

The Elusive Foreign Compact

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I. INTRODUCTION

Missouri v. Holland marks one of the great rivalries of foreign affairs law, with Missouri and the federal government squaring off over states' rights limitations on the federal government's treaty-making power.¹ But the rivalry did not end with that case. Recently, Missouri and the federal government opened a new chapter in their feud over state and federal powers in foreign affairs. This time, however, the constitutional challenge involved an international agreement made by Missouri, not the federal government.

On February 14, 2001, U.S. Senator Byron Dorgan from North Dakota wrote the U.S. State Department to complain about a Memorandum of Understanding ("MOU") that Missouri had signed with the Province of Manitoba on January 25, 2001.² In that MOU, Missouri and Manitoba agreed "to work cooperatively to the fullest extent possible consistent with law and existing treaties . . . in their efforts to oppose water transfers" between the Missouri River and Hudson Bay watersheds.³ Manitoba believed that U.S. water development projects linking the two watersheds risked the introduction of

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1. 252 U.S. 416 (1920) (upholding the Migratory Bird Treaty and its implementing statute, the 1918 Migratory Bird Treaty Act).

2. Letter from Byron L. Dorgan, U.S. Senator, to the Office of Legal Counsel [sic], U.S. Dep't of State (Feb. 14, 2001), *available at* www.state.gov/documents/organization/28984.pdf [hereinafter Dorgan Letter]; *see also* Memorandum of Understanding Between the State of Missouri & the Province of Manitoba on Their Shared Concerns About Water Transfers Between the Missouri & Hudson Bay Watersheds Jan. 25, 2001, www.gov.mb.ca/waterstewardship/transboundary/positions/missposition/missouri-mou.html [hereinafter Missouri-Manitoba MOU] (Governor Bob Holden and Premier Gary Doer signed the MOU for the State of Missouri and the Province of Manitoba respectively.). Senator Dorgan also complained directly to Missouri officials. *See* Terry Ganey, *Missouri's River Pact with Manitoba Angers Senator from North Dakota*, ST. LOUIS POST-DISPATCH, Feb. 18, 2001, at B6.

3. Missouri-Manitoba MOU, *supra* note 2. Under the MOU the two sides agreed to share information, to mutually support efforts in opposing water transfers between major watersheds – including incremental works that could lead to such transfers – and to communicate concerns about inter-basin transfers to their respective national governments. *Id.*

invasive species into Manitoba's waters – the Hudson Bay basin – with irreparable environmental and economic consequences.⁴ Manitoba thus solicited Missouri (and other states) to join its fight against such transfers given those states' own interests in preserving the Missouri River for drinking and recreational purposes.⁵ In contrast, Senator Dorgan (whose state would benefit from inter-basin transfers) characterized water transfers as a “national interest . . . much broader than the interest of one American state or one Canadian province.”⁶ In Senator Dorgan's view, Missouri's MOU ran afoul of clear constitutional limits on the ability of U.S. states to enter into foreign agreements.⁷

Article 1, Section 10 of the Constitution contains the Compact Clause: “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power.”⁸ The same section expressly prohibits U.S. states from entering into “any Treaty, Alliance or Confederation.”⁹ Read literally, the text supports Senator Dorgan's view. It suggests a bifurcation of (a) agreements that U.S. states can make *if* Congress consents – compacts and agreements; and (b) agreements that U.S. states cannot make at all – treaties, alliances and confederations. Even assuming then that the Missouri-Manitoba MOU did not trigger the

4. *See, e.g.*, Terry Ganey, *Holden, Canadian Oppose Transfers of Missouri River Water – Officials Sign Deal Aimed at Protecting Supply, Environment*, ST. LOUIS POST-DISPATCH, Jan. 31, 2001, at A7. Federal law supports the possibility of *some* such inter-basin water transfers, provided they meet certain procedural and substantive conditions, including compliance with the 1909 Boundary Waters Treaty. *See, e.g.*, Dakota Water Resources Act of 2000 (DWRA), Pub. L. No. 106-554, app. D, § 602, 114 Stat. 2763, 2763A-282 (amending Act of Aug. 5th, 1965, Pub. L. No. 89-108, 79 Stat. 433, *amended by* Garrison Diversion Unit Reformulation Act of 1986 (Garrison Act), Pub. L. No. 99-294, 100 Stat. 418); Treaty Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448 [hereinafter BWT]. At present, only one project involving (a relatively small) inter-basin water transfer – the Northwest Area Water Supply (NAWS) – is under construction although Manitoba has challenged that project's compliance with federal environmental laws. *See, e.g.*, *Manitoba v. Norton*, 398 F. Supp. 2d 41, 44 (D.D.C. 2005).

5. *See* Dorgan Letter, *supra* note 2, at para. 4 (“I understand that Manitoba has contacted other states with the interest of entering into similar Memorandums of Understanding.”). Later in 2001, Manitoba also concluded an identical MOU with Minnesota. *See* Memorandum of Understanding to Protect Water Resources Between the State of Minnesota and the Province of Manitoba, July 13, 2001, <http://www.gov.mb.ca/chc/press/top/2001/07/agreement.pdf>.

6. Dorgan Letter, *supra* note 2, at para. 3.

7. *See id.* (“[I]n my view an agreement in this area should be prohibited under the compact clause of the Constitution. . . . From my perspective, it appears that Missouri has acted inappropriately and not in accordance with the Constitution in signing a MOU with the Province of Manitoba.”).

8. U.S. CONST. art. I, §10, cl. 3.

9. U.S. CONST. art. I, §10, cl. 1.

absolute prohibition on treaties, Congress still needed to consent in order to overcome the conditional prohibition on *any* state agreement with a foreign power.¹⁰ Since Congress had not considered – let alone consented to – the Missouri-Manitoba MOU, its constitutionality appears suspect.

Senator Dorgan asked the State Department for an “analysis of this agreement and your determination of whether such an agreement is allowed” under the Constitution.¹¹ On November 20, 2001, the State Department’s Legal Adviser, William H. Taft, IV, provided a lengthy memorandum in response to Senator Dorgan’s request.¹² The State Department Memo declined, however, to determine the MOU’s constitutionality, saying merely that it “potentially implicates several constitutional doctrines,” including the Compact Clause.¹³

But why did Senator Dorgan seek a decision from the State Department at all? The Compact Clause contains a Congressional power, not an Executive one. If Senator Dorgan believed that Missouri had violated its terms – and he did – why not look to his colleagues in Congress for relief? As the holder of the power, shouldn’t Congress dictate when and how states conclude agreements with foreign governments?

It turns out that Senator Dorgan had good reason to consult the State Department. Whatever the constitutional text suggests about Congress having plenary power over the states’ foreign agreements, the reality has proved quite different. Congress has done remarkably little to define or execute its own Compact Clause power. In its stead, the other two branches – the Court and the Executive – have played much larger roles. In exercising its judicial function, the Court has done much of the definitional work, delineating when Congress must approve a state’s agreement. Judicial decisions on interstate compacts have glossed over the distinction between treaties and compacts and implied a *third* category of state agreements – i.e., those that states have a

10. Although the Framers undoubtedly understood the prohibited “Treaty” and Congress’s power to approve “any Agreement or Compact” to govern different instruments, no modern consensus exists on how they expected this distinction to operate. In its place, the Court has suggested a very different bifurcation of U.S. state agreements. *See infra* notes 52-69 and accompanying text.

11. Dorgan Letter, *supra* note 2, at para. 5.

12. Memorandum from William H. Taft, IV, Office of the Legal Adviser, U.S. Dep’t of State, to Byron Dorgan, U.S. Senator (Nov. 20, 2001), in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 180 (2002) [hereinafter Legal Adviser Compact Memo]. In the interest of full disclosure, I worked on earlier versions of this Memorandum during my tenure at the State Department.

13. *Id.* In addition to the Compact Clause, the Memorandum noted that the Missouri-Manitoba MOU implicated: (a) the Supremacy Clause, given how federal law (e.g., the DWRA and the Garrison Act) might occupy the field and preempt the MOU under the reasoning of *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); and (b) the Foreign Affairs power that would trump U.S. state efforts to conduct their own foreign policy based on *Zschernig v. Miller*, 389 U.S. 429 (1968). *See* Legal Adviser Compact Memo, *supra* note 12, at 193-98.

power to make free from congressional oversight or approval. And, in terms of execution, the Executive has done much more than Congress to police state activities with foreign powers in light of these judicially-drawn lines. As Senator Dorgan's own letter suggests, the Executive, not Congress, plays the lead role today in dictating the appropriateness of state interactions with foreign governments.¹⁴

This Essay explores and questions the current operation of the Compact Clause vis-à-vis foreign compacts. First, I examine how small a role Congress plays in questions about state agreements with foreign governments, even in the face of substantial state practice. Second, I seek to explain *why* Congress's power over foreign compacts appears so dormant. I find congressional inaction to be a function of judicial and executive action. The Court's rulings have greatly limited when Congress *must* consent to an interstate compact, and Congress appears to accept similar limits for foreign compacts. At the same time, the states, foreign governments, and even Congress itself have turned to the Executive to assess what U.S. states can do with or without congressional consent. Third, focusing on this Executive role, I illustrate some of the informational, functional, and structural problems it produces. Ultimately, by highlighting the elusive nature of foreign compacts under current doctrine and Executive practice, I seek to establish the need for a more sustained inquiry of foreign compacts and Congress's role in this aspect of the states' foreign affairs.¹⁵

II. FOREIGN COMPACTS – A “DO NOTHING” CONGRESS?

Since the Founding, Congress has approved some two hundred *interstate* compacts.¹⁶ The vast majority of these approvals came after 1920, when

14. Although I emphasize the Executive's performance of tasks left undone by an inactive Congress, I concede that individual members of Congress might prefer this Executive substitution because of the transaction costs of getting Congress to agree on anything or for the leverage a concurring Executive view provides to members trying to get Congress to take action. Indeed, the Executive's views could also garner judicial deference if foreign compact questions come before U.S. courts, particularly since they involve foreign affairs and international agreements. *See generally* Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000); Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723 (2007); Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777 (2008); Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571 (2007).

15. My own contribution to this inquiry is a work-in-progress, titled *Unpacking the Compact Clause* (draft manuscript, on file with author).

16. In a 1998 study, the Council of State Governments listed 101 interstate compacts explicitly approved by Congress. WILLIAM KEVIN VOIT & GARY NITTING, COUNCIL OF STATE GOV'TS, INTERSTATE COMPACTS & AGENCIES 1998 (1999). This figure significantly undercounts the actual number of approvals, since it does not include (a) compacts involving boundaries; (b) defunct compacts; (c) compacts

U.S. states began to employ the interstate compact in new ways; shifting it from a boundary settlement device to one also capable of advisory, administrative and regulatory functions.¹⁷ Today, these agreements among U.S. states operate bilaterally, regionally and nationally. They address a range of topics, including boundaries, child welfare, crime control, education, pollution control, regional economic assistance, resource-sharing, and transportation.¹⁸

The foreign compact, in contrast, has proved a much more elusive creature.¹⁹ Congress has consented to a mere handful of these agreements.²⁰

pending congressional consent; and (d) cases of implicit congressional consent. *See id.* at 11-14; *cf.* *Virginia v. Tennessee*, 148 U.S. 503, 522-23 (1893) (congressional consent can be express or implied). Other studies have more comprehensive accountings, but are dated. *See, e.g.*, Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *YALE L.J.* 685, app. A at 735-46 (1925) (listing 39 congressionally approved interstate compacts between 1789-1925); THE COUNCIL OF STATE GOV'TS, *INTERSTATE COMPACTS 1783-1970* (1971) [hereinafter 1971 CSG STUDY] (listing 131 congressionally approved interstate compacts through 1970); Kevin J. Heron, *The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements*, 60 *ST. JOHN'S L. REV.* 1, 2 (1985) (listing 176 operative compacts using 1978-79 studies). Currently, the Council of State Governments indicates that more than 200 interstate compacts exist but does not delineate those lacking congressional consent. *See* Council of State Governments, 10 *Frequently Asked Questions*, www.csg.org/programs/ncic/documents/compactFAQ.pdf (last visited Sept. 14, 2008).

