

When Should Interstate Compacts Require Congressional Consent?

MATTHEW PINCUS*

The Compact Clause of the U.S. Constitution states “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.” Despite this language, the Supreme Court has consistently held that only a small fraction of agreements entered into by states require approval in the form of federal legislation. This Note examines the current state of the law concerning when interstate compacts need congressional consent and argues that this body of law is ripe for reexamination in light of recent proposals to adapt the interstate compact to address issues such as climate change and reform of the electoral college. The current test for when an interstate compact requires congressional approval was articulated by the Court more than thirty years ago in U.S. Steel v. Multistate Tax Commission. This test is poorly tailored to combat the dangers that some proposed interstate compacts pose both to states that choose not to participate in the compacts and also to the federal system itself. The U.S. Steel test should be replaced by a comparatively simple judicial standard, which requires congressional approval for interstate compacts that address issues not widely recognized as particularly suited to state action.

I. INTRODUCTION

On February 23, 2006, an organization calling itself the “National Popular Vote” held its initial press conference in Washington, D.C. The group, composed of prominent current and former elected officials from both the Republican and Democratic parties,

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as well as the heads of several public interest organizations,¹ proposed a new piece of legislation for states throughout the country: an interstate compact titled the Agreement Among the States to Elect the President by Nationwide Popular Vote.² This agreement is intended to revolutionize the process by which the United States elects its President. Each state in the compact would pledge to award all of its electoral votes to the presidential candidate who received the most votes in the 50 states and the District of Columbia.³ Because each state that joined the compact would award its electoral votes not based on the winner of the most votes within its borders but rather on the results of the election nationwide, this proposed system would effectively circumvent the electoral college; it would force Presidential candidates to shift their resources from the small number of “battleground” states to the broader American electorate. This dramatic change in the method of electing the President, a federal officer, could be made without the approval of any branch of the federal government save — in the event of a legal challenge — the judiciary. As the organization asserts, because “under the U.S. Constitution, the states have exclusive and plenary . . . power to allocate their electoral votes”⁴ such a change could be accomplished solely by altering state law, rather than federal law or the Constitution itself.⁵

That a limited number of states could agree to create such a fundamental shift in the federal political system without the approval of Congress might strike someone acquainted with the text of Article I of the Constitution as odd.⁶ One section of this Article,

1. National Popular Vote — Explanation of National Popular Vote Bill, <http://www.nationalpopularvote.com/pages/explanation.php> (last visited Apr. 8, 2009).

2. *Id.* The idea of enabling election of the President according to the popular vote through an interstate compact did not originate with the “National Popular Vote” organization. The history of the National Popular Vote compact notion is examined more closely below. *See infra* Part II.

3. JOHN R. KOZA ET AL., EVERY VOTE EQUAL § 6.3 (2006).

4. *Id.*

5. The proponents of the “Agreement Among the States to Elect the President by Nationwide Popular Vote” do not rule out seeking congressional consent for the compact, but they do claim that such consent is not necessary under current law. *See id.* § 6.1.

6. The compact will come into effect only after it is enacted by states collectively possessing a majority of the electoral votes (i.e., 270 of the 538 electoral votes). National Popular Vote — FAQ: What is “The Agreement Among the States to Elect the President by Nationwide Popular Vote” and How Would it Work?, <http://www.nationalpopularvote.com/pages/faqitem.php?f=11> (last visited Apr. 8, 2009).

labeled “the Compact Clause,” proclaims “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.”⁷ Read literally, this provision would require all agreements between states to be approved by both houses of Congress and to be signed by the President before coming into effect.⁸ The Supreme Court, however, has held in a series of decisions beginning with *Virginia v. Tennessee*⁹ in 1893, that only a small subset of interstate agreements require congressional assent. In its most recent major case to consider the issue, *U.S. Steel v. Multistate Tax Commission*,¹⁰ the Supreme Court ruled that only those interstate agreements that “enhance[] state power *quoad* the National Government” are ineffective without the approval of Congress.¹¹ This test — at least as elaborated in *U.S. Steel* — would exempt agreements such as the “Agreement Among the States to Elect the President by Nationwide Popular Vote” (“NPV”) from the congressional consent requirement.¹²

This Note argues that the current test to determine when interstate compacts require the consent of Congress should be overhauled.¹³ The *U.S. Steel* test potentially allows a coalition of states to set national policy, while making an end-run around the “finely wrought” procedures of bicameralism and presentment necessary for enacting federal legislation¹⁴ and the strict supermajoritarian requirements for amending the Constitution through Article V.¹⁵ If coalitions of states are able to effect na-

7. U.S. CONST. art. I, § 10.

8. See *U.S. Steel v. Multistate Tax Comm’n*, 434 U.S. 452, 459 (1978).

9. 148 U.S. 503 (1893).

10. 434 U.S. 452 (1978).

11. *Id.* at 473.

12. Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College?*, 7 ELECTION L.J. 218, 224–25 (2008) (arguing that the Supreme Court would not find congressional consent to be required in the case of the NPV compact, because compacting states would not seek to “impose their electoral choice on the other states,” and because the NPV compact does not authorize participating states “to exercise any powers they could not exercise in its absence”); Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 743 (2007); see also KOZA ET AL., *supra* note 3, § 5.12. But see Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372 (2007).

13. Michael Greve has argued this position in greater detail. See Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 380 (2003). See *infra* Parts III.C and IV.A.

14. *INS v. Chadha*, 462 U.S. 919, 941 (1983); see also Schleifer, *supra* note 12, at 746–47.

15. U.S. CONST. art. V.

tionwide change through interstate compacts, the inertia that normally hinders the federal legislative process will make it difficult for Congress to override their legislation. In this way, the use of interstate compacts can exploit the constitutional mechanisms designed to hamper Congress's ability to create federal law for the purpose of making change more permanent. Accordingly, compacts that attempt to effect change on a national level should be invalid in the absence of Congressional consent. Ultimately, this Note recommends that the *U.S. Steel* test should be replaced with a comparatively simple judicial standard that would strike down interstate compacts not approved by Congress unless the subject matter of the compact is widely recognized as a traditional locus of state action.¹⁶

Part II of this Note begins by examining the original uses of interstate compacts, as well as when such agreements required congressional approval. Traditionally, this device was used to resolve disputes between small numbers of states concerning boundary issues, water rights, and other similar local issues. However, in the last few decades, proposals for using interstate compacts to address issues that are truly national have begun to gain traction. Part III examines the current state of the law concerning when such compacts require the consent of Congress, fo-

16. Scholars have suggested that the Supreme Court will revisit its Compact Clause jurisprudence in the near future. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 178–79 (2004); Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 11 (1997); see also Schleifer, *supra* note 12, at 749 (claiming that, while compacts similar to the NPV are “almost certainly viable even without congressional consent under *U.S. Steel*, [such] proposal[s] might be the camel that breaks the straw”). Even while concluding that the Court is likely to revise its Compact Clause jurisprudence, however, few scholars have articulated a standard that they believe the Court should adopt instead of *U.S. Steel*. An exception, of sorts, is Michael Greve, who, writing before the popularity of proposals for broad national compacts such as the RGGI and NPV, argued for a strict application of the Compact Clause such that virtually no interstate compact should be found valid lacking “overwhelming evidence” of congressional assent. Greve, *supra* note 13, at 380. Such a requirement is intended to “stack the deck” against states that wish to enter into a compact by requiring them to make an affirmative showing that the agreement belongs to an exceedingly narrow category of compacts that he believes to be outside the reach of the general prohibition of the Constitutional Compact Clause. *Id.* at 369–79. Greve’s proposal is examined more closely *infra* Part III.D. The test proposed in *State Collective Action*, Note, 119 HARV. L. REV. 1855 (2006), is closely modeled on Greve’s test. *The Compact Clause and the Regional Greenhouse Gas Initiative*, Note, 120 HARV. L. REV. 1958 (2007), proposes a different test, one which focuses on whether the challenged compact involved mutual consideration between the member states and thereby can be considered a “compact or agreement” within the Constitution’s definition.

cusing particularly on the jurisprudential test of *U.S. Steel*. The *U.S. Steel* test, this Part asserts, is poorly conceived and represents a singularly unconvincing interpretation of the Constitutional text and structure. Part IV argues that critics have misperceived the fundamental problem with the adaptation of the interstate compact to issues of broad national concern. The most pressing problem with interstate compacts such as the NPV is that by enacting a compact a coalition of states can reverse the workings of legislative inertia that normally hinder the lawmaking process. In doing so, groups of states can alter the balance of power between states and the national government. This Part then turns to developing a new jurisprudential test for when interstate compacts should be found invalid for lacking congressional consent. The test proposed here — one that requires the consent of Congress for compacts outside of a few areas that are widely recognized as traditional foci of state concern — would be preferable to the current regime under *U.S. Steel*, as well as consonant with the understanding of the Compact Clause at the time that it was crafted.

