January, 1997

Interstate Compacts in a Democratic Society: The Problem of Permanency

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INTERSTATE COMPACTS IN A DEMOCRATIC SOCIETY:
THE PROBLEM OF PERMANENCY

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I. REEVALUATING CONGRESSIONAL CONSENT AND
DISPROPORTIONATE BINDINGNESS ................. 11

II. STATES IN COMPACT NEGOTIATION ............ 18

III. THE POWER COMPACT AGENCIES EXERCISE .... 22

IV. WHEN AND HOW COMPACTS SHOULD BE USED .... 34

V. CONCLUSION .................................. 47

We may be in an age of devolution,¹ but that does not mean that the
geographic and economic externalities that hinder individual state action
have disappeared. Even absent federal preemption, a state may still be
powerless, for example, to control environmental problems that extend
beyond its boundaries. Another state might have to scuttle the corporate

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Circuit. B.A. 1994, J.D. 1997, Yale University. I would like to thank Michael Graetz, Jerry
Mashaw, and Allan Erbsen for their comments on this Article.

violated constitutional principles of state sovereignty by requiring state law enforcement
officers to conduct background checks on prospective handgun purchasers); Idaho v. Coeur d’Alene
Tribe, 117 S. Ct. 2028, 2043 (1997) (holding that Eleventh Amendment prohibits federal courts
from asserting jurisdiction over suits against states that go to the heart of a state’s interest, even
when the complaint is couched to conceivably invoke traditional exceptions to immunity);
under Indian commerce clause to abrogate states’ Eleventh Amendment immunity); United States
Congress’ authority to regulate interstate commerce); Symposium, Constructing a New
tax or labor policies its citizens most prefer out of fear that businesses would flee to friendlier jurisdictions. As such dilemmas become clear, the interstate compact—little used or noticed in recent years—may become an increasingly important method of coordination at the sub-federal level.² This Article examines the democratic implications of such a resort.

An interstate compact is an exception to the rule that one legislature may not restrict its successors.³ More than mere statutes, compacts are contracts that are binding on the member states and their citizens.⁴ Like

². Indeed, commentators from earlier eras have occasionally predicted that compacts would enable states to address important problems. See WELDON V. BARTON, INTERSTATE COMPACTS IN THE POLITICAL PROCESS 165-66 (1967) (“Of course compacts have no formal authority to decide on questions of federalism, but they may affect the balance of power between the nation and the states. By augmenting the real or apparent effectiveness with which the states handle governmental problems that are entrusted to them, interstate compacts may mitigate social pressures for transfer of authority over such problems to the national government . . . .”); PARRIS N. GLENDENING & MAVIS MANN REEVES, PRAGMATIC FEDERALISM 282-83 (1977) (“Substantial evidence exists that the states use compacts to protect their power in the federal system, and such use is applauded by the strong supporters of the states.”); VINCENT V. THURSBY, INTERSTATE COOPERATION: A STUDY OF THE INTERSTATE COMPACT 149 (1953) (recommending interstate compacts wherever possible in order to preserve vitality of states and avoid overburdened national government); Richard C. Kearney & John J. Stucker, Interstate Compacts and the Management of Low Level Radioactive Wastes, 45 PUB. ADMIN. REV. 210, 214 (1985) (“[T]he interstate compact provides an effective means for the states to act in a positive manner in blocking federal encroachments on their sovereignty, while permitting the states to work cooperatively in areas in which the federal government cannot or will not involve itself.”).

³. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting “narrower scope for operation of the presumption of constitutionality” for “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation”); Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932) (“[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years.”); Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602, 621 (1899) (“[E]ach subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify [an] act.”); Stone v. Mississippi, 101 U.S. 814, 818 (1880) (“[N]o legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.”); Newton v. Commissioners, 100 U.S. 548 (1880) (allowing Ohio legislature to move a county seat, notwithstanding decision by earlier legislature); Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 416 (1853) (holding that one session of legislature could not limit ability of future session to impose taxes).

⁴. See West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951); Hinderlider v. La Plata River, 304 U.S. 92, 106 (1938); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 725 (1838) (“The boundary so established and fixed by compact between [states], become [sic] conclusive upon all the subjects and citizens thereof, and bind [sic] their rights . . . .”); Poole v. Fleeger, 36 U.S. (11 Pet.) 185, 209-10 (1837) (boundary decision between states endowed affected states’ citizens with certain rights in land); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 92 (1823) (“[T]he terms compact and contract are synonymous.”).
any other statute, an interstate compact supersedes prior law. But as with other contracts, the Contract Clause of the United States Constitution protects compacts from impairment by the states. Although a state cannot be bound by a compact to which it has not consented, a compact takes precedence over the subsequent statutes of signatory states. A state may not unilaterally nullify, revoke, or amend one of its compacts if the compact does not so provide, and the extent to which a compact may constitutionally permit any alteration by less than unanimous consent is unclear. Indeed, the Supreme Court has held that a state may not withdraw from a compact on the ground that its highest court has found the agreement to be contrary to the state constitution. A transgressing state can be sued in federal court, with specific performance an available remedy.

Compacts currently serve three functions. First, compacts resolve state boundary disputes. Indeed, this was the purpose of all but one of

5. See Hinderlider, 304 U.S. at 106 (“[T]he [compact for water] apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted [private] water rights before it entered into the compact.”).


7. See Arizona v. California, 283 U.S. 423, 462 (1931) (holding that Colorado River Compact could not impair legal rights of noncompacting state).

8. See Green, 21 U.S. at 92 (“The constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a state and individuals; . . . a State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals.”).

9. See Sims, 341 U.S. at 28 (“It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified . . . .”); Green, 21 U.S. at 13 (holding that a Kentucky law diminishing power of existing compact is unconstitutional).

10. See infra text accompanying notes 184-93.

11. See Dyer, 341 U.S. at 28 (“The Supreme Court of . . . West Virginia is, for exclusively State purposes, the ultimate tribunal in construing the meaning of her Constitution. . . . [H]owever, . . . we are free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States.”); see also id. at 35 (Jackson, J., concurring) (“[I]f the compact system is to have vitality and integrity, [West Virginia] may not raise an issue of ultra vires, decide it, and release herself from an interstate obligation.”).

12. See Delaware River Joint Toll Bridge Comm’n v. Colburn, 310 U.S. 419, 427 (1940); Virginia v. West Virginia, 246 U.S. 565, 591 (1918); Virginia v. West Virginia, 78 U.S. 39, 55 (1870); see also Virginia, 246 U.S. at 601 (“It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between States carried with it the right, if the contract was assented to and hence became operative by the will of Congress, to see to its enforcement.”).

the thirty-six compacts enacted before 1921. Second, compacts institutionalize one-shot interstate projects, most often involving the allocation of natural resources (particularly water) or the building of bridges. Third, and of primary concern here, compacts create ongoing administrative agencies with jurisdiction over such varied and important domains as resource management, public transportation, and economic development.

Thus far, there have been few compacts—about 175 in all of United States history. Typically, compacts have emerged from political


15. The Colorado River Compact of 1929 is the most notable apportionment agreement. See 46 Stat. 3000 (1929) (presidential proclamation of compact’s effectiveness); 45 Stat. 1057, 1064 (1928) (congressional approval); see also Sabine River Compact, Pub. L. No. 578, 68 Stat. 690 (1954); Yellowstone River Compact, Pub. L. No. 231, 65 Stat. 663 (1951); Arkansas River Compact, Pub. L. No. 82, 63 Stat. 145 (1949); Snake River Compact, ch. 73, 64 Stat. 29 (1948); Costilla Creek Compact, ch. 328, 60 Stat. 246 (1943); Belle Fourche River Compact, ch. 64, 58 Stat. 94 (1944); Republican River Compact, ch. 104, 57 Stat. 86 (1943); Cheyenne River Compact, ch. 216, 44 Stat. 1247 (1943); Rio Grande River Compact, ch. 155, 53 Stat. 785 (1939); South Platte River Compact, ch. 46, 44 Stat. 195 (1923); La Plata River Compact, ch. 110, 43 Stat. 796 (1925).


18. See Council of State Governments, Interstate Compacts and Agencies (1983) (containing the most recent accounting). The pace of compacting has varied markedly over time. While 36 compacts were adopted between 1783 and 1920, 65 were adopted between 1931 and 1955. See Barton, supra note 2, at 3. The 1960s saw the enactment of 47 compacts, but the pace has slowed since the beginning of the 1970s, a decade in which fewer than 20 compacts were adopted. See Crihfield, supra note 14, at 580; Glendenning & Reeves, supra note 2, at 279-80.
accidents, state or private schemes to avoid federal regulation, or state desperation. Yet the advantages of interstate cooperation in a devolutionary era suggest that compacts may soon enjoy much wider appeal.

First, the geographic case for regionalism is often undeniable. As of 1994, twenty-nine of the largest metropolitan areas in the United States extended across state lines, creating frequent needs for interstate coordination. In addition, there are a growing number of environmental, transportation, developmental, and other problems that otherwise transcend state boundaries, for which "[r]egional control . . . undoubtedly represents the technical ideal" and perhaps the only feasible possibility. For instance, experience and science strongly suggest that a river basin can be managed effectively only as a unit.