17. As Frankfurter and Landis noted in their seminal work, interstate compacts originated as dispute settlement mechanisms for resolving boundary and shared resource questions. Their article promoted (and presaged) the use of interstate compacts as advisory, administrative and regulatory tools for interstate cooperation on matters where Congress could not (or would not) act. *See* Frankfurter & Landis, *supra* note 16, at 729; *see also* FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, *THE LAW AND USE OF INTERSTATE COMPACTS* ix (1976); Heron, *supra* note 16, at 2.

18. *See* CAROLINE N. BROUN ET AL., *THE EVOLVING USE AND CHANGING ROLE OF INTERSTATE COMPACTS* xvii (2006); 1971 CSG STUDY, *supra* note 16; Frankfurter & Landis, *supra* note 16, at 729.

19. The distinguishing character of a foreign compact lies in the presence of one or more foreign participants in the agreement approved by Congress. Since some foreign compacts involve multiple U.S. state participants, foreign compacts may also qualify as interstate compacts for purposes of U.S. state relations *inter se*.

20. Several scholars have suggested Congress has stopped approving foreign compacts entirely. *See, e.g.*, Peter R. Jennetten, *State Environmental Agreements with Foreign Powers: The Compact Clause and the Foreign Affairs Power of the States*, 8 *GEO. INT'L ENVTL. L. REV.* 141, 168 n.163 (1995) (suggesting Congressional approval not sought for any foreign compacts since 1968); Edward T. Swaine, *Does Federalism Constrain the Treaty Power*, 103 *COLUM. L. REV.* 403, 497 (2003) (suggesting no congressionally-approved foreign compacts since 1957). But Congress has not ceased approving foreign compacts altogether; it consented to the IEMA Compact in 2007, as well as the PNEMA Compact and Northwest Wildland Fire Protection Agreement in 1998. *See infra* notes 26, 30-31 and accompanying text.

Virtually all of them have the same, limited function – coordinating activities by Border States in sharing information, resources or costs within a transboundary region. And Congress has not consented to every agreement fulfilling such functions. In fact, Congress has consented to foreign compacts in only four narrowly defined categories: (a) bridges; (b) fire fighting; (c) highways; and (d) emergency management.

The first recorded case of congressional approval of a foreign compact came in 1870, when Congress approved New York and Canada's International Bridge Compact to construct a Niagara River bridge.²¹ This marked the beginning of a nearly century-long process (public *and* private), culminating in Congress's 1957 approval of the Buffalo and Fort Erie Public Bridge Authority.²² In 1972, Congress expanded on this concept, passing the International Bridge Act, authorizing U.S. state agreements with Canadian and Mexican counterparts on the construction, operation, and maintenance of transboundary bridges.²³

After a series of devastating fires in Maine, in 1952 Congress authorized Canadian participation in a Northeastern Interstate Fire Protection Compact.²⁴ No Canadian province actually belonged, however, until 1970 when New Brunswick and Quebec joined, following the conclusion of a U.S.-Canada agreement authorizing their participation.²⁵ More recently, in 1998, Congress

21. See Act to Authorize the Construction and Maintenance of a Bridge Across the Niagara River, ch. 176, 16 Stat. 173 (1870).

22. See 1971 CSG STUDY, *supra* note 16, at 9 (discussing subsequent Canada-New York agreements as "too complex for enumeration," but listing Congress's approval in 1934 of New York-Canada Bridge Compact that arose because private efforts to construct a bridge had failed); H.R.J. Res. 549, 84th Cong., Pub. L. No. 824, 70 Stat. 701 (1956), *repealed by* H.R.J. Res. 342, 85th Cong., Pub. L. No. 85-145, 71 Stat. 367 (1957) (repealing statute gave congressional consent to compact between New York and Canada on continuing use of the Buffalo and Ft. Erie Public Bridge Authority for the Niagara River bridge).

23. Pub. L. No. 92-434, § 3, 86 Stat. 731, 731 (1972) (codified at 33 U.S.C. § 535a (2000)).

24. Congress originally consented to the Compact in 1949 but reserved consent to Canadian participation. Act of June 25, 1949, ch. 246, 63 Stat. 271, 272. That consent came in 1952. Act of May 13, 1952, Pub. L. No. 340, § 1, 66 Stat. 71, 71, *repealed by* Act of June 30, 1978, Pub. L. No. 95-307, § 8, 92 Stat. 353 (continued effectiveness of compacts formed under repealed law was preserved by 16 U.S.C. §1647(b) (2006)); R. Bruce Sackinger, Comment, *Paradiplomatic Maneuvers on the Longest undefended Border: National and Subnational Fire Protection Agreements Between Canada and the United States*, 13 WILLAMETTE J. INT'L & DIS. RESOL. 319, 343 (2005).

25. Agreement Effected by Exchange of Notes Relating to the Participation of the Provinces of New Brunswick and Quebec in the Northeastern Interstate Forest Fire Protection Compact, U.S.-Can., Jan. 29, 1970, 21 U.S.T. 415; *see also* Jennetten, *supra* note 20, at 164 n.138. Nova Scotia joined in 1996, but without any additional federal consent. *See* Sackinger, *supra* note 24, at 343 (suggesting consent might exist

approved a Northwest Wildland Fire Protection Agreement that now includes four U.S. states and four Canadian sub-national members (British Columbia, Alberta, the Yukon Territory, and the Northwest Territories).²⁶

In several instances, Congress's consent included foreign participation that never materialized. For example, in 1958 Congress authorized Minnesota to negotiate a compact with Manitoba to develop a highway to access the northwest part of Minnesota.²⁷ According to Congress, however, the parties needed additional congressional consent to give any such compact binding effect, which never happened.²⁸ Similarly, in 1951, Congress in authorizing Interstate Civil Defense and Disaster Compacts also approved "mutual aid pacts" on the same topic between U.S. states and neighboring countries, although none apparently ever came to fruition.²⁹

Congress most recently consented to a foreign compact on December 17, 2007, when it approved the International Emergency Management Assistance Memorandum of Understanding ("IEMA Compact").³⁰ The IEMA

under Arrangement Effected by Exchange of Notes Relating to Mutual Assistance in Fighting Forest Fires, U.S.-Can., May 7, 1982, 34 U.S.T. 1557).

26. Act of Nov. 12, 1998, Pub. L. No. 105-377, § 1, 112 Stat. 3391, 3391 [hereinafter Northwest Wildland Fire Protection Agreement] (granting consent of Congress to an interstate forest fire protection compact). A 1984 Great Lakes Forest Fire Compact also exists among several U.S. states and Canadian provinces, but Congress has not authorized it. See Sackinger, *supra* note 24, at 343-44.

27. Act of Sept. 2, 1958, Pub. L. No. 85-877, § 1, 72 Stat. 1701, 1701.

28. See *id.*

29. See Federal Civil Defense Act of 1950, ch. 1228, §§ 201(g), 203, 64 Stat. 1245, 1249, 1251 (1951). The Interstate Civil Defense Compact that U.S. states actually negotiated based on this authority provided for participation by "any neighboring foreign country or province or state thereof." Frederick L. Zimmermann et al., *Effective Interpleader via Interstate Compacts*, 55 COLUM. L. REV. 56, 63 n.40 (1955). In several other cases, the compact text allows for foreign participation, but Congress's consent does not address it either because Congress consented in advance or because it gave consent only to states that had already joined the Compact. See, e.g., 1971 CSG STUDY, *supra* note 16, at 23 (describing the Bus Taxation Proration and Reciprocity Agreement's scope as including "[a]ll States, U.S. territories and possessions, Canadian provinces and States of Mexico" but noting Congress consented only to states already participating in the compact, and required additional consent for states subsequently adopting it); *id.* at 25 (Congress consented to an interstate Vehicle Equipment Safety Compact in the Federal Highway Safety Act of 1958, Pub. L. No. 85-684, 72 Stat. 635, but the Compact subsequently negotiated allowed for participation by Canadian provinces and Mexican states.).

30. See, S.J. Res. 13, 110th Cong., Pub. L. No. 110-171, 121 Stat. 2467 (2007). The Conference of New England Governors and Canadian Premiers originally negotiated the IEMA Compact in July 2000. Congress considered it for congressional consent in 2000 and subsequent years before granting consent in 2007. See, e.g., S.J. Res. 37, 109th Cong. (2006); S.J. Res. 12, 107th Cong. (2001); S.J. Res. 52, 106th Cong. (2000). The Senate and House approved the IEMA Compact on October 2 and December 17, 2007, respectively. Although not required for purposes of its

Compact provides a framework for cooperation in planning for, and responding to, disasters and other emergencies among six northeastern U.S. states and five Canadian provinces. Congress approved a similar compact among northwestern U.S. States and Canadian provinces in 1998 – the Pacific Northwest Emergency Management Arrangement (“PNEMA Compact”).³¹ Both of these foreign compacts mirror an earlier interstate agreement – the Emergency Management Assistance Compact (“EMAC”) – that Congress approved in 1996.³²

Taken together, this history demonstrates how remarkably few foreign compacts Congress has approved. One might infer from this some congressional hostility to agreements between U.S. states and foreign governments. The empirical evidence, however, does not support that assumption. Congress has refused its consent to foreign participation in a compact exactly *once* – in the 1968 Great Lakes Basin Compact (and even then only at the behest of a U.S. State Department concerned about conflicts with U.S. treaty obligations).³³ Nor has Congress ever challenged a U.S. state’s agreement as a prohibited treaty.

In reality, Congress rarely has *any* chance to opine on what states propose to do with foreign governments.³⁴ Why? U.S. states simply do not

constitutionality, Congress typically presents compacts to which it consents to the President for approval, thereby giving them the status of federal law. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981); ZIMMERMANN & WENDELL, *supra* note 17, at 24-25 (noting how “[u]sage has brought the President into the compact process”). The President approved the IEMA Compact on December 26, 2007. 121 Stat. at 2472.

31. Act of Nov. 12, 1998, Pub. L. No. 105-381, 112 Stat. 3402 [hereinafter PNEMA Compact].

32. H.J. Res. 193, 104th Cong., Pub. L. No. 104-321, 110 Stat. 3877 (1996). Although originally approved for thirteen U.S. states, *id.* at 3877, today all fifty states, Puerto Rico, Guam, the U.S. Virgin Islands and the District of Columbia are parties to EMAC.

33. *See* Act of July 24, 1968, Pub. L. No. 90-419, 82 Stat. 414 (granting consent to a Great Lakes Basin Compact but limiting it to U.S. state participation and not including provisions authorizing recommendations to the federal governments on treaties and agreements). The underlying Great Lakes Basin Compact provided for co-equal membership of Ontario and Quebec and the creation of a Commission to advise on appropriate policies for the Great Lakes Basin. 82 Stat. at 414-15. Ironically, Jennetten’s legislative history review found that the states only submitted it to Congress *because* of Canadian participation; otherwise they viewed the compact’s advisory function as falling outside those categories of compacts requiring congressional consent. Jennetten, *supra* note 20, at 165-66. The State Department objected to it, however, fearing that the Compact would operate inconsistent with U.S. obligations to Canada under the 1909 Boundary Waters Treaty. *See id.*; *see also* BWT, *supra* note 4.

