran against federal law (thereby violating federal supremacy), then “it would have no independent meaning.”<sup>74</sup> Instead, “[t]he Clause must mean that some actions which would be permissible for individual States to undertake are not permissible for a group of States to *agree* to undertake.”<sup>75</sup> The majority chose to ignore both this logic and Justice White’s added warning that “if the Compact Clause has any independent protective force at all, it must require the consent of Congress to an interstate scheme of such complexity and detail as this.”<sup>76</sup> Greve concludes that *U.S. Steel* left the Compact Clause so weak that only a compact violating federal law “*in haec verba*—on its face” would be subject to congressional action<sup>77</sup>—a needless

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68. *See id.* at 460, 468-72. Justice Powell’s opinion described a rule in this instance that eschews a functional test, holding instead that “[t]he number of parties to an agreement is irrelevant if it does not impermissibly enhance state power at the expense of federal supremacy.” *Id.* at 472; *see infra* Part III.A.

69. *See id.* at 468 n.19 (“Mr. Justice Field misread Story’s Commentaries . . .”).

70. *Id.* at 472-73.

71. *See id.* at 472-78.

72. *Id.* at 480 (White, J., dissenting).

73. *See id.* at 479 & n.33 (majority opinion).

74. *Id.* at 482 (White, J., dissenting).

75. *Id.*

76. *Id.* at 480.

77. *See* Greve, *supra* note 11, at 307-08 (“*U.S. Steel* effectively declared the Compact Clause inoperative . . .”); *see also* *Star Sci., Inc. v. Beales*, 278 F.3d 339, 360 (4th Cir. 2002) (offering a recitation of *U.S. Steel* to defend the conclusion that a compact does not fall within the ambit of the Compact Clause as interpreted by *U.S. Steel*, even though it implicitly implicates federal interests).

measure since any compact expressly violating federal law would already be invalid under the Supremacy Clause.<sup>78</sup> Thus, after *U.S. Steel*, the Compact Clause holds little independent meaning.

The Court has not reevaluated *U.S. Steel*. It rejected a petition for certiorari in 2010 on the Master Settlement Agreement (MSA) between forty-six states and the major tobacco companies.<sup>79</sup> As with the MTC, supporters of the MSA attempted to gain congressional approval but were defeated.<sup>80</sup> Yet unlike the MTC, the MSA is for all intents and purposes permanently binding on member states, as they would suffer significant financial damages for withdrawing.<sup>81</sup> A diverse group of constitutional law scholars (Richard Epstein, Alan Morrison, and Kathleen Sullivan) submitted an amicus brief supporting certiorari.<sup>82</sup>

Ironically, this status quo was arguably neither the desired nor envisioned outcome of either *Virginia v. Tennessee* or *U.S. Steel*. In *Virginia v. Tennessee*, Justice Field's opinion assumed that many compacts require congressional approval,<sup>83</sup> while the Court's holding in *U.S. Steel* was seemingly not intended to render the Compact Clause, for all intents and purposes, extraneous.<sup>84</sup> Thus, without grappling substantively with the implications, the Supreme Court has effectively rendered the Compact Clause a constitutional vestige.

Perhaps change is coming. In early 2018, writing in dicta for a unanimous Court, Justice Gorsuch cited a pre-*U.S. Steel* ruling that had envisioned congressional approval as a necessary aspect of compact formation.<sup>85</sup> Whether this indicates newfound willingness by the Roberts Court to revitalize a

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78. See *supra* note 4.

79. See *S&M Brands, Inc. v. Caldwell*, 562 U.S. 1270 (2011) (denying certiorari). The MSA was allegedly designed to recover Medicaid expenses resulting from fraudulent techniques employed by those companies. See Petition for Writ of Certiorari at 2, *S&M Brands*, 562 U.S. 1270 (No. 10-622), 2010 WL 4494146.

80. See Robert A. Levy, *Tobacco Wars: Will the Rule of Law Survive?*, 2 J. HEALTH CARE L. & POL'Y 45, 46-47 (1998); *supra* text accompanying note 60.

81. See Petition for Writ of Certiorari, *supra* note 79, at 7. The Court in *U.S. Steel* had relied upon the lack of such binding power to justify withholding congressional scrutiny for the MTC under the Compact Clause. See *U.S. Steel*, 434 U.S. at 473.

82. See Amicus Curiae Brief of Constitutional Law Scholars in Support of the Petition at 1 & n.2, *S&M Brands*, 562 U.S. 1270 (No 10-622), 2010 U.S. S. Ct. Briefs LEXIS 4535, at \*1 & n.2.

83. See 148 U.S. 503, 519-20 (1893).

84. See *U.S. Steel*, 434 U.S. at 472-78; see also *supra* text accompanying notes 71-73.

85. See *Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018) ("Congress's approval serves to 'prevent any compact or agreement between any two States, which might affect injuriously the interests of the others.' It also ensures that the Legislature can 'check any infringement of the rights of the national government.'" (citation omitted) (first quoting *Florida v. Georgia*, 58 U.S. (17 How.) 478, 494 (1855); and then quoting 3 STORY, *supra* note 20, § 1397)).

neglected clause—as it has done in recent decades with other elements of Article I, Section 10<sup>86</sup>—is not clear, but it makes the present a useful time to reexamine the Compact Clause, particularly in light of ambitious new compacts on the horizon.

### B. Future Compacts

Numerous proposals and actual organizational efforts for advanced compacts that would affect different policy realms are underway. Four enterprising proposals illustrate the range of policies that could be affected by future compacts. First, the National Popular Vote Interstate Compact (NPVIC) seeks to prevent the Electoral College and popular vote outcomes from diverging in presidential elections.<sup>87</sup> The NPVIC would pledge the votes of the electors of the adopting states to the national popular vote winner, rather than the winner in their respective states.<sup>88</sup> Since 2004, fifteen states (and the District of Columbia) have enacted the proposal, for a total of 196 electoral votes, with more on the horizon.<sup>89</sup> It will take effect when the number of electoral votes of the states ratifying the compact reaches 270.<sup>90</sup> This proposal has attracted newfound public attention in recent years.<sup>91</sup> Legal scholars have

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86. See *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 6-9 (2009) (examining the original purposes of the Tonnage Clause of Section 10); see also Michael S. Greve, *Enforcing the Compact Clause*, AM. ENTERPRISE INST. (Feb. 14, 2011, 12:00 AM), <https://perma.cc/2NTF-69PA> (noting that the application of the Tonnage Clause in *Valdez* was the first time it had been applied in decades). For the Tonnage Clause, see U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, lay any Duty of Tonnage . . .”).

87. For the text of the MPVIC, see JOHN R. KOZA ET AL., *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* 255-60 (4th ed. 2013). This divergence has occurred twice in the last two decades. Drew DeSilver, *Trump’s Victory Another Example of How Electoral College Wins Are Bigger than Popular Vote Ones*, PEW RES. CTR.: FACT TANK (Dec. 20, 2016), <https://perma.cc/6VJT-RAFA>.

88. See KOZA ET AL., *supra* note 87, at 258.

89. See Alex Cohen, *The National Popular Vote, Explained*, BRENNAN CTR. FOR JUST. (Mar. 14, 2019), <https://perma.cc/K52E-JKY3> (marking the proposal’s growing momentum, with fourteen states and the District of Columbia having enlisted as of March 2019, and an additional fourteen states considering the proposed compact); Daniel Uria, *Coalition to Change Electoral College Votes Grows Closer to 270-Vote Mark*, UPI (June 13, 2019, 6:25 AM), <https://perma.cc/6PJZ-JDH5> (reporting on Oregon becoming the fifteenth state to join the NPVIC in June 2019, and detailing the compact’s progress, including hearings held in forty state legislatures).

90. See *Agreement Among the States to Elect the President by National Popular Vote*, NAT’L POPULAR VOTE!, <https://perma.cc/J9YC-2QXK> (archived Apr. 27, 2019).

91. See Editorial, *Let the People Pick the President*, N.Y. TIMES (Nov. 7, 2017), <https://perma.cc/C58A-2W8B>. Backers argue this should be a bipartisan concern—it has benefited Republicans twice, but nearly resulted in John Kerry winning the White House with a popular vote loss in 2004. See KOZA ET AL., *supra* note 87, at 47-48; Janelle Bouie, Opinion, *The Electoral College Is the Greatest Threat to Our Democracy*, N.Y. TIMES (Feb. 28, footnote continued on next page

argued ably both for and against the NPVIC's validity,<sup>92</sup> but the proposal is remarkable simply for the breadth of the change that it would enact through the compact form. This is a far more complex undertaking than the type of localized border disputes that the Supreme Court confronted in *Tennessee v. Virginia*,<sup>93</sup> it would reshape the electoral process envisioned by the Constitution and ultimately alter every state's role in presidential elections.

The Interstate Compact for Border Security is another attempt to harness the compact form to address a major policy issue. In 2015, the Texas Senate passed a bill by a wide margin that would make the State the first to join a compact binding its members to enforce federal immigration law.<sup>94</sup> The compact was necessary, the bill's sponsor said, because Congress "failed us in securing our border."<sup>95</sup> Other compacts intended to effectuate state-based immigration enforcement have included a border wall compact enacted by the Arizona legislature<sup>96</sup> and a birth certificate monitoring compact authored by Kansas's then-Secretary of State Kris Kobach.<sup>97</sup> While *Arizona v. United States* casts some doubt upon the validity of state intervention in the realm of immigration, a central locus of federal power,<sup>98</sup> the Supreme Court has not restricted state powers in many other policy areas to such an extent. For

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2019), <https://perma.cc/Q363-8WL7>; Stevenson Swanson, *Turning Election into Popularity Race*, CHI. TRIB. (July 21, 2008), <https://perma.cc/QM6B-TW7R>.

92. Compare Daniel P. Rathbun, Comment, *Ideological Endowment: The Staying Power of the Electoral College and the Weaknesses of the National Popular Vote Interstate Compact*, 106 MICH. L. REV. FIRST IMPRESSIONS 117, 118 (2008) (suggesting that the compact would run afoul of even the limited controls instituted by *U.S. Steel*), with Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 739-48 (2007) (evaluating the case law and judging that a proposal along the lines of the NPVIC would likely face no congressional approval requirement).

93. See *supra* text accompanying note 40.

94. See Stutz, *supra* note 10; see also S. 1252, 84th Leg., Reg. Sess. (Tex. 2015).

95. Stutz, *supra* note 10.

96. See Act of Apr. 28, 2011, ch. 309, 2011 Ariz. Sess. Laws 2012 (codified as amended at ARIZ. REV. STAT. ANN. § 41-113 (2019)).