Similarly, one of the basic insights of economics is that efficient decisionmaking takes account of externalities. If each state acting independently seeks to improve its own position by imposing costs on others, then decisionmaking should be centralized to apply to the entire

19. See infra text accompanying notes 137-57.
21. See FRANK P. GRAD, I TREATISE ON ENVIRONMENTAL LAW § 3.04, at 3-372 (1995) ("As the federal law recognizes, problems of environmental pollution refuse to confine themselves manageably within existing political boundaries. The 'problem shed' is likely to be regional in dimension, and in the case of water pollution is likely to include not only numerous municipalities and other local governments within metropolitan areas, but a number of states within the same watershed, or served by one river or river system. For effective regional water pollution control, therefore, the only presently available alternative to reliance on greater federal involvement is a governmental entity established by agreement between a number of state governments."); RICHARD H. LEACH & REDDING S. SUGG, JR., THE ADMINISTRATION OF INTERSTATE COMPACTS 6 (1959); James P. Hill, The Great Lakes Quasi Compact: An Emerging Paradigm for Regional Governance of U.S. Water Resources?, 1989 DET. C.L. REV. 1, 2 (discussing the use of compacts to meet "the challenge of water division pressures").
22. Richard O. Zerbe, Optimal Environmental Jurisdictions, 4 ECOLOGY L.Q. 193, 238 (1974); see also BARTON, supra note 2, at 59; J.B. Ruhl, Interstate Pollution Control and Resource Development Planning: Outmoded Approaches or Outmoded Politics?, 28 NAT. RESOURCES J. 293, 294-95 (1988) ("Yet it is even more apparent now [in 1988] than it was twenty years ago 'that certain problems cannot be solved through jealous adherence to state boundaries.' Many pollution and planning problems have simply outgrown the notion of state boundaries. . . . In many ways, a continuing blind adherence to political boundaries has made solutions to interstate pollution and planning problems virtually unreachable.").
23. See N. William Hines, Nor Any Drop to Drink: Public Regulation of Water Quality—Part II: Interstate Arrangements for Pollution Control, 52 IOWA L. REV. 432, 457 (1966) ("[T]he handling of water quality regulation on a regional basis is so sensible that it is nearly inescapable."); Zerbe, supra note 22, at 235; Frederick L. Zimmermann, Intergovernmental Commissions: The Interstate-Federal Approach, 42 ST. GOV'T 120, 122 (1969) (reporting that National Academy of Sciences publication designated river basin a "coherent hydrological unit relevant to water control").
affected area, everything else being equal. For example, one of the driving forces behind the Colorado River Compact, which apportioned the river between upper and lower basins in preparation for further apportionment among states, was that the preexisting regime granted "priority of appropriation." This gave each state an overwhelming incentive to use as much of the river as possible, which threatened development in all the riparian states given the extreme scarcity of water. Of course, arriving at a reasonable definition of the affected area and designing rules to cover it are not always this simple. Moreover, mistakes may shift the externality problem from between states to between regions. But interstate compacts, with larger and

24. See Stephen David Galowitz, Interstate Metro-Regional Responses to Exclusionary Zoning, 27 REAL PROP., PROB. & TR. J. 49, 115 (1992) ("Interstate compacts help break down fences where appropriate, providing a formal mechanism to reduce the jurisdictional component of the transboundary spillover problem."); Dale D. Goble, The Compact Clause and Transboundary Problems: "A Federal Remedy for the Disease Most Incident to a Federal Government," 17 ENVTL. L. 785, 787 (1987) ("Because of their geographically limited political responsibility, states are unlikely to restrict the conduct of their citizens to benefit the citizens of another state. Out-of-state individuals cannot make their preferences known through the local political market."); Vincent Ostrom et al., The Organization of Government in Metropolitan Areas: A Theoretical Inquiry, 55 AM. POL. SCI. REV. 831, 840 (1961); Marc J. Roberts, Organizing Water Pollution Control: The Scope and Structure of River Basin Authorities, 19 PUB. POL'Y 75, 99-100 (1971); Ruhl, supra note 22, at 298 ("If interstate pollution and planning regulation were left to each state's individual decisionmaking, each state could be faced with a trade-off between fostering its own economic growth and protecting the quality of other states' environments. . . . Even if it were certain that other states would [compensate the state for its economic sacrifice], a rational, self-interested state might choose to let all other states make the sacrifices necessary to protect the interstate environment, thus benefiting directly from their sacrifices without affecting its own economic conditions. With all states thinking this way, of course, no impetus for interstate pollution control or resource development planning exists."); Zerbe, supra note 22, at 227 ("[T]he government responsible for environmental control should be large enough to encompass the area of damages.").

25. See Gordon Tullock, Federalism: Problems of Scale, 6 PUB. CHOICE 19, 21-22, 25 (1964) (arguing that smaller governmental units give voters more voice and that bureaucratic costs in form of agency effects will increase with size).


28. As Gordon Tullock and Marc J. Roberts have noted, many activities have some external costs that only a global authority could internalize. While an interesting theoretical point, there seems no cause to let the impossibility of perfection undermine the search for improvement. See Roberts, supra note 24, at 100 ("Arguments for giving the agency enough geographic scope to encompass all interactions are likewise insufficiently well-formulated to be helpful. Again, water is related to almost all phases of economic activity, patterns of population location, and so on. What area short of the nation, or the world, would encompass 'all' external interactions?"); Tullock, supra note 25, at 19.

29. Joseph J. Spengler argued in 1937 that the problem of externalities precluded the
more flexible jurisdictions, are better equipped to counter externalities than an individual state's law, particularly given the general assumption that externalities are a constantly diminishing function.\textsuperscript{30} Beyond the basic insights that appear in the compact literature, uniform standards are a clear means of addressing prisoner's dilemmas in which the perceived threat of interstate competition leaves all states worse off, with policies they otherwise would reject as contrary to the public interest.\textsuperscript{31} Rather than allowing the threat of lost business to make state environmental, labor, and regulatory policies far weaker than the people would like them to be, for instance, state governments could attempt to avoid these downward spirals by turning to agreements that extend beyond state boundaries. Such a response would not be totally effective unless it covered all possible sources of counterproductive competition, which interstate compacts cannot often do.\textsuperscript{32} But it would limit fears of being undercut close to home, when such inter-jurisdictional comparisons may be most important. Indeed, this type of supposition seems to have spurred the recent meetings on welfare policy between the ideologically like-minded governors of New York, New Jersey, and Connecticut.\textsuperscript{33}

Yet while the benefits of compacting for devolutionists are clear, the compacting form raises serious democratic concerns. Perhaps the core meaning of democracy is that it allows the majority in a polity to largely determine the shape of their government and the course of its pursuits. No matter the benefits of permanency, there is still a tension between this principle and long-term contracts by governments. Even if compacts are the product of deliberative, collective self-determination,

effective use of regional compacts, contending that it was extremely unlikely that the effect of a compact could be limited to the compacting states. He supported compacting only in the small class of cases in which the costs would be internalized or compensating payments would be made from the compacting to the noncompacting states. See Joseph J. Spengler, The Economic Limitations to Certain Uses of Interstate Compacts, 31 AM. POL. SCI. REV. 41, 43 (1937).


\textsuperscript{32} See Spengler, supra note 29, at 42 (discussing limits of regionalism).

which often is doubtful, they severely hamper the people's ability to continue to guide their own fate by strictly limiting a party state's power to respond to changing preferences and circumstances. At the heart of the meaning of compacts, this tension has gone essentially unexplored by compact writers, who instead expound on the advantages of finality and hail compacts as augmenting the voice of the citizenry as they empower the states.\textsuperscript{34}

The democratic tension this disability creates varies depending on the subject matter of the compact, becoming more compelling the more decisionmaking power the compact wields and the less integral permanency is to the agreement's purpose. Functional democracy frequently requires some measure of finality (and protection for minority rights).\textsuperscript{35} Indeed, the United States Constitution itself ties the nation to a historical agreement barring super-majority consensus for change.\textsuperscript{36} But the Constitution binds out of the conviction that certain established institutions are necessary to make self-government possible, and it leaves current legislators with substantial control. Permanency becomes much more problematic for democracy when, as with agency compacts, it insulates decisionmaking from popular control and prevents democratically-elected decisionmakers from responding to change. Furthermore, the convention debates make clear that the Founders carefully considered both policy and forum in drafting the Constitution.\textsuperscript{37} In contrast, every interstate agreement that potentially infringes upon federal power must assume the compact form.\textsuperscript{38} Even if compacting states recognize the advantages of permanency—and they often do not—their lack of

\begin{footnotes}
\textsuperscript{34} See, e.g., Jerome C. Muys, Interstate Water Compacts 323 (1971) ("An interstate agreement on water problems is more in accord with traditional concepts of grass roots democracy than is the imposition of a Congressional solution to a water allocation or quality problem."); Meyers, supra note 27, at 52 ("Those who wish to bring decision making closer to the voter will care [if compacts decline in use]. The action of a state legislature approving or disapproving a compact is more likely to express the views of more voters in a signatory state than is approval or disapproval by the Congress.").

\textsuperscript{35} Most notably, legislatures routinely bind themselves with bond obligations. Social security and the highway trust fund, among other policies, bind the future as well.

\textsuperscript{36} For more on the tension between self-government and the permanency of the Constitution, see Paul W. Kahn, Legitimacy and History: Self-Government in American Constitutional Theory 8 (1992) ("No one lives in that state of grace in which all government is self-government, in which the voice of authority is nothing other than the voice of the self. People cannot live like that as long as they live within history.").


\textsuperscript{38} United States Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 471 (1978).
\end{footnotes}
institutional options certainly limits the extent of their affirmative choice to be bound.

Boundary compacts, which will not concern us beyond this section, are perhaps the least problematic in democratic terms. While they commit future state legislators to obeying a dictate of their predecessors, this commitment is as narrow in content and muted in imposition on the future as possible. Boundary compacts decide one, particular dispute forever and do no more; they establish no operating or decisionmaking mechanisms. They locate citizens' votes, but do not override them on any substantive issue. Moreover, the benefits of permanency are obvious for compacts that establish state boundaries: A settled boundary, no matter how historically inaccurate, is more useful than any other kind.

Other one-shot compact projects are somewhat more troublesome. Although these compacts create no decisionmaking authority, the case for permanency in matters like water allocation is at least somewhat cloudy. State development often depends on a guaranteed water supply. But whereas any fixed boundary is more valuable than an uncertain one, popular evaluation of the content of water allocation decisions, which may change over time, seems at least as important as the fact that the matter has been resolved.