34. Congress can, of course, use its other enumerated powers to restrict or preempt a foreign agreement, before or after the fact. The fact that Congress has not done so with respect to existing foreign agreements does not mean, however, that Congress has tacitly approved them. Congress’s informational deficit on the

submit their arrangements with foreign powers to Congress for approval.³⁵ Thus, Congress frequently has no knowledge – let alone views on – what the states might be doing abroad.³⁶ But make no mistake – U.S. states have *very* active international agendas. Since North Carolina Governor Luther Hodges first led a gubernatorial trade mission to Western Europe in 1959, state engagements with foreign governments have risen dramatically.³⁷ U.S. states now interact directly with foreign sovereigns and sub-national governments on a regular basis.³⁸

These interactions have in turn produced *hundreds* of written agreements between U.S. states and foreign governmental entities. Finding these agreements poses a challenge; no centralized or coordinated reporting system exists and copies are often not made public. Still, the available evidence shows that in contrast with the limited scope of congressionally approved foreign compacts (cross-border bridges, fires, and emergencies), these foreign agreements cut a much broader swath in terms of parties, topics, and functions.

Canadian provinces and Mexican states remain among their most frequent partners, but U.S. states' foreign agreements include other national and sub-national governments from the likes of Australia, China, Israel, Moldova, the Netherlands, Taiwan, and the United Kingdom.³⁹ They cover an array of

agreements' existence, content, and operation provides an equal, if not more plausible, explanation for congressional inaction.

35. See, e.g., Jennetten, *supra* note 20, at 168 (“[S]tates have felt that the wiser course is not to approach Congress for approval of many agreements.”).

36. As Senator Dorgan's letter demonstrates, frequently at least some members of Congress will have knowledge of state activities abroad. In particular, I assume a state's congressional delegation will know what the state government does vis-à-vis foreign governments. But, I also assume that in most cases these members have incentives to keep such information private, preserving more freedom of action for their states whenever possible.

37. CHRIS WHATLEY, COUNCIL OF STATE GOV'TS, STATE OFFICIAL'S GUIDE TO INTERNATIONAL AFFAIRS 3 (2003); John Kinkaid, *The American Governors in International Affairs*, PUBLIUS, Fall 1984, at 95, 102.

38. Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2414 (2006) (“Governors are increasingly responsible for dealing with demands from foreign governments and international institutions.”); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1247-48 (1999) (discussing the “dramatically heightened profile of state and local governments on the world scene”); see also Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 821-22 (1989); Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, FOREIGN POL'Y, Spring 1992, at 158.

39. See, e.g., Partnership on Global Climate Change Action Between the United Kingdom and the State of Wisconsin, May 12, 2008, <http://www.wisgov.state.wi.us/docview.asp?docid=13713> [hereinafter UK-Wisconsin Partnership]; Memorandum of Understanding Between the State of Victoria and the State of California for Collaboration on Climate Change Action, May 4, 2007, http://gov.ca.gov/pdf/press/070506_climate_change_document.pdf [hereinafter

topics, including agriculture, climate change, education, energy, environmental cooperation, family support, hazardous waste, homeland security, investment, military cooperation, pollution, sister-state relations, tourism, trade, transportation, and, of course, water issues.⁴⁰ In terms of content, foreign agreements perform a variety of functions, ranging from (a) “passive” joint declarations or statements of common policies;⁴¹ (b) agreements to cooperate

Victoria-California MOU]; Memorandum of Understanding on Tourism Cooperation Between the State of Hawaii of the United States of America & the China National Tourism Administration of the People’s Republic of China, Apr. 3, 2006, <http://www.hawaiireporter.com/story.aspx?39ff83e4-da93-4abd-9961-76fdf9462a12> [hereinafter China-Hawaii MOU]; Memorandum of Understanding Between the State of Alaska and the Ministry of Economic Affairs for the Republic of China (Taiwan) for the Production and Purchase of K-Fuel Coal, Sept. 16, 2004, <http://www.secinfo.com/d14D5a.15Z75.b.htm> [hereinafter Alaska-Taiwan MOU]; Memorandum of Intent Between the Republic of Moldova and the State of North Carolina, Apr. 22, 1999, <http://www.secretary.state.nc.us/Partnership/memorandum.htm> [hereinafter Moldova-North Carolina MOI]; Letter of Intent Between the Ministry of Housing, Spatial Planning [of] the Netherlands and the Department of Environmental Protection, The State of New Jersey, June 5, 1998, <http://www.state.nj.us/dep/dsr/Netherlands.PDF> [hereinafter Netherlands-New Jersey LOI]; Memorandum of Intent between Israel and New Jersey Concerning a Joint Israel-New Jersey Program to Promote the Establishment of Environmental Management Systems, Nov. 13, 1996, <http://www.state.nj.us/dep/dsr/Israel.PDF> [hereinafter Israel-New Jersey MOI].

40. See, e.g., UK-Wisconsin Partnership, *supra* note 39 (climate change); Victoria-California MOU, *supra* note 39 (climate change); China-Hawaii MOU, *supra* note 39 (tourism); Agreement of Cooperation Intention between the State of Kansas and Ministry of Education of the People’s Republic of China, Oct. 24, 2005, <http://internationaleled.org/mou/Kansas%20MOU%20with%20China%20final.pdf> (education); Alaska-Taiwan MOU, *supra* note 39 (energy); Oil Spill Memorandum of Cooperation, May 8, 2001, http://www.oilspilltaskforce.org/memo_cooperation.htm [hereinafter Oil Spill Memorandum] (British Columbia, Alaska, California, Hawaii, Oregon and Washington agreement on oil pollution); Missouri-Manitoba MOU, *supra* note 2 (water); Memorandum of Understanding Between the State of Rio de Janeiro, Brazil, and Maryland, of the United States of America, Nov. 8, 1999, <http://www.sos.state.md.us/International/mdss/RioMOU.pdf> (sister-state agreement); Moldova-North Carolina MOI, *supra* note 39 (military cooperation); Israel-New Jersey MOI, *supra* note 39 (environmental cooperation); Transportation Cooperation Agreement Between the Province of British Columbia and the State of Washington, Sept. 6, 1994, http://www.env.gov.bc.ca/spd/ecc/docs/annual_reports/jointstate94.pdf (transportation); Raymond S. Rodgers, *Conclusion of Quebec-Louisiana Agreement on Cultural Co-Operation*, 64 AM. J. INT’L L. 380 (1970) (Quebec-Louisiana agreement on education); Press Release, Office of Governor Linda Lingle, Governor Lingle Signs Agricultural Cooperative Agreement with Israeli Government (May 20, 2004), available at http://hawaii.gov/gov/news/releases/2004/News_Item.2004-05-20.2441 [hereinafter Hawaii-Israel Agreement on Agriculture and Aquaculture].

41. See, e.g., Declaration of the Federated States and Regional Governments on Climate Change, Dec. 6, 2005, http://www.mddep.gouv.qc.ca/air/leaders/Declaration_

whether generally, via an action plan, or through the creation of some institutional entity;⁴² (c) isolated agreements committing to a particular project or activity;⁴³ to (d) regulatory agreements laying out normative expectations for participant behavior in particular areas.⁴⁴

What has Congress done in the face of such a regular (and even robust) U.S. state practice? Virtually nothing. Congressional inaction serves as the operating norm. Some might question if Congress has done so little because foreign agreements mean little; i.e., its silence is a function of the

en.pdf (affirming commitment of participants—Quebec, Manitoba, Northwest Territories, Nanavut, State of Bavaria, Brussels-Capital, California, Catalonia, Connecticut, Maine, New Brunswick, New South Wales, Nova Scotia, Ontario, Scotland, South Australia, Upper Austria, Vermont, Victoria, Wallonia, Western Cape, Yukon, Burgenland, Carinthia, Wales, Flanders, Prince Edward Island, North Rhine Westphalia—to take action against climate change).

42. See, e.g., Memorandum of Understanding on Environmental Cooperation Between the California Environmental Protection Agency, the California Department of Food and Agriculture, and the California Resources Agency of the State of California, United States of America and the Ministry of Environmental and Natural Resources of the United Mexican States, Feb. 13, 2008, <http://www.calepa.ca.gov/Border/Documents/2008/021308MOU.pdf> [hereinafter California-Mexico Environmental Cooperation MOU] (Parties agree to develop Joint Action Plan to implement cooperative goals of enhancing policies for environmental protection and sustainable resources.); Oil Spill Memorandum, *supra* note 40 (Participants agree to cooperation of agencies and support for an Oil Spill Task Force to address common problem of oil spills in the Pacific.); Maryland-Israel Declaration of Cooperation, May 3, 1988, <http://www.marylandisrael.org/pages/publications/marylandisrael-declaration-of-cooperation.php> (general agreement to promote economic development between Maryland and Israeli businesses and research institutions).

43. See, e.g., Memorandum of Understanding, Alaska-Canada Rail Link Feasibility Study, Apr. 25, 2005, http://alaskacanadarail.com/documents/mou_final_april252005.pdf (Alaska-Canada agreement to study feasibility of possible Alaska-Canada rail link, including creation of an Alaska-Canada Advisory Committee to oversee the study); Memorandum of Understanding Between the Instituto de Servicios de Salud Pública del Estado de Baja California, Mexico, and the Environmental Protection Agency of the State of California, United States of America, Relative to the Study of Lead in the Baja California Population, Oct. 30, 2001, http://www.calepa.ca.gov/Border/Documents/env_agreements_eng.pdf (agreement to develop and conduct a study of lead exposure in Baja population).

44. See, e.g., Memorandum of Understanding Between the Government of the State of Iowa of the United States of America and the Ministry of Foreign Affairs of the United Mexican States, Regarding Consular Notification and Access in Cases Involving Minors, Apr. 20, 2006, http://www.dhs.state.ia.us/policyanalysis/PolicyManualPages/Manual_Documents/Master/17-C3%20T12.pdf (creates procedural guidelines for Iowa authorities having custody of Mexican minors); Reciprocal Agreement Between the State of New York and Québec Concerning Drivers' Licenses and Traffic Offenses, Feb. 4, 1988, <http://www.canlii.org/qc/laws/regu/c-24.2r.0.1.2/20030530/whole.html> (regulating reciprocity of resident drivers' licenses and traffic offenses reporting).

agreements' political insignificance. But congressional silence holds true even when foreign agreements implicate significant foreign relations questions or create organizational structures patterning future U.S. state behavior.