II. THE ADAPTATION OF THE INTERSTATE COMPACT DEVICE TO MATTERS OF NATIONAL CONCERN

Essentially, an interstate compact is an agreement that two or more states enter into in order to deal with a problem or concern that crosses state boundaries.¹⁷ While states employ a variety of mechanisms to assure legal uniformity — for instance, the adoption of uniform codes or the adaptation of model acts — interstate compacts are distinct in that they address issues that, by their nature, affect more than one state.¹⁸ This Part situates recent proposals that have broad national impacts within the larger historical context of interstate compacts and of the Compact Clause. Whereas, interstate compacts were originally used to address is-

17. Patricia S. Florestano, *Past and Present Utilization of Interstate Compacts in the United States*, 24 PUBLIUS 13, 14 (1994).

18. Christi Davis & Douglas M. Branson, *Interstate Compacts in Commerce and Industry: A Proposal for "Common Markets Among States"*, 23 VT. L. REV. 133, 135 (1998) (“[M]odel acts and uniform codes only result in harmonization of state laws . . . [The] vehicle to standardize commerce and industry, or certain aspects thereof, on a transboundary or regional basis . . . is the interstate compact.”).

sues that were of concern to pairs or small groups of states, the 20th century saw the interstate compact transformed into a tool for dealing with a wide range of social, environmental, and political issues. Part II.A addresses the history of interstate compacts generally, as well as the origins of the Compact Clause in the Constitution. Part II.B examines the briefer history of the NPV, as well as a similar recent compact proposal to curb the emission of greenhouse gasses. As the expanse of issues addressed by interstate compacts has increased, they have come to represent an alternative means of achieving results that might more naturally be achieved through federal legislation or through constitutional amendment.

A. A BRIEF HISTORY OF THE INTERSTATE COMPACT AND THE COMPACT CLAUSE

The Compact Clause included in the Constitution is based on a similar clause in the Articles of Confederation that provided that “[n]o two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.”¹⁹ Whereas other federalist systems have functioned well without any blanket prohibition on the ability of subsidiary parts to form agreements between themselves,²⁰ the

19. ARTICLES OF CONFEDERATION, art. VI.

20. Perhaps most notably, the EU has no general treaty provision or legislation that regulates the ability of member states to conclude treaties or other agreements between themselves. In general, member states of the EU are free to conclude any such agreements they wish. The EU treaty, however, does preclude Member states from establishing agreements in areas within the exclusive competence of the Community. Treaty Establishing the European Economic Community, art. 43, Mar. 25, 1957; *see also* KOEN LENAERTS ET AL., CONSTITUTIONAL LAW OF THE EUROPEAN UNION, 5-024 (2005). In areas of shared competency, where both the individual states and the EU are able to pass binding laws, the Community is able to preempt compacts made by individual states, due to the general primacy of EU over national law. *Id.* at 5-023. In such areas, however, the ability of the Community to trump national law is subject to the limitations imposed by the principle of subsidiarity, articulated in Article 5 of the EC treaty: under this principle, the Community may only take action “if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.” EC Treaty, art. 5; LENAERTS ET AL., *supra* at 5-030. Additionally, treaties between member states cannot infringe on “fundamental rights,” which Article 220 of the EC Treaty ensures that the European Court of Justice must observe. EC Treaty, art. 220; *see also* RALPH H. FOLSOM,

framers of the Constitution saw treaties between member states as a threat to the cohesion of the Union as a whole. They included this Compact Clause in the Articles to lessen to the threat of sedition or secession by member states, which were viewed as more likely to occur if states acted collectively.²¹ As Michael Greve outlines, the continued practice of separate agreements between member states despite the prohibition of this clause in the Articles was one of the factors that lead to the strengthening of national government's authority in the Constitution.²²

Nonetheless, certain agreements between states were always thought to be exempt from the congressional consent requirement under both the Articles of Confederation's and the Constitution's versions of the clause. The Virginia-Maryland Compact of 1785, which governed the Potomac River, the Pocomoke River, and the Chesapeake Bay, did not receive congressional approval, yet questions concerning its validity under the Articles of Confederation never arose.²³ Likewise, states concluded numerous boundary agreements in the first few decades after the Constitution was enacted without Congress's consent. Courts almost universally sustained the validity of these agreements.²⁴ All in all, in the years after the enactment of the Constitution but prior to 1921, only thirty-six of the numerous compacts between states received the consent of Congress.²⁵ From these facts, it seems clear that in the period when the Constitution was adopted, the Compact Clause was not viewed as applying precisely as written;

EUROPEAN UNION LAW IN A NUTSHELL 72 (2005). Such agreements must also not impede the free movement of goods, services and capital, protected by various provisions of the EC Treaty. See Joseph Schuch, *Bilateral Tax Treaties Multi-lateralized by the EC Treaty in MULTILATERAL TAX TREATIES: NEW DEVELOPMENTS IN INTERNATIONAL TAX LAW* 35, 36–39 (Michael Lang et al. eds., 1998). The EU takes a form closer to a confederation of member states than to the unified entity of the United States and, for this reason, represents a very different governmental form than does the US. Nonetheless, its experience shows how well a federalist system can operate using the same framework to examine agreements between member states that it uses to examine legislation enacted by individual member states.

21. Greve, *supra* note 13, at 296.

22. *Id.* at 297.

23. *U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452, 463 (1978); *Wharton v. Wise*, 153 U.S. 155 (1894).

24. Felix Frankfurter & James Landis, *The Compact Clause of the Constitution — A Study in Interstate Adjustments*, 34 *YALE L. J.* 685, 749–54 (1928).

25. Greve, *supra* note 13, at 288; see also Brevard Cihfield, *INTERSTATE COMPACTS, 1783–1977: AN OVERVIEW*, *THE BOOK OF THE STATES 1978–79* 580 (Council of State Governments, 1978).

some set of compacts — perhaps only those that settled boundaries between states — were always viewed as outside of the requirement of congressional consent.

Over the years, however, other compacts were brought before Congress to secure its consent. By the early nineteenth century, compacts such as the Kentucky and Tennessee Boundary Compact of 1820 were being approved by Congress, even though they addressed boundary issues similar to those covered by other compacts for which approval had not been sought.²⁶ The legislative branch also approved compacts on issues other than interstate boundaries, such as the Virginia and West Virginia Debt Agreement of 1862, which obligated the new state of West Virginia to pay a portion of Virginia's debts, and the Lake Michigan Agreement of 1910, which established the parameters of the criminal jurisdiction over the waters of Lake Michigan of the bordering states, Wisconsin, Illinois, Indiana, and Michigan.²⁷

A turning point in the use of the compact device occurred in 1921 when New York and New Jersey established the Port of New York Authority. The states used an interstate compact to establish an administrative agency responsible for operating various transportation facilities related to the shared port, as well as for managing the development of the port and its industries.²⁸ Inspired by the creation of this relatively complex administrative agency through the device of the interstate compact, (later Justice of the Supreme Court) Felix Frankfurter and James Landis celebrated the compact as a possible tool for responding to “[t]he overwhelming difficulties confronting modern society.”²⁹ They suggested that through the “imaginative adaptation of the compact idea” states could band together to solve the myriad problems presented “by the growing interdependence” of the states.³⁰

As if responding to this exhortation, the 20th century saw the compact device adapted to address tough national issues and to establish expansive regulatory regimes. Beginning in the 1970s, the majority of interstate compacts established regulatory agen-

26. Frankfurter & Landis, *supra* note 24, at 735.

27. *Id.* at 698–99, 742.

28. *Id.* at 697–98.

29. *Id.* at 729; see also Marliisa S. Briggert, Note, *State Supremacy in the Federal Realm: The Interstate Compact*, 18 B.C. ENVTL. AFF. L. REV. 751, 758–59 (1991).