97. See BEN MERRIMAN, CONSERVATIVE INNOVATORS: HOW STATES ARE CHALLENGING FEDERAL POWER 67-70 (2019) (citing the border fence compact as a "device for coordinating state resistance" (capitalization altered)).

98. The Supreme Court's limitation of state powers in this realm makes it unlikely this compact could proceed as currently formulated. See *Arizona v. United States*, 567 U.S. 387, 397-400 (2012). See generally David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (outlining the history of immigration as a "famously exceptional" domain within the Court's constitutional jurisprudence). But immigration remains a fairly strong centerpiece of the federal government's power, and of executive power in particular. See Jessica Bulman-Pozen, Essay, *Preemption and Commandeering Without Congress*, 70 STAN. L. REV. 2029, 2041 n.53 (2018) (highlighting scholarship on the intensity of executive power in immigration as a key factor in the *Arizona v. United States* decision).

instance, the Health Care Compact, adopted by nine red-leaning states as a replacement to the Affordable Care Act, would permit the member states to adopt their own preferred health care approaches.<sup>99</sup> The proposal is tailored to take advantage of the compact form—it would potentially allow for member states to override federal law and replace federal health care law with their own individual creations.<sup>100</sup> This would be theoretically possible because an effectuated compact is considered a piece of federal law.<sup>101</sup> Strikingly, while the measure’s backers concede that congressional approval would be required for it to proceed, they insist that the President’s signature is not necessarily required for their compact to take effect.<sup>102</sup> Thus, passage in Congress was their primary object.<sup>103</sup> If such a formulation were accepted, compacts could theoretically avoid the presentment requirement.<sup>104</sup> In fact, presentment remains an unsettled question in compact jurisprudence—compacts are customarily sent to the President to be signed, but this has simply been the modern custom.<sup>105</sup>

Finally, the Regional Greenhouse Gas Initiative (RGGI) is an agreement currently in effect that aims to control carbon emissions in the face of inaction at the federal level.<sup>106</sup> It began with a memorandum of understanding between

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99. See Health Care Compact, The Health Care Compact § 4 (2011), <https://perma.cc/UBU7-SB5G>; see also *Frequently Asked Questions*, HEALTH CARE COMPACT, <https://perma.cc/LTH2-63NQ> (archived Apr. 29, 2019); *Health Care Compact*, NAT’L CTR. FOR INTERSTATE COMPACTS, <https://perma.cc/N23R-64A5> (archived Apr. 27, 2019). For an example of the Health Care Compact as adopted by a state, see Act of Apr. 20, 2011, No. 10, 2011 Ga. Laws vol. 1, bk. 1, at 30 (codified at GA. CODE ANN. § 31-48-1 (2018)).

100. See Health Care Compact, *supra* note 99, at 3.

101. See *Cuyler v. Adams*, 449 U.S. 433, 440 (1981) (“[T]he consent of Congress transforms the States’ agreement into federal law under the Compact Clause.”).

102. See *Frequently Asked Questions*, *supra* note 99.

103. See Bulman-Pozen, *supra* note 12, at 1027.

104. See U.S. CONST. art. I, § 7, cl. 3 (“Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him . . .”).

105. President Roosevelt vetoed two compacts in the 1940s, leading to today’s effective understanding that presentment is required. See FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, *THE INTERSTATE COMPACT SINCE 1925*, at 93-94, 93 n.335 (1951); Bulman-Pozen, *supra* note 12, at 1026. However, this custom has not been tested in practice, and it has been subject to challenge by some advocates of unorthodox compact formation. See Bulman-Pozen, *supra* note 12, at 1026-28 (describing the tradition of compact presentment as one of “historical practice,” not of clear necessity, and describing the attempts, thus far unsuccessful, of partisan supporters of certain radical compacts to eliminate the executive veto).

106. See Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 HARV. L. REV. 1958, 1959-60 (2007); see also *Elements of RGGI*, REGIONAL GREENHOUSE GAS INITIATIVE, <https://perma.cc/N5MU-GMNK> (archived Apr. 29, 2019).

seven Northeastern states that signified their intent to join a regional cap-and-trade scheme that the states would manage with the help of a specially created organization—RGGI, Inc.<sup>107</sup> The program, which operates today in nine states, is the first cross-border, mandatory cap-and-trade program in effect in the United States.<sup>108</sup> It aims to decrease the carbon dioxide output of the participating states by 2.5% per year until 2020, entirely through the activism of the individual states.<sup>109</sup> These four policy areas are indicative of the increasing trend of interstate compacts becoming the vehicles for wide-ranging policy changes without congressional input.

## II. Why Defend the Compact Clause?

The discussion in Part I above shows that with the Compact Clause limited by *U.S. Steel*, compacts may be formed freely without congressional oversight. This Part asks whether we should care: Do unrestrained compacts serve a valuable purpose with congressional function at a historic low?<sup>110</sup> We start with the benefits of the current system before turning to two overriding concerns that this Note argues outweigh any benefits—and that render the status quo not only worrisome to state and federal interests, but also harmful to our national unity.

### A. Benefits of Eliminating the Compact Clause

Compacts are adaptable tools at the disposal of impatient states. They are attractive as the United States grows more polarized and Congress—in good democratic fashion—keeps pace.<sup>111</sup> At the same time, polarization at the state

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107. See Note, *supra* note 106, at 1959-60. RGGI, Inc. is eager to note that it “has no regulatory or enforcement authority, and all such sovereign authority is reserved within the States.” RGGI, Inc., REGIONAL GREENHOUSE GAS INITIATIVE, <https://perma.cc/62FT-V866> (archived Apr. 29, 2019).

108. See Press Release, RGGI, Inc., 2016 RGGI Investments Generate Environmental and Economic Benefits: \$436.4 Million Invested in Strategic Energy and Consumer Benefit Programs (Sept. 19, 2018), <https://perma.cc/Z3AB-P2Q4>.

109. See Press Release, RGGI, Inc., RGGI States Release Updated Model Rule, Concluding Regional Program Review Process (Dec. 19, 2017), <https://perma.cc/TXD4-KQVK>.

110. See SARAH A. BINDER, CTR. FOR EFFECTIVE PUB. MGMT., BROOKINGS INST., POLARIZED WE GOVERN? 10 fig.3 (2014), <https://perma.cc/VC8X-C5DV> (graphing the increasing legislative gridlock between 1947 and 2012); J. Tobin Grant & Nathan J. Kelly, *Legislative Productivity of the U.S. Congress, 1789-2004*, 16 POL. ANALYSIS 303, 311 fig.1 (2008) (indicating the falling legislative productivity in recent decades compared to the early and mid-twentieth century).

111. There is an extensive literature exploring this phenomenon, and, of course, some would argue that the causal link runs in the reverse: a top-down polarization effect. See, e.g., SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS 3-4 (2008) (arguing that in addition to individual voters’ “[b]alkaniz[ation],” the political parties have contributed

*footnote continued on next page*

level—where intentional instruments of inertia, such as the filibuster, may not exist<sup>112</sup>—tends to produce not divided rule, but potent one-party control.<sup>113</sup> States, although not always models of functional governance themselves, are where legislation can often be more easily achieved.<sup>114</sup> Compacts are therefore valuable vessels for advancing stalled political and social priorities stymied by Congress. If a group of states joining together in a compact to enact their policy preferences spurs Congress to act in response—a form of Heather Gerken’s model of “dissenting by deciding”<sup>115</sup>—perhaps we say so much the better. Further, if Congress won’t act, and the states are forbidden from acting in concert, some spillover problems—issues that affect multiple jurisdictions, or issues that a single state cannot effectively manage alone<sup>116</sup>—will go unaddressed, leading to inefficiency in governance and economic stewardship. This would impose a needless cost, considering that the status quo—not requiring congressional consent—appears to be causing little significant harm at present.

A defunct Compact Clause may offer these benefits, but that is not the full story. The following Subparts evaluate the harms created by the status quo; they indicate that a revitalized Compact Clause could prevent multiple ills

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significantly to a more polarized Congress); Cynthia R. Farina, Essay, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1717-33 (2015) (concluding that voter polarization is an insufficient explanation for the degree of congressional gridlock, and surveying other potential causes).

112. See Kyle Grossman, Note, *The Untold Story of the State Filibuster: The History and Potential of a Neglected Parliamentary Device*, 88 S. CAL. L. REV. 413, 416 (2015) (“[I]n many states, legislators rarely deploy filibusters because they can be easily cut short.”); see also Glen Justice, *States Six Times More Productive than Congress*, CQ (Jan. 27, 2015), <https://perma.cc/YL9N-S5YQ> (demonstrating that all fifty state legislatures passed a greater percentage of introduced legislation than did the 113th Congress in the same time period).
113. See Nat’l Conference of State Legislatures, *State and Legislative Partisan Composition* (2016), <https://perma.cc/Y3KM-HK98>; Boris Shor & Nolan McCarty, *State Legislatures and Polarization*, MEASURING AM. LEGISLATURES (May 21, 2013), <https://perma.cc/5BU2-8WHB>.
114. See Justice, *supra* note 112; cf. Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 549-50 (2011) (finding increasing polarization at the state level, tempered by more active moderating viewpoints in state legislative bodies).
115. See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1763-65 (2005) (arguing that by substantiating a policy position in practice, minority positions are more likely to overcome majority opposition and see their preferred approach adopted by the majority).
116. See Larson, *supra* note 8, at 910-11 (describing a so-called “Goldilocks governance challenge,” where neither of the two institutional powers within the federalist structure—the states and the federal government—is well adapted to managing problems alone).

while still promoting the benefits above.<sup>117</sup> Specifically, enacting a clear framework for compact approval could encourage states to adopt increasing numbers of beneficial compacts while inhibiting harmful ones.

## B. Harms of Elimination: Horizontal Federalism

Historically, a principal argument in favor of the Compact Clause was the defense of nonparticipating states against the vagaries of their fellow states, whether to impose costs on those outside of a particular compact or to exclude certain states from the benefits being reaped.<sup>118</sup> The MSA, discussed above, exemplifies one such situation.<sup>119</sup> There, four states that failed to join the compact (Florida, Minnesota, Mississippi, and Texas) were excluded from a multibillion dollar revenue stream supplied by the tobacco industry.<sup>120</sup> Yet this horizontal perspective fails to capture today's complex reality. Viewing the states as a uniform series of sovereign entities, each contained within a neat box where the tentacles of their fellow states (let alone the vertical presence of the federal leviathan) cannot, or at least properly should not, reach, belies an increasingly interconnected federalism.<sup>121</sup> It is time for compacts to catch up. What follows is the introduction of compacts into the vivid federalism that recent scholarship has delineated.