For example, Congress had nothing to say in October 2007 when ten U.S. states joined ten European nation states, the European Commission, two Canadian provinces and New Zealand to form an "International Carbon Action Partnership" (ICAP) to promote cap and trade carbon markets to combat global warming.⁴⁵ This partnership operates in tension with a White House (and Congress) uncommitted to such markets and ongoing U.S. negotiations with many of the same ICAP participants on this very topic.⁴⁶ Similarly, notwithstanding its 1968 objection to Canadian participation, Congress has yet to opine on a December 13, 2005 Great Lakes Agreement that *does* include Canadian participation in a Regional Body advising U.S. states on water diversions.⁴⁷ Nor did Congress react to Kansas Governor

45. Political Declaration on the International Carbon Action Partnership, Oct. 29, 2007, http://www.icapcarbonaction.com/docs/icap_declaration.pdf [hereinafter ICAP Declaration]. U.S. state ICAP participation builds on two interstate initiatives, the Regional Greenhouse Gas Initiative (RGGI) and the Western Climate Initiative (WCI). The RGGI currently includes ten Northeastern/Mid-Atlantic U.S. states. *See* Regional Greenhouse Gas Initiative, <http://www.rggi.org> (last visited Sept. 16, 2008). The WCI began in 2007 among five Western U.S. states, and now includes seven U.S. states and two Canadian provinces. *See* Western Climate Initiative, <http://www.westernclimateinitiative.org> (last visited Sept. 16, 2008). The WCI has collaborated to set a regional goal for greenhouse gas emissions reductions and to pursue plans for a regional cap-and-trade program. *See id.*; W. CLIMATE INITIATIVE, DRAFT DESIGN RECOMMENDATIONS ON ELEMENTS OF THE CAP-AND-TRADE PROGRAM (2008), <http://www.westernclimateinitiative.org/ewebeditpro/items/O104F17390.pdf>.

46. The United States never ratified the Kyoto Protocol and is now engaged in negotiations on a successor regime. As yet, it has not accepted – and may actually oppose – carbon markets. Congress has also been unable to legislate on the topic. *See, e.g.*, Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22; Sheryl Gay Stolberg, *Pact on Gas Emissions Eludes Rich and Developing Nations*, N.Y. TIMES, July 10, 2008, at A10 (discussing White House willingness to make only general commitments on combating climate change); Eric Pooley, *Why the Climate Bill Failed*, TIME, June 9, 2008, <http://www.time.com/time/nation/article/0,8599,1812836,00.html> (discussing Congress's inability to act on climate change); *see also* White House Office of Press Sec'y, U.S. Climate Change Policy (Nov. 19, 2004), <http://www.state.gov/g/oes/rls/fs/2004/38641.htm>; Letter from George W. Bush, President of the United States, to Chuck Hagel, Jesse Helms, Larry Craig, and Pat Roberts, U.S. Senators (Mar. 13, 2001), <http://www.whitehouse.gov/news/releases/2001/03/20010314.html> (explaining Executive Branch and Senate opposition to Kyoto Protocol).

47. Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement, Dec. 13, 2005, http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf [hereinafter Great Lakes Agreement]. On the same day, eight U.S. states agreed to the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Compact

Kathleen Sebelius's 2003 agreement with Alimport – Cuba's food trade agency – that reportedly contemplated Cuban purchases of \$10 million in Kansas agricultural products in return for the Kansas government's commitment to encourage a change in U.S. policy toward Cuba.⁴⁸

In sum, looking to Congress for details on its Compact Clause power in the foreign context proves a nearly fruitless exercise. Congress has done little to agree to foreign compacts, little to object to them, and little to even monitor what U.S. states actually do abroad. The Compact Clause as it applies to foreign actors lies effectively dormant.

III. WHY DOESN'T CONGRESS DO FOREIGN COMPACTS?

Acknowledging how little purchase the Compact Clause has for Congress does not, of course, tell us *why* this situation has come to pass. As the foregoing analysis makes clear, we cannot explain Congress's *de minimus* role in terms of a lack of state activity, or even the idea that such activity lacks political relevance. Perhaps, however, Congress has a legal litmus test?⁴⁹ After all, many agreements made by U.S. states with foreign governments specifically disavow any legal effect; they are, by design, political

that they *do* plan to submit to Congress for its consent. See Great Lakes-St. Lawrence River Basin Resources Compact, Dec. 13, 2005, http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf [hereinafter Great Lakes Compact]; see also John Crook, *Eight U.S. Great Lakes States, Ontario, and Quebec Conclude New Agreements to Limit Diversions of Water from Great Lakes Basin*, 100 AM. J. INT'L L. 467, 467 (2006).

48. See, e.g., *Agricultural Sales to Cuba Keep Rising Despite Embargo & Administration Policy Crackdown*, NOTICEN, Apr. 1, 2004, available at 2004 WLNR 6607376 (“In December 2003, Kansas Gov[ernor] Kathleen Sebelius signed a US \$10 million sales agreement with Alimport. The agreement also binds the governor to work with the state’s congressional delegation to abolish trade and travel restrictions.”); see also Scott Rothschild, *Sebelius Signs Trade Pact with Cuba*, HAVANA JOURNAL, Jan. 15, 2004, <http://www.havanajournal.com/business/print/3582>. The Kansas-Cuba deal or others like it may explain a bill submitted in the House of Representatives “to impose a [100%] tax on amounts received from trading with Cuba if [that trade was] conditioned . . . on lobbying Congress to lift [Cuban] trade or travel restrictions.” See H.R. 3670, 108th Cong. (2003). The bill never made it out of committee. In 2005, Kansas’s Lieutenant Governor John Moore supported a bill introduced in the U.S. House and Senate to reduce restrictions on Cuba. Press Release, Office of the Governor of Kan., Lt. Governor Announces Sale of Kansas Wheat to Cuba (Feb. 11, 2005), available at <http://www.governor.ks.gov/news/NewsRelease/2005/nr-05-0211a.html> (“It is vital we have less restrictions in dealing with Cuba.”).

49. Alternatively, we could try to explain Congress’s inaction as a form of acquiescence to state activities. That argument, however, would require not only inverting the constitutional text – which prohibits state-foreign agreements *unless* Congress assents – but also require more empirical support than the current evidence allows.

commitments.⁵⁰ Does Congress define compacts warranting its approval (or even attention) as only those that involve legally binding commitments?

The limited evidence we have does not support such a test. The one time Congress denied foreign participation – the 1968 Great Lakes Compact – the compact itself declaimed any legal or binding force.⁵¹ It becomes difficult, therefore, to ascribe to Congress a categorization of compacts via the presence or lack of legal force.

But the legal litmus test does have devotees outside of Congress. In the interstate context, the Supreme Court has adopted a legal formula for defining what constitutes a “compact” and delineating which compacts Congress must approve. And the Executive, not Congress, has taken on the role of executing the Court’s distinctions in the foreign context. Thus, the best explanation for Congress’s inaction on foreign compacts lies outside of Congress, in the ongoing actions taken by the Court and the Executive.

A. *Judicial Interpretations and Foreign Compacts*

The Supreme Court has interpreted the Compact Clause free from original meaning questions that so often implicate constitutional inquiries. Although it recognizes the Framers undoubtedly intended a distinction between treaties and compacts, the Court regards that difference as “lost” to history.⁵²

50. See, e.g., California-Mexico Environmental Cooperation MOU, *supra* note 42 (“The Parties acknowledge that this Memorandum of Understanding is only intended to provide for cooperation between the Parties and does not create any legally binding rights or obligations. To the extent any other provision of this Memorandum of Understanding is inconsistent with this paragraph, this paragraph shall control.”); Memorandum of Understanding Between the Province of Manitoba, Canada, and the State of California, United States of America, Dec. 14, 2006, http://www.gov.mb.ca/asset_library/en/premier/mou_california.pdf (“This Memorandum of Understanding is not intended to be legally binding or to impose legal obligations on either Participant and will have no legal effect.”); Netherlands-New Jersey LOI, *supra* note 39 (“It is agreed by the Signatories that this Letter of Intention [sic] is an expression of good will, and does not bind either signatory, to the commitments herein, or to providing financial resources.”). The practice of concluding politically binding texts, in lieu of legally binding instruments (e.g., treaties or contracts), is now “employed in almost every field of international relations.” Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT’L & COMP. L.Q. 787, 788 (1986); see generally Michael Bothe, *Legal and Non-Legal Norms—A Meaningful Distinction in International Relations*, 11 NETH. Y.B. INT’L L. 65 (1990); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT’L L. 296 (1977).

51. Great Lakes Basin Compact, Art. VI, § N in Act of July 24, 1968, Pub. L. No. 90-419, 82 Stat. 414, 418 (“[N]o action of the Commission [set up by the Compact] shall have the force of law in, or be binding upon, any party state.”).

52. See *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 463 n.10 (1978). Neither the Constitutional Convention nor the state ratification debates

Without such guidance, the Court has wrestled with how broadly to read the term “compact” itself. The only Supreme Court case to address that question for a foreign agreement, *Holmes v. Jennison*, resulted in a divided Court.⁵³

Holmes involved a question of Vermont’s power to extradite a fugitive back to Canada. A four justice plurality opinion, authored by Chief Justice Taney, concluded that even without a written agreement with Canada, the Governor’s arrest warrant implied a prohibited compact with Canada absent congressional consent.⁵⁴ In doing so, Taney’s opinion read the Compact Clause literally, requiring congressional consent for “every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.”⁵⁵ Taney explained his ruling in terms of the Framers’ fear of the danger to the Union if direct intercourse was allowed between states and foreign nations.⁵⁶ In contrast, the other justices declined to imply that Vermont’s extradition involved any agreement with Canada or questioned the Court’s jurisdiction.⁵⁷

provide much insight as to the distinction, and the Federalist Papers regarded the distinction as too obvious to warrant attention. *See, e.g.*, THE FEDERALIST NO. 44, at 305 (James Madison) (Edward Gaylord Bourne ed., 1937) (suggesting that “for reasons which need no explanation” the prohibition on state treaty-making was copied into the new Constitution from similar provisions in the Articles of Confederation); VINCENT V. THURSBY, INTERSTATE COOPERATION 4 (1953) (“[T]here was no discussion of ‘agreements’ or ‘compacts’ in any of the state conventions ratifying the Constitution.”); Frankfurter & Landis, *supra* note 16, at 694 (finding a lack of attention to the Compact Clause in the records of the Constitutional Convention and Federalist Papers). For more detailed analysis of the original meaning of the terms used in Article 1, § 10, see Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?*, 3 U. CHI. L. REV. 453 (1936). *See also* David E. Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact*, 64 MICH. L. REV. 63 (1965).

53. 39 U.S. (14 Pet.) 540, 561 (1840) (Taney, C.J., plurality opinion).

54. *Id.* at 573-74. Taney declined to find the implicit Vermont-Canadian agreement triggered the constitutional ban on U.S. state treaty-making. *Id.* at 571. He also reasoned, in the alternative, that Vermont’s act violated a dormant foreign affairs power with respect to extradition. *Id.* at 574-75.

55. *Id.* at 572. Taney’s concern over Vermont’s proposed extradition implicated federal policy, since at the time, the federal government was not extraditing persons to Canada pending renegotiation of the extradition treaty with Great Britain. *See id.* at 574.

56. *Id.* at 573-74 (“The framers . . . manifestly believed that any intercourse between a state and a foreign nation was dangerous to the Union; that it would open a door of which foreign powers would avail themselves to obtain influence in separate states.”).

57. *Id.* at 579-86 (Thompson, J., dissenting) (arguing Court lacked jurisdiction under § 25 of the Judiciary Act); *id.* at 594-98 (Catron, J., dissenting) (disputing existence of actual agreement between Vermont and Canada, but suggesting if it existed, it “would have been prohibited by the Constitution”); *id.* at 586 (Baldwin, J., dissenting); *id.* at 588-94 (Barbour, J., dissenting).