At the other end of the spectrum are compacts that establish administrative agencies with jurisdiction over important aspects of economic or social life, which have become increasingly common since New York and New Jersey compacted to establish a Port Authority in 1921. By necessity, these ongoing enterprises, the focus of this Article, must constantly make choices that the compacting state governments did not anticipate at the time of enactment. Even if agency compacts rigorously attempt to facilitate public openness and state oversight, which (as we will see) they generally do not, the important, democratic check of a realistic possibility of amendment or termination would still be missing. The more decisionmaking authority the agency has, the more potentially dangerous the diminished ability of states to govern the agencies they have created. In addition, the case for permanency is significantly less compelling here than in the boundary context. To be sure, the permanency of agency compacts may facilitate

41. See ch. 77, 42 Stat. 174 (1921) (text of compact creating the New York-New Jersey Port Authority); HARDY, supra note 39, at 4; LEACH & SUGG, supra note 21, at 6-7.
42. See infra text accompanying notes 106-16.
long-term planning, property acquisition, and bond financing. Similarly, the finality—and enforceability—of agency compacts might also seem particularly appealing to states hoping to avoid a "race to the bottom," in which interstate cooperation would improve the situation of each state only if no state reneges. As we will see, however, permanency's contribution to the efficacy of agency compacts is often uncertain or unnecessary. More to the point, by far the most legitimate reason to create an agency compact is to satisfy citizen needs or preferences and to further the public interest. Whereas simply resolving a troublesome issue is predominant in boundary matters and important with other one-time projects, the purpose of agency compacts does not suggest that maximizing the effectiveness of current policies, to the extent that finality does that, should take precedence over responding to subsequent changes in the democratic consensus. Furthermore, the evidence indicates that states create agency compacts without much of a theory about when such a recourse to permanency is appropriate.

The democratic tension within compacts is also much more pronounced from the perspective of citizens than state governments, which suggests that it may be yet harder to surmount. From the states' point of view, federal preemption binds them essentially as much as compacts do. In either case, change will be impossible (preemption) or very difficult/impossible (compact) unless a state can convince the federal government to change its policy by either altering its program or overriding the compact agreement (a prospect discussed more fully below). Although the problem of permanence is much more stark for the states when federal preemption is not likely, threatened federal

43. See HARDY, supra note 39, at 3; MUYS, supra note 34, at 324; Richard H. Leach, Interstate Authorities in the United States, 26 LAW & CONTEMP. PROBS. 666, 670-71 (1961).
44. See infra text accompanying notes 177-79.
45. See infra text accompanying notes 142-57. In contrast, Congress specifically and deliberately created the independent regulatory agencies to be relatively permanent institutions, whose commissioners are appointed for set terms and subject to presidential removal only for cause. Congress determined that this permanency was necessary if these agencies were to fulfill their intended function as a check on executive power. See Morrison v. Olson, 487 U.S. 654, 687-88 (1988) ("In Humphrey's Executor, we found it 'plain' that the Constitution did not give the President 'illimitable power of removal' over the officers of independent agencies. Were the President to have the power to remove FTC Commissioners at will, the 'coercive influence' of the removal power would 'threaten' the independence of [the] commission." (quoting Humphrey's Executor v. United States, 295 U.S. 602, 629-30 (1935)); Humphrey's Executor, 295 U.S. at 629 (upholding limitations on the president's power to remove Federal Trade Commissioners because "it is quite evident that one who holds office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will").
46. See infra text accompanying notes 52-53.
action spurs most compacts. From the people's perspective, however, federal preemption—whatever its other problems—means that the responsible institution of democratic government is free to change its policies as its judgment dictates and to use the threat of change as a means of control. In contrast, compacts seriously disable the democratic institutions most likely to be concerned—the states—from significantly altering their plans or wielding that threat.

Recognizing this tension does not necessarily mean abandoning agency compacts. But the problem of permanency does suggest a fundamental need to reevaluate them: the value of the constitutional requirement that Congress consent to all state agreements with the potential to "'encroach upon or interfere with the just supremacy of the United States;" the compact negotiating process; the powers compact agencies possess; and, perhaps most importantly, which issues are resolved through agency compact.

The jurisprudence on compacts is aged. Given the political pressures for devolution and the Supreme Court's recent attentiveness to state autonomy, this body of law is likely to be revisited. As long as the problem of permanency remains, states should resort to compacts only when their advantages are most compelling: when the problem at hand requires a regional response; when any interstate agreement must be a compact because it may infringe on federal authority; when Congress is unable or unwilling to act; and when the compact agreement itself is drafted to mitigate democratic concerns. However, if the Court concludes, as I argue it should, that the contract impairment clause does not bar compacts that liberalize termination and amendment, then the agency compact may fulfill its potential as a valuable tool in a devolutionary era when geography, economics, or a prisoner's dilemma of interstate competition demand a solution extending beyond one state's lines.

I. REEVALUATING CONGRESSIONAL CONSENT AND DISPROPORTIONATE BINDINGNESS

Congress' role is the first issue that should be reexamined in light of the democratic tension within compacting. Every interstate agreement must win the approval of the party state legislatures, but only some

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47. See infra text accompanying notes 144-49.
49. See supra note 1.
interstate agreements are compacts, directly bound to the compact jurisprudence on permanency and constitutionally required to garner congressional as well as state assent.50 Only those agreements that may "encroach upon or interfere with the just supremacy of the United States"51 must take the compact form and receive Congress’ consent. Yet Congress, unlike the states, is not bound by the compacts it approves. It can condition its consent or simply supersede its approval legislation with subsequent law.52

From the states’ perspective or that of people who support compacts as a way to increase state power, this asymmetry is yet another reason to be reluctant to compact. Not only are the states bound almost irrevocably,53 but the omnipresent threat that Congress will change its mind deprives them of the full benefit of reliance. However, from a democratic perspective, the fact that Congress (perhaps with some state encouragement) can undo an agreement to which the states are largely confined mitigates the problem of permanence, although this certainly does not remove most cause for concern. A compact agency may be essentially immune from the threat of termination or alteration by the states, which presumably would want to supervise the enterprise they initiated most closely. But if matters become truly disastrous, Congress may be induced to pull the plug, amend the compact, or threaten either—perhaps emphasizing the point by withdrawing a portion of the financial and other support that the federal government provides to some compact agencies. These are far from ideal means of democratic control, particularly since congressional supervision and interest are much less likely in areas in which the states have taken the lead. Still, congressional freedom from permanency is a reassuring last resort.

Although limited in its democratic vision, the jurisprudence on congressional approval provides Congress with a powerful institutional position from which to control the use and content of compacts. Almost exclusively, the case law stresses the need to prevent undue harm to non-compacting states54 and "to ensure that Congress . . . maintain[s] ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority."55 Unconcerned by the particular constraints of the compact form,

50. See United States Steel, 434 U.S. at 469.
51. Id. at 471 (quoting New Hampshire, 426 U.S. at 369 (quoting and affirming Virginia, 148 U.S. at 519)). Like any other statute, approval legislation is subject to presidential veto.
52. See infra text accompanying notes 61-78.
53. See supra text accompanying notes 3-13.
the Supreme Court has found that Congress may consent in advance, sacrificing some power over the final form of compacts in order to encourage specific agreements. The Court will also imply consent from congressional action, making formation of a compact even easier.

While the Court has conceived of congressional consent fairly narrowly, Congress’ power of refusal allows it to make a much broader judgment about both submitted agreements and the responsibility its approval power entails. In light of the limitations of the compact form, this is a crucial opportunity to gauge the need for a compact and the degree of democratic tension the compact agreement creates. Given the fact that the democratic content of compacts has long been ignored, it is not surprising that there is no evidence that this sort of analysis presently takes place.

Congress has rarely granted consent in advance, but it has

170 (1894); Tobin, 195 F. Supp. at 606; HARDY, supra note 39, at 13.

56. See Cuyler, 449 U.S. at 441 (“Congress may consent to an interstate compact by authorizing joint state action in advance or by giving express or implied approval to an agreement [which] the States have already joined.”) (citing Virginia, 148 U.S. at 521); Virginia, 148 U.S. at 521 (“The constitution does not state when the consent of congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement . . . .”).

57. See Cuyler, 449 U.S. at 441; Virginia, 148 U.S. at 521 (“[C]onsent may be implied, and is always to be implied when congress adopts the particular act by sanctioning its objects and aiding in enforcing them . . . .’’); Virginia v. West Virginia, 78 U.S. (11 Wall.) 39, 59-60 (1870); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 85-86 (1821) (“The only question . . . is, has Congress, by some positive act in relation to such agreement, signified the consent of that body to its validity?”). The extent of congressional action needed to support a finding of implied consent is unclear.


Somewhat earlier, in the Weeks Act of 1911, 16 U.S.C. § 552 (1970), Congress granted advance consent to each of the several States of the Union to enter into any agreement or compact, not in conflict with any law of the United States, with any other State or States for the purpose of conserving the forests and the water supply of the States entering into such agreement or compact.
Although Congress has been somewhat more rigorous in recent years, its review of proposed compacts only infrequently ventures beyond the airing of classic concerns about state encroachment, particularly into the jurisdiction of unsympathetic federal agencies.90

While this history indicates that Congress must be persuaded to exercise meaningful control over the resort to agency compacts, it does not negate the inherent power of that body’s institutional location in the compacting process. Indeed, Congress has more than just the ability to prevent compacting where the need is not great. The Supreme Court has also found that Congress’ right to reject compacts includes the power to consent conditionally,61 which allows direct and sophisticated tailoring to mitigate democratic concerns. In fact, some federal consent legislation

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90. See MARIAN E. RIDGEWAY, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM 21 (1971); Kearney & Stucker, supra note 2, at 212. President Roosevelt’s 1942 veto of the Republican River Compact on the grounds that it would limit national control over a navigable waterway and “restrict the authority of the United States to construct irrigation works and to appropriate water for irrigation purposes in the basin,” 88 CONG. REC. 3286 (1942), was a rare exception to this perfunctoriness. The agreement was subsequently revised and approved a year later. See ch. 104, 57 Stat. 86 (1943).