### 1. Compacts meet "Federalism 3.0"

In 2016, Heather Gerken delivered a wake-up call: "[O]ur operating system is outdated. . . . We need an intellectual frame for thinking about today's federalism, Federalism 3.0."<sup>122</sup> Gerken's work—which is by no means

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117. See *infra* Parts II.B.-C.

118. See Greve, *supra* note 11, at 362.

119. See *supra* notes 79-82 and accompanying text.

120. Michael Greve has noted that although those four states did receive separate compensation, ameliorating somewhat their exclusion from the ongoing payments, the actual horizontal harm arose from the nine principal states that engineered the settlement and effectively forced the participation of the remaining thirty-seven, some quite unwillingly. See Greve, *supra* note 11, at 350, 362.

121. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1549-50, 1553-54 (1994) (quoting Samuel H. Beer, *The Modernization of American Federalism*, PUBLIUS: J. FEDERALISM, Autumn 1973, at 49, 75). Michael Greve's insightful and comprehensive Compact Clause analysis may be starting to show its age—nearly two decades old—and perhaps also his ideological viewpoint, reflecting an earlier perspective on "the tendency to conflate the states' opportunistic agenda with federalism." See Greve, *supra* note 11, at 387. See generally Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57 (2014) (embracing a far more dynamic interplay between the horizontal state powers as integral to federalism writ large).

122. Gerken, *supra* note 13, at 1696.

uncontroversial<sup>123</sup>—suggests that, as legal practitioners and scholars, we must choke back an instinctive aversion to spillover effects (jurisdictions affecting those nearby)<sup>124</sup> and reject our innate desire for clear delineations such as nationalists versus federalists. Gerken and Ari Holtzblatt have suggested embracing the diverse conflicts operating today between states, outside interest groups, Congress, and the executive branch.<sup>125</sup> These “[s]pillovers, in short, can help generate the democratic churn necessary for an ossified system to move forward.”<sup>126</sup>

Where do compacts fit in this tapestry of power plays? Although they do not enter Gerken and Holtzblatt’s analysis, they actually provide the key to an essential harm compacts pose.<sup>127</sup> First, it is important to establish the correct frame of reference; as able federalism scholars have reminded us, “[f]ederalism must be understood as a means rather than an end.”<sup>128</sup> States’ rights are not themselves the endpoint of federalism; rather, “their worth derives entirely from their utility in enhancing the freedom and welfare of individuals.”<sup>129</sup> Gerken and Holtzblatt argue that the conflict we see around us is better suited to moving our democratic society forward than illusory, immediate progress in the direction we ourselves might choose to go.<sup>130</sup> Taking that hypothesis further, what could be more immediate and convey the illusion of progress better than an interstate compact, executed without congressional approval, that shoves a block of states in the direction a majority of their citizens desire

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123. See, e.g., Robert Cooter, *Gerken’s Federalism 3.0: Better or Worse Than It Sounds?*, 105 CALIF. L. REV. 1725 (2017) (refuting a variety of Gerken’s assertions regarding the actual functioning of federalism); Gil Seinfeld, *Neglecting Nationalism*, 21 U. PA. J. CONST. L. 659, 693-95, 695 n.133 (2019) (pointing out that Gerken and others in this new movement of federalism studies have a tendency “to explore ‘the possibilities’ and ‘underappreciated benefits’ . . . and to leave th[e] difficult questions for another day” (footnotes omitted) (first quoting Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258 (2009); and then quoting *id.* at 1285)).

124. See *supra* text accompanying note 116.

125. See Gerken & Holtzblatt, *supra* note 121, at 61-63.

126. *Id.* at 63.

127. At first glance, the power struggle that a successful compact could touch off between rival states might seem well suited to Gerken’s model for successful democratic engagement.

128. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 223 (2000).

129. See Lynn A. Baker & Ernest A. Young, Essay, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 135 (2001).

130. See Gerken & Holtzblatt, *supra* note 121, at 88 (“We worry not just that the enclave solution is too easy for political elites but that it’s too easy for everyday citizens. It’s too comfortable to sort oneself into homogenous communities and ignore those with different views . . . [such that] incentives for democratic engagement are reduced.” (emphasis omitted)).

to see the nation as a whole move? Such efforts will almost axiomatically move faster if they need only the support of those states that already agree with them.

Yet the end result of such a process—a patchwork of opposing compacts on hot-button national issues from health care and gun control to the regulation of major nationwide dangers like the tobacco industry—harms both the uninvolved states and the very project of national unity that lies at the core of federalism itself.<sup>131</sup> Further, the partitioning argument—that policymaking should return to the states when the federal government is gridlocked—rests on the notion that the states are the best division lines for such political decisionmaking. As scholarship has shown, the United States is riven at a more granular level<sup>132</sup>—why stop at state-level compacts? A conservative community in California’s Central Valley, for instance, would (if granted home rule powers) most likely prefer to adopt the policies favored in Wyoming and Idaho than those advanced by Democratic supermajorities in Sacramento.<sup>133</sup> If individual self-determination becomes our only focus, the project of a pluralistic society crumbles into virtual impossibility.

## 2. Horizontal harms in practice

Nor is this merely a theoretical concern. Most of the major regulatory compacts in recent decades have been preceded by some effort to gain congressional approval before organizers resorted to a compact.<sup>134</sup> Further, empirical studies have demonstrated that compacts are being used to replace, not complement, congressional action on national problems.<sup>135</sup> Thus, compacts serve to supplant Congress when it chooses not to act, or when vetogates within the federal legislative process prevent action on a particular controversy. Moreover, this problem is growing. Rising polarization and decreasing congressional productivity form a pernicious cycle. When coupled

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131. For an insightful analysis of the importance of the concept of union throughout the Founding Era, see Alison L. LaCroix, Essay, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2090 (2014) (“Federalism was [the Framers’] particular answer to the question of how to build a union.”).

132. See BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 1-15 (2008).

133. See DAVID G. LAWRENCE, *CALIFORNIA: THE POLITICS OF DIVERSITY* 91 (5th ed. 2007) (describing the Central Valley’s political divergence from the more liberal coastal regions of California).

134. See, e.g., Levy, *supra* note 80, at 46-47; White, *supra* note 60, at 461.

135. See Ann O’M. Bowman & Neal D. Woods, *Expanding the Scope of Conflict: Interest Groups and Interstate Compacts*, 91 SOC. SCI. Q. 669, 676-82 (2010) (analyzing thirty years of compact data suggesting that states use compacts as “[s]ubstitutes for national policy making”).

with efforts toward wide-ranging compacts, these trends feed upon, and likely exacerbate, one another: An unproductive Congress incentivizes advocates to push for compacts as a more responsive alternative. This increasingly extracongressional focus of advocacy further weakens Congress's capacity for effective legislation, reducing the pressure felt by members of Congress to act upon issues being handled instead by compacts.<sup>136</sup>

Averting this hypothetical outcome should not lead us to block all compacts. However, for those compacts most likely to cause such turmoil—those with national political aims—a commonsense safeguard would be a return to congressional oversight. Like-minded states would be prevented from bringing policy preferences they could not enact in Washington into implementation as a separate bloc. Of course, states are still free to legislate their policy preferences within their own borders, with possible repercussions in neighboring states.<sup>137</sup> At times, such local or regional solutions will be the best answer—a reasoned solution surely will not require every compact to receive congressional approval. However, accepting congressional gridlock as inevitable and abandoning the national project for independent fiefdoms governed by the individual policy preferences of small groups of states has potentially grave consequences.<sup>138</sup> The horizontal harm to be prevented is saving the states from themselves—if one believes as a normative matter that

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136. As Gerken and Holtzblatt put it: “[N]ational elites have every incentive to relegate tough questions to local decisionmakers rather than forge a compromise at the national level.” Gerken & Holtzblatt, *supra* note 121, at 86. For more on this tendency, see Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 209-11 (1997) (outlining the advantages of members of Congress delegating whenever possible, rather than taking direct responsibility for handling issues). Cf. Bulman-Pozen & Gerken, *supra* note 123, at 1287 (suggesting that a patchwork of individual state legislation, especially in the context of spending federal funds, could actually incentivize federal action in response).

137. The distinction between a single state enacting its preferences and a coalition of compacting states doing the same is the presumption that a single state—or, more accurately in a Federalism 3.0 world, the many supporters of a particular policy across all levels of government nationwide—will not rest on its laurels having achieved a policy outcome within its own borders, but will instead seek to advance its preferred policy at the national level. If a policy's supporters have picked off the low-hanging fruit, so to speak, with a compact among all willing states, they will be at least somewhat less motivated to advance further. Compacts thereby foreseeably risk “[r]ed and blue silos, policymaking enclaves, national policy amounting to nothing more than a series of exceptions.” See Gerken & Holtzblatt, *supra* note 121, at 86.

138. For one political commentator's exploration of this approach, resulting in the imagined termination of our union, see Sasha Issenberg, *Divided We Stand: The Country Is Hopelessly Split. So Why Not Make It Official and Break Up?*, N.Y. MAG.: INTELLIGENCER (Nov. 14, 2018), <https://perma.cc/L6CM-MT3C> (“Interstate compacts have rarely been applied to controversial topics. Yet to a paralyzed Congress . . . they could provide an appealing vehicle to restless factions on both the left and the right. . . . An imagined trial separation, if you will.”).

“[f]ederalism ought to exercise a centripetal rather than centrifugal force on the polity,”<sup>139</sup> then the current permissibility of states forming their own preferred pseudo-national policies without congressional involvement, even in pursuit of laudable policy objectives, must be addressed.

### C. Harms of Elimination: Vertical Federalism

Traditional Compact Clause jurisprudence views the states as a uniform group of sovereign entities aligned against a similarly uniform federal government writ large.<sup>140</sup> Like the horizontal outlook discussed above, this perspective is out of date, no longer reflecting today’s politics of federalism.<sup>141</sup> The obsolescence of the test articulated by Justice Powell in *U.S. Steel* becomes inescapable when we notice that states controlled by a particular political party are likely to share their viewpoint with whichever branches of the federal government are controlled by the same party—as seen, for instance, when a Senate majority leader urges governors of his party to resist the environmental directives of a President of the opposite party.<sup>142</sup> How are we to determine “whether the Compact enhances state power *quoad* the National Government,”<sup>143</sup> when parts of that very government are likely to actively support and encourage a compact harmful to other edifices of federal power? Modern federalism scholarship thus sweeps the *U.S. Steel* test away, requiring a new standard.<sup>144</sup> But there remains a further vertical federalism harm, more pernicious but less obvious, beyond the simple blurring of lines between state and federal allegiances.