30. *Id.* at 729.

cies of one sort or another.³¹ Compacts were used frequently by groups of states to address environmental concerns, such as in the Appalachian and Rocky Mountain Low-Level Radioactive Waste Agreements of 1985 and 1983³² or in the Interstate Pest Control Compact of 1968;³³ states also fashioned agreements on family law issues, such as in the Interstate Compact on Adoption and Medical Assistance of 1980³⁴ and in the Interstate Compact for the Placement of Children of 1974.³⁵ By the mid-1990s, border agreements constituted the subject of less than one percent of interstate compacts coming into force.³⁶

B. THE CONTEMPORARY USES OF INTERSTATE COMPACTS AND PROPOSALS FOR FUTURE COMPACTS

The approximately 200 interstate compacts now in effect cover a broad range of issues, from water allocation and conservation (thirty-seven compacts) to energy and low-level radioactive waste disposal (fifteen compacts).³⁷ Numerous compacts also address crime control (eighteen compacts), education (thirteen compacts), and child welfare (five compacts).³⁸ One of the most prominent compacts to have gone into effect in the last decade is the Master Settlement Agreement (“MSA”), under which forty-six states agreed to end their litigation against the four largest tobacco companies in 1998.³⁹ Shortly after this agreement went into effect, Star Scientific, a tobacco company that did not participate in the agreement, brought an unsuccessful but widely noted suit to have the MSA invalidated as unconstitutional under the Compact

31. Florestano, *supra* note 17, at 21.

32. *Id.* at 22.

33. Interstate Pest Control Compact, <http://pestcompact.org> (last visited Jan. 7, 2009).

34. Florestano, *supra* note 17, at 22.

35. Association of the Administrators of the Interstate Compact on the Placement of Children, <http://icpc.aphsa.org/Home/about.asp> (last visited Jan. 5, 2009).

36. Florestano, *supra* note 17, at 21–22.

37. WILLIAM KEVIN VOIT ET AL., COUCLIL OF STATE GOV'TS, INTERSTATE COMPACTS & AGENCIES 2003 (2003) available at http://www.csg.org/pubs/Documents/2003_Compacts_Directory.pdf.

38. *Id.*

39. Greve, *supra* note 13, at 350.

Clause since it had never been approved by Congress.⁴⁰ The MSA's enactment in 1998 and the subsequent court challenges to it brought interstate compacts back onto the radar of legal scholarship and were at least partially responsible for the conception of new possible roles for the interstate compact.

The last few years have seen ambitious efforts to utilize interstate compacts to address particularly tough national issues. In the environmental arena, the Regional Greenhouse Gas Initiative ("RGGI"), which came into effect in September of 2008,⁴¹ originated as a response to federal inaction in the face of rising greenhouse gas levels.⁴² The RGGI obliges signatory states to implement a cap and trade arrangement for carbon dioxide emissions from power plants. States will freeze emissions at approximately current levels and reduce them over the following decade while allowing power plants to trade emissions credits among themselves.⁴³ Currently, ten states have joined the RGGI.⁴⁴ It seems likely that, under the current *U.S. Steel* test, the RGGI would not be found to require congressional approval.⁴⁵

The interstate compact that has generated the most publicity over the last few years is the National Popular Vote ("NPV") compact. Originating in suggestions by Robert W. Bennett,⁴⁶ as well as by Akhil Reed Amar and Vikram David Amar,⁴⁷ this proposal was explicitly presented as an alternative to Constitutional

40. *Star Sci., Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002); see also Shital A. Patel, *The Tobacco Litigation Merry-Go-Round: Did The MSA Make It Stop?*, 8 DEPAUL J. HEALTH CARE L. 615, 636 (2005).

41. Felicity Barringer & Katie Galbraith, *States Aim to Cut Gases by Making Polluters Pay*, N.Y. TIMES, Sept. 15, 2008, at A17, available at <http://www.nytimes.com/2008/09/16/us/16carbon.html>.

42. Michael S. Smith, Note, *Murky Precedent Meets Hazy Air: The Compact Clause and the Regional Greenhouse Gas Initiative*, 34 B.C. ENVTL. AFF. L. REV. 387 (2007); Claire Carothers, Note, *United We Stand: The Interstate Compact as a Tool for Effecting Climate Change*, 41 GA. L. REV. 229, 259 (2006); see also The Regional Greenhouse Gas Initiative (RGGI) CO2 Budget Trading Program — Welcome, <http://www.rggi.org/about.htm> (last visited Apr. 10, 2009).

43. Smith, *supra* note 42, at 405.

44. See The Regional Greenhouse Gas Initiative (RGGI) CO2 Budget Trading Program — Participating States, <http://www.rggi.org/states> (last visited Apr. 10, 2009).

45. Smith, *supra* note 42, at 411.

46. Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2d 241 (2001).

47. Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FINDLAW.COM, Dec. 28, 2001, available at <http://writ.news.findlaw.com/amar/20011228.html>.

amendment through the process outlined in Article V.⁴⁸ The motivating force behind the compact is dissatisfaction with the current method of electing a president, particularly with the way the Electoral College system disincentivizes candidates from collecting votes in states that are either clearly sympathetic or obviously hostile.⁴⁹ Because of the impossibility of changing this system through legislation, and because of the significant hurdles involved in enacting a constitutional amendment, the compact presents a feasible way to achieve an otherwise impossible result. The NPV's proponents emphasize that Congressional consent is not required for the compact to be found valid by the courts.⁵⁰ If backers of the compact needed to secure its validation in Congress, which they could not accomplish simply by securing support of the legislatures of a handful of populous states, the compact would represent a less attractive way to effect change. As of January 5, 2009, the NPV compact was signed into law in four states, Hawaii, Illinois, New Jersey and Maryland,⁵¹ and had been approved by both houses of the Michigan, Rhode Island and Massachusetts legislatures.⁵²

Both the RGGI and the NPV compacts exploit the slackness of the *U.S. Steel* test in order to transform the interstate compact from a device for addressing local issues into an alternative to federal legislation. Both proposals are attractive to their proponents precisely because they are viewed as free from the requirement of congressional assent. Supporters attempt to utilize the interstate compact device in a way that appears pretextual and designed to accomplish goals that they think they would be unable to accomplish by constitutional amendment or by federal legislation.

Increased activity in areas where states have not previously formed compacts is likely in the coming years. A recently released handbook published by the American Bar Association,

48. See Bennett, *supra* note 46.

49. KOZA ET AL., *supra* note 3, § 6.1; see also Schleifer, *supra* note 12, at 720–21; Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS., 205, 218 (2007).

50. KOZA ET AL., *supra* note 3, § 5.12.

51. National Popular Vote — News on Reforming Electoral College to Reflect Nationwide Vote, <http://www.nationalpopularvote.com> (last visited Apr. 10, 2009).

52. National Popular Vote — News Summary, <http://www.nationalpopularvote.com/pages/summary.php> (last visited Apr. 10, 2009).

Evolving Use and Changing Role of Interstate Compacts: A Practitioner's Guide, identifies insurance regulation, prescription drug purchasing and election administration as likely topics for future compact formation.⁵³ While the NPV is the most dramatic recent proposal to utilize the device of the interstate compact to create an extreme change on a national level, future compacts aiming towards the same goal of national action are possible. This is especially true if commentators or courts find that the NPV does not require congressional consent. In view of the possibility of new and currently unidentified uses of interstate compacts on the horizon, the need to reevaluate the current criteria for when such agreements require the consent of Congress is all the more pressing.

III. THE *U.S. STEEL* TEST

This Part examines the current state of the law concerning when agreements between states require the consent of Congress. Part III.A briefly reviews the history of the interpretation of the Compact Clause's congressional consent requirement prior to the Supreme Court's decision in *U.S. Steel*. Part III.B examines the Court's decision in *U.S. Steel* and the current outlines of the *U.S. Steel* test. Part III.C provides an overview of the most commonly noted problem with the test: its disregard for issues of horizontal federalism. Finally, Part III.D describes the most prominent proposal for a new test to replace that of *U.S. Steel*, and discusses the problems with this proposed test.

A. THE PRECURSORS TO *U.S. STEEL*

Few Supreme Court cases have dealt with the issue of when agreements between states require the consent of Congress.⁵⁴ The first case to address this issue explicitly was *Virginia v. Tennessee* in 1893.⁵⁵ In this case, Virginia challenged a border

53. CAROLINE N. BROUN ET AL., *THE EVOLVING USE AND CHANGING ROLE OF INTERSTATE COMPACTS: A PRACTITIONER'S GUIDE* 188–89 (2007) (noting additionally that “the expansion into new substantive fields that characterized the evolution of compact usage in the last 60 years is likely to continue well into the future”).