Although it has never overruled the *Holmes* plurality, the Court has not endorsed Taney's absolutist vision of the Compact Clause in later cases involving interstate agreements.⁵⁸ Instead, the Court has used federalism as a guiding principle to issue increasingly narrow interpretations of Congress's power. In 1893, Justice Field held in *Virginia v. Tennessee* that Congress did not need to consent affirmatively to state compacts, but could do so implicitly through actions that reflected the compact's existence.⁵⁹ At the same time, in *dicta*, Field suggested that Article I, Section 10's reference to "any compact or agreement" did not mean *all* state agreements, but only those that involved "the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."⁶⁰

Virginia thus introduced the idea of applying the Compact Clause functionally rather than according to its plain text.⁶¹ If compacts did not implicate the purpose for which congressional consent was devised – i.e., preventing accretions of state power that threaten the federal government's unity and supremacy – the Compact Clause gave Congress no power over a state's agreements. In other words, the Compact Clause applied, not to *any* state agreements, but only to *some* of them.

Field's functional vision of a "federal supremacy" test became the basis for deciding which of the many interstate agreements that emerged in the mid-twentieth century Congress could insist on approving.⁶² The Court

58. In fact, Taney's plurality opinion remains authoritative at least with respect to state agreements on extradition. See *Ex parte Holmes*, 12 Vt. 631, 635-42 (1840) (relying on Taney's opinion to deny fugitive's extradition to Canada); see also *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 465 n.15 (1978) (reconciling *Holmes* with *Virginia v. Tennessee* because *Holmes* involved "exclusive foreign relations powers expressly reserved to the Federal Government"); *United States v. Rauscher*, 119 U.S. 407, 414 (1886) (endorsing Taney's opinion); 3 Op. Att'y Gen. 661 (1841) (considering Taney's opinion on Compact Clause as "law").

59. 148 U.S. 503, 521-22 (1893) (implying congressional consent to 1803 boundary line agreement between Virginia and Tennessee given later federal legislation and proceedings based on the existence of the agreed line); see also *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823) (Congress impliedly consented to Virginia-Kentucky Compact of 1789 by admitting Kentucky into Union.).

60. *Virginia*, 148 U.S. at 519.

61. Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 HARV. L. REV. 1958, 1958 (2007) ("The Supreme Court, however, has long been reluctant to give the Compact Clause a 'literal' reading Instead, the Court has used a functional test . . .").

62. Interstate compacts became increasingly utilized after the creation of the New York Port Authority and Frankfurter and Landis's seminal article advocating the interstate compact as a useful vehicle for redressing various outstanding regional problems. See, e.g., *supra* note 17; S.J. Res. 88, 67th Cong., 42 Stat. 174 (1921) (approving Port of New York Authority Compact); Frankfurter & Landis, *supra* note 16. In the process, however, neither scholars, government officials nor the courts gave

frequently cited Field's test with approval, but did not actually use it as a holding until 1976 in *New Hampshire v. Maine*.⁶³ Even with the adoption of a federal supremacy test, deciding exactly which state agreements require congressional consent remains an open question. The Court has never found any interstate agreement to do so.⁶⁴

In the absence of a modern example to employ, the Court has identified several criteria to inform decisions on when agreements *would* implicate federal supremacy. Specifically, in *U.S. Steel Corp.*, the Court reasoned interstate compacts that increase the bargaining power of member states vis-à-vis the federal government would not impinge on federal authority unless the compact (a) authorized member states to do things they could not do in the compact's absence; (b) delegated sovereign powers to an institution established by the Compact; or (c) restricted the ability of states to exit the compact.⁶⁵

Beyond the federal supremacy test, moreover, the Court has adopted another legal litmus test of sorts. Specifically, the Court has found that certain interstate arrangements do not qualify as compacts at all, thus avoiding the federal supremacy question entirely.⁶⁶ In *Northeast Bancorp Inc.*, the Court, without citation, articulated four "classic indicia of a compact": (i) setting up a regulatory organization or body; (ii) conditioning action on corresponding actions of other participants; (iii) restricting a participant's ability

much attention to the suitability of applying a "federal supremacy" caveat to give states *some* power when they otherwise had none, a position I analyze in more detail in a work-in-progress. *See supra* note 15.

63. 426 U.S. 363, 369-70 (1976) (finding Compact Clause did not apply to a proposed Maine-New Hampshire consent decree on precise drawings of pre-agreed boundary lines since that decree did not change the boundary or "lead . . . to the increase of the political power or influence of the states affected"). Earlier cases had cited the federal supremacy distinction with approval. *See, e.g.*, *North Carolina v. Tennessee*, 235 U.S. 1, 15-16 (1914); *Stearns v. Minnesota*, 179 U.S. 223, 246-48 (1900); *Louisiana v. Texas*, 176 U.S. 1, 17 (1900).

64. In addressing interstate agreements, the Court has found either (a) the agreement did not encroach on federal supremacy so as to require congressional review, or (b) that Congress had already approved the agreement. *See, e.g.*, *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 175-76 (1985) (finding no compact nor any impact on U.S. federal structure in matching bank deregulation statutes consistent with federal law); *Cuyler v. Adams*, 449 U.S. 433, 440 (1981) (Congress authorized interstate compact in advance.); *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 472-73 (1978) (finding no enhancement of state power in relation to federal government where the compact did not authorize member states to exercise powers that they could not exercise in the absence of the compact).

65. *See* 434 U.S. at 472-73.

66. The Court recognized this new distinction in light of the fact that U.S. states devised new ways to cooperate that did not involve written agreements – e.g., reciprocal legislation, model uniform state laws – but which still might involve an "agreement" at some level. *See Clark v. Allen*, 331 U.S. 503, 517 (1947).

to modify or repeal its own laws; and (iv) reciprocal constraints on each State's regulations.⁶⁷ Without legally binding conditions or deep organizational structures, therefore, these criteria suggest no compact exists.

The Court's doctrine thus produces a very different vision of the Compact Clause than one derived from the text itself. The Court has found congressional consent required only for interstate agreements that "encroach upon or interfere with the just supremacy of the United States," and reasoned that agreements that do not legally bind the states, by definition, pose no such threat.⁶⁸ In doing so, the Court has also implied a power to the states to conclude certain agreements without congressional oversight or approval. Indeed, the Court has even suggested that some congressionally-approved compacts did not need that approval, giving states a green light to conclude similar arrangements in the future free from Congress's participation.⁶⁹

The Supreme Court has never applied its looser formulation of the Compact Clause to foreign agreements by U.S. states.⁷⁰ The State Department, however, has assumed that it would, a position it conveyed to Senator Dorgan in the Missouri-Manitoba dust-up.⁷¹ The *Restatement (Third) of the Foreign Relations Law of the United States* and numerous scholars adopt a similar stance.⁷²

67. *Ne. Bancorp*, 472 U.S. at 175. The Court did not, however, indicate whether each of these criteria needs to exist to qualify an arrangement as a compact, or if one or more of them alone would suffice.

68. *See id.* at 175-76; *see also U.S. Steel Corp.*, 434 U.S. at 473; Legal Adviser Compact Memo, *supra* note 12, at 185 ("[T]wo questions need to be asked to determine whether [an MOU] triggers the Compact Clause's requirement for congressional approval. First, is the MOU a 'compact or agreement' for constitutional purposes? Second, if so, does it belong to that class of agreements that the Supreme Court has determined require congressional consent?").

69. *See U.S. Steel Corp.*, 434 U.S. at 471 ("It is true that most multilateral compacts have been submitted for congressional approval. But this historical practice, which may simply reflect considerations of caution and convenience on the part of the submitting States, is not controlling.").

70. In the interstate context, the Court has declined to revisit a literal reading of the Compact Clause on *stare decisis* grounds. *See id.* at 459-60.

71. *See, e.g.*, Legal Adviser Compact Memo, *supra* note 12, at 181 ("The Department ordinarily looks to *Virginia v. Tennessee*, 148 U.S. 503 (1893), in assessing whether an agreement involving a U.S. State would constitute a 'Compact . . . with a foreign Power,' although that case did not involve a compact with a foreign power.").

72. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. f (1987); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 155-56 (2d ed. 1996); Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Managements in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 446 (2006); Jennetten, *supra* note 20, at 153-54; Raymond Spencer Rodgers, *The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments*, 61 AM. J. INT'L L. 1021, 1023 (1967). Louis Henkin did acknowledge that the "foreign element and the relevance to U.S. foreign relations might sometimes suggest a difference" between

The international practice of U.S. states also accords with the Court's doctrine. By not sending their foreign arrangements to Congress for review and approval, the states appear to appreciate and endorse the Court's gloss on the constitutional text. At least one state – Maryland – has done so expressly.⁷³ Indeed, many state-foreign arrangements avoid triggering the very criteria the Court has suggested warrant Congressional scrutiny. Often, state agreements with foreign powers reflect a “political” or “non-binding” intent, or they avoid creating rule-making institutions.⁷⁴ For example, the ICAP Declaration on carbon emissions had an overtly “political” character, while Governor Sebelius's agreement with Cuba purportedly reflected a “non-binding” intent.⁷⁵ Missouri's MOU with Manitoba conditioned joint work on “law and existing treaties.”⁷⁶ And, although U.S. states and

interstate and foreign compacts. HENKIN, *supra*, at 425 n.20. In contrast, Edward Swaine actively resists the suggestion that some foreign compacts might not require congressional approval. See Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1230 n.355 (2000) (suggesting foreign compacts invariably encroach on federal authority and require consent).

73. See 80 Op. Md. Att'y Gen. 48, 49-52 (1995), available at <http://www.oag.state.md.us/Opinions/1995/80OAG48.pdf> (Maryland's Attorney General uses Court's interstate compact doctrine to conclude the state did not need congressional consent for a cooperative Memorandum of Understanding concluded with the World Health Organization.).

74. See *supra* note 50 and accompanying text. This practice is frequently ambiguous. States including “non-binding” provisos in their agreements also often include other language indicative of legal effect. See, e.g., Memorandum of Understanding Between the Province of British Columbia and the State of Oregon on Pacific Coast Collaboration to Protect Our Shared Climate and Ocean, Oct. 23, 2007, http://governor.oregon.gov/Gov/pdf/letters/MOU_10_23_2007.pdf (Signatories “agree that this [MOU] shall have no legal effect or impose a legally binding obligation” but otherwise identify a laundry list of things on which they “agree” to work together on, including information sharing, cooperation, and promotion of certain programs.); Memorandum of Understanding Between the State of California and the Government of the Kingdom of Sweden on Renewable Fuels and Energy, June 15, 2006, http://resources.ca.gov/press_documents/CaliforniaSwedenBiofuelsMOU.pdf (indicates “[n]othing in this MOU shall be legally binding” but includes text on dispute resolution and duration); California-Mexico Environmental Cooperation MOU, *supra* note 42 (same).

75. ICAP Declaration, *supra* note 45 (titled “Political Declaration”); Rothschild, *supra* note 48 (Kansas-Cuba joint communiqué described as “nonbinding”).

76. Missouri-Manitoba MOU, *supra* note 2 (“[T]he State of Missouri and the Province of Manitoba agree to work cooperatively to the fullest possible extent consistent with law and existing treaties between our respective nations to ensure that”). The State Department's reply to Senator Dorgan argued, however, that conditioning an agreement on compliance with existing law or treaties does not preclude a finding that the agreement is legally binding. See Legal Adviser Compact Memo, *supra* note 12, at 187 (citing examples of treaty provisions subject to parties' laws or international obligations).

Canadian provinces may have used the Great Lakes Agreement to create a new institution, they emphasized its advisory capacity in comparison to its interstate counterpart that would regulate U.S. state behavior.⁷⁷ U.S. states have thus clearly digested the judicial view of the Compact Clause and run with it.