In addition, Congress limited its consent to the 1935 Interstate Compact for the Conservation of Oil and Gas to three-year periods out of concern that the compact commission would violate antitrust laws. See ch. 781, 49 Stat. 939, 940-41 (1935); MUYS, supra note 34, at 376.


But see Robert C. Ellickson, Public Property Rights: A Government’s Rights and Duties When Its Landowners Come into Conflict with Outsiders, 52 S. CAL. L. REV. 1627, 1654-55 (1979) ("Congress has contributed to [the] glacial pace [of compact creation] by declining to rubberstamp interstate agreements, and instead insisting on undertaking its own review of the merits of each agreement. For example, in the late 1960’s when it was in the process of amending the Clean Air Act, Congress refused to approve several interstate air pollution compacts pending before Congress."). The overall evidence strongly suggests that the fate of these environmental agreements was unusual, the consequence of the imminent preemptive federal legislation. See GRAD, supra note 21, § 2.05, at 2-563 to -565 (1995) (describing specific constraints Congress has placed on air pollution control compact formation); Leonard Weakley, Interstate Compacts in the Law of Air and Water Pollution, 3 NAT. RESOURCES L. 81, 88 (1970) ("The emphasis of the Federal programs for the abatement of both air and water pollution has been directed toward the development of Federal organizations designed to cover the entire country.").

has already limited compact agencies to their enumerated functions or imposed disclosure requirements—first steps toward judiciously controlling the decisionmaking power of compact administrators. Furthermore, Congress' ability to impose conditions that demand ongoing compliance, which includes the right to require federal representation on a compact commission, increases the likelihood that compact agencies will be subject to congressional monitoring, or at least subject to legal control through litigation that holds the agency to its original agreement even if it does not allow for change.

This is not to suggest that Congress has truly begun to consider how its right of conditional consent can best be wielded, or that the law governing conditional consent, like the law controlling consent generally, unambiguously advances democratic control. Congress generally attaches conditions only sparingly, and then mainly to prevent infringements on federal jurisdiction. Usually these conditions do not require ongoing monitoring. Moreover, the Supreme Court held in one instance that party states had implicitly acquiesced to conditions that Congress placed on an agreement the states had already ratified.


64. The latter option would require consideration of what particular standing rules apply in this area, a topic beyond the scope of this Article.

65. See Leach & Sugg, supra note 21, at 50-51; Sherrett, supra note 58, at 986.

66. See Hardy, supra note 39, at 18.

67. See Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 281-82 (1959) ("The States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached.").
While the limits of this proposition are not clear, it seems extremely problematic in democratic terms for a state to be tightly bound to a compact whose final form did not weather the state's formal democratic process and the public scrutiny that entails, even if the official or administrator in charge of compact implementation ultimately accepted Congress' change. Given the democratic tension within compacting, Congress has a responsibility to use its power of conditional consent to scrutinize compacts, while taking care that states, at least at the moment of enactment, are not bound against their will.

Like its power to reject compacts or to consent conditionally, Congress' authority to amend or override compacts with subsequent legislation is an important, if not wholly satisfying, check on the extent to which compacts may bind a state's citizens to an agreement that has lost democratic support: If a compact falls seriously out of favor with enough people, there is a chance that Congress will free the states from their outdated accord. Moreover, unlike elsewhere in the compact jurisprudence, the law is clear on Congress' ability to alter or entirely preempt compacts to which it has agreed, whether or not the original compact legislation specifically reserves that right.

68. Presumably, the more fundamental the congressional condition, the more difficult the conflation of state acquiescence and approval. The condition in Petty, for instance, stated that nothing in the compact should be construed to impair federal jurisdiction over interstate commerce and navigable waterways. See id. at 277-78. This stipulation did not substantially change the compact. Indeed, one might argue that Congress had not actually imposed a condition at all because it simply restated the standard view that federal law must always be supreme over state law in the area of interstate commerce. See id.

69. My point applies only to agency compacts. Overturning boundary agreements would be counterproductive. Tellingly, the Court's early boundary compact cases occasionally included dicta suggesting that Congress did not have the power to amend or repeal compacts it had approved. See Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 725 (1838) (declaring that a boundary compact operated "with the same effect as a treaty between sovereign powers"); Poole v. Fleeger, 36 U.S. (11 Pet.) 185, 209 (1837) (stating that the right to compact is a right of the states, only limited by Congress' power to grant or deny consent).

70. See Louisville Bridge Co. v. United States, 242 U.S. 409, 418 (1917) ("Congress is not prevented by the Constitution from passing laws that impair the obligation of contracts, and in its enactments the presence or absence of a specifically reserved right to alter, amend, or repeal the compact to which it is consenting] has not the same peculiar significance that it has in state legislation. It is no doubt a circumstance, but not by any means conclusive."); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 433 (1855) (holding that Congress may enact legislation incompatible with compact to which it had previously granted consent, relying on rationale that one Congress may not impair constitutional legislative authority of subsequent Congress); Riverside Irrigation Dist. v. Andrews, 568 F. Supp. 583, 589-90 (D. Colo. 1983) (holding that congressional approval of a compact does not limit congressional authority to subsequently enact laws inconsistent with the compact); Washington Metro. Area Transit Auth. v. One Parcel of Land in Montgomery County, 490 F. Supp. 1328, 1333 (D. Md. 1980), aff'd, 706 F.2d 1312 (4th Cir. 1983) (same); Port Auth. Bondholders
Concentrating on the democratic content of compacting reveals the potential mitigating force of Congress’ ability to reject compacts, to consent conditionally, and to override ongoing compact enterprises. However, all of the previous discussion assumed an interstate agreement that must secure congressional approval and become an official compact because it may “encroach upon or interfere with the just supremacy of the United States.” When interstate agreements do not have to become compacts, and thus directly subject to the compact jurisprudence on permanency, they should not do so. The ameliorating power of Congress’ role does not overcome the problems with the compact form. For this reason, the Court’s recent ruling in *Cuyler v. Adams* is extremely troublesome. *Cuyler* held that every interstate agreement concerning “an appropriate subject for congressional legislation” becomes a compact upon congressional consent, regardless of whether such consent was constitutionally necessary. By all accounts, the

73. *Id.* at 440. As the Court explained the matter:

Where an agreement is not “directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,” it does not fall within the scope of the [Compact] Clause and will not be invalidated for lack of congressional consent. But where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States’ agreement into federal law under the Compact Clause.
difficulty of determining which interstate agreements require consent pushes states to seek approval in most cases. Under Cuyler, this turns all of these agreements into compacts. Particularly given Cuyler's failure to define the limits of "appropriate," the decision may do much to countermand any democratically-inspired attempt to limit the use of compacting as much as possible. Extending the well-settled rule that consent need not be express or direct to circumstances in which consent was never necessary would place even more interstate agreements within the confines of the compact form. All in all, Cuyler makes it yet more important for Congress to wield its power of consent carefully, to seek federal solutions to problems that extend beyond one state's boundaries, and to allow interstate agreements that do not need to become compacts to remain free from the burden of that jurisprudence.

II. STATES IN COMPACT NEGOTIATION

Focusing on the problem of permanency sheds new light on the possibility inherent in Congress' freedom from boundedness and on the limitations of the jurisprudence on congressional consent. It also does much to transform the meaning of the way states come to the agreements that they ultimately submit for federal approval. The compact literature has assumed the basic viability of the form and directed its criticism toward the supposedly inordinate delays that accompany interstate agreements. But arriving at an agreement promptly becomes far less important than achieving the most satisfactory accord possible once one sheds the premise of essential soundness and keeps foremost the democratic tension within compacts. If states are going to be tightly bound to their compacts regardless of their shifting policy goals, a

Id. (quoting United States Steel, 434 U.S. at 468).

74. See HARDY, supra note 39, at 13 ("The congressional consent requirement has been and continues to be the most litigated and contested aspect of interstate compacts."); RIDGEWAY, supra note 59, at 46-47 (suggesting difficulty of arriving at a "fixed policy or formula" for determining which compacts require consent); infra text accompanying notes 160-64.

75. See Celler, supra note 63, at 686; Ellickson, supra note 60, at 1654-55; David E. Engdahl, Characterization of Interstate Arrangements: When Is a Compact Not a Compact, 64 Mich. L. Rev. 63, 69-70 (1965) ("[D]raftmen have been so uncertain of the scope and application of the compact clause that until very recently nearly every formal interstate arrangement has been submitted for congressional consent.").

76. See Cuyler, 449 U.S. at 440 ("Where Congress has authorized the States to enter into a cooperative agreement, . . . the consent of Congress transforms the States' agreement into federal law.").

77. Id.

78. See cases cited supra note 57.

79. See infra text accompanying notes 80-82.
lengthy negotiating process becomes a facially desirable means of enabling states to reach agreements that best reflect the democratic consensus, at least at the time of enactment.

Perhaps the foremost complaint made about compacts centers around the twin postulates that their enactment “requires something like geological time”\(^{80}\) and that this delay is the largest and most unfortunate obstacle to compacts becoming “a viable alternative to direct federal intervention for solution of interstate . . . problems.”\(^{81}\) Although recent data is sketchy, writers frequently cite studies indicating that compacts take between four and nine years to enact and lament that the states and Congress have not been able to proceed more rapidly.\(^{82}\)


81. Note, Interstate Agreements for Air Pollution Control, 1968 Wash. U. L.Q. 260, 264; see also Hardy, supra note 39, at 20-21 (quoting Thursby, supra note 2, at 138) (“One of the most frequently heard criticisms of interstate compacts concerns the lengthy time period involved in initiating, negotiating, and ratifying them. Compact negotiation has been described as being ‘a slow and cumbersome process at best,’ and it has been deemed comparable in difficulty to international negotiations.”); Muys, supra note 34, at 326 (“An often voiced criticism of the compact approach to regional water resources management is that compacts require an exceedingly long time to negotiate and effectuate by state ratification and Congressional consent.”); Jerome C. Muys, Interstate Compacts and Regional Water Resources Planning and Management, 6 Nat. Resources Law. 153, 168 (1973) (same); Lois G. Forer, Water Supply: Suggested Federal Regulation, 75 Harv. L. Rev. 332, 342 (1961) (“[P]rolonged and uncertain [compact] negotiations of necessity impede if not prevent the development of water resources.”); Frank P. Grad, Federal-State Compact: A New Experiment in Co-Operative Federalism, 63 Colum. L. Rev. 825, 854 (1963) (“To make compacts truly effective, states cannot afford the luxury of several years’ delay in negotiation and ratification, and Congress . . . should no longer have to delay for years before granting its consent.”). But see Muys, supra note 34, at 331-32 (“The record of compact negotiations suggests that where there has been sufficient motivation to reach agreement, negotiations have been expedited. . . . Where there is no pressing need to reach agreement, Parkinson’s law undoubtedly prevails and the work of negotiation expands to fill the time available to accomplish it.”).