#### 1. Congressional inversion

When compacts are unleashed in a polarized world, but Congress is hamstrung (by James Madison’s design) into relative quiescence by that polarization, the system no longer functions safely.<sup>145</sup> Madison did not design inertia-generating checks and balances within the federal system primarily to restrain federal power itself; had that been his goal, the inept governance of the

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139. Gerken & Holtzblatt, *supra* note 121, at 86.

140. *See, e.g., U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 474-78 (1978).

141. *See Bulman-Pozen, supra* note 12, at 966 (“In the United States today, national partisan conflict and cooperation occur in an integrated way across the states and the federal government.”).

142. *See id.*

143. *See U.S. Steel*, 434 U.S. at 473.

144. *See infra* Parts III.A-B.

145. For an overview of Madison’s design, see Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845, 866-70 (2001) (detailing the reasoning underlying the federal structure).

Articles of Confederation would have been more than satisfactory. Instead, he sought to prevent states from gaining the ability to turn the expansive powers of the federal government against their fellow states.<sup>146</sup> Unrestrained compacts risk twisting the safeguard that inertia was supposed to offer into the tool of a cunning majority—or an obstreperous minority—allowing it to achieve its policy preferences with no opportunity for its national opponents to interfere. This is the second major vertical harm that unrestrained compacts pose—the inversion of congressional inertia from a safeguard into a policymaking cudgel.

Bicameralism, veto powers, and supermajoritarian requirements like the filibuster, along with the inherent political logjams within Congress, all serve to inhibit the capacity of a legislative majority to enact its will upon the nation—that is, they contribute to “legislative inertia.”<sup>147</sup> Madison designed a legislative process in which most efforts at policymaking would fail.<sup>148</sup> Yet as we have seen, Madison argued forcefully at the Constitutional Convention that compacts must be required to successfully navigate this thicket in order to take effect.<sup>149</sup> This is important because without subjecting compacts capable of altering multistate policy to the same rigor as equivalent congressional legislation, an arbitrage opportunity will exist in favor of compacts.<sup>150</sup> The key vertical harm of such nationally influential compacts is that they harness the legislative inertia—which would otherwise work against their implementation—to prevent congressional opposition from halting them.<sup>151</sup> Inertia no longer prevents potentially divisive and unwelcome initiatives; instead, it cements them in place.<sup>152</sup>

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146. See Samuel Kernell, “*The True Principles of Republican Government*”: Reassessing James Madison’s Political Science, in JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT 92, 102-04 (Samuel Kernell ed., 2003).

147. See Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 82 (1984).

148. See Bennett, *supra* note 145, at 869; see also THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

149. See *supra* text accompanying notes 32-35.

150. For instance, the Twenty-Fifth Amendment poses a greater hurdle for presidential removal than the traditional Article I impeachment process, preventing such arbitrage opportunities. Compare U.S. CONST. amend. XXV, § 4, with *id.* art. I, § 3, cl. 7.

151. Congress’s inability to legislate is already directly harmful to that branch. See Nathaniel Persily, *Introduction* to SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 3, 8 (Nathaniel Persily ed., 2015) (“[P]ersistent gridlock . . . shift[s] power away from Congress and toward the president and courts.”). This trend encourages compacts as an alternative to lawmaking, and its negative feedback loop (congressional inaction spawning compacts that succeed through congressional inertia) could further exacerbate existing partisan dysfunction.

152. This harm has been elucidated before, but not in the context of Federalism 3.0, as described here. See Pincus, *supra* note 50, at 533-34; *supra* Part II.B.

2. Vertical harms in practice

Several examples illustrate this danger within a modern, integrated system, where political allies reside across the state and federal levels of government. Suppose red-leaning states rejected the Affordable Care Act<sup>153</sup> and instead banded together to create their own health care framework, simply ignoring Congress in implementing this joint compact. Even if blue-leaning states, a majority of Congress, and the President all opposed this measure, it is more likely than not that a determined congressional minority could harness inertia to block any effort to override the compact, even though Congress maintains the titular right to do so.<sup>154</sup> Likewise, under a Republican-controlled federal government, blue states could legislate far-reaching gun control background check systems among themselves and be protected by a skillful Democratic Senate minority wielding the filibuster. Yet even more concerning, rather than a minority having its way, imagine if a narrowly divided Congress, controlled by one party, were to silently acquiesce to a compact among its core of supportive states to strengthen laws that could not pass Congress, but which are popular within the narrower confines of those compacting states. This danger becomes more acute when a group of states act in concert, rather than the protest of a solitary state resisting Congress alone. In such cases, the Constitution's protection for a minority opposed to such initiatives—congressional inertia—would be inverted and thrown back against any efforts to prevent this effective seizure of policymaking power by a skillful majority, sidestepping the intended legislative mechanisms to achieve policy ends a minority's opposition will be powerless to prevent.

Indeed, while some scholars might point to the political process as the best remedy for such unpalatable scenarios,<sup>155</sup> that process has already proven insufficient on its own to protect against broadly unpopular legislation becoming law, with measures sought by a minority of Americans having been adopted into law by both parties.<sup>156</sup> This is even more likely to occur in the compact setting, where members of Congress would not have to directly

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153. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

154. For another perspective on this concern, see Pincus, *supra* note 50, at 533-34 (describing the ills of inverted legislative inertia actuating state action on compacts).

155. See, e.g., Kramer, *supra* note 121, at 1511.

156. See, e.g., Margot Sanger-Katz & Haeyoun Park, *Obamacare More Popular than Ever, Now That It May Be Repealed*, N.Y. TIMES (Feb. 1, 2017), <https://perma.cc/DU7E-22S6> (recalling the Affordable Care Act's early unpopularity, which lingered for years after its passage); Emily Stewart, *The Republican Tax Law Is Becoming Less Popular, Not More*, VOX (June 22, 2018, 10:30 AM EDT), <https://perma.cc/TPX6-8AAN> (describing the initial low popularity of the recent major tax reform legislation and the continued decline in its popularity since its passage).

endorse a controversial initiative, but could simply opt not to intervene.<sup>157</sup> Thus, as polarization grows, coalitions of states and their federal allies will be all the more likely to turn to compacts for an easy end run around the legislative process.

These scenarios do not suggest that returning to a pre-*Virginia v. Tennessee* world, in which all compacts must go to Congress for approval,<sup>158</sup> makes sense. Indeed, the status quo is likely inhibiting even beneficial compacts due to uncertainty and confusion over the unclear framework for compacts' formation and approval.<sup>159</sup> Rather, the outdated rubric of *U.S. Steel* should be replaced with a new doctrine, one able to prevent the vertical and horizontal harms outlined here while speeding the adoption of beneficial compacts. That is the project of this Note, to which we turn now.

### III. Reinvigorating the Compact Clause

Compacts present numerous opportunities for interstitial governance and increased flexibility, especially in a polarized age. Unrestrained, however, they present the specter of transforming our policy landscape into localized silos of states that incapacitate the minority-protection capacities of the federal system in coordination with their federal allies. The key dilemma, of course, is determining which compacts should be permitted without review and which

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157. Members of Congress will usually embrace opportunities to avoid direct responsibility for unpalatable measures. *See, e.g.*, R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 101 (1990) (“[T]he process of delegation insulates [legislators] from political retribution.”).

158. *See supra* text accompanying note 41.

159. For instance, consider the recent confusion among state legislators debating a compact regarding what is currently permitted under the Court’s convoluted Compact Clause jurisprudence. *See* Proceedings of the Connecticut House of Representatives, *supra* note 14 (documenting state legislators’ expressions of uncertainty and unfamiliarity with the case law governing compacts, including *Virginia v. Tennessee* and *U.S. Steel*); *see also* Jerome C. Muys, *Interstate Compacts and Regional Water Resources Planning and Management*, 6 NAT. RESOURCES LAW. 153, 180-81 (1973) (“The failure to state clearly the relationship of compact commissions possessing project construction or regulatory authority to existing federal agencies and programs has caused unnecessary confusion and probably impeded the effective use of such powers.”). There is also confusion and skepticism over how compacts operate generally, which could be alleviated by more normalized rules for implementation. *See, e.g.*, Jeremy Snavely, *Areas for Further Investigation Regarding the Interstate Medical Licensure Compact: Opposition to HB 2502 in Arizona*, 21 J. AM. PHYSICIANS & SURGEONS 28, 28 (2016) (“It is not yet clear how the Compact and rules made by the Interstate Commission governing the Compact will affect existing state law, or what protections exist against the Commission inappropriately expanding the scope of its rulemaking.”); Marie McCullough, *Compact Aims to Help Doctors Practice Across State Lines*, PHILA. INQUIRER (Nov. 2, 2015) <https://perma.cc/BYB5-Z9Y4> (“Confusion is another problem, despite the federation of medical boards’ efforts to explain the compact . . .”).

must go to Congress for approval. This was the challenge that Justice Powell felt had no effective answer when he authored the opinion for the Court in *U.S. Steel*.<sup>160</sup> Fortunately, federalism scholarship today provides a more precise focus on the harms to be mitigated, making this a more manageable challenge.<sup>161</sup> Yet, even without that perspective, the limited Compact Clause scholarship of recent decades has managed to offer several workable fixes. Before offering any novel solution, it is worthwhile to examine each of these existing proposals. But their shared weakness quickly becomes apparent: They focus invariably upon the compacts themselves (that is, their intended aims, rather than the potential policy results) as the sources of harm. This Note posits that a compact-focused test will never provide the flexibility necessary to enact any standard less sweeping than a literal reading of the Compact Clause—an approach Justice Powell rightly rejected as unduly limiting.<sup>162</sup> Instead of focusing on the compact, this Note suggests looking to the intent of the states proposing such agreements to ascertain whether congressional scrutiny is warranted. That switch is the fundamental insight of negative field preemption, to which this Note will turn after first considering the existing solutions for reviving the Compact Clause, which have largely formed in two branches—functional and categorical tests.