The Court, therefore, not Congress, offers the best explanation for why the legislative consent contemplated by the Compact Clause has minimal operative effect on U.S. states' foreign agreements. At one level, we might view the Court's doctrine as a functional spin on a literal text that otherwise gives Congress great power not only over state agreements abroad, but also *inter se*.⁷⁸ On another level, the Court's opinions reflect a power grab of sorts.⁷⁹ By narrowing the definition of compact and creating a third category of compacts free from federal oversight, the Court has effectively diluted Congress's power to approve (or disapprove) state agreements.⁸⁰ The Court

77. Thus, the *interstate* Great Lakes Compact creates a Council that can determine common standards on managing the Great Lakes' water resources for U.S. states subject to the *advice* of the Regional Body set up by the Great Lakes Agreement (which includes Canadian provincial participation). Great Lakes Agreement, *supra* note 47, at ch. 5. The Great Lakes Agreement itself, however, includes language that appears legally binding on the U.S. state and Canadian provincial "Parties." *See id.* at art. 200 ("The Parties shall adopt and implement Measures to prohibit New or Increased Diversions [of water from the Great Lakes Basin], except as provided for in this Agreement.").

78. Certainly, Field's opinion in *Virginia* considered a literal reading of the Compact Clause problematic in terms of the burdens it would impose on the states and Congress with respect to interstate relations. Field's test thus reflected an attempt to minimize congressional involvement where he thought Congress would have no need to be involved. *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893) (listing examples of interstate agreements that "can in no respect concern the United States" like an agreement by New York to buy land Virginia had come to own in New York state).

79. The fact that the Court would interpret the constitutional text is unsurprising, even accounting for its recognition that certain constitutional questions are not justiciable. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 177 (1803). More surprising, however, is the lack of congressional practice revealing Congress's own opinion of the nature or scope of its power over foreign compacts. *Cf. Duncan B. Hollis, Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1388 (2006) (noting the Executive's primary role in delineating the scope of its treaty power).

80. Of course, even if the Compact Clause does not retain its literal meaning, Congress can still employ other enumerated powers (i.e., its power over interstate and foreign commerce) to regulate or preempt most state agreements. But, as Justice White noted in his dissent in *U.S. Steel Corp. v. Multistate Tax Commission*, "The Compact Clause, however, is directed to joint action by more than one State. If its only purpose . . . [was] 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

has switched the default position for states from one requiring congressional approval to one of unsupervised agreement-making barring a judicial decision finding a “compact” that threatens federal supremacy. Simply put, the Court – not Congress – controls the current scope of Congress’s power under the Compact Clause. Such an interpretative role may be entirely appropriate (and, indeed, normal) in the domestic context, but its extension to the foreign context warrants further examination.⁸¹

B. Executive Interpretations and Foreign Compacts

Unlike the Court, the Executive has not overtly claimed authority to define when and how Congress must exercise its Compact Clause power. Indeed, in the context of the Missouri-Manitoba MOU, the State Department acknowledged that “[t]he Constitution does not specifically assign responsibility for interpretation or enforcement of this clause to the Executive branch.”⁸² Yet, in the absence of Congressional action and without the explicit extension of the Court’s doctrine to foreign compacts, the Executive has taken the lead in dealing with questions of foreign agreements by the states. The Executive has done so in three distinct ways: (1) in the exercise of its own Executive powers; (2) at the direction of Congress; or (3) as a surrogate for an inactive Congress.

1. Executive Power and Foreign Compacts

The Constitution grants the President a treaty-making power (subject to the Senate’s advice and consent) at the same time as it denies that power to the states.⁸³ We thus might expect to see the Executive resist state agreements with foreign powers that it regards as constituting treaties. In reality, the Executive has rarely taken such a position. In 1937, the State Department did object to a proposed trade promotion arrangement between Florida and Cuba because “the Department’s policy in regard to promotion of commerce with foreign countries and the negotiation of commercial treaties does not contemplate the conclusion of special agreements or pacts between separate states and foreign governments *even if the consent of Congress to*

for individual States to undertake are not permissible for a group of States to *agree to undertake.*” 434 U.S. 452, 482 (1978) (White, J., dissenting).

81. I am undertaking that examination in a separate, larger research project. *See supra* note 15.

82. Legal Adviser Compact Memo, *supra* note 12, at 180.

83. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur”); U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation”); *see also infra* note 87.

*such special agreements could be obtained.*⁸⁴ Such incidents, however, remain largely exceptional.⁸⁵ Indeed, the 2003 Kansas-Cuba agriculture pact illustrates how the sort of agreement objected to in 1937 now generates no objection from either Congress or the Executive.⁸⁶

The Executive has more often used its treaty-making powers not as a brake on state agreements with foreign governments, but as a vehicle to facilitate them.⁸⁷ An early example occurred in 1799 when the Senate gave its

84. See Letter from Duggan, The Chief of the Division of Latin American Affairs, to J.M. Carson, Dep't of State (Feb. 10, 1937), in 5 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 25 (1943) (emphasis added). In 1938, the State Department's Legal Adviser advised that an arrangement between California and the Mexican territory of Baja California for reciprocal exemption of motor vehicle registration fees would require the consent of Congress and *might* infringe the treaty-making power of the Federal Government. 5 HACKWORTH, *supra*, at 25.

85. I do not mean to suggest, however, that the Executive never takes steps to constrain state agreement-making, only that it does so infrequently. As the Attorney-Adviser for Treaty Affairs in the State Department's Office of the Legal Adviser, I informed a U.S. state on several occasions that it needed to amend a proposed agreement with a foreign government that the Department believed would otherwise constitute a treaty commitment as a matter of international law. At the same time, the Department's role was largely *ad hoc*, depending most often on whether a state or foreign government originally asked the State Department for its views. See Letter from Duncan B. Hollis, Office of Treaty Affairs, to Nicolas Dimic, Embassy of Can. (Jan. 13, 2000), in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, 2000, at 293, 293-94 (2001) (State Department interprets treaty prohibition to apply to the negotiation and conclusion of all agreements by which the United States intends to bind itself under international law); Gloria Folger Dehart, *Comity, Conventions, and the Constitution: State and Federal Initiatives in International Support Enforcement*, 28 FAM. L.Q. 89, 103 n.46 (1994) (detailing two instances of State Department objections to foreign agreements: (i) an agreement by a foreign government to use its share of U.S. aid to buy a state's farm products in return for technical assistance and advice from the state, and (ii) a state agreement to assist the judiciary of a South American country in law enforcement in ways impacting U.S. interests).

86. Edward Swaine, however, has argued that the textual grant of the treaty-making power to the federal government, together with its express denial to the states, creates a "dormant treaty power" that *courts* should employ to proscribe "a relatively well-defined class of state foreign affairs activities: those involving direct or indirect negotiating – put less formally, bargaining – with foreign powers on matters of national concern." Swaine, *supra* note 72, at 1138. Swaine uses this approach to distinguish state agreements with foreign powers – which by virtue of involving negotiations with foreign governments facially conflict with the treaty power – from interstate agreements that do not. *Id.* at 1224.

87. I use the term "treaty-making power" here to refer not only to the President's power to make treaties with Senate advice and consent under Article II, but via other accepted domestic means of committing the United States to an international agreement: (1) with congressional approval (i.e., congressional-executive agreements); (2) via the President's own Executive power (i.e., sole executive agreements); or (3) via existing Article II treaties. See, e.g., CONG. RESEARCH SERV., TREATIES AND OTHER

advice and consent to a Treaty made with the Oneida Indian nation to effectuate an agreement between that tribe and the state of New York.⁸⁸ More recently, both the IEMA and PNEMA foreign compacts owe their existence to an international agreement between the United States and Canada. Under Article II(j) of the Agreement on Cooperation in Comprehensive Civil Emergency Planning and Management, the United States and Canada agreed to “encourage and facilitate cooperative emergency arrangements between adjacent jurisdictions on matters [falling] within the competence of such jurisdictions.”⁸⁹ The PNEMA Compact’s preamble specifically recognizes this agreement in laying out its own purposes.⁹⁰ As noted above, another U.S.-Canadian agreement facilitated Canadian provincial participation in the Northeast Interstate Forest Fire Protection Compact.⁹¹ And in 1984, the United States and Canada adopted and endorsed an agreement between the City of Seattle and British Columbia regarding power generation by, and operation of, Ross Dam on the Skagit River.⁹²

The Executive has relied on other powers to facilitate foreign agreements as well. The idea of sister-city (and, later, sister-state) agreements actually began as a foreign policy initiative of President Eisenhower.⁹³

INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. REP. 106-71, at 3-5 (2001); Robert E. Dalton, *National Treaty Law and Practice: United States*, in NATIONAL TREATY LAW & PRACTICE 765, 780-85 (Duncan B. Hollis et al. eds., 2005).

88. Convention Between the State of New York and the Oneida Indians, June 1, 1799, <http://earlytreaties.unl.edu/treaty.00028.html>. The early history of U.S. state agreements with Indian nations with respect to the Compact Clause has gone largely unexplored, a deficit I hope to remedy in future work. See *supra* note 15.

89. Agreement on Cooperation in Comprehensive Civil Emergency Planning and Management, U.S.-Can., art. II, Apr. 26, 1986, http://www.lexum.umontreal.ca/ca_us/en/cts.1986.36.en.html. Based on that authority, the Conference of New England Governors and Eastern Canadian Premiers authorized negotiations of the IEMA Compact, which concluded in July 2000. See *supra* note 30.

90. PNEMA Compact, *supra* note 31, § 1.

91. See *supra* note 25. Similarly, in reference to what would become the Great Lakes Agreement, the State Department offered to assist the states and provinces on modalities for Canadian participation in the interstate agreement since Canada took the view that its provinces could not conclude binding agreements with U.S. states. See Letter from Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs, to Margaret Grant, Executive Dir., Great Lakes Council of Governors, in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 198, 199-200 (2002) [hereinafter Dalton Letter].

92. See Boundary Waters Ross Dam Treaty, U.S.-Can., Apr. 2, 1984, annex, T.I.A.S. No. 11088 (incorporating text of British Columbia-Seattle Agreement). Although most of the Compact Clause doctrine and literature involves agreements by the states themselves, to the extent municipalities are component governmental units of a state, I assume that the same constitutional provisions apply to them as well.

93. See Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1649 (2006).

Today, the State Department plays an active role in various state agreements with foreign governments, ranging from family support to military cooperation. Relying on the Executive's foreign affairs power, the State Department assists with and consents to U.S. state arrangements with foreign jurisdictions on reciprocal treatment of family maintenance and support decisions.⁹⁴ Using the President's Commander-in-Chief power, the Defense Department has a decade-old National Guard Partnership Program that oversees cooperative agreements and military relations between state national guard units and foreign militaries.⁹⁵ For example, in 2004, North Carolina and Moldova renewed a 1999 Memorandum of Intent that has provided a framework for cooperation between various entities including North Carolina's National Guard and Moldova's military.⁹⁶

Thus, the Executive can invoke its own powers to support the formation and operation of state agreements with foreign powers. To the extent the Executive's actions precede (or follow) a congressionally-approved compact, the two branches' respective powers are mutually reinforced. Problems might arise if Congress tried to approve a foreign compact that the State Department insisted would constitute a prohibited treaty, or if the Executive branch entered into an executive agreement supporting a foreign agreement that Congress rejected as a foreign compact. Neither scenario, however, has yet materialized.