54. Hasday, *supra* note 16, at 11.

55. 148 U.S. 503 (1893).

agreement it had made with Tennessee on the ground that the requirement of congressional consent had not been met.⁵⁶ The Court determined that, by its terms, the Compact Clause would seem to require the consent of Congress even for those agreements “to . . . which the United States can have no possible objection or have any interest in interfering with.”⁵⁷ Quoting with approval Justice Story’s *Commentaries on the Constitution of the United States*,⁵⁸ the Court held that while “the consent of Congress may be properly required, in order to check any infringement of the rights of the national government,” nonetheless, “a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief.”⁵⁹ For this reason, the Court concluded, the Compact Clause cannot have been intended to apply to all interstate agreements.⁶⁰ Rather, “looking at the object of the constitutional provision,” the Court determined that the Compact Clause’s “prohibition is directed to the formation of any combination tending to . . . encroach upon or interfere with the just supremacy of the United States.”⁶¹ Because the Court eventually found that Congress had consented to the boundary agreement between the two states, its discussion of the Compact Clause is dicta.⁶² Nevertheless, the Court’s discussion in *Virginia v. Tennessee* effectively set the terms for all future judicial considerations of the Compact Clause.

The next major Supreme Court case to address when compacts between states require the consent of Congress did not occur until 1976, when the Court issued its ruling in *New Hampshire v. Maine*.⁶³ Again, one state (New Hampshire) brought an action against another (Maine), seeking to invalidate a preexisting border agreement on several theories. It included a claim that the agreement violated the Compact Clause because Congress had not consented to it. In its brief treatment of the Compact Clause

56. *Id.* at 517.

57. *Id.* at 518.

58. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1st ed. 1833).

59. *Virginia vs. Tennessee*, 148 U.S. 503, 519–20 (1893).

60. *Id.* at 518.

61. *Id.* at 519.

62. Greve, *supra* note 13, at 300.

63. 426 U.S. 363 (1976).

issue, the Court quoted the dicta of *Virginia v. Tennessee* and limited the congressional consent requirement to those agreements that “encroach upon or interfere with the just supremacy of the United States.”⁶⁴ Noting that the agreement between New Hampshire and Maine had simply determined the location of a preexisting boundary line more precisely, and thereby was not an agreement tending to encroach on the powers of the national government, the Court held that it was not subject to the requirement of congressional consent.⁶⁵ *New Hampshire v. Maine* inscribed the nearly century old dicta of *Virginia v. Tennessee* into federal law.⁶⁶

B. THE U.S. STEEL TEST

U.S. Steel Corp. v. Multistate Tax Commission,⁶⁷ which arose only two years after *New Hampshire v. Maine*, involved not a border dispute but an interstate tax agreement. The 1967 Multistate Tax Compact (“MTC”) established the Multistate Tax Commission (“The Commission”), composed of appointees from all signatory states, to regulate the state taxation of multistate and multinational enterprises.⁶⁸ The Commission was charged with eliminating duplicate taxation and promoting uniformity or compatibility in the tax systems of member states.⁶⁹ The proponents of the MTC attempted to secure congressional approval for the compact, but were blocked by the successful lobbying efforts of the Council of State Chambers of Commerce, which strongly opposed federal legislation to regulate the taxation of multistate businesses.⁷⁰

Various multistate business interests, concerned with the MTC’s regulatory power, brought a class action suit arguing that the MTC violated the Compact Clause because it lacked congress-

64. *Id.* at 369.

65. *Id.* at 369–70.

66. See Greve, *supra* note 13, at 302.

67. 434 U.S. 452 (1978).

68. Multistate Tax Commission, <http://www.mtc.gov/About.aspx?id=40> (last visited Apr. 10, 2009).

69. *Id.*

70. Eugene F. Corrigan, *Interstate Corporate Income Taxation — Recent Revolutions and a Modern Response*, 29 VAND. L. REV. 423, 426–27 (1976); see also Robert M. White, *The Constitutionality of the Multistate Tax Compact*, 29 VAND. L. REV. 453, 461 (1976).

sional consent.⁷¹ Declining to depart from its recent decision in *New Hampshire v. Maine*, and noting that the appellants had offered no reasonable alternative to the view of the Compact Clause articulated in that decision,⁷² the Court went on to develop in more detail than it had in previous decisions the criteria that determine when congressional consent to an interstate compact is necessary.

The Court described the test to determine whether an unapproved compact was unconstitutional as a determination of “whether the Compact enhances state power *quoad* the National Government.”⁷³ The pertinent issue, in the Court’s view, was whether the compact had any “potential, rather than actual, impact upon federal supremacy.”⁷⁴ Nonetheless, the entire focus of the Court’s examination of the MTC was its actual impact — or, rather, lack thereof — on the national government.⁷⁵ In determining that the MTC was not the sort of interstate agreement for which congressional consent was required, the Court emphasized the following factors: first, the MTC did not authorize the member States to exercise any new powers other than those they could have exercised without the existence of the compact; second, the MTC did not delegate the states’ sovereign power to the commission it created; and lastly, each compacting state retained its ability adopt or reject the rules and regulations developed by the commission and to withdraw from the compact at any time.⁷⁶ Additionally, the Court dismissed the appellants’ claim that the MTC exerted unconstitutional pressure on non-member states to alter their own tax policies: “unless [such] pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause of Art. IV, § 2, it is not clear how our federal structure is implicated.”⁷⁷ By the Court’s logic, a compact’s impact on non-participating states was irrelevant to the question of

71. The plaintiffs also raised challenges under the Fourteenth Amendment and Commerce Clause, both of which the Court summarily dismissed. *U.S. Steel*, 434 U.S. at 478–79.

72. *Id.* at 460.

73. *Id.* at 473.

74. *Id.* at 472.

75. *Id.* at 481 (White, J., dissenting); Greve, *supra* note 13, at 306.

76. *U.S. Steel*, 434 U.S. at 473.

77. *Id.* at 478 (citation omitted).

the necessity of congressional consent, so long as it did not threaten federal supremacy.⁷⁸

Compact Clause challenges to interstate compacts have arisen only rarely since the Court decided *U.S. Steel*.⁷⁹ When they have, lower courts have disregarded the Court's characterization of the test as one that considers *potential* impacts on the supremacy of the federal government, and have confined their investigation to the same narrow factors considered by the Court in *U.S. Steel*'s discussion of the *actual* impact of the MTC on the national government.⁸⁰ For example, *Star Scientific v. Beales* challenged the Master Settlement Agreement ("MSA") between state attorneys general and four major tobacco companies on Compact Clause grounds.⁸¹ The Fourth Circuit Court of Appeals looked only to actual impacts of the compact on the federal government and, finding none, refused to invalidate the compact for not having been approved by Congress.⁸² Other Compact Clause challenges have been dismissed more summarily, whether they were challenges to the MSA⁸³ or to interstate agreements on the enforcement of traffic citations.⁸⁴

C. CRITIQUES OF THE *U.S. STEEL* TEST

The most widely repeated critique of the *U.S. Steel* test centers on its "wholesale disregard of federalism's horizontal dimension."⁸⁵ By framing its test in terms of the supremacy of the federal government, the *U.S. Steel* opinion precludes any inquiry into whether a given compact has detrimental impact on non-

78. Based on this logic, scholars have generally concluded that the NPV compact would not be found to require congressional consent under the *U.S. Steel* test. Because the method of electing the president does not challenge the sovereignty of the federal government, it would survive the test of *U.S. Steel*, even while it may profoundly effect who leads the executive branch of that government. See Hendricks, *supra* note 12, at 225–56.

79. Greve, *supra* note 13, at 361.

80. *Id.*

81. 278 F.3d 339 (2002); see *supra* note 40 and accompanying text.

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

83. *Mariana v. Fisher*, 226 F. Supp. 2d 575, 586–87 (M.D. Pa. 2002); *PTI v. Philip Morris*, 100 F. Supp. 2d 1179 (C.D. Cal. 2000).

84. *State v. Kurt*, 802 S.W.2d 954 (Mo. 1991).