82. For the key studies, see Roscoe C. Martin et al., River Basin Administration and the Delaware 132 (1960) (reporting that negotiation, ratification, and consent for 19 river management and control compacts took an average of eight years and nine months) (cited in Forer, supra note 81, at 342 n.49; Grad, supra note 81, at 854 n.180; Zerbe, supra note 22, at 226 n.66; Note, Interstate Agreements, supra note 81, at 264 n.37); Wallace R. Vawter, Interstate Compacts—the Federal Interest 11 (1954) (reporting that negotiation, ratification, and consent process for 65 compacts lasted an average of four years and nine months and that natural resource compacts took an average of six years and nine months) (cited in Kearney & Stucker, supra note 2, at 212); Paul T. Chambers, Water Pollution Control Through Interstate Agreement, 1 U.C. Davis L. Rev. 43, 45 (1969) (finding that pollution control compacts take an average of five years to negotiate, ratify, and obtain consent) (cited in Muys, supra note 34, at 327); see also Grad, supra note 81, at 827 (“It took exactly two years from the completion of the [initial research study for the Delaware River Basin Compact] to the final enactment of the compact—an accomplishment unheard of in the annals of water compacts.”); Meyers, supra note 27, at 12 (noting that despite “dire necessity of reaching an
As a preliminary matter, most of this literature lacks context. The average time required to bring a compact to completion is a meaningless statistic without information about the other options: adjudication, federal regulation, or individual state action. The comparative data that is available, while anecdotal, suggests that the alternatives to compacting are not necessarily more speedy. The federal government's efforts to initiate projects that will allocate resources between states or between public and private interests have been notoriously slow-moving. Indeed, congressional apportionment of the lower Colorado River basin amongst states required six years, the same amount of time needed to ratify and approve the interstate compact that first divided Colorado River water rights into two basins. The Tennessee Valley Authority, which placed the federal government in charge of numerous development activities in a multistate region, took seventeen years to enact. If anything, adjudication over interstate disputes is even slower than either compacting or federal action. To cite an extreme example, federal litigation to allocate the Truckee-Carson-Tahoe waters between California and Nevada began in 1913 and did not end until 1990.

Somewhat more typically, the special master that the Supreme Court assigned to review Texas' challenge to the technical basis for allocation under the Pecos River Basin Compact did not even issue his first report for five years. While states can decide on an independent course relatively easily, the impetus for interstate action generally arises because uncoordinated action is hopelessly inefficient and ineffective under the circumstances. From this perspective, the time required to compact appears far from inordinate.

More fundamentally, a lengthy negotiating process seems understandable, unavoidable, and wholly desirable in light of the permanency compacts entail. If states are going to bind themselves, they should be sure, at the very least, that their compacts represent the best solution agreement," ratification and consent to Colorado River Compact took six years).

83. See Muys, supra note 34, at 333.
84. See Meyers, supra note 27, at 12.
85. See ch. 32, 48 Stat. 58 (1933) (enacting statute for the Tennessee Valley Authority); Martha Derthick, Between State and Nation: Regional Organizations of the United States 18 (1974).
86. See Muys, supra note 34, at 332.
possible—if only at the time of commitment. Given the longevity of compacts, the fact that compact negotiations may have to survive several political administrations, for instance, should not necessarily be troubling. Such a long-term commitment should represent much more than a passing whim or a political sop.

From this perspective, attempts to accelerate compacting by limiting the ability of states to control the content of their agreements are fundamentally misguided. Traditionally, governors interested in compacting have appointed interstate drafting committees. These committees have facilitated free-ranging debate and have generally been responsive to the state governments that created them. They have not, however, moved rapidly. In response to criticism about endless delay, compact proponents have increasingly turned to an expedited procedure. Under this method, regional organizations and state officials acting informally devise proposed agreements on their own. Although ratifying state governments can either approve or reject the resulting documents, they neither shape the content of the proposals nor have an institutional mechanism through which to negotiate alterations. States can articulate their reasons for rejection, but this rapidly becomes a poor means of bargaining. States that would like to make changes lack established fora in which to deal collectively with the other states that have yet to ratify. Moreover, they must also persuade states that have already adopted the proposed agreement to modify their approval legislation, an inherently more difficult project than amending a submission yet to face and survive legislative scrutiny. Meant to end "dithering" and to force commitment, such a constraining "reform" only worsens the dilemma of bindingness the more it achieves its purposes.

This is not to say that traditional methods of compact negotiation lack flaws. Like the expedited procedures, if to a lesser extent, joint negotiating committees have structural deficiencies that may push states toward positions that do not best represent their preferences, even at the

90. See HARDY, supra note 39, at 6-7; Heron, supra note 58, at 9; JULIUS H. COHEN, THEY BUILT BETTER THAN THEY KNEW 334-36 (1946) (autobiographical account of elaborate processes of the New York-New Jersey Port Authority negotiating committee).

91. See HARDY, supra note 39, at 7; Heron, supra note 58, at 9.

92. See HARDY, supra note 39, at 7.

93. See FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 17 (1976); Heron, supra note 58, at 9. The Interstate Compact for the Supervision of Parolees and Probationers was the first compact subject to this abbreviated procedure. Proposed by the Interstate Commission on Crime, an extra-legal organization of state officials, it was negotiated without prior state approval. The first states ratified it in 1935. See HARDY, supra note 39, at 7-8; COUNCIL OF STATE GOVERNMENTS, INTERSTATE COMPACTS, 1783-1956, at 32 (1977). Today, all fifty states, along with the Virgin Islands and Puerto Rico, belong. See Heron, supra note 58, at 10.
time of compacting. First, these committees are not permanent institutions, but are instead created for particular negotiations. Even if committee members are experts on the subject matter of the proposed compact, their probable unfamiliarity with the compacting form may be substantially disabling. Second, single-issue compacts\(^4\) may offer no opportunity for the trading that allows bargainers to express the intensity of their preferences and thus may result in a parochialism in which states will surrender nothing because there are no suitable concessions to receive in return.\(^5\) Moreover, simply expanding a compact’s scope to facilitate “logrolling” makes no sense, if one of the problems that we are most concerned about is that states may subject issues to the compact form without affirmatively desiring the permanency it entails.\(^6\)

Focusing on the democratic tension within compacts reveals the most fundamental problems with current negotiating processes. When the supposed plague of delay fades, what is left is a structure that may hamper states as they strive to come to interstate agreement and then tightly binds them to their flawed accord.

III. THE POWER COMPACT AGENCIES EXERCISE

Once in operation, compact agencies are subject to two perennial, and conflicting, complaints. One part of the compact literature contends that compact agencies are particularly unresponsive to popular concerns and particularly autonomous from the democratic institutions of government, even for administrative agencies. The other part protests that compact agencies are disappointingly toothless, at least in practice. The problem of permanency makes both schools of criticism simultaneously understandable. Given the broad immunity that compact agencies enjoy from amendment or termination by the governments most likely to supervise them,\(^7\) their unresponsiveness is both unsurprising and highly troubling. In light of the vastly limited control states exercise

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\(^4\) Interstate compacts historically have been limited to a single subject, although the Bi-State Development Agency Compact between Missouri and Illinois, the Delaware Valley Regional Planning Commission, and the Metropolitan Washington Council of Governments are three examples of multipurpose compacts. See Galowitz, supra note 24, at 118-21; see also Muys, supra note 81, at 158.

\(^5\) On the advantages of logrolling, see Edwin T. Haefele, A Utility Theory of Representative Government, 61 AM. ECON. REV. 350 (1971); Roberts, supra note 24, at 111-12 (“When decisions are made on a project-by-project basis, and when projects have geographically concentrated benefits, almost any representative of a geographic constituency will tend to take a narrow, constituency-oriented view.”).

\(^6\) See infra text accompanying notes 142-57.

\(^7\) See supra text accompanying notes 3-13.
over the entities they create, their tendency to form weak compacts or to undercut operative compact agencies, especially as time passes and the agency becomes increasingly less in tune with current state priorities, is predictable and somewhat reassuring.

Agency compacts invariably provide that elected state officials will exercise some form of oversight and occasionally include provisions to facilitate public access to compact decisionmaking. Yet these controls have not prevented the agencies from exercising an extraordinary measure of independence. More conscientious drafting and more attentive supervision could bring compact agencies under better democratic control. But the agencies' oft-noted disregard for outside concerns, which the New York-New Jersey Port Authority best exemplifies, seems intrinsically linked to their relative security from the threat of termination or amendment.

At the very least, the governors of the party states normally appoint compact agency commissioners and may remove them for cause. Compact agencies are also generally subject to annual reporting provisions, open record requirements, and audits. In addition, several agencies must open all meetings to the public and have special public hearings before making significant decisions. Perhaps most importantly, some agency compacts permit gubernatorial veto of

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98. See infra text accompanying notes 132-36.
99. See GRAD, supra note 21, § 3.04, at 3-379; LEACH & SUGG, supra note 21, at 34-35 (quoting Palisades Interstate Park Compact) ("Each member of the commission may be removed from office for neglect of duty or misconduct in office by the governor of the state of which such member is a citizen . . . ."); id. at 70; Leach, supra note 43, at 672-73 (noting that compacts often have "provisions for the removal of officers found guilty of malfeasance"); Robert W. Tobin, The Interstate Metropolitan District and Cooperative Federalism, 36 TUL. L. REV. 67, 81 (1961).