#### A. Functional Tests

A functional test examines the potential effect of a proposed compact along predefined strata to determine whether it should require congressional approval.<sup>163</sup> For instance, will a compact on environmental regulation impose externalities upon other nonparticipating states? If so, functionalist tests would require that compact to go to Congress. The magnitude of the proposed impact is irrelevant to the inquiry; even a *de minimis* effect suffices to flag a compact.<sup>164</sup>

Michael Greve, a leading functional proponent, has offered a series of indicia by which to judge proposed compacts. Greve's primary focus is preventing states from taking advantage of one another, a classic horizontal federalism concern.<sup>165</sup> He would target four effects: externalities imposed on

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160. See *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 459-60 (1978). In authoring the opinion for the Court, Justice Powell found himself without an "effective alternative other than a literal reading of the Compact Clause." *Id.* at 460.

161. See *supra* Parts II.B.-C.

162. See *U.S. Steel*, 434 U.S. at 459-60.

163. See Greve, *supra* note 11, at 368-69.

164. See *id.* at 369.

165. See *id.* at 377-78. Greve himself acknowledges a focus on "'federalism' (in the primitive sense of uninhibited horizontal activity)." *Id.* at 377.

other states, cartelization, delegation of state powers to an external entity, and the exercise of any powers concurrently held by Congress.<sup>166</sup>

This final criterion—when a compact tramples on the enumerated powers of the federal government—is the only means within the test for defending against traditional vertical harms; however, it wields considerable power. States would be free to form compacts without first seeking congressional approval only if those compacts fell outside of the constitutionally enumerated federal powers (for instance, if they used only state police powers).<sup>167</sup> Greve wrote at the time of the newly invigorated federalism of the Rehnquist Court. That Court’s limitations on federal power, he contended, permit the Compact Clause to function along the contours of federalism to a degree not possible at the time Justice Powell searched in vain for a distinguishing element by which to restrict compacts.<sup>168</sup> “The scope of compacts that require no congressional approval,” Greve rightly observed, “expands as the scope of enumerated powers contracts.”<sup>169</sup> However, even a reined-in Commerce Clause doctrine leaves little room for compacts to form without congressional approval. State police powers would provide only a limited realm for free compacting, and many modern compacts (including both the MSA and MTC<sup>170</sup>) fall within Congress’s enumerated legislative powers. An enumeration test therefore severely restricts compact formation. It can be viewed as a strict remedy, one which would significantly curb compacts.<sup>171</sup>

Further, Greve would circumscribe compacts that potentially dilute political accountability of elected officials in the compacting states or that delegate state powers to independent regulatory bodies.<sup>172</sup> Suggesting that these two harms are among the most pernicious a compact can cause, Greve argued that they should be singled out for special scrutiny by courts.<sup>173</sup> Yet, as he admitted, the process of ascertaining the potential impacts of each challenged compact would render “[t]he judicial inquiry . . . a fact-intensive and error-prone examination.”<sup>174</sup> This functional test, although comprehensive, would entail a heavy burden both on the courts charged with applying it and upon states wishing to join together in creative and beneficial ways. Finally,

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166. *See id.* at 293, 368.

167. *See id.* at 371-73.

168. *See id.* at 372.

169. *Id.*

170. *See supra* Part I.A.2.

171. *See Pincus, supra* note 50, at 529-31 (describing the stringent hurdles imposed by Greve’s formulation).

172. *See Greve, supra* note 11, at 368, 374-77.

173. *See id.* at 374.

174. *Id.* at 379.

externalities and cartels would be strictly prevented.<sup>175</sup> This hearkens back to an earlier version of federalism, with states secure in their own sovereign plots, and fails to address the more vibrant world of Federalism 3.0, in which externalities and spillovers are an encouraged and integral element of the democratic process.<sup>176</sup>

Other functionalists have argued that Greve's test would produce overinclusive outcomes.<sup>177</sup> They suggest that his exclusive focus on horizontal federalism concerns in three of the four indicia places too heavy an emphasis on the states that wish to form compacts, at the expense of protecting against vertical harms—thereby failing to prevent state or federal political interests from joining together to utilize legislative inertia as a potential tool for advancing pernicious compacts.<sup>178</sup>

One proposed alternative has been to focus solely on compacts concerning “traditional loci of state action.”<sup>179</sup> Any compact with such a focus would not require congressional approval.<sup>180</sup> Along these lines, the Third Circuit has suggested that compacts dealing with matters traditionally left to the states *prima facie* do not require congressional approval.<sup>181</sup> Yet this leads inevitably to the troubling question of what spheres would be implicated and how to identify them—creating the same impracticable tangle that caused the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority* to abandon the endeavor of identifying traditional spheres of local control.<sup>182</sup> This singular focus on subject matter is reminiscent of the categorical tests outlined in the next Subpart, yet would operate in the functional sense of having only a single prong—traditional state areas of activity—rather than methodically dividing compacts into different categories. Nonetheless, this form, as we shall see momentarily, suffers from an inflexible approach that would struggle to appropriately handle complex regulatory or policy compacts—such as the MSA—which impact multiple areas of governance.

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175. *See id.* at 368.

176. *See* Gerken & Holtzblatt, *supra* note 121, at 88-89.

177. *See* Pincus, *supra* note 50, at 531.

178. *See id.* at 531-35 (describing the overly strong focus in Greve's formulation upon horizontal threats, and suggesting a greater emphasis upon the effect of a successful compact on the inertia inherent in the federal legislative process).

179. *See id.* at 531.

180. *See id.* at 542.

181. *See* McComb v. Wambaugh, 934 F.2d 474, 479 (3d Cir. 1991) (reasoning from the compact in question's strong relation to “areas of jurisdiction historically retained by the states” that approval by Congress “was not necessary for the Compact's legitimacy”).

182. *See* 469 U.S. 528, 546-47 (1985). For a nuanced discussion of the significance and aftermath of this decision, see Kramer, *supra* note 121, at 1486 n.3.

B. Categorical Tests

Rejecting a functional approach, other scholars have suggested using a categorical test to determine whether a compact should be swept into the arms of Congress or whether it should be allowed to pass by unobstructed. In short, there would be two categories: An identified compact would require approval, as envisioned by the Compact Clause, while other agreements, effectively “noncompact” compacts (such as RGGI), would be able to proceed freely.<sup>183</sup> This test is reminiscent of the distinctions originally drawn by the Supreme Court in *Virginia v. Tennessee*, where the Court considered whether implicit compacts require congressional approval, but stated that in some instances an agreement between two states may not constitute a formal compact necessitating that process.<sup>184</sup> Five signposts laid out by the Court in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System* as classic indicia of compacts would become the categories for sifting compacts.<sup>185</sup> These indicia are: (1) the degree of reciprocity between the states joining the proposed agreement; (2) the degree of cooperation between those member states; (3) whether the accord creates a separate organization that will administer or assist with the goal of the agreement; (4) whether conditions are attached with which agreeing states must comply; and (5) whether states are free to unilaterally withdraw from the agreement if they choose to do so in the future.<sup>186</sup> If a proposed compact displays one or more of these criteria, it would be judged to fall officially within the ambit of the Compact Clause.

Such a categorical test, which technically requires strict adherence to the Compact Clause (i.e., all compacts must be approved by Congress) but in practice would permit many pseudo-compacts to proceed, does provide a system open to the “imaginative adaptation of the compact idea.”<sup>187</sup> However, it is both under- and overinclusive of compacts that threaten unilateral changes to national policy or other harms. The categories’ fixed nature restricts the test’s flexibility in addressing new forms of agreement, failing to recognize the potential dangers posed by novel and dynamic compacts while flagging many helpful and harmless compacts, including the local interstitial compacts that may pose the least concern. Further, the test requires fact-intensive litigation to determine whether a particular compact is or is not defined by certain criteria. This approach could block efforts to factionalize

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183. See Note, *supra* note 106, at 1968 (proposing “a formalist, categorical test—one that asks whether the arrangement in question is a compact or agreement between states, and if so, requires consent”).

184. See 148 U.S. 503, 520-21 (1893).

185. See 472 U.S. 159, 175 (1985); Note, *supra* note 106, at 1973-76.

186. See Note, *supra* note 106, at 1973-76.

187. See Frankfurter & Landis, *supra* note 16, at 729.

policymaking—the horizontal harm identified in Part II above—as most administrative compacts would display some or all of these categorical features, but it would struggle to distinguish the many benign compacts displaying those same attributes.

In sum, although separating dangerous compacts from their harmless counterparts will never be a completely unambiguous process, and both functional and categorical tests succeed at flagging some suspect characteristics, neither formula is a tight fit for the harms a reinvigorated Compact Clause should target. Further, neither test would be straightforward for courts to administer or for compacting states to understand. By defining a preset series of effects that are judged to be pernicious (in the case of functional tests), or preset categories of suspect forms of operation (for categorical tests), these tests counter the threat of siloed policymaking only at great cost—limiting many beneficial compacts as collateral damage—while failing to fully address the risk that congressional inertia will be used by compacting states to their own advantage. An approach more precisely targeted at the horizontal and vertical harms is necessary to bring the Compact Clause back to relevance.

### C. Negative Field Preemption

This Note proposes a remedy different from the solutions outlined above. Rather than presuming that compacts themselves present a danger depending on their functional or categorical attributes—an outlook that inherently requires courts to apply an intensive inquiry over a “checklist” of features or categories—this solution relocates the analysis of the perceived harm from the compacts themselves to the intent of their drafters. Borrowing from the established concept of federal field preemption,<sup>188</sup> this approach uses the same methodology but reverses the polarity: It would be state efforts to replace or supplant congressional action that render a compact suspect and thereby require congressional assent. Reflecting this inversion, the proposed mechanism is called “negative field preemption.”

Let’s start with the traditional fundamentals of preemption theory. “[A]most certainly the most frequently used doctrine of constitutional law in practice,”<sup>189</sup> there are two types of preemption: express and implied.<sup>190</sup> Express preemption is the federal power, arising out of the Supremacy Clause, to

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188. For a cogent outline of the origins of federal preemption, see Richard A. Epstein & Michael S. Greve, *Introduction: Preemption in Context*, in *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS* 1, 11-16 (Richard A. Epstein & Michael S. Greve eds., 2007).