85. Greve, *supra* note 13, at 387. See also Schleifer, *supra* note 12, at 719 (noting that the "jurisprudence of the Interstate Compact Clause has demonstrated a surprising lack of precision . . . that seems to ignore entirely concerns of horizontal federalism").

participating states. As Justice White observed in his dissenting opinion, it is “obvious that [non-participating] States can be placed at a competitive disadvantage” by an interstate compact.⁸⁶ For instance, he pointed out that states which do not to join the MTC may have difficulty attracting multistate corporations looking for new places to set up shop.⁸⁷ In responding to the dissent’s objections, the *U.S. Steel* majority admitted that “[g]roup action in itself may be more influential than independent actions by the States.”⁸⁸ Nonetheless, the court refused to distinguish externalities on other states created by the MTC as different than the pressure that states frequently experience as a result of tax decisions made by individual states.⁸⁹ The Court therefore concluded that externalities on non-participating states should not be a reason for invalidating unapproved interstate agreements.⁹⁰

This aspect of *U.S. Steel* has come under intense criticism from Michael Greve, a scholar with the American Enterprise Institute.⁹¹ Greve demonstrates that the externalities created by state agreements may be significantly larger and more coercive than those created by the unilateral decisions or regulations of a single state.⁹² Greve characterizes the Supreme Court’s lack of attention to the difference between the unilateral actions of a single state and the collective actions of multiple states using a particularly sharp analogy:

[It] is a lot like saying that a private firm need not fear price-fixing among its competitors because the competitors are permitted to take unilateral actions that might put the firm out of business anyway. If the private market analogy fails to persuade, [c]onsider the analogy of physical interstate externalities: the unregulated use of a waterway may leave a downstream state dry, because upstream states will individually over-exploit the resource. It does not follow,

86. *U.S. Steel v. Multistate Tax Comm’n*, 434 U.S. 452, 495 (1978).

87. *Id.*

88. *Id.* at 473.

89. *Id.* at 478.

90. Greve, *supra* note 13, at 335.

91. *Id.*

92. *Id.*

however, that the upstream states may agree on an allocation that deprives the downstream state of water.⁹³

The consent of Congress — the body with the greatest institutional competency to judge the effects of a compact on the nation as a whole — is therefore necessary to balance the burdens and benefits of any given compact.⁹⁴

In addition to its disregard of horizontal federalism, the *U.S. Steel* test has also been critiqued as being at odds with the policy objectives behind the Compact Clause. Justice White voiced this most cogently in his dissent from the decision:

The Compact Clause . . . is directed to joint action by more than one State. If its only purpose . . . were to require the consent of Congress to agreements between States that would otherwise violate the Commerce Clause, it would have no independent meaning. The 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.⁹⁵

Justice White clearly articulates why *U.S. Steel* is unpersuasive Constitutional interpretation. In effect, the *U.S. Steel* test reduces the issue of whether a compact requires congressional consent to whether it authorizes compacting states to exercise any powers they could not exercise in its absence. As such, the test empties the Compact Clause of all of its independent meaning and reduces it to a provision that simply serves to recapitulate the other provisions of the Constitution.⁹⁶ As an interpretation of the Compact Clause, therefore, *U.S. Steel* is exceptionally unconvincing.

93. *Id.*; see also Schleifer, *supra* note 12 (noting the disregard of issues of horizontal federalism).

94. Greve, *supra* note 13, at 366.

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

96. This has proved particularly true in its later applications. See, e.g., *Star Scientific v. Beales*, 278 F.3d. 339 (2002).

D. MICHAEL GREVE'S PROPOSAL FOR A NEW COMPACT CLAUSE TEST

In the context of a larger argument concerning the original intentions behind the inclusion of the Compact Clause in the Constitution, Michael Greve describes a new test that he believes should replace the current *U.S. Steel* test. As Greve sees it, the purpose of the Compact Clause is to “guard . . . against harmful state compacts, without unduly restricting fruitful and beneficial state cooperation.”⁹⁷ Greve views compacts that pose issues of horizontal federalism as harmful. As opposed to “run-of-the-mill” enactments by individual states,⁹⁸ interstate agreements can exert excessive coercive power and effectively compromise the sovereignty of states that do not wish to join the agreement.⁹⁹ Greve argues for a Compact Clause interpretation that views its purpose as placing a limit on state actions that have potential to affect sister states and their citizens.¹⁰⁰

Near the conclusion of his exhaustive article, Greve articulates a new judicial test that he feels should replace the current *U.S. Steel* regime.¹⁰¹ The test Greve outlines would shift part of the burden of litigation from those challenging unapproved compacts as violations of the Compact Clause to those defending such agreements as valid.¹⁰² Such challenges should succeed as long as the plaintiff makes a credible showing that a proposed compact would pose a risk of interstate externalities, cartelization (which

97. Greve, *supra* note 13, at 377.

98. *Id.* at 365.

99. *Id.* at 335.

100. *Id.* at 365. Greve's dominant lens for examining the *U.S. Steel* test is horizontal federalism and state sovereignty. As Greve sees it, the lack of enforcement of the Compact Clause on the part of the Judicial branch is part of its overall “disregard of federalism's horizontal dimension.” *Id.* at 385. Greve argues that one of the benefits of adopting his proposed strict alternative to the *U.S. Steel* test is that it would stimulate the Court to develop doctrines to “protect states against aggression by sister states” *Id.* at 385. Yet, even during the period of the Constitution's enactment, some interstate compacts were viewed as not subject to the Compact Clause's congressional consent requirement. *See supra*, note 23 and accompanying text. Therefore, neither a simple prohibition of all unapproved compacts, nor a judicial test that effectively precludes the vast majority of compacts without explicitly prohibiting them, seems in keeping with the understanding of the Compact Clause at the time it was drafted. For this reason, Michael Greve's extremely strict application of the Clause, can also be objected to as not representing a fully accurate interpretation of the Compact Clause's original meaning.

101. *Id.* at 368–82.

102. *Id.* at 368–69.

he defines as the creation of institutions that “restrict policy competition among the states”¹⁰³) or agency problems (the transfer of state sovereignty to extra-constitutional entities¹⁰⁴). In addition to this basic test, Greve briefly suggests an additional prong: states should be allowed to form unapproved compacts only in areas where Congressional action is precluded.¹⁰⁵ All a plaintiff would have to demonstrate in order to successfully challenge an interstate compact is that it overlapped in some way with the enumerated powers of Congress or that it posed a reasonable likelihood of creating any one of his described harms against non-participating states.¹⁰⁶ In turn, however, defendants could prevail if they could prove definitively that no risk of externalities exists.¹⁰⁷

Greve’s test comprises an extremely broad prohibition on unapproved compacts. First, it requires that defenders of compacts provide definitive proof of a complete lack of impact on non-participating states.¹⁰⁸ By forcing states to prove a negative — the *lack* of any cross-border impacts — Greve’s test imposes a heavy burden on all interstate compacts. Proponents of many compacts that have no significant impact on other states will be unable to demonstrate conclusively a complete lack of any such effects before the compacts are allowed to go into effect. The “enumerated powers” prong of Greve’s test is even more severely constrictive. Because interstate compacts invariably involve interstate concerns, only a miniscule number of them, if any, lie outside of Congress’s enumerated powers.¹⁰⁹ For this reason Greve’s “enumerated powers” prong comes close to being an absolute prohibition on unapproved compact formation.

Stripped of its nearly preclusionary “enumerated powers” prong, however, Greve’s test would not capture some of the new sorts of compacts currently being considered. For instance, the RGGI arguably has no significant impact on non-participating

103. *Id.* at 293.

104. *Id.*

105. *Id.* at 368.

106. *Id.* at 369.

107. *Id.*

108. Greve, *supra* note 13, at 369.

109. Note, *State Collective Action*, *supra* note 16, at 1861 n.23 (“In some areas states may make agreements that are beyond Congress’s powers, but under current definitions of commerce, these areas would be quite narrow.”).

states. As a voluntary cap-and-trade program solely between member states, the RGGI would seem to have only a positive effect on other states: energy businesses wishing to escape the regulation would relocate away from participating states.¹¹⁰ In turn, the greenhouse gases that the RGGI seeks to reduce have no targeted harmful impact on particular states. Thus, looking for negative impacts on non-participating states would not clearly lead to the invalidation of the RGGI.

All in all, Greve's test is overly broad and sweeps away an unnecessarily large number of compacts by requiring definitive proof of a complete lack of impact on non-participating states. Additionally, Greve's focus on problems of horizontal federalism leads him to misconstrue the full nature of the issues raised by interstate compacts. As this Note argues in the following Part, a major problem with some compacts currently being considered is one of vertical federalism: rather than producing negative impacts on non-participating states, these compacts upset the delicate balance of power between the federal and state governments. As the example of the RGGI shows, some of these new types of compacts may not be reachable simply through an analysis of horizontal federalism concerns.