In some cases, commissioners are state officeholders, executive department officials, or state administrators serving ex officio, an arrangement that, one would think, furthers agency coordination with state government. See LEACH & SUGG, supra note 21, at 48; Muys, supra note 81, at 170; Joseph F. Zimmermann, Political Boundaries and Air Pollution Control, 46 J. URB. L. 173, 192 (1968) (discussing Mid-Atlantic States Air Pollution Control Compact Commission, in which governors of signatory states are ex officio members).

100. See LEACH & SUGG, supra note 21, at 47-48; Leach, supra note 43, at 672; Tobin, supra note 99, at 82.
102. See Leach, supra note 43, at 672-73; Tobin, supra note 99, at 81.
103. See LEACH & SUGG, supra note 21, at 38; Muys, supra note 81, at 162-63 (discussing the Delaware River Basin Compact); Tobin, supra note 99, at 81-82.
agency policies\textsuperscript{104} and, less frequently, require legislative approval of supplemental agency plans.\textsuperscript{105}

Despite these controls, there is a broad consensus that compact agencies are remarkably unconcerned about popular needs and desires, even compared to state and federal agencies.\textsuperscript{106} Virtually unknown to the public, they tend to be nominally led by officials whose main interests and responsibilities lie elsewhere and dominated by staff that prefers to keep the agency far removed from the vagaries of state politics.\textsuperscript{107} Capture by private economic interests is also a perennial

\textsuperscript{104} See LEACH & SUGG, supra note 21, at 36 (describing gubernatorial veto provisions in the New York-New Jersey Port Authority Compact, the Maine-New Hampshire Interstate Bridge Compact, and the Tennessee-Missouri Bridge Compact, by which a governor can veto any action of a commissioner appointed from her state); \textit{id.} at 41 (quoting the Delaware River Basin Compact) (detailing a provision in the Delaware River Basin Compact providing that the Authority "may not construct, erect, or otherwise acquire 'any new facility or project' " until the party state governors have consented to the project); Leach, \textit{supra} note 43, at 672-73; Tobin, \textit{supra} note 99, at 81.

\textsuperscript{105} See LEACH & SUGG, supra note 21, at 36-37 (discussing the New York-New Jersey Port Authority Compact and the Delaware River Basin Compact); Leach, \textit{supra} note 43, at 672-73; Tobin, \textit{supra} note 99, at 81.

\textsuperscript{106} See, e.g., RIDGEWAY, supra note 59, at 295-96; Robert G. Dixon, Jr., \textit{Constitutional Bases for Regionalism: Centralization; Interstate Compacts; Federal Regional Taxation}, 33 Geo. Wash. L. Rev. 47, 77 (1964) (recounting "the sorry past record of interstate compact agencies in regard to their responsiveness and responsibility"); Lewis C. Green, \textit{State Control of Interstate Air Pollution}, 33 Law \& Contemp. Probs. 315, 323 (1968); Leach, \textit{supra} note 43, at 673-74; Charles McKinley, \textit{The Management of Water Resources Under the American Federal System}, in \textit{FEDERALISM: MATURE AND EMERGENT} 328, 347 (Arthur W. Macmahon ed., 1955) (describing compact agencies as "cumbersome, jerry-built structures lacking in region-wide political responsibility, parasitic on national finance, and negative or unduly dilatory in decision-making"). \textit{But see} LEACH & SUGG, \textit{supra} note 21, at 37 ("[M]embers of interstate bodies are usually careful to act in general accordance with state policy. To do otherwise would be to make the agency's operations difficult if not impossible, for interstate agencies, like any other units of government, operate within the realm of practical politics."); MUYS, \textit{supra} note 34, at 334-36 (dismissing the fear that "interstate compact commissions generally are not as politically responsive as traditional state and federal agencies"); Muys, \textit{supra} note 81, at 171 (discussing the political accountability of compact commissions).

\textsuperscript{107} See BRUCE A. ACKERMAN ET AL., \textit{THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY} 200 (1974) ("[S]tate and national politicians, when acting in a regional setting, will nonetheless act to pursue their state and national political interests and rely principally upon the advice of aides who normally assist them in the bulk of their work on a nonregional level of government."); \textit{LEACH & SUGG, supra} note 21, at 222-24 ("[M]ost compact agencies come to be identified in the public mind and in legislative circles with their staffs and not with the members themselves. The typical staff, under its executive director, tends both to initiate and to carry out policy."); RIDGEWAY, \textit{supra} note 59, at 48-49 ("If the general population of the area has only the vaguest knowledge of the [Missouri-Illinois Bi-State Development Compact] agency and its activities, this is not unusual for agencies of this type, which prefer to avoid the white light of publicity except when it is useful to their designs, and which are removed from the
problem, although its extent appears to be highly contextual, a function of the officials involved, the strength of the private interest, and the degree to which the interest group has decided to concentrate its resources at the state or interstate as opposed to the federal level. At a minimum, compact agencies tend to be even quicker than other administrative agencies to establish influential industry advisory committees and to be less likely to institute effective channels of communication with the public.

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108. See Barton, supra note 2, at 31 ("The [Atlantic States Marine Fisheries Compact] Commission may even be considered harmful to sportsmen and anglers, to the extent that the compact agency has frustrated efforts to use the national government to regulate the fisheries. This seems anomalous in view of the fact that recreational interests were in the forefront of the movement to create the interstate agency. But if we consider the founding process as a whole . . . we find that commercial fishery groups were the prime movers of the compact. It is not surprising that, where sport and commercial fishery interests are inconsistent, the compact has reflected the interests of the latter."); Ridgeway, supra note 59, at 309 ("In this new stage of federalism's evolution, the people of the United States appear to play a diminished role. Authority, planning, negotiation, decision-making, administration move into the realm of [inter alia] special economic development interests . . . ."); id. at 152 ("All present [Great Lakes Basin] commissioners have had close and active identification with Great Lakes matters and some have ties or interlocking relationships with various private special interest groups in the water field."); Note, Interstate Agreements, supra note 81, at 282 ("State governments have traditionally been more susceptible to pressure from economically powerful interests opposed to extensive emission controls.").

109. See Barton, supra note 2, at 22 (describing the Atlantic States Marine Fisheries Compact and the Interstate Oil Compact Commission, which respective industries did much to create and which industries have used "to prevent unwelcome governmental influence on their industries [and to] secure services and favorable decisions from other governmental agencies"); id. at 56 ("The intention in most cases has been to prevent governmental regulation that would be detrimental to the interests of these [private enterprise] groups. Since industries generally enjoy effective access to the legislatures and administrative agencies of the states in which they are located, at the state level they can more easily prevent regulations which they perceive as inimical to their interests."); infra text accompanying notes 144-49.

110. See Ackerman et al., supra note 107, at 202-05 (concluding that "a river basin agency that seeks to develop a set of regional political institutions will tend to be dominated by the best organized groups (i.e., the polluting firms and cities)," while compact officials will have great difficulty "in obtaining substantial exchanges of opinion" from public interest groups,
Clearly, there is much party states, compact agency commissioners, and future compact drafters can do to strengthen democratic control over compacts. Most of the restraints in place are radically under-utilized. State governments have made little effort to integrate interstate agencies into their legislative or administrative framework, placing the onus on compact commissioners to carry out informal liaison. Although governors generally have wide discretion over their appointments, commissioners from the private sector have disproportionately hailed from industry. In turn, the lack of information states collect and the predictably muted differences between commissioners has no doubt contributed to the remarkably low rate of gubernatorial vetoes and the even rarer incidence of removal hearings. Legislative subcommittees and state administrative working groups particularly devoted to compact agencies might noticeably ameliorate some of these problems. Compact commissioners, for their part, could prioritize liaison with state whose representatives will be hard to identify and who will, in turn, have more difficulty communicating with their members; Leach & Sugg, supra note 21, at 39 ("The Pacific Marine Fisheries Compact . . . requires the commission it creates to confer with an advisory committee representing industry and other private interests on any recommendation it desires to make for either state or federal action."); Muyes, supra note 34, at 88-89 ("Initially, [the Ohio River Valley Water Sanitation Compact Commission] sought [the] participation of industrial representatives who possessed expertise and data that was not otherwise available. . . . [N]o general citizens advisory committee was ever formed, nor were steps taken on a formal basis to secure the continuing views of recreationists."); see also Barton, supra note 2, at 22 ("Both [the Atlantic States Marine Fisheries Commission and the Interstate Oil Compact Commission], while regulatory in form, have been unable (or indisposed) to acquire and wield effective power over the commercial fishermen and oil producers—the groups which they ostensibly are designed to regulate. Instead, fishermen and oil producers have used the compacts to prevent unwelcome governmental influence on their industries. Moreover, the two compact agencies have assisted the fishery and oil industries in securing services and favorable decisions from other governmental agencies.").

111. See Leach & Sugg, supra note 21, at 48-49 (noting that "contacts between state executive departments and interstate compact agencies remain unilateral"); Muyes, supra note 81, at 167; Ridgeway, supra note 59, at 297-98; Leach, supra note 43, at 672-74 ("In no state, however, even in the executive branch, has a single official or department been specifically charged with maintaining liaison with the interstate authorities to which that state is party . . . ."); Tobin, supra note 99, at 82-83 (contending that the Missouri-Illinois Bi-State Development Agency, which is part of the administrative framework in each of the two party states, is an exception to this general rule).