189. Stephen A. Gardbaum, *The Nature of Preemption*, 79 *CORNELL L. REV.* 767, 768 (1994).

190. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000).

explicitly preempt state laws.<sup>191</sup> Alongside this clear power is the implicit capacity for preemption to occur when state law in some way conflicts with federal law.<sup>192</sup> Implied preemption can occur in two ways: a direct conflict between state law and a federal law, in which only one may be followed (conflict preemption), and an indirect encounter, where state law would frustrate or hinder federal law (obstacle preemption).<sup>193</sup> Preemption can also occur when a state attempts to legislate in a policy area that the federal government has reserved for itself.<sup>194</sup> This is field preemption, which can occur either expressly or impliedly—as when the federal government occupies a given field with “a framework of regulation ‘so pervasive . . . that Congress left no room for the States to supplement it.’”<sup>195</sup> First introduced in 1947 in *Rice v. Santa Fe Elevator Corp.*, the principle has been repeatedly affirmed and utilized by the Supreme Court.<sup>196</sup> Field preemption, like the other forms of preemption—and similar to the Compact Clause itself—is a “necessary outgrowth of the Supremacy Clause.”<sup>197</sup>

Field preemption is expansive and powerful; while Congress may explicitly choose to preempt state law in a given field, the Supreme Court has also been

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191. See Richard A. Epstein, Essay, *The Case for Field Preemption of State Laws in Drug Cases*, 103 NW. U. L. REV. 463, 464 (2009); see also U.S. CONST. art VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).
192. See Epstein, *supra* note 191, at 464. For a more critical perspective on the implied preemption doctrine, see Calvin Massey, Perspective, “*Joltin’ Joe Has Left and Gone Away*”: *The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759, 762-64 (2003).
193. See Note, *Preemption as Purposivism’s Last Refuge*, 126 HARV. L. REV. 1056, 1057-58 (2013); see also Epstein, *supra* note 191, at 464.
194. See Note, *supra* note 193, at 1057-58. For a detailed scholastic overview of implied preemption doctrine, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 678-80 (7th ed. 2015).
195. See *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This principle, arising in *Rice*, has been endorsed by a unanimous Supreme Court in recent decades. See, e.g., *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).
196. That said, it has not gone without challenge. See *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in the judgment) (declining to endorse the Court’s jurisprudential embrace of implied preemption). Interestingly, some scholars have argued that the Court’s preemption and anticommandeering jurisprudences are directly linked, and that the Court has the balance wrong—that is, commandeering should be permitted and preemption stopped. See Bulman-Pozen & Gerken, *supra* note 123, at 1295-307.
197. See *Lozano v. City of Hazleton*, 724 F.3d 297, 302 (3d Cir. 2013) (quoting *Lozano v. City of Hazleton*, 620 F.3d 170, 203 (3d Cir. 2010), *vacated and remanded mem.*, 563 U.S. 1030 (2011)). Laurence Tribe has suggested that field preemption can occur within any of the other areas of preemption doctrine. See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1177 (3d ed. 2000).

willing to invoke field preemption for implicit cases when the “federal interest” is so weighty that federal statutes “will be assumed to preclude enforcement of state laws on the same subject.”<sup>198</sup> It must be acknowledged that the Court has grown less eager to apply implied field preemption when alternatives are available; indeed, the Court’s approach to preemption itself has not been uniform.<sup>199</sup> However, even the doctrine’s critics continue to apply it within the Court’s existing categories of preemption jurisprudence.<sup>200</sup> Further, the concept underlying preemption can usefully be transplanted into the compact realm regardless of its current popularity for facilitating the occupation by Congress of an entire field of policy. This is all the more so because the Court’s increasing hesitation to invoke the broad reach of field preemption—and preemption more broadly—suggests that analogous efforts by a compacting group of states to seize control over a policy realm should be treated with similar skepticism.

In application, we see implied field preemption being extended to instances of a state law merely creating an “obstacle to the accomplishment and execution of the full purposes and objectives” of a federal scheme.<sup>201</sup> For example, the Supreme Court in *Arizona v. United States* held that the federal immigration regulation at issue, although not explicitly preempting state immigration laws, “[p]rovide[d] a full set of standards governing alien registration, including the punishment for noncompliance” and “was designed as a ‘harmonious whole.’”<sup>202</sup> “Where Congress occupies an entire field,” Justice Kennedy wrote for the Court, “even complementary state regulation is impermissible.”<sup>203</sup>

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198. See *Rice*, 331 U.S. at 230; see also *English*, 496 U.S. at 79 (applying field preemption).

199. Ernest Young has concluded that “when the Justices think that the preemption question is not a close one, they often choose not to invoke” a presumption against preemption. See Ernest A. Young, “*The Ordinary Diet of the Law: The Presumption Against Preemption in the Roberts Court*,” 2011 SUP. CT. REV. 253, 308. He argues that “[t]his is true both when the Court does and does not find preemption,” and thus that “[t]he Court’s approach may well be a form of ‘incompletely theorized agreement.’” *Id.* at 308-09 (citing Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995)).

200. Compare *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting) (opposing the expansive application of implied field preemption), with *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 628, 630-31 (2012) (Thomas, J.) (invoking implied field preemption). Further, some scholars have called for significant expansions of field preemption in the products liability realm. See Epstein, *supra* note 191, at 465, 473-74 (endorsing strong field preemption with respect to regulation by the Food and Drug Administration).

201. See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

202. See 567 U.S. 387, 401 (2012) (quoting *Hines*, 312 U.S. at 72).

203. *Id.*

Field preemption remains a complicated doctrine—indeed, the Court has conceded, “there can be no one crystal clear distinctly marked formula.”<sup>204</sup> Yet the mechanics of the negative field preemption proposal rest upon the established procedures used by courts in making federal field preemption determinations.<sup>205</sup> In *Hines v. Davidowitz*, for instance, the Court scrutinized the legislative history of a naturalization scheme created by Congress—the Alien Registration Act of 1940—and determined that the purpose behind the Act was to create “a single integrated and all-embracing system.”<sup>206</sup> Justice Black’s opinion for the Court placed particular emphasis on the statement of Texas Senator Tom Connally (who chaired the subcommittee drafting the bill): “[W]e went over all the existing laws, and worked the new provisions into the existing laws, so as to make a harmonious whole.”<sup>207</sup>

The legislative history, language, and purposes of a statute help determine whether Congress intended for its “scheme of federal regulation [to] be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”<sup>208</sup> Indeed, the Court has for the most part been successful in enforcing field preemption jurisprudence with near unanimity likely because, as Richard Epstein and Michael Greve have noted, “the justices know how to read a statute.”<sup>209</sup> This brings us to the translation of preemption doctrine into the compact realm.

### 1. Negative field preemption in concept

Negative field preemption of a compact is based upon a relatively straightforward inquiry: Is the compact intended to supplant congressional action in the same field? The edifices of the compact must be so pervasive as to make reasonable the inference that the compacting states have left no room for Congress to supplement it.<sup>210</sup> Applying this to compacts means focusing not on

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204. See *Pennsylvania v. Nelson*, 350 U.S. 497, 502 (1956) (quoting *Hines*, 312 U.S. at 67).

205. It is worth adding that the European Court of Justice has adopted a similar doctrine. See Anne van Aaken, *Supremacy and Preemption: A View from Europe*, in *FEDERAL PREEMPTION*, *supra* note 188, at 277, 296. This helps illustrate the importance of such exclusive competence for supranational governmental systems.

206. See *Hines*, 312 U.S. at 69-74; see also Alien Registration Act, 1940, Pub. L. No. 76-670, 54 Stat. 670 (codified as amended at 18 U.S.C. §§ 2385, 2387 (2017)).

207. *Hines*, 312 U.S. at 72 n.34 (quoting 86 CONG. REC. 8345 (1940) (statement of Sen. Connally)).

208. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

209. See Richard A. Epstein & Michael S. Greve, *Conclusion: Preemption Doctrine and Its Limits*, in *FEDERAL PREEMPTION*, *supra* note 188, at 309, 336.

210. This field preemption concept was applied with the opposite orientation—that is, with federal action leaving no opportunity for state regulation in a given field—by the Supreme Court in *Rice v. Santa Fe Elevator Corp.* See 331 U.S. at 230.

the functional merits of a compact, but upon the extent to which it intends to offer a cohesive solution within a policy sphere. In other words, rather than examining the effects or structure of a compact—as functional and categorical tests, respectively, would have us do—negative field preemption looks purely at the intent behind the compact’s creation. It determines, as a court would before finding implied field preemption, whether the compact is designed to fully supplant congressional action.<sup>211</sup> If so, Congress would have to provide its assent in accord with the Compact Clause.

The reworking of field preemption doctrine into the compact arena makes intrinsic sense, as the two fields have converging, if not mirroring, rationales: the increasingly interwoven federalism implications of many policy issues and the inability of states (in the preemption context) and the federal government (for compacts) to address these concerns.<sup>212</sup> In other words, with preemption the federal government decides that the states cannot act effectively in a given field, while with a nationally effective compact (such as the tobacco MSA), the states make the same judgment about Washington. Thus, the utility of this approach is twofold. First, it allows the vast majority of necessary and fruitful compacts—border and water use agreements to govern spillover commons, for example—to be enacted without the looming shadow of congressional interference, enabling the commonsense intuition of most observers since *Virginia v. Tennessee* that there must exist a large body of useful compacts “to which the United States can have no possible objection or have any interest in interfering with.”<sup>213</sup> Second, it focuses precisely on the most relevant horizontal and vertical harms identified in Part II above. Namely, states detaching themselves from the national firmament to enact their own private policy preferences via compact—potentially permitting powerful minorities, or narrow majorities, to conduct an end run around the Constitution and harness congressional inertia to their own advantage.

Negative field preemption is not without its challenges. Because states lack the supremacy power of Congress, they likely cannot be as clear in their shared core intention to create “a single integrated and all-embracing system,”<sup>214</sup> such

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211. While determining intent is a tricky task, *see, e.g.*, *United States v. O’Brien*, 391 U.S. 367, 383 (1968) (“Inquiries into congressional motives or purposes are a hazardous matter.”), courts have succeeded in doing so when needed to make field preemption determinations, *see, e.g.*, *Chamber of Commerce v. Whiting*, 563 U.S. 582, 601 (2011) (plurality opinion) (“[I]t stands to reason that Congress did not intend to prevent the States from using appropriate tools [by preempting their] authority.”); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 106 (1983) (“[T]he broad construction advocated by appellants would defeat the intent of Congress to provide comprehensive preemption of state law.”).

212. *See* JOSEPH F. ZIMMERMAN, *FEDERAL PREEMPTION: THE SILENT REVOLUTION* 63-64 (1991).

213. *See* 148 U.S. 503, 518 (1893).