2. Legislative Authorization for Executive Compacts

Far from viewing the Executive Branch as a competitor in the exercise of its Compact Clause power, Congress has sought more Executive involvement in foreign compacts, not less. In the relatively few instances where Congress has consented to foreign compacts, it has frequently sought to delegate responsibilities over those agreements to the Executive. For example, although the 1972 International Bridge Act authorizes U.S. states to conclude agreements on trans-border bridges with their Canadian and Mexican counterparts, Congress did so with a significant caveat: "[t]he effectiveness of

Private interests, however, orchestrate these transnational state and municipal arrangements instead of the Executive Branch. See Sister-Cities International, www.sister-cities.org/icrc/directory (last visited Sept. 18, 2008) (listing existing sister-city relationships).

94. See Dehart, *supra* note 85, at 102-03. Formally, these maintenance and support deals come through each side passing legislation granting reciprocal treatment, rather than via a written agreement *per se*. *Id.* at 99-100.

95. The National Guard State Partnership Program involves cooperative arrangements among 43 U.S. states, two territories, the District of Columbia, and 51 countries. Not all of these partnerships, however, rest on written agreements between the U.S. state and its foreign counterpart. See, e.g., National Guard Bureau, Office of International Affairs, <http://www.ngb.army.mil/ia/Tab3.aspx> (listing partnerships).

96. See Moldova-North Carolina MOI, *supra* note 39.

such agreement shall be conditioned on its approval by the Secretary of State.”⁹⁷ Similarly, although no military aid pacts actually emerged from the Interstate Civil Defense and Disaster Compact, in the authorizing statute, Congress had directed arranging such pacts “through the Department of State.”⁹⁸ Both the Northeastern and Northwestern Fire Fighting Compacts also contemplate an executive agency – the U.S. Forest Service – playing a coordinating role.⁹⁹ Congress thus appears quite comfortable involving the Executive branch in both the formation and implementation of those agreements it has approved.

3. The Executive as Congress’s Surrogate?

What happens, however, when the states do not consult Congress on their proposed foreign agreement? As the State Department noted in responding to Senator Dorgan on the Missouri-Manitoba MOU:

In practice, however, it is not uncommon for states of the United States to consult with the Department of State when they are considering entering into an arrangement with a foreign power for advice as to the consistency of that arrangement with the Compact Clause. In the first instance, responsibility for fidelity to the requirements of the Compact Clause lies with the states themselves, pursuant to the Supremacy Clause of the Constitution. Should they submit a proposed compact to the Congress, it is the prerogative of the Congress to approve or disapprove the compact, or to require modifications. Ultimately, issues concerning the Compact Clause or a particular arrangement by a state with a foreign power may need to be resolved in the courts, either state or federal.¹⁰⁰

97. Pub. L. No. 92-434, § 3, 86 Stat. 731, 731 (codified at 33 U.S.C. § 535a (2000)).

98. Federal Civil Defense Act of 1950, ch. 1228, § 203, 64 Stat. 1245, 1251 (1951).

99. See Sackinger, *supra* note 24, at 347 n.171; see also Northeastern Interstate Forest Fire Protection Compact, CONN. GEN. STAT. § 23-53, art. VI (“The commission may request the United States Forest Service to act as the primary research and coordinating agency of the Northeastern Forest Fire Protection Commission, in cooperation with the appropriate agencies in each state and the United States Forest Service may accept the initial responsibility in preparing and presenting to the commission its recommendations with respect to the regional fire plan.”); Northwest Wildland Fire Protection Agreement, *supra* note 26, at art. IX (“The Members may request the United States Forest Service to act as the coordinating agency of the Northwest Wildland Fire Protection Agreement in cooperation with the appropriate agencies for each Member.”).

100. Legal Adviser Compact Memo, *supra* note 12, at 181.

As this statement reveals, the Executive often acts as Congress's surrogate in dealing with potential state agreements with foreign governments.¹⁰¹ For the most part, the Executive's involvement follows inquiries from foreign governments that want confirmation of the propriety of concluding an agreement with a U.S. state, although occasionally a U.S. state will seek such assurances with respect to a particular foreign government as well. In both cases, the Executive appears to view the Compact Clause as something (i) triggered by the states "*should they submit a proposed Compact to the Congress,*" and otherwise (ii) subject to overarching judicial control.

More specifically, as the Executive has confronted proposed foreign agreements, it has used the judicially drawn lines defining and distinguishing among compacts in the interstate context. As the State Department told Senator Dorgan, "[t]he Department ordinarily looks to *Virginia v. Tennessee*, 148 U.S. 503 (1893), in assessing whether an agreement involving a U.S. state would constitute a 'Compact . . . with a foreign Power,' although that case did not involve a compact with a foreign power."¹⁰² The State Department went on to suggest that it was "not immediately apparent" if the Missouri-Manitoba MOU had the indicia of a compact identified by the Court in *Northeast Bancorp, Inc.*¹⁰³ Assuming, however, it qualified as a compact the Department used the remaining doctrine for interstate compacts to assess whether (a) the MOU impacted other states or federal interests; (b) dealt solely with local matters; or (c) could be carried out by Missouri even absent the MOU.¹⁰⁴ On the first two points, the Department concluded that the MOU did not simply address a local policy matter; it impacted federal interests as well as those of other states.¹⁰⁵ But the Department left open the question of whether Missouri's enlistment of Manitoba's support operated to the legal detriment of the federal government's decision-making process or the operation of existing U.S.-Canadian treaties.¹⁰⁶ The Department also left unresolved whether the "mutually supportive" nature of the Missouri-Manitoba MOU meant Missouri could have taken the acts called for by the MOU in its absence.¹⁰⁷ Thus, the Department utilized the judicial framework for judging

101. I recognize, moreover, that at least some members of Congress may welcome this development. See *supra* note 14.

102. Legal Adviser Compact Memo, *supra* note 12, at 181.

103. See *id.* at 188; *supra* note 67 and accompanying text (listing *Northeast Bancorp, Inc.*'s "classic" criteria for a compact). Interestingly, the Department declined to use the legal status of an instrument such as the Missouri-Manitoba MOU to determine if it qualified as a compact. See Legal Adviser Compact Memo, *supra* note 12, at 188. But see Dalton Letter, *supra* note 91, at 199 (suggesting agreement on the "non-binding" character of proposed Great Lakes Charter Annex—and the preceding Great Lakes Charter—alleviated State Department concerns over its signing).

104. Legal Adviser Compact Memo, *supra* note 12, at 189.

105. *Id.* at 189-90, 191.

106. *Id.* at 191.

107. *Id.* at 192. The Department also questioned whether or not Missouri's commitments under the MOU would lead to concrete actions, suggesting that if they did, a

interstate compacts, but did so without coming to any firm resolution on the constitutionality of the Missouri-Manitoba MOU.

In other cases, however, the Executive has taken a firmer stance on when the Constitution *does not* require a state to go to Congress. In a 1981 case involving a proposed agreement by Vermont with Quebec on water service, the State Department viewed the Compact Clause as inapplicable because federal permitting procedures would still apply and the agreement's activities would involve traditionally "local" functions that would not trigger political concerns.¹⁰⁸ The Department used the same distinction in 1990 to explain why it did not believe an Indiana-Ukraine agreement needed congressional consent.¹⁰⁹ Although it has not done so overtly, these cases essentially demonstrate how the Executive, rather than Congress, has sought to control when and how U.S. states may enter into agreements with foreign governments.

IV. SAVING FOREIGN COMPACTS

Given the foregoing analysis, why should we worry about the elusive foreign compact? Is it simply an anachronism – a method of federal control over state behavior ill-suited to our globalized, disaggregating world?¹¹⁰ Certainly, there are other examples of constitutional text that have fallen by the wayside. For example, the ban on state letters of marque and reprisal¹¹¹ has no modern utility. Why not let the foreign compact fall into desuetude as well?

There is a major difference between the foreign compact and letters of marque and reprisal. In the latter case, the prohibition lost its force when the regulated activity went away. For foreign compacts, however, the practice of states entering into agreements with foreign governments has not disappeared; on the contrary, it appears to be increasing dramatically.¹¹² The issue for the federal government, therefore, is not what to do in the absence of regulated activity, but *when* to regulate the activity, and *who* should do the regulating.

preemption argument might preclude Missouri's conduct, rather than the Compact Clause. *Id.* at 192-93.

108. *See id.* at 183-84.

109. *See id.* at 184 n.14 (discussing Preliminary Agreement to Develop and Implement a Trade Development Initiative between Indiana's Department of Commerce and the All-Union Academy of Agricultural Sciences and the Ukrainian Association of Consumer Goods Exporters).

110. *See, e.g.,* Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF., Sept-Oct. 1997, at 184.

111. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . grant Letters of Marque and Reprisal . . .").

112. *See supra* notes 37-44 and accompanying text.

Others have already challenged the relative merits of having the Court, not Congress, dictate the limits of federal authority over *interstate* compacts.¹¹³ No one, however, has undertaken a sustained inquiry of whether those limits translate to *foreign* compacts, nor have they examined the merits of an Executive largely supplanting or substituting for Congress's role. Both questions warrant further inquiry.¹¹⁴ For now, let me focus on the second question concerning the Executive's role – a role that has so far gone largely unrecognized, and thus unexamined. Specifically, I want to highlight a few deficiencies that the Executive practice produces.

Let me be clear from the start, however – I am not suggesting that the Executive has no role to play in regulating the states' foreign agreements. On the contrary, the Executive clearly has authority to resist state intrusions on Executive power (whether the treaty power or foreign affairs more generally) as well as to use that power to facilitate state-foreign arrangements. But whether authorized or not, the Executive's practice with respect to the states' foreign agreements is *insufficient*. Leaving the Executive in nearly sole control of the states' foreign agreements produces at least three types of deficiencies in the federal government's oversight: (i) *informational*, (ii) *functional*, and (iii) *structural*.

First, assuming the Court is correct that the Compact Clause only protects federal supremacy – a debatable presumption – the Executive lacks the information needed to achieve that goal.¹¹⁵ Although the Executive may initiate certain state agreements (e.g., the National Guard Partnership Program), most of its oversight over the states' foreign agreements has an *ad hoc* character. The Executive may have a demonstrable *will* to review proposed agreements for their effect on federal supremacy – as it did with the Missouri-Manitoba MOU – but its *capacity* to do so depends on some state, foreign government or third party bringing the agreement to its attention in the first place. In the vast majority of cases, states appear to have concluded their foreign agreements without any Executive consultation or oversight. In this respect, the Executive's practice mimics the same informational deficits that explain Congress's inaction over foreign compacts. At present, no system

113. Michael Greve, in particular, has written a compelling critique of the Court's interstate Compact Clause doctrine. See Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 285 (2003) (“By limiting the operation of the Compact Clause to state agreements that encroach on federal supremacy—which are unlawful in any event—the Supreme Court has re-inverted the constitutional presumption and emptied the Compact Clause of all content.”).

114. The equivalency of interstate and foreign compacts is something that I consider elsewhere. See *supra* note 15.

115. In the foreign context, for example, one could argue that the Compact Clause does not serve federal supremacy – i.e., allowing state action so long as it does not conflict with federal action—but federal *exclusivity* – i.e., denying the states authority to act altogether.

exists for the Executive to know *what* agreements states are concluding, with *whom* they are concluding them, and on *what* topics.¹¹⁶

States, of course, have a duty to comply with constitutional limits.¹¹⁷ And while they may generally endeavor to comply with the Compact Clause's mandate to the extent they believe it applies, the federal government has no way of knowing when they cross the line, whether inadvertently or deliberately. The present system leaves states free to decide to publicize their foreign agreements, in whole or in part, or to make them secretly. We know that U.S. states participated in the ICAP Declaration because they publicized it prominently.¹¹⁸ We know that Kansas did a trade pact with Cuba, but don't know what it actually says because the text is not readily available.¹¹⁹ And we have no way of knowing whether other agreements exist that states had reasons to conclude, but also reasons to keep secret.