112. See Barton, supra note 2, at 86-87.

113. See Leach & Sugg, supra note 21, at 36, 77 (noting that the authors know of only one case in which the probity of a compact commissioner was questioned); Sidney Goldstein, An Authority in Action—An Account of the Port of New York Authority and Its Recent Activities, 26 Law & Contemp. Probs. 715, 718 (1961) (arguing that the infrequent exercise of the governors’ veto power “is proof that Port Authority policies are consistent with those of the governors”).
governments and dramatically expand their efforts to inform the public and respond to popular concerns, perhaps by utilizing an ombudsperson and broadening opportunities to learn about and participate in hearings. Compact drafters (or members of Congress reviewing submitted interstate agreements) might also liberalize the procedures surrounding public hearings and the opportunity to comment, mandate ombudspersons, and require more diversity on compact commissions. In addition, they could make commission service practically possible for people without state salaries or business careers by ending the tradition of providing little or no compensation to agency officers.\textsuperscript{1} Compact agreements might also facilitate government liaison by limiting the terms of commissioners so that they generally do not outlast the appointing governor.\textsuperscript{5} Finally, compact drafters or Congress could establish remedial procedures within compacts to keep compact agencies to their original powers even if making the agencies more responsive to changing preferences and circumstances remains extremely difficult.\textsuperscript{16}

But while democratic control over compact agencies certainly can be improved, the extraordinarily consistent history of agency autonomy has roots that seem too deep to be explained away as the consequences of a failure to undertake straightforward reforms. The problem of perma-

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\item \textsuperscript{1}See LEACH \& SUGG, supra note 21, at 76 ("As the habit of providing, at the most, nominal compensation suggests, the position of a member of a compact agency is among the least recognized public positions in the United States.").
\item \textsuperscript{5}See GRAD, supra note 21, § 3.04, at 3-379 ("The term of a commissioner of a compact agency commonly exceeds that of the governor who appoints him. This makes for great political independence, but it may also make for a lack of responsiveness.").
\item \textsuperscript{16}A number of commentators have also suggested that compact agencies would be more majoritarian, and hence more responsive to popular will, if they provided for representation based on population or some measure of interest, rather than give each party state an equal vote. See id. § 3.04, at 3-377 to -378 ("The equal sovereignty concept has given far greater influence to the smaller states, and has sometimes put the larger state at the mercy . . . of the smaller states."); MUYS, supra note 34, at 366 ("Some weighted representations would seem to be in accord with the Supreme Court's gradual extension of the 'one man, one vote' rule."); Grad, supra note 81, at 853 (supporting weighted representation based on the "vast difference in the amount of [financial] contribution" amongst states); Edwin T. Haefele, Who Are the Appropriate Partners, 24 J. SOIL \& WATER CONSERVATION 93 (1969) ("A requirement that states delegate power to basin residents who then elect the members of the commission on the basis of equal population districts could provide [a] necessary safeguard."); McKinley, supra note 106, at 345 ("The composition of an interstate compact agency is bound to push the process of policy formulation away from regional goals and toward state and local particularism."); Muys, supra note 81, at 171 ("Consideration should be given by compact negotiators to providing for weight representation on compact commissions."); see also LEACH \& SUGG, supra note 21, at 34-37 (quoting Arkansas River Compact) (noting that Arkansas River Compact gives each state one vote and provides that "every decision, authorization or other action shall require a unanimous vote" ); Grad, supra note 81, at 853 (describing the Delaware River Basin Compact, in which voting is based on equal sovereignty principle).
\end{itemize}
nency makes this history both eminently understandable and deeply disturbing. Set free from some of the core instruments of democratic control, compact agencies are largely unbeholden to any popular constituency and seem to become impervious to popular will as a matter of course. The New York-New Jersey Port Authority is the best documented, if somewhat extreme, case study.

Upon preliminary review, the controls on the Port Authority appear to be significant. Authority commissioners are gubernatorially appointed and can be removed for cause. Each governor can veto the actions of the commissioners from her state, and both state legislatures must approve new projects (as must the affected municipalities in some instances). The Authority must submit annual reports to the states and meet audit and public record requirements. But here, too, the states have not done their utmost to enforce these provisions or to draft the compact as carefully as it might be done to facilitate democratic control. While meant to limit the agency’s scope, the Authority’s categorical inability to depend on state financial support, for instance, radically decreases its incentives to remain in the states’ good graces. Similarly, although suits against the Port Authority are always possible, the compact establishes no remedial procedures to facilitate legal control if the agency strays from its compact.

Still, one is most struck by the single-mindedness with which the Port Authority has pursued its powers to their outer boundaries.

117. See Leach & Sugg, supra note 21, at 35-36, 42-43; Dixon, supra note 106, at 73-74 & n.106; Goldstein, supra note 113, at 716-18.

118. For instance, the two governors rarely exercise their veto power over the Authority. See Leach & Sugg, supra note 21, at 36; Goldstein, supra note 113, at 718; see also Barton, supra note 2, at 69 (“Attempts to impose controls on the Authority from the outside (either to force the agency to engage specific problems or to prevent actions by the Authority that would be detrimental to specific interests) have been sporadic and unco-ordinated . . . ”).

119. The Port Authority has argued that the requirement of financial self-sufficiency is a means of democratic control. See Leach & Sugg, supra note 21, at 42-43 (citing Matthias E. Lukkens, Assistant Executive Director of the Port Authority); Dixon, supra note 106, at 74 n.106 (same); see also Goldstein, supra note 113, at 717 (agreeing).

120. See Hess v. Port Auth. Trans-Hudson Corp., 115 S. Ct. 394, 397 (1994) (holding that interstate compact agencies are not entitled to Eleventh Amendment sovereign immunity).

121. See ch. 77, 42 Stat. 174, 178 (1921).

122. A number of critics have accused the Authority of large-scale disregard for the concerns of the general public. Ross D. Netherton has observed that:

The Authority is dependent upon the continued willingness of the investment bankers to market its securities and makes no pretense about the predominance of this factor in its policy considerations. The interest of the public in the most efficient use of bonds and the way in which services are administered is not the responsibility of the creditor to consider or promote.
Originally charged with building, operating, and coordinating transportation facilities in the New York City metropolitan region, the Port Authority has construed its mandate to allow for enormous autonomy. Financed with bonds it issues in its own name and user fees on its facilities, the Authority budgets its own revenues, contracts without legislative approval, and determines its internal organization. Perhaps more importantly, the Authority has taken it upon itself—with some support from bi-state statutes in 1931 but without congressional approval—to group new and old projects together. While at first glance a mere accounting decision, the move allows the agency to skirt its compact's prohibition on collecting tolls for facilities that have already paid for themselves. The possibility of grouping also creates an enormous incentive for the Authority to initiate projects endlessly. If the last one was ever paid for, all the tolls would have to cease. The Port Authority would lose its major source of revenue, and starting collection again on existing structures would be close to politically impossible. This kind of manipulative interpretation of compact mandates is particularly troubling given the larger national goal of facilitating interstate commerce and the specific federal policy that roads and bridges should be free to all users in interstate commerce once the structures have paid for themselves.

Netherton, supra note 107, at 691; see also Barton, supra note 2, at 86-88 ("[Commissioners] are conditioned both by their personal outlook and [business] training and the autonomous nature of the compact organizations which they lead to think in terms of the financial soundness of the compact agencies, rather than the social needs of the metropolitan areas. . . . [T]he Port of New York Authority, while perhaps able to devote substantial amounts of funds to subsidize marginal programs, has used its influence to avoid an extensive commitment to mass transportation."); Dixon, supra note 106, at 73-75.


124. See Bard, supra note 123, at 269, 272-80; Note, Congressional Supervision, supra note 107, at 1419.

125. See Barton, supra note 2, at 87; Celler, supra note 63, at 688 (noting that the bi-state legislation was never submitted to Congress).

126. See Barton, supra note 2, at 69; Celler, supra note 63, at 688.

127. See Celler, supra note 63, at 688; Netherton, supra note 107, at 686-87; Note, Congressional Supervision, supra note 107, at 1420. As early as 1955, tolls collected on the George Washington Bridge had paid for the bridge's construction twice. The Holland Tunnel, by this time, had paid for itself four times. See Netherton, supra note 107, at 686.

128. See Netherton, supra note 107, at 686-87.

129. See Netherton, supra note 107, at 689-90; Note, Congressional Supervision, supra note 107, at 1420. Many years ago, the Port Authority also attempted to interpret the gubernatorial veto power narrowly. After the governors of New York and New Jersey vetoed an Authority resolution opposing the St. Lawrence Seaway project, the Commissioners asserted that the governors should confine their vetoes to cases of misfeasance or malfeasance, rather than simple
The Port Authority has not veered off course to the point that Congress or both party states would agree to its termination, but it has pushed at the outer limits of this generally forgiving constraint. The Authority still serves an important purpose, since presumably the public desires efficient transportation in the New York City metropolitan region now as much as ever. One might further predict that a majority of the region's citizens would not be overly concerned about the Port Authority even if they were aware of its present form, given the difficulty of cooperation between states, the extraordinary corruption in the local governments, and the common intuition that removing some institutions from politics will actually further the public interest. Nevertheless, the Port Authority as currently constituted is largely unconcerned about either the specific transportation policies the public wants or the policies that would serve the public interest in some broader sense. As one early critic phrased the concern,

[The Authority] does not make its decisions to build another tunnel, or to expand an airport instead of investing in mass-transit facilities, in terms of the whole public, or of the interest of the whole area. . . . It makes its decisions in terms of its own, more limited public—i.e., the auto driver who keeps it going with his tolls, and the bond market.\(^\text{130}\)

While not utterly disastrous, such imperviousness hardly constitutes democratic control over a government body that affects virtually the entire population of the New York City metropolitan area. Although the above description may be a mite hyperbolic, it is very clear and certainly unsurprising that the Port Authority's most significant contact with the general public is oriented outward, propelled by the agency's public relations machine.\(^\text{131}\)

Just as the protection the Port Authority enjoys from popular rebuke does much to make sense of its unharnessed pursuit of its narrow goals, the problem of permanency—the specter of the Port Authority—very plausibly explains states' reluctance, in the vast majority of cases, to create powerful compact agencies or to give them much support once

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\(^{130}\) See Dixon, supra note 106, at 74-75.