214. *See* *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941); *supra* text accompanying note 206.

as the one revealed by the legislative history relied upon in *Hines*.<sup>215</sup> Further, relying on intent is not the clearest metric, particularly when there are multiple actors and manifold intents at work in a given compact. Yet courts have experience discerning intent, even from those who attempt to hide it and even when multiple actors are involved.<sup>216</sup> Further, while Congress has no need to fear being clear with its intent, state legislators seeking to convince colleagues and other states to join a compact will find it difficult to succeed in doing so if they must take exceeding care to hide their intentions from public view. A number of indicia may be called upon to identify such undesirable joint intent, particularly when viewed within the context of the complexity and administrative capabilities of a proposed compact. Courts have proven adept at applying such criteria in a variety of similar situations. Dormant Commerce Clause cases, for instance, while not without their challenges, have successfully ascertained states' illicit intentions to capture economic gains for themselves at their neighbors' expense.<sup>217</sup> Although the Dormant Commerce Clause doctrine was judicially created,<sup>218</sup> it has been effectively implemented even in the context of facially neutral laws.<sup>219</sup> The Dormant Commerce Clause acts to reverse the constitutional presumption (created by congressional inertia) in favor of state action in a field of activity, commerce, which is particularly prone to opportunistic abuse by the states.<sup>220</sup> Equal attention, at least, should be placed at the disposal of the Compact Clause, an explicit constitutional provision with a similarly valuable role to play in the balance of power within the structure of federalism.

This leads to an additional, more complex, concern: What should be considered an effort to occupy a field, and on what scale is that field to be defined? Fortunately, established field preemption procedures provide an immediate framework for resolving this problem. In *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, Justice Scalia, writing for the Court, described the process for determining when a field has been occupied by a legislative scheme as an inquiry into the degree of "inaction joined

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215. See *supra* text accompanying notes 206-07.

216. See Gayle Binion, "Intent" and Equal Protection: A Reconsideration, 1983 SUP. CT. REV. 397, 437-38 (discussing explications of intent in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)).

217. See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 202-03 (1994) (finding an intent to benefit intrastate milk producers through a supposedly neutral surcharge system).

218. See Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 421 (2008).

219. See Valerie Walker, Note, *The Dormant Commerce Clause "Effect": How the Difficulty in Reconciling Exxon and Hunt Has Led to a Circuit Split for Challenges to Laws Affecting National Chains*, 91 WASH. L. REV. 1895, 1898 (2016).

220. See MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 80 (1995).

with action.”<sup>221</sup> Likewise, when a compact leaves a space of significant inaction alongside its action in a policy sphere, it would not be considered an effort to occupy the field. How significant this degree of inaction must be is a determination requiring further consideration before negative field preemption is implemented; however, it should be sufficient to target comprehensive compacts which leave little policy space unoccupied—as, for instance, when the tobacco MSA neatly resolved the issue of tobacco industry compensation for forty-six states.<sup>222</sup> Negative field preemption would consider the MSA to have occupied the field.<sup>223</sup>

Further, the Supreme Court has explained that preemption requires examining “the *target* at which the state law *aims* in determining whether that law is pre-empted.”<sup>224</sup> Thus, a compact can be judged by the scope of its proposed solution: Does it provide a complete fix to a national problem? If so, it should be submitted to Congress. If it merely addresses a regional or local problem, by contrast, or if it offers a partial fix to a national issue, with room remaining for complementary legislation, it can proceed freely. Of course, not every compact will fall into one of these clear categories—there will have to be judicial review of close calls and examination of amorphous intent, but the frequency of such analyses, and the fact-based intensity when they do occur, will be comparably less burdensome than under either the functional or categorical solutions. This is so for two reasons—first, because fewer compacts would be eligible for review (unlike with functional tests, for instance, under which nearly all compacts would be flagged),<sup>225</sup> and second, because only a single aspect would be considered, the compact’s intent, rather than complicated multifactor tests of potential impact.

Several examples will help elucidate the operation of negative field preemption in the real world.

## 2. Negative field preemption in practice

Let us begin by returning to the 1921 Port of New York Authority Compact, imagining a review based on negative field preemption (ignoring for a moment that the compact’s supporters placed importance on seeking and receiving congressional assent). The agreement between the States of

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221. See 485 U.S. 495, 503 (1988).

222. See *supra* notes 79-82 and accompanying text.

223. The number of states in a compact, whether four or forty-six, cannot be the determinative factor; if it were, pernicious compacts could evade review simply by remaining confined to a predetermined number of states.

224. See *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015).

225. See *supra* Part III.A.

New York and New Jersey created an independent agency to administer their shared port.<sup>226</sup> This entity, the Port of New York Authority, would have jurisdiction only over a limited geographic space and would affect only the two states' shared interest in that resource.<sup>227</sup> This effort displayed no indication of comprehensively occupying the field—whether framed in terms of interstate commerce generally or even solely the management of the commerce of New York Harbor. Indeed, its backers explicitly emphasized that “nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States.”<sup>228</sup> Instead, it was intended solely “to do only what any private corporation may do.”<sup>229</sup> This accord did not purport to solve any issue other than local congestion and inefficiency. It did not seek to replace or supplant congressional action in that realm, and specifically disclaimed interest in doing so. Instead, it is the very model of the sort of spillover inefficiency management (administering the split jurisdiction of New York and New Jersey in New York Harbor) for which Rhett Larson has encouraged us to consider compacts the ideal solution.<sup>230</sup> Thus, it represents a model for compacts seeking solely to address regional dilemmas and would easily pass muster under a negative field preemption analysis (that is, it could proceed without congressional oversight).

Unfortunately, the Port of New York Authority Compact would not be so lucky under different standards. Under a categorical regime, this compact would be suspect under at least three of the categories due to its (1) creation of an independent administrative structure; (2) imposition of conditions each state must fulfill; and (3) limitation on withdrawal from the compact.<sup>231</sup> It would potentially implicate the remaining two categories as well, depending on a court's necessarily fact-specific analysis of the degree of reciprocity and cooperation that the compact entails.<sup>232</sup> Under a categorical model, it would undoubtedly be required to receive congressional approval; while it might win that approval (as it did in reality),<sup>233</sup> the compact's implementation would be delayed and its backers might be dissuaded from proposing it, which would be a loss to all concerned.

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226. See Comment, *supra* note 45, at 785 n.5.

227. See Act of Aug. 23, 1921, ch. 77, 42 Stat. 174.

228. 61 CONG. REC. 4921 (1921) (statement of Rep. Ansorge).

229. *Id.* (quoting *City of New York v. Willcox*, 189 N.Y.S. 724, 727 (Sup. Ct. 1921)).

230. See Larson, *supra* note 8, at 912.

231. See *supra* Part III.B.

232. See Note, *supra* note 106, at 1974-76.

233. See *supra* text accompanying notes 46-47.

Likewise, a functionalist test would flag this compact for congressional review; it flunks at least two and as many as all four of Michael Greve's indicia.<sup>234</sup> By (1) delegating state powers to an external entity (the Port of New York Authority), and (2) exercising powers over commerce that certainly are concurrently held by Congress, the compact would already be bound for congressional review under a functionalist approach. Further, a court's determination concerning (3) the risks of externalities on other states and (4) the resulting cartelization would potentially implicate a full sweep of the risk factors under both the functionalist and categorical tests.<sup>235</sup> Thus this innovative and useful compact would be inhibited under either of those regimes, while negative field preemption would allow it to proceed easily.

The same would be true of most spillover governance compacts. By dealing primarily with regional issues (such as shared waterways or forests),<sup>236</sup> they would typically be immune from scrutiny under negative field preemption, while the more rigid functionalist and categorical methodologies would be likely to flag them based on the level of interstate cooperation and perhaps because of the administrative agency created to oversee the compact. While those who normatively favor increased scrutiny for all compacts could applaud that result—and, indeed, a compact skeptic might argue that because of their permanently binding terms (suspect under categorical tests) or the risk of cartelization (a functional red flag), they are deserving of extra scrutiny—this Note suggests that the majority of such compacts represent useful, and often necessary, local solutions to pressing problems. These compacts do not need or deserve the added hurdle of congressional oversight. As a more flexible approach, negative field preemption is the superior solution for encouraging useful local compacts.

RGGI is an effort to limit carbon dioxide output among the participating states.<sup>237</sup> It addresses a global problem, which might initially present the possibility that it occupies a field; however, it does so in a way that intentionally leaves a large degree of "inaction joined with action."<sup>238</sup> While the states have created a modest cap-and-trade program for themselves, their actions alone are insufficient to resolve the overarching problem they seek to address. Tellingly, RGGI has not been proffered by its advocates as a wholesale

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234. See *supra* notes 165–66 and accompanying text.

235. See Greve, *supra* note 11, at 368.

236. See Larson, *supra* note 8, at 918, 926–31.

237. See Press Release, RGGI, Inc., *supra* note 109.

238. See *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (discussing this more general principle in a context other than compacts).

solution to the issue of climate change but as “a modest first step.”<sup>239</sup> The outcome of negative field preemption should not vary based on the number of adopters of a particular compact, but even if RGGI were to grow into a nationwide program, the scale and scope of the proffered solution would remain too small to constitute intentional occupation of the field, rendering it permissible under negative field preemption.

By design, RGGI does not resemble a traditional compact; officially, it is described as simply the coordinated individualized action of each state (formalized in a joint memorandum of understanding).<sup>240</sup> While the reciprocal nature of RGGI’s cap-and-trade scheme might flag it under a categorical test, other scholars have suggested that it could pass muster under such a regime.<sup>241</sup> Regardless of that unclear outcome, RGGI could not survive under Greve’s externalities prong, nor would it withstand his test’s condemnation of compacts that wield a power possessed by Congress (market-based environmental regulation), demonstrating again how powerful his fourth prong comes to be—strong enough to force virtually all compacts to Congress’s doorstep.

A more complex benchmark is the MTC, which was approved in *U.S. Steel*.<sup>242</sup> That compact created an independent commission designed to apportion income from multistate businesses among the member states<sup>243</sup>—prompting congressional review under both functional and categorical tests. The commission held the power both to audit members and to resolve disputes in nonbinding opinions.<sup>244</sup> Further, although the Court emphasized that states are free to leave at any time (relieving it of concern under one category of the categorical test),<sup>245</sup> the MTC was a comprehensive scheme that seeks to address an entire field, rendering it suspect under negative field preemption. Further, it did so in an area in which Congress is competent to legislate,<sup>246</sup> flagging

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239. See Sondra Bogdonoff & Jonathan Rubin, A Primer for Maine: Regional Greenhouse Gas Initiative 2 (2006), <https://perma.cc/Y8WD-EW9C> (listing the advantages of achieving this first step through a cap-and-trade program like RGGI). Perhaps a challenge could be mounted under negative field preemption that the actual intent of RGGI goes further than a first step, but as noted above, the need to advance any multistate agreement across many state legislative hurdles makes widespread deception beyond the reach of an inquiring court difficult to fathom.