The present *ad hoc* approach to Executive oversight cannot resolve the information deficit, absent some reporting or monitoring system to give the federal government sufficient information to judge the propriety of the states' foreign agreements. The absence of such a system, moreover, undermines those cases where the Executive has acted. Without knowing when or how the Executive would approach the hundreds of foreign agreements it has not approved – let alone considered – it becomes difficult to assign much weight to the much more limited category of cases where the Executive has made its views known.

Second, even assuming that the Executive had a system for monitoring the states' foreign agreements, it might not have the functional capacity to actually control the states' activities. The Executive practice on compacts has, to date, largely occurred through means of persuasion – the Executive

116. Of course, if the Executive actually had full information – i.e., it knew about all of the states' foreign agreements – that information might overwhelm its capacity for oversight. See EARL H. FRY, *THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS* 128 (1998) (The current swath of agreement-making by sub-national entities such as the states lies beyond the ability of the national government to “control, supervise, or even monitor.”).

117. The Supremacy Clause binds U.S. states to obey the Constitution. U.S. CONST. art. VI, cl. 2.

118. See *supra* note 45 and accompanying text.

119. See *supra* note 48 and accompanying text. Similarly, despite California Governor Schwarzenegger and British Prime Minister Tony Blair trumpeting an “Historic Agreement to Collaborate on Climate Change,” California, without explanation, removed part of the Memorandum of Understanding from its website after displaying it only for a few hours. See United Kingdom and California Announcement on Climate Change & Clean Energy Collaboration (July 31, 2006), <http://gov.ca.gov/index.php/fact-sheet/united-kingdom-and-california-announcement-on-climate-change-clean-energy-c/>; Duncan Hollis, *When Is an Agreement Not an Agreement? The Blair-Schwarzenegger Global Warming Pact*, OPINIO JURIS, Aug. 2, 2006, <http://opiniojuris.org/2006/08/02/when-is-an-agreement-not-an-agreement-the-blair-schwarzenegger-global-warming-pact/>.

offers its opinion on whether or not states should go ahead with an agreement, or what form it should take. The Executive has not, however, demonstrated that it has the capacity to actually enforce its views should states resist. Certainly, it could employ diplomatic pressure on the foreign government(s) to discourage an agreement's conclusion.¹²⁰ But, if the foreign government resists such pressure (or the Executive declines to exert it), what can the Executive do? Indeed, the Missouri-Manitoba MOU reveals a cautious Executive branch, one that *declined* to pronounce the MOU unconstitutional and suggested that the courts, not the Executive, should make that call. As a result, the Missouri-Manitoba MOU continues to operate today, notwithstanding the Department of State's stated concerns with that agreement.¹²¹

To the extent that the Executive could forcefully resist foreign agreements by U.S. states, it remains to be seen if it would do so in every situation. The Court's interstate Compact Clause doctrine has focused on agreements that affect the unity and supremacy of the federal government; i.e., interstate agreements that disadvantage other states or the federal government itself. In contrast, the Executive Branch's primary concern with foreign agreements will most likely be cases that interfere with Executive power. Thus, the Executive may object when it perceives a foreign compact could interfere with existing U.S. treaties, as it did with the 1968 Great Lakes Basin Compact.¹²² Or, it might resist state agreements that affect the external posturing of the United States through its foreign relations (i.e., interfere with the U.S. ability to speak with one voice to foreign nations).¹²³

The Executive's focus on protecting its own power, however, may lead it to overlook a different type of foreign agreement; i.e., those where the goal is not for the state to project its interests extraterritorially in competition with the federal government, but where a foreign government seeks to use the state to gain a foothold *within* the U.S. legal or political system. Indeed, Manitoba, not Missouri, instigated their MOU, presumably because it recognized that it could achieve more by having an inside voice on decisions of U.S. law and policy than by speaking to the federal government directly. Similarly, the

120. For example, indicating to a foreign government the federal government's hostility to a proposed agreement with a U.S. state is likely to affect that government's willingness to do the agreement far more than if the Executive directly questioned the U.S. state about its authority to do such an agreement.

121. See, e.g., Canada School of Public Service, Building Cross-Border Links: A Compendium of Canada-US Government Collaboration (Nov. 5, 2007), http://www.cspc-efpc.gc.ca/research/publications/html/p128/34_e.html (listing Missouri-Manitoba MOU among the "Main Channels of Collaboration" as an ongoing bilateral relationship with *ad hoc* contacts).

122. See *supra* note 33 and accompanying text.

123. See, e.g., THE FEDERALIST, NO. 42, at 285 (James Madison) (Edward Gaylord Bourne ed., 1937) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations."); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000) (State laws "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments.").

expressed goal of ICAP may involve promoting markets for carbon emissions, but it is also possible that the real goal for its European proponents was co-opting U.S. states as leverage against a federal government resistant to regulating such emissions. Certainly, the Executive can recognize these efforts, but it may not have the same incentive to regulate or control them as it does for direct threats to its own powers.

Third, Executive Compacts present a structural dilemma. In earlier work, I have examined how federalism constrains the treaty power, arguing that the Executive plays the most important role in effectuating federalism concerns in U.S. treaties, in lieu of more conventional arguments favoring judicial or legislative safeguards.¹²⁴ In doing so, I emphasized how much of an effect the Executive's practice had on the contents of its own constitutional power.

On one level, the Executive's interpretations of foreign compacts reinforce that thesis. Here again, we see the Executive actually doing the hard work of implementing constitutional powers and constraints. More specifically, federalism concerns appear at the root of the Executive's practice just as they do in its own treaty-making, informing its willingness to accord the states autonomy in making certain agreements, facilitating others, and resisting (at least in theory) those that would affect the supremacy of the federal government.

On a deeper level, however, the Executive's foreign compacts practice actually reverses the framework that operates in the treaty context. The treaty power is primarily an Executive power, and the Executive's willingness to self-interpret the limits of that power warrants our attention. But the Compact Clause is not an Executive power; it belongs to Congress.¹²⁵ This reverses the Executive's role. Instead of self-enforcing federalism limits in the exercise of one of its enumerated powers, the Executive has acted on foreign compacts to apply such limits to another branch's power. Such interference with a power assigned to Congress, with or without congressional acquiescence, implicates the Constitution's separation of powers. The Executive's role can have consequences for Congress's share of the foreign affairs powers, perhaps even giving the Executive greater claim to plenary authority in

124. See Hollis, *supra* note 79, at 1388.

125. The Court's doctrine has suggested an implicit state power as well – i.e., the power to conclude non-compacts or those compacts that do not threaten federal supremacy. Even if that power exists in the foreign context (which, given the treaty prohibition, is certainly more debatable than for interstate compacts), it does not eliminate the enumeration of a congressional power to approve foreign compacts. Indeed, the Court has suggested that even if certain compacts did not *require* congressional approval, Congress still had the *authority* to approve them, and, in so doing, convert them to federal law. See *Cuyler v. Adams*, 449 U.S. 433, 440 (1981); *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978).

this area.¹²⁶ Moreover, to the extent that the Executive's own conduct extends the Court's interstate compact doctrine to foreign compacts, it threatens to dilute Congress's power in a way that the Court itself has yet to endorse.¹²⁷ The result suggests a distortion of the constitutional distribution of powers among the three federal branches.

V. CONCLUSION

In *Missouri v. Holland*, Chief Justice Oliver Wendell Holmes rejected the idea that states' rights – whether reflected in limitations on the federal government's enumerated powers or via “some invisible radiation from the general terms of the Tenth Amendment” – constrained the treaty power.¹²⁸ Holmes viewed the Constitution as granting the federal government a power to make international agreements even on subjects otherwise taboo to the federal government.¹²⁹ Missouri thus lost in its quest for state autonomy and the federal government won judicial confirmation of a broad treaty power.

In contrast, Missouri appears to have won its battle with the federal government over its MOU with Manitoba; that MOU continues to operate today, despite objections from Senator Dorgan and expressions of concern from the State Department.¹³⁰ Missouri's apparent victory in turn reflects the very different image of federal-state power that governs foreign compacts. Rather than denying that states' rights limit federal power – as *Missouri* did for treaties – the Court has effectively found states' rights do limit federal power when it comes to Congress's approval of interstate agreements.

126. See, e.g., Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (using historical sources to critique idea of using Vesting Clause to broaden presidential powers in foreign affairs); Martin S. Flaherty, *The Most Dangerous Branch*, 30 HARV. J.L. & PUB. POL'Y 153 (2006) (discussing claims of executive essentialism and division of foreign affairs power between the President and Congress); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234-35 (2001) (arguing “residual” foreign affairs power lies with the Executive via the Vesting Clause subject to specific textual grants to Congress).

127. Of course, just as scholars have debated using judicial or political safeguards for federalism in the legislative and treaty contexts, we could ask whether the Court or the Executive should constitute judicial or political safeguards for federalism in the compact context. The Compact Clause's current operation reflects a judicial safeguards model in its domestic incarnation. The Executive's extension of that doctrine to foreign contexts (an executive safeguard on federalism, if you will) assumes, however, that federalism concerns apply with equal force to interstate and foreign compacts, which is almost certainly not the case given the presence (and potential impacts) foreign actors can have on the federal system in the foreign context that do not arise for interstate compacts.

128. 252 U.S. 416, 433-34 (1920).

129. *Id.* at 433.

130. See *supra* note 121 and accompanying text.

Notwithstanding the power assigned to Congress to approve “any Agreement or Compact,” the Court has decided that states have a right to conclude arrangements that do not qualify as compacts, as well as to make certain types of compacts without federal supervision. Far from resisting this move, the Executive has endorsed it, while accepting the mantle of policing these categories in the foreign context given Congress’s absence.

This Essay has endeavored to show how elusive foreign compacts are today. Congress rarely approves (*or* rejects) foreign compacts, even in the face of a robust and growing practice of state commitments to foreign national and sub-national governments. The Court’s and the Executive’s interpretations of the Compact Clause help explain this situation. But they do not tell us whether we should preserve it. In fact, the Compact Clause’s current operation (or lack thereof) has produced an informational deficit, where the federal government lacks the necessary information to accomplish what even the Court admits is the goal – protecting the unity of the federal government and its supremacy. Nor can the Executive alone salvage that goal, even though it has some express and implicit powers to do so. The Executive will tend to protect its own powers and the *external* relationships of the United States, but it may not have the desire or ability to deter foreign agreements that threaten the *internal* functioning of the U.S. government via what Chief Justice Taney referred to as “dangerous” foreign influences.¹³¹ At the same time, the Executive effectively stands in Congress’s shoes when it comes to foreign compacts, a position that poses structural problems for the separation of powers within the federal government.

The Compact Clause has become a constitutional anomaly; an example of how far text and practice may diverge. That divergence, however, begs our attention. The *status quo* of an absent Congress needs reconsideration at least with respect to the growing autonomy and increasing commitments of U.S. states abroad. Congress may not have the will (or the capacity) to monitor all of the states’ foreign engagements, but it undoubtedly could stand alongside the Executive in playing some role; overseeing, approving, or even facilitating such activity. To do so, however, requires that we first acknowledge the need for more sustained consideration of the Compact Clause. We can – and should – be asking if the Compact Clause could operate in ways that produce less elusive foreign compacts and what impacts that shift might have for future state, federal, and foreign relationships.

131. *Holmes v. Jennison*, 39 U.S. 540, 574 (1840) (Taney, C.J., plurality opinion).