IV. WHEN SHOULD INTERSTATE COMPACTS REQUIRE THE CONSENT OF CONGRESS?

This Part describes a previously unrecognized problem with some expansive interstate compacts and proposes that unapproved interstate compacts be limited to areas widely recognized as traditional loci of state action. This Part begins by observing that the horizontal federalism critique of *U.S. Steel* does not capture all that is problematic about its Compact Clause analysis. Part IV.A argues that a larger problem with the status quo under *U.S. Steel* is the potential for interstate compacts to shift the balance of power between states and the federal government. Once an interstate compact enters into force, the difficulty inherent in the federal legislative process makes it harder for Congress to

110. See *id.* at 1863 ("Precisely why the states want to participate in RGGI is unclear — because greenhouse gases do not have localized effects, the states do not seem to receive any tangible benefit from this program even though they bear the costs of the cap . . .").

pass a law preempting an interstate compact than to let the compact continue to operate. Part IV.B sketches the outlines of a new judicial test that focuses on the subject matter of a challenged interstate compact, and argues that this test strikes the right balance between the status quo and the overly restrictive proposal of Michael Greve.

A. LEGISLATIVE INERTIA AND THE COMPACT CLAUSE

While the way in which externalities created by interstate compacts can harm non-participating states has been noted widely, a different problem with the *U.S. Steel* test is not easily understood in terms of horizontal federalism: interstate compacts can upend the normal workings of legislative inertia on the federal level. Allowing compacts to go into effect without congressional approval can enable the enactment of legislation having national impact through an alternative mechanism. This alternative mechanism, however, reverses the usual workings of what has been called “legislative inertia.”¹¹¹

The constitutional structure of the federal government includes a large number of institutional checks designed to make it difficult to take action.¹¹² Legislation, for example, must be approved not by a single congress, but by two separate houses.¹¹³ The fact that the members of each of these houses are on different election schedules and reflect different constituencies complicates the political calculus of law-making, and makes it more difficult for any individual initiative to receive approval.¹¹⁴ As the Federalist Papers make clear, this bicameral structure was designed to impede the aggrandizement of the lawmaking power by making it more difficult for it to reach agreement.¹¹⁵

111. Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L. J. 569, 592–93 (1987); see also William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1525–26 (1987).

112. See Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1361 (2001).

113. U.S. CONST. art. I, § 7.

114. Robert W. Bennet, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845, 867 (2001).

115. THE FEDERALIST NO. 51, 388 (James Madison) (Edward Mead Earle ed. 1971).

In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different

In addition to legislative bicameralism, the other significant hurdle to federal legislation is the presentment requirement, and the corresponding threat of the executive veto.¹¹⁶ While the veto is also exercised by a person who is elected by the people, presidential elections are conducted with different apportionment schemes than those for members of the legislative branch and presidents serve for a term different than either congresswomen or senators. As a result of this system of bicameralism and presentment, prevailing coalitions in each legislative body and the executive are able to hinder or even stifle each other's initiatives.¹¹⁷

The result of this cumbersome legislative process is that it is extremely difficult and time-consuming to pass a federal law. Lawmaking often involves numerous compromises from the time a bill is introduced until the members of each house finally vote upon it.¹¹⁸ Many proposed laws die in this process, never coming up for a vote or arriving for signature on the desk of the president. These built-in impediments put a "thumb on the scale" against congressional action: doing nothing is always easier than passing a piece of legislation. The federal government was deliberately structured to set obstacles between the will of the popular majority of the people and passage of laws.¹¹⁹ The architects of the constitution were more concerned about a government overly responsive to the people than a constitution that was not responsive enough.¹²⁰

Thus, the institutional bias against taking action is a deliberate and important facet of the federal constitutional structure. When interstate compacts of wide impact are allowed to come into force, this "legislative inertia" has an unintended effect: the same forces that typically prevent congressional action exert pressure to let the compact remain in place. It is true that, because interstate compacts inevitably involve interstate concerns,

branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.

Id.

116. U.S. CONST. art. I, § 7.

117. Bennet, *supra* note 114, at 869.

118. Redish & Nugent, *supra* note 111, at 592–93.

119. Bennet, *supra* note 114, at 866.

120. *Id.*

Congress is almost always able to override any compact it wishes, either explicitly (through legislation) or by preempting the field in which the compact operates.¹²¹ Any such legislation, however, must pass through both houses and survive any possible veto by the president. Thus, legislative inertia makes it more difficult for Congress to pass a law voiding an interstate compact than to refuse to approve one. As a result, passing an interstate compact effectively enhances the power of the enacting states, while diminishing that of Congress.¹²² Although the same could be said for the enactment of any state law in an area where Congress and the states share authority, what makes interstate compacts different is that they inherently involve relations between the states and coordinated action among them. Interstate compacts have the potential — as demonstrated by the NPV — to have much broader impact on the country as a whole than uncoordinated actions by individual states.

The *U.S. Steel* test allows a coalition of states to take action on a national scale while making an end-run around the “finely wrought” procedures of bicameralism and presentment necessary for enacting federal legislation¹²³ or, in the case of the NPV, the strict supermajority requirements for amending the Constitution under Article V.¹²⁴ The proponents of the NPV seek to utilize the compact device to take national action without going through Congress or gathering support in the necessary supermajority of state legislatures as specified by Article V.¹²⁵ Previously, the backers of both the Master Settlement Agreement¹²⁶ and the Mul-

121. Note, *State Collective Action*, *supra* note 16, at 1861 n.23.

122. It is true that compacts, which must be enacted by state legislatures, are subject to many of the same hurdles on the state level as are federal laws. Interstate compacts are problematic not because they are *easier* to enact than federal legislation, but rather because the workings of legislative inertia allow coalitions of states to assume greater power through the device of the interstate compact than they could without such coordination.

123. *INS v. Chadha*, 462 U.S. 919, 941 (1983); *see also* Schleifer, *supra* note 12, at 746–47.

124. U.S. CONST. art. V.

125. *Id.*

126. Robert A. Levy, *Tobacco Wars: Will the Rule of Law Survive?*, 2 J. HEALTH CARE L. & POLY 45, 46–47 (1998) (“After . . . a \$40 million advertising campaign by tobacco companies, the McCain bill [setting terms for the settlement] was defeated on June 17, 1998 . . . [It] had been weighed down by Democratic amendments to fund other government programs and Republican amendments to curb drug use and eliminate the marriage penalty.”).

tistate Tax Compact¹²⁷ tried and failed to gain approval in Congress for their policy proposals. By enacting these compacts and then challenging Congress to override them, proponents of the policies behind the MSA and the MTC turned the legislative inertia that had previously hindered them to their advantage.

The use of interstate compacts can allow the exploitation of the very mechanisms that are designed to put the brakes on taking national action in order to make change more permanent.¹²⁸ In instances where states take action in areas that are usually within the purview of Congress, the inertia that hinders the federal legislature from reversing the compact represents a fundamental distortion of a key aspect of our constitutional structure. For this reason, coalitions of states should not be allowed to exploit the compact mechanism to create national change.¹²⁹

B. CONSIDERATIONS IN CREATING A REPLACEMENT FOR THE *U.S. STEEL TEST*

Any replacement for the *U.S. Steel* test must recognize that interstate compacts can lead to desirable outcomes and that there are valid reasons for states to agree to act collectively to address various problems.¹³⁰ An optimal replacement for the *U.S. Steel* test should allow states to form compacts in some areas without the requirement of congressional consent. As Part IV.A outlined, however, compacts such as the NPV that attempt to take action on quintessentially national issues run a very real risk of upsetting the balance of power between the states and the federal government. Likewise, the practice of seeking congressional approval for a compact, and then, if such approval is not obtained, enacting the compact and challenging Congress to override it—as was done with both the MTC and the MSA compacts—represents an

127. See *supra* note 70 and accompanying text.

128. Where interstate compacts effectively amend the Constitution by other means, the problems are even more apparent. In effect, the proponents of the NPV accomplish through legislation in a few states a nationwide change that usually requires at least a supermajority of state legislatures. Balancing this, however, is the fact that the NPV, as an interstate compact, could be overridden by only a simple majority of Congress.

129. See Redish & Nugent, *supra* note 111, at 573 (concluding that “the dormant commerce clause is invalid because it reverses the political inertia established by the Constitution”).