240. See REG’L GREENHOUSE GAS INITIATIVE, MEMORANDUM OF UNDERSTANDING 6-10 (2005), <https://perma.cc/NZQ5-ZJMF>.

241. See Note, *supra* note 106, at 1977.

242. See *supra* Part I.A.2.

243. See *supra* notes 56-60 and accompanying text.

244. See Greve, *supra* note 11, at 303.

245. See *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 473 (1977).

246. Congress spent over four years deliberating whether to rectify the interstate tax issues that the MTC ultimately resolved. For a history of that consideration period, see  
*footnote continued on next page*

Greve's expansive vertical indicia for suspect compacts: states invoking congressional powers. Thus, it would likely fail under all three approaches; negative field preemption, functional analyses, and categorical analyses would all require congressional approval for this scheme to be enacted. The same holds true for the MSA reached with the tobacco industry and approved by the Supreme Court.<sup>247</sup>

Also interesting are the fates of forthcoming compacts under the negative field preemption test. The NPVIC and Health Care Compact are both instances of extracongressional action. Rather than the labeling and categorization complexity of functional or categorical compact tests, negative field preemption presents a straightforward analysis.

The NPVIC quickly encounters difficulties. It is a self-contained mechanism for replacing the Electoral College with an effective popular vote presidential election.<sup>248</sup> By replacing the existing system with a new fully fledged framework, the plan runs into trouble under negative field preemption because of its intent to solve this issue once and for all. Irrespective of whether one normatively agrees with that policy outcome, this compact should be required to receive congressional sanction before taking effect.<sup>249</sup> Under the categorical test, the reciprocity between the states likewise makes the NPVIC suspect and most likely bound for Congress. But under the strict functionalist test, this is a more complicated analysis than it might initially appear. The subject matter of the NPVIC is not within the purview of Congress (which could not itself alter the constitutional framework to eradicate the Electoral College)—there is no congressional role to be supplanted here. Thus, although this very characteristic may spell trouble for the NPVIC on

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Natasha N. Varyani, *States Unbound: Examining the Authority of the Multistate Tax Compact in a Modern Multijurisdictional Economy*, 1 WAYNE ST. U. J. BUS. L. 21, 34-38 (2018).

247. See *supra* notes 79-81 and accompanying text.

248. See *supra* notes 87-90 and accompanying text.

249. With congressional approval, however, the proposal holds the potential, remarkably, to replace the Electoral College without a constitutional amendment. See Akhil Reed Amar, *The Inaugural Abraham Lincoln Lecture on Constitutional Law, Electoral College Reform, Lincoln-Style*, 112 NW. U. L. REV. 63, 72-77 (2017) (describing the popular vote compact's origins as an alternative to a full constitutional amendment); Anthony J. Gaughan, *Ramshackle Federalism: America's Archaic and Dysfunctional Presidential Election System*, 85 FORDHAM L. REV. 1021, 1038 (2016) ("[C]onstitutional amendments do not happen overnight. In the meantime, therefore, the 'National Popular Vote Compact' is a potentially viable short-term alternative.").

other fronts,<sup>250</sup> it would not be implicated by Greve's expansive fourth prong, ironically making it one of the only compacts allowed to proceed under a functionalist test.

Finally, let us evaluate the Health Care Compact described above, enacted into law in recent years in nine red-leaning states.<sup>251</sup> Negative field preemption prevents the losers in a political battle from alternatively enacting their policy preferences in the form of a compact with like-minded states—thus, the compact which seeks to replace the Affordable Care Act with the states' own preferred health care arrangement is suspect under negative field preemption and requires congressional review. This is a nonpartisan result; blue state efforts to replace Trump Administration policies would necessarily meet a similar fate.

But while the functionalist test would flag these compacts, the categorical model is not well configured to recognize the harm of such discordant measures. A health care compact that did not entail significant reciprocity or cooperation between the member states—but merely the shared adoption of the same policies—would not be considered harmful under the categorical test and would be free to proceed without congressional consent. If those nine red states and their allies across the nation could rally forty senators to their cause, they would be effectively immune from oversight.<sup>252</sup>

This analysis is summarized in Table 1 below, which shows how these historical and proposed compacts fare under the three different tests. Compacts that would be permitted without congressional approval are represented in white. Compacts that must be sent to Congress appear in dark gray. The light gray entries represent compacts that could conceivably come out either way under the given analysis.

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250. See Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, 2012 BYU L. REV. 1523, 1578-79 (arguing that *U.S. Term Limits, Inc. v. Thornton* prohibits efforts such as the NPVIC without the passage of a constitutional amendment); see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

251. See *supra* text accompanying note 99.

252. Such coordinated interstate approaches may indeed be the right solution for a variety of pressing problems, particularly in the realm of interstitial federalism. Yet it is the contention of this Note that most such enterprises require congressional assent under the Compact Clause.

**Table 1**  
Compact Outcomes Under Proposed Reform Measures

	<b>Functionalist Tests</b>	<b>Categorical Tests</b>	<b>Negative Field Preemption</b>
Port of New York Authority Compact			
Spillover Governance Compacts			
Regional Greenhouse Gas Initiative (RGGI)			
Multistate Tax Compact (MTC)			
Master Settlement Agreement (MSA)			
National Popular Vote Interstate Compact (NPVIC)			
Health Care Compact			

Compacts permitted without congressional approval are represented in white. Those requiring approval appear in dark gray. Light gray compacts could have either outcome.

As we see, the adoption of a jurisprudence based on negative field preemption offers advantages over both the current *U.S. Steel* regime as well as the functional and categorical tests that have been proposed. The current system imposes a limitless limit. The functional test goes too far, flagging nearly every compact. This would drastically restrict compacts' utility in solving the sort of problems for which they would be most useful—spillover commons and shared regional issues. The time and effort necessary to take a watershed management compact through Congress, for instance, would inhibit beneficial small compacts on the subject. Meanwhile, the categorical test struggles to properly identify harmful compacts but permits dangerous ones to pass; its fixed approach is poorly suited to simultaneously allowing useful compacts like the Port of New York Authority to pass while restricting the growth of partisan initiatives like the Health Care Compact. Negative field preemption avoids these pitfalls, permitting the Court's clear, longstanding normative preference for compacts to be allowed to flourish as the "vehicle for . . . fruitful

possibilities,” as Felix Frankfurter and James Landis termed them.<sup>253</sup> At the same time, negative field preemption averts the potential harms of complex, state-led policy schemes being implemented by compact without the opportunity for congressional review.

Negative field preemption is not a perfect, catch-all solution. Its requirement that a comprehensive scheme occupy a specific field will likely permit some compacts to escape congressional oversight despite being undesirable end runs around Congress. Further, a fact-specific analysis will be required in close cases, which may meet with the displeasure of busy courts that would prefer to admit or deny all comers in the compact realm. In these senses, negative field preemption is a good compromise, with the inherent drawbacks that all compromises entail, providing a step forward. Compared with earlier proposals, negative field preemption has the advantage of permitting many more compacts to proceed than a functionalist approach, while providing greater adaptability and reliability than a categorical test.

To this, let us add one final note on the realistic prospects for any change to Compact Clause doctrine, negative field preemption or otherwise. Although the Supreme Court’s engagement with the Compact Clause has been notably limited throughout U.S. history, it seems probable that an opportunity to reevaluate this jurisprudence is on the horizon. The Court has recently gestured faintly toward a different path in its view of compact approval.<sup>254</sup> At the same time, the complexity of proposed future compacts calls out for greater attention. The time is therefore ripe to begin considering negative field preemption and other proposals for the Compact Clause’s reformation.

### Conclusion

This Note has argued that the Compact Clause is an important safeguard within our constitutional structure, and warrants renewed attention and vigor amid our present political polarization. As we have seen, the U.S. Supreme Court’s current jurisprudence deprives the Clause of independent meaning. This threatens harm as states seek to enact their policy preferences through unreviewable compacts, evading the scrutiny of Congress. We should be especially concerned when such compacts solve a particular policy problem to the liking of a subset of states, weakening the impetus for a united approach and threatening a centrifugal federalism that endangers our national project.

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253. See Frankfurter & Landis, *supra* note 16, at 717-18.

254. A recent decision by the Court appeared to hint at congressional approval as a necessary element. See *Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018) (“Congress’s approval serves to ‘prevent any compact or agreement between two States, which might affect injuriously the interests of the others.’” (quoting *Florida v. Georgia*, 58 U.S. (17 How.) 478, 494 (1855))).

Furthermore, compacts may shift the inertial tendencies of Congress from a brake on unwanted progress into a mechanism for enabling unwise advances by a few cunning states. Permitting these states to legislate to their own whims is a consequential decision that should be made as a national choice, not because of a backend loophole that the Supreme Court has left open. Indeed, Justice Powell's formulation in *U.S. Steel* made little sense at the time and makes even less today; within the complexity of "Federalism 3.0," state and federal interests are intermingled, turning his rubric for determining state encroachment into a confounding endeavor. Compacts continue to gain sophistication and increasingly provide a ready alternative to stalled congressional action—thus, absent doctrinal change, these dangers will only continue to grow.

Negative field preemption serves as a balanced method for controlling dangerous compacts. It permits the majority of useful and innovative interstate agreements to be smoothly enacted, while requiring suspect initiatives to undergo the constitutionally envisioned process of congressional oversight before coming into force. Unlike the more uncompromising solutions that have been proposed in the past, negative field preemption can responsibly restore the Compact Clause from the vestigial constitutional appendage we see today, while still permitting creative compacts to flourish.

James Madison imagined the Clause's importance would remain widely recognized, but the reasons for including this provision in our Constitution have not—despite Madison's prediction—been "so obvious" to modern observers that they may be safely "passed over without remark."<sup>255</sup> The Compact Clause deserves our attention, and this Note aims to impart its utility. With negative field preemption as a centerpiece—the start of a renewed conversation—this previously underexplored field of compacts is ready to connect with the larger federalism revival now underway. A reinvigorated Compact Clause promises to place compacts into service as valuable tools within the land of federalism.

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255. See THE FEDERALIST NO. 44 (James Madison), *supra* note 148, at 283.