130. See Note, *State Collective Action*, *supra* note 16, at 1860.

aggrandizement of state power at the expense of the federal government. This argues against the status quo, under which virtually no unapproved interstate compacts are found to violate the Compact Clause.

Two additional considerations argue for crafting a new judicial test to replace that of *U.S. Steel*. First, as Justice White eloquently articulated in his dissent from *U.S. Steel*, “[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.”¹³¹ A new judicial test should give *some* meaning to the text of the Constitution. Otherwise, the Compact Clause is reduced to a redundancy, serving to signify that the states cannot do collectively what they cannot do individually. Lastly, an interpretation of the Compact Clause should accord with the general structure of the Constitution and particularly with the overall design of Article I, which grants Congress wide authority over the regulation of interstate relationships.¹³²

Since neither a blanket prohibition on unapproved compacts nor a rule of extreme laxity is appropriate, the question of how to interpret the Compact Clause is a question of where to draw the line between acceptable compacts and those compacts that run a risk of state aggrandizement at the expense of federal power. One possibility would be simply to forbid the congressional end-run of the sort engaged in by backers of the MTC and MSA, who failed to secure congressional approval for their compact and then enacted it anyway. Courts found in both cases that the unapproved compacts did not require approval after all. As the foregoing legislative inertia analysis suggests, these decisions are problematic. Any judicial rule that found congressional approval necessary as soon as it was sought, however, would simply serve to discourage the backers of interstate compacts from attempting to secure congressional approval at all. This would not be a desirable outcome.

131. *U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452, 482 (1978) (White, J., dissenting).

132. See Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1498–99 (2007) (“Section 10 . . . represents an express articulation of the interstate model also evident in the other constitutional interstate provisions—that is, prohibitions on the states that are independently binding but subject to ultimate congressional control.”).

Likewise, a test that attempted to root out pretextual interstate compacts on the basis of their underlying motivations is unlikely to be successful. While such a test might capture the NPV, as a general proposition determining the intent behind a specific piece of legislation is extraordinarily difficult.¹³³ For this reason, the Court — after a brief sojourn into such jurisprudence in the early 20th century — has long refused to engage in purpose-based analysis of whether a particular law is pretextual.¹³⁴ Such an approach would be so dramatic a departure from previous jurisprudence that it is unlikely that the Court would choose to return to an analysis of pretext in evaluating challenges under the Compact Clause.

C. A SUBJECT-MATTER BASED APPROACH TO THE COMPACT CLAUSE

This section argues that the best criteria for determining which interstate compacts should require congressional consent is their underlying subject-matter. It proposes a relatively simple test to replace that of *U.S. Steel*: that courts exempt from the requirement of congressional consent only compacts that lie *squarely* within the realm of traditional state concern. Such a test would have the advantage of eliminating most problematic compacts while still allowing opportunities for states to form agreements in areas such as education and family law, as well as to conclude any boundary agreements they may still wish to enact. Additionally, this test would be significantly more clear-cut and easier to administer than either the current *U.S. Steel* test or the multi-part test proposed by Michael Greve.

In a pair of decisions from the end of the last decade and the beginning of this one, *United States v. Lopez*¹³⁵ and *United States v. Morrison*,¹³⁶ the Supreme Court drew attention to the states'

133. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body.").

134. David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 92 (2006). *But see* Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1302–03 (2003) (arguing for the viability of a pretextuality-based approach in Commerce Clause cases).

135. 514 U.S. 549 (1995).

136. 529 U.S. 598, 599–621 (2000).

intrinsic powers to act in what it labeled areas of “traditional state concern.”¹³⁷ In *Lopez*, the Court found the Gun Free School Zones Act¹³⁸ unconstitutional, claiming that it represented inappropriate Congressional action in areas that are traditionally regulated by the state.¹³⁹ In *Morrison*, the Court struck down the civil remedies provision of the Violence Against Women Act¹⁴⁰ as exceeding the scope of Congress’s enumerated Article I powers. The Court again based its ruling in part on the notion that some areas of regulation are beyond Congress’s reach because they “ha[ve] always been the province of the States.”¹⁴¹ The degree to which the Court’s reasoning rests on defining separate spheres of authority for state and federal powers has been debated.¹⁴² Nonetheless, these cases emphasize that some areas of law are particularly suited to control on the state level.¹⁴³ While the contours of traditional state concern have not yet been fully and precisely

137. *Lopez*, 514 U.S. at 577; see also Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After Morrison*, 25 OKLA. CITY U. L. REV. 843, 853 (2000) (“Beyond clarifying Lopez’s discussion of congressional findings, Morrison also brought into sharper focus the importance not just of limits on the reach of federal power, but the other side of the coin: the reserved powers of the states.”).

138. 18 U.S.C. § 922(q)(1)(A) (1994).

139. *Lopez*, 514 U.S. at 564–68; *id.* at 577 (Kennedy, J., concurring) (“Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.”).

140. 42 U.S.C. § 13981 (1994).

141. *Morrison*, 529 U.S. at 618; see also Choper & Yoo, *supra* note 137, at 854.

142. Compare Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 141 (2001) (“While cases like *Lopez*, *Morrison*, *Printz*, and *Seminole Tribe* are more protective of state sovereignty than anything we have seen from the Court since 1937, they do not fall into dual federalism’s trap of attempting to define exclusive spheres of state authority.”) with Joshua A. Klein, Note, *Commerce Clause Questions After Morrison: Some Observations On The New Formalism And The New Realism*, 55 STAN. L. REV. 571, 577 (2002):

[T]he *Lopez/Morrison* Court seems to have some inchoate sense of a particular limit [on congressional power] that is appropriate — one that preserves the “federal and state balance.” And the Court’s conception of this balance includes very definite views about what areas are to be regulated primarily by the states — that is, areas where congressional ambitions must be restrained.

143. A recent Supreme Court decision, *Gonzales v. Raich*, 545 U.S. 1 (2005), upheld the application of federal commerce legislation to intrastate medicinal marijuana use, suggesting that the states may hold control over somewhat narrower set of areas than these earlier cases suggested. See Louis C. Shansky, *Gonzales v. Raich: Political Safeguards Up In Smoke?*, 56 DEPAUL L. REV. 759, 759 (2007). Nonetheless, it seems likely that future Court rulings will continue to observe that some areas of regulation are inherently part of state power.

drawn,¹⁴⁴ the Court has explicitly marked out several areas as clearly within the category. These include criminal law enforcement and education in *Lopez*,¹⁴⁵ and family law in *Morrison*.¹⁴⁶

Compacts in subject areas that are *clearly* within the realm of traditional state concern should be allowed to go into effect without the requirement of congressional assent. Under this rule congressional consent would not be required were states to agree to enact compacts in the areas of family law, criminal law, and education, which have all been singled out by the Court as provenances of particular state interest.¹⁴⁷ When presented with a new interstate compact a court would not have to examine painstakingly whether its subject matter did or did not fall within “traditional state concerns.” As the Court noted in *Garcia v. San Antonio Metropolitan Transit Authority*, the precise determination of whether a given regulation is or is not within the realm of traditional state concerns can be a difficult inquiry.¹⁴⁸ Rather, the test would be whether the subject matter of the proposed compact was within those few areas *unequivocally* of particular state interest. A significant burden would be placed on those wishing to argue that their compact did not require congressional approval: they would not simply have to show that the compact’s subject

144. See Jesse H. Choper, *Taming Congress’s Power Under The Commerce Clause: What Does The Near Future Portend?*, 55 ARK. L. REV. 731, 754 (2003) (“Defining ‘areas of traditional state concern,’ ‘where States historically have been sovereign,’ . . . is no easy task.”).

145. *U.S. v. Lopez*, 514 U.S. 549, 564 (1995).

146. *Morrison*, 529 U.S. at 599:

If accepted, [the government’s] reasoning would allow Congress to regulate any crime whose nationwide, aggregated impact has substantial effects on employment, production, transit, or consumption. Moreover, such reasoning will not limit Congress to regulating violence, but may be applied equally as well to family law and other areas of state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. The Constitution requires a distinction between what is truly national and what is truly local

147. *Lopez*, 514 U.S. at 580 (“[I]t is well established that education is a traditional concern of the States.”); *Morrison*, 529 U.S. at 614 (“Petitioners’ reasoning, moreover, will not limit Congress to regulating violence but may . . . be applied equally as well to family law and other areas of traditional state regulation.”), 618 (“The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”).

148. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) (“[A]ny rule . . . that looks to the “traditional,” “integral,” or “necessary” nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.”).

matter lay within the realm of traditional state concern, but rather that it was in an area widely agreed to be within the states' particular purview. This high standard should prevent the Court from having to engage in the sort of nebulous inquiry into traditional state functions it rejected in *Garcia* and should limit the use of unapproved compacts to a handful of relatively uncontroversial topics.

This test represents a sensible line to draw between compacts that should and should not require the consent of Congress. As argued above, the issue with interstate compacts is not the border between state and federal power. However one reads the Commerce Clause cases, the states and Congress share significantly overlapping authority. Because interstate compacts intrinsically involve interstate concerns, the area of law affected by a compact will almost never be beyond Congress's reach.¹⁴⁹ Rather, in interpreting the Compact Clause courts should consider whether the area of a compact is an appropriate one for states to be able to use the additional leverage they receive from forcing Congress to overcome legislative inertia to nullify their action. Viewed in this light, it makes sense for Congress to have to overcome inertia to overturn state agreements in those areas that are particularly suited to state control. In areas that are not as clearly suited to state regulation, states should bear the burden of having to secure authorization of their compact through federal legislation.

This test would differ from the "enumerated powers" prong of the multi-part test proposed by Greve.¹⁵⁰ Greve proposes a strict prohibition against letting any compacts come into effect without congressional approval that *could* be enacted by Congress. This approach rests on a model of dual federalism, as it assumes that if a particular area of regulation is subject to congressional control it is an inappropriate area for compact activity.¹⁵¹ Greve's approach would allow unapproved compacts only in extremely rare instances, especially given the Court's apparent move away from *Lopez* and *Morrison*'s stricter limitations on federal power in

149. See Note, *State Collective Action*, *supra* note 16 at 1861 n.23 (2006). *But see* Greve, *supra* note 13, at 372 (suggesting that, in light of *Morrison* and *Lopez*, some sorts of compacts may be beyond the reach of Congress' enumerated powers).

150. See Greve, *supra* note 13, at 369.

151. See *supra* note 109 and accompanying text.

later cases such as *Gonzales v. Raich*.¹⁵² In contrast, this Note's approach does not assume that the powers of the federal and state governments do not overlap. Rather than looking to the precise contours of federal power as a test for when compacts should be allowed to come into force without congressional approval, this approach would consider whether the subject matter of the proposed compact *clearly* lies within certain specific realms that the Supreme Court's Commerce Clause jurisprudence has demarcated with some clarity.

The standard proposed by this test is significantly more clear-cut and easily administrable than that of the *U.S. Steel* test. The criteria for determining when a compact potentially or actually infringes on the national government have proved unclear.¹⁵³ There has been significant confusion concerning what factors are meant to weigh in this analysis as well as whether to consider only actual impacts of a proposed interstate compact or to consider all possible impacts.¹⁵⁴ It was apparently for this reason that the court in *Star Scientific* adopted the *U.S. Steel* court's discussion of the degree of actual infringement by the Multistate Tax Compact as its criteria for the potential infringement by the Master Settlement Agreement.¹⁵⁵ In contrast, the Court has in its Commerce Clause opinions provided a concrete list of areas of law it finds to be within the particular purview of the states. While the determination of whether the subject matter of any particular compact is within these areas will doubtlessly still require judicial intervention, this inquiry should be easier to conduct than that required under *U.S. Steel*.

Additionally, the test proposed here will not — as Greve's test would — unduly hinder states from forming beneficial agreements in many areas where they desire to do so. Historically, states have frequently desired collective action on topics related to family and criminal law; both of these areas have been common focuses of compact activity.¹⁵⁶ Under the rule proposed here many compacts currently in force would not be found to require the assent of Congress; this includes the Interstate Compact on

152. 545 U.S. 1 (2005).

153. See *supra* Part III.B.

154. See *supra* notes 79–83 and accompanying text.

155. See *supra* notes 80–81 and accompanying text.

156. See VOIT ET AL., *supra* note 37.

Adoption and Medical Assistance and the Interstate Compact for the Placement of Children, which concern family law,¹⁵⁷ the Southern Regional Education Compact and the Midwestern Higher Education Compact, which concern Secondary and College Education,¹⁵⁸ and the Interstate Corrections Compact and the Interstate Compact For Adult Offender Supervision, which enable state cooperation in local crime prevention and punishment.¹⁵⁹

While many of the interstate compacts currently in effect would survive scrutiny under this new, straightforward test, other recently considered or enacted compacts, such as the RGGI compact,¹⁶⁰ would not. Because the RGGI's ambit is outside the narrow sphere singled out by the Court as being of particular concern to states, it would need approval from Congress to come into effect.¹⁶¹ Likewise, this test would require consent for the NPV, since its intended area of effect is not one of the Court's articulated areas of traditional state concern.¹⁶² The supporters of both of these compacts would be forced to seek either congressional action or an Article V constitutional amendment. They would therefore have to overcome inertia similar, if not identical, to that they would encounter if they sought to accomplish their goals through these other mechanisms.¹⁶³

157. *Id.* at 28–33.

158. *Id.* at 63–73.

159. *Id.* at 47–62.

160. *See supra* notes 41–45 and accompanying text.

161. Whether this fact is positive or negative is debatable. On the one hand, the RGGI is unlikely to have negative externalities on non-participating states. *See supra*, note 110 and accompanying text. On the other hand, even while the RGGI may represent a positive development in the struggle to address global climate change, it also represents unified action by state legislatures to contravene the legislative decisions of congress on what is a quintessentially national — and not state — issue.

162. Supporters of the NPV may argue that because the appointment of electors is entrusted to the states under the Constitution, it should be exempt from the requirement of congressional consent under this test. *See Schleifer, supra* note 12, at 747. For reasons of preserving the political inertia that works against Constitutional amendment, however, compacts such as the NPV — ones that take action outside traditional areas — should still require congressional approval.

163. In the case of compacts that overlap with Congress' powers under Article I, proponents would encounter identical inertia: they would need to secure a simple majority of both houses of Congress and survive any veto by the President. Proponents of compacts such as the NPV, which are intended to reproduce the effects of a Constitutional amendment, would encounter less inertia than if they employed the more arduous Article V process but still greater inertia than if they were not forced to seek the consent of Congress at all.

All in all, this proposed test strikes a balance between the unnecessarily constrictive test suggested by Greve and the overly permissive test of *U.S. Steel*. It would allow states to continue to form binding agreements in many of the areas on which their current interstate compact activity focuses: family law, criminal law and education. It would, however, subject compacts that have the capacity to produce wide scale national change (such as the NPV) to the same forces of legislative inertia that would be encountered if the same ends were sought through more traditional means.¹⁶⁴

V. CONCLUSION

Whether the NPV compact will be passed into law by enough states for it to come into effect remains unclear. If enacted, however, any compact that attempts to accomplish far-reaching national goals will inevitably be subject to judicial challenges. Such a challenge will necessarily put pressure on courts to revisit the Compact Clause. If the Supreme Court, as has been predicted, chooses to revise its holding in *U.S. Steel*,¹⁶⁵ it will need to decide whether to heed Justice White's criticism that the current regime allows the Clause "no independent meaning."¹⁶⁶ Below its surface, *U.S. Steel* argues that the Compact Clause is redundant, serving simply to mark the fact that states cannot do together what they cannot do separately. Going forward, the Court will have to decide whether this reading of the clause is correct.

This Note argues that there are powerful reasons to believe that such a redundant reading of the Compact Clause should be abandoned. In addition to the possibility, observed by Justice White and others, that an interstate compact may create negative externalities for non-participating states, agreements that substantially overlap with areas of federal law pose vertical federal-

164. One possible problem with this proposed test may be that it is not carefully designed to eliminate all externalities on non-participating states. At the same time, allowing states to make unapproved agreements only in areas similar to boundary agreements, education, family law, and crime control should require consent for many compacts with damaging impacts on states that chose not to participate. It is difficult to imagine many areas of family or educational law, for instance, where interstate agreements can exert excessive pressure on states that choose not to participate.

165. See *supra* note 16.

166. *U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452, 482 (White, J., dissenting).

ism issues that have not been previously noted. Some compacts, such as the RGGI, that may not have any identifiable negative externalities on non-compacting states, may nonetheless represent an ill-advised shift in the carefully calibrated balance of power between the federal government and the states. For this reason, it is important that future Compact Clause jurisprudence attend not simply to issues of horizontal federalism but also to the balance of power between Congress and the states.