\(^{131}\) New Strength in City Hall, FORTUNE, Nov. 1957, at 256, 256.

See Leach, supra note 43, at 673-74 ("In an attempt to dispel [the] belief [that the Authority is undemocratic], the Port Authority early developed an extensive public relations program."); see also Leach & Sugg, supra note 21, at 224 ("Critics allege, [that] compact agencies, once launched, and left as they are to exist in a twilight zone of public consciousness, may never accomplish what they might or should. As a consequence, they may become less concerned with performance than with successful public relations—with winning approval by word instead of deed.").
they are in operation. If the Constitution protects compacts from diminishment, the states have tended to bind themselves to low thresholds.

132. See Derthick, supra note 85, at 55-56 ("The [Delaware River Basin Compact]'s actual functions have fallen far short of its formal powers. Except for navigation control, there is virtually nothing that the DRBC is not authorized to do with respect to water resources in the basin, yet its activity has been limited and selective. After more than ten years [in 1974], it is still seeking to develop a set of functions that will be stable, serve important public purposes, and not be fatally undermined by the noncooperation of member governments."); id. at 191-92 ("[W]hile particular adaptations to the organizational environment vary widely from one type of regional organization to another, the common result is either specialization of activity or a low level of activity. Regional action proceeds within a narrow sphere or at a slow pace."); Grad, supra note 21, § 3.04, at 3-371 to -372 ("Unfortunately, past experience in the use of interstate compacts for water pollution control is somewhat mixed, and there is considerable doubt whether most existing interstate compact agencies have the necessary legal capacity to undertake the requisite functions under federal law. Most existing agencies, for instance, do not appear to have the requisite powers to assume responsibility for the management of a pollution permit program."); Leach & Sugg, supra note 21, at 213 ("[N]one of [the interstate compact agencies] has tried to do too much. This effective focus is a tribute to the framers of the compacts, which typically define the scope of the agencies they create in clear terms."); Muys, supra note 34, at 337 ("With the exception of the Delaware and Susquehanna compacts, and perhaps a few others, the authority granted to compact commissions has been exceedingly limited and their funding accordingly as anemic."); id. at 75 ("The policy document [of the Ohio River Valley Water Sanitation Compact] was a fairly conservative one, clearly designed to let the states know that this new institution on the river was not contemplating any serious boatrocking as far as established state agencies were concerned."); Green, supra note 106, at 323 ("[A]s devices to settle boundary disputes, the compacts have clearly been useful. However, as devices to establish permanent administrative machinery, their value is less clear. They have been widely criticized as characteristically indecisive and ineffective, as inflexible and as lacking effective political control or responsibility. . . . As to regulatory functions, one can point to virtually no achievement, and very little effort."); Hill, supra note 21, at 2 ("Oftentimes, these regional solutions have created organizations and mechanisms which have been characterized as weak and ineffective, with the few stronger regional organizations termed 'political accidents.' "); McKinley, supra note 106, at 347 ("The interstate compact contrivances thus far suggested for meeting the need for regional public policy formulation and administration of land and water resources appear to be cumbersome, jerry-built structures lacking in region-wide political responsibility, parasitic on national finance, and negative or unduly dilatory in decision-making."); Muys, supra note 81, at 166; Ruhl, supra note 22, at 294 ("[M]ost observers would agree that true interstate constructs for pollution control and resource development planning remain mostly the 'theoretically attractive solution.' Their implementation has not proven effective in dealing with the necessities of interstate trans-boundary pollution control and resource development planning problems."); Zerbe, supra note 22, at 226 ("Once established, [river management] compacts are often ineffective as pollution control instruments."); Note, Interstate Agreements, supra note 81, at 282 ("Water pollution control compacts have been only minimally effective, on the whole. For example, under the Ohio River Valley Water Sanitation Compact, effective in 1948, no enforcement power was employed until 1956. As of 1963, the Ohio Valley Compact Agency had never taken legal action against an industry to secure compliance with its water quality standards. Five actions had been begun against municipalities but these were dropped when the alleged offender began to construct treatment facilities.").
But while the antidemocratic aspects of the compact form make the imperviousness of compact agencies especially disturbing, a democratic perspective transforms the weakness of many compact agencies from a supposedly tragic waste of opportunity to a somewhat comforting check. The compact literature has harshly criticized states for limiting the potential reach of their compacts.\textsuperscript{133} State governments, commentators argue, are so "jealous of their prerogatives"\textsuperscript{134} that they have lost sight of both the public interest in interstate cooperation and the possibility that such cooperation will preclude federal preemption that leaves the states with even less control.\textsuperscript{135} Jurisdictional protectionism clearly

\textsuperscript{133} Congress' lack of enthusiasm also has occasionally drawn ire. See Derthick, supra note 85, at 65-66 ("Planners of the [Delaware River Basin Compact] commission hoped that [the federal representative] would be able to speak authoritatively for the federal government; if he could not, the commission could not fulfill its functions of comprehensive planning and policy making for the basin. The dominant aim of federal agencies, however, has been to avoid making commitments through the DRBC."); Ruhl, supra note 22, at 308-09 ("[M]any compacts fail to live up to their stated purposes, and the federal government is partly to blame for this. The Federal Water Pollution Control Act pays only lip service to the compact process, and the federal approval process is burdensome."); Zerbe, supra note 22, at 227 ("Congress was never very interested in seeing that [river management] compacts would be set up or, if set up, would work. Under some conditions an interjurisdictional compact can serve as an effective device for the control of pollution.").

\textsuperscript{134} Howard W. Odum & Harry E. Moore, American Regionalism: A Cultural-Historical Approach to National Integration 206 (1938); see also Ackerman et al., supra note 107, at 200 ("[S]tate and national politicians, when acting in a regional setting, will nonetheless act to pursue their state and national political interests . . . ."); Barton, supra note 2, at 177 ("The interstate compact approach to river basin development . . . tends to accentuate state and local parochialism at the expense of regional and national goals in water use policy."); Derthick, supra note 85, at 191 ("Proponents of a new organization in American government usually must agree in advance not to diminish the authority or functions of established organizations: the price of achieving entry into the universe of organizations is a promise not to disturb that universe. Unless the functions of the new organization can be made to appear innocuous . . . , the opposition of threatened organizations is likely to kill it."); Leach & Sugg, supra note 21, at 213 ("With regard to some compact agencies, fears were expressed at first that they would usurp the prerogatives of existing state agencies and might even be in a position to dominate them."); Muys, supra note 81, at 169 ("[T]he member states of the traditional interstate compact [were] not . . . really committed to a regional approach to river basin problems. Their participation [under the compact] was cautious and hesitant, concerned primarily with preservation or promotion of their individual state interests.").

\textsuperscript{135} See Ackerman et al., supra note 107, at 325-26 ("A recurring theme . . . has been the failure of interstate cooperation, even with federal assistance, to be equal to the challenge of region-wide pollution problems. 'Cooperative federalism' has been an attractive label concealing spasmodic research, parochial political decision making, and unsatisfactory policy implementation."); Barton, supra note 2, at 85 ("Perhaps the most significant conclusion to be drawn from this analysis of metropolitan area compact agencies is that none has demonstrated both the perspective and ability to handle within its jurisdiction the emerging social problems—transportation, parking, recreation, air pollution, and the like—that cry out for public
plays a part in the consistent hobbling of compacts. Nevertheless, looking at the problem of permanency raises the possibility that states may shy away from strong compacts at least in part because they do not want to tightly bind their citizenry to a particular set of policy concerns. Alternatively, it suggests that, even if state governments act purely from selfish motivations, this particular display of self-centeredness is not especially troubling given the democratic imperative to limit compacts to the most compelling cases.

Focusing on the democratic content of compacts thus resolves a persistent tension in compact scholarship and brings to light a far more pressing issue. It makes sense of both the mighty single-mindedness with which compact agencies have pursued their agendas and of the equally prominent complaints that states have undercut their own compacts. What this means, of course, is that compacts now tend to be either quite powerful and markedly unresponsive or, much more often, practically useless, but still unresponsive and largely indestructible. One scenario is dangerous outright; the other represents a reckless resort to a problematic institution when the states do not actually intend to accomplish much by such an exercise. The power of the compact form demands more careful consideration of its use. Part IV, which considers when compacts should be enacted and how they should be shaped, addresses the policy implications at the very heart of the problem of permanency.

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136. This, of course, is particularly the case when states compact specifically to discourage federal action that they expect to be less favorable to their interests. See Leach & Sugg, supra note 21, at 196-97 (describing Interstate Oil Compact, which was created to avoid federal regulation, has recommendatory power only, and no right to financing by member states); Muys, supra note 81, at 167-68 ("[I]t is clear that some of the water pollution control and flood control compacts . . . were admittedly designed to forestall [federal] action in those two areas."); infra text accompanying notes 144-49.
IV. WHEN AND HOW COMPACTS SHOULD BE USED

Historically, compacts have emerged in essentially three situations. They have been political accidents, state or private ploys to avoid federal regulation, or the desperate last resorts of states. Generally not satisfied with the rarity of compacts, the literature urges their more frequent consideration.

Indeed, the amount of concern that scholars and statesmen have expressed about interstate competition that prevents a state from pursuing the policies it most prefers might make the infrequency of compacts seem almost inexplicable. Why doesn't a state that cannot strengthen its labor, environmental, or regulatory laws as much as it would like because it fears losing business to other states simply compact with its closest competitors in order to establish uniform regulation?

Recognizing the tension between long-term contracts and democracy makes the relative infrequency of compacts much more understandable and desirable. In addition to the structural deficiencies in the negotiation process that hamper satisfactory agreement, politicians may have strong political and ideological reasons to avoid the permanency of compacting when ongoing enterprises are involved, even if this concern

137. Within these categories, which will be discussed below, there are other factors that make compacting more or less likely.

First, comfortable abundance and well-aligned interests, while rare, always make compacting much easier. See Paul Elliott, Texas’ Interstate Water Compacts, 17 ST. MARY’S L.J. 1241, 1263, 1267 (1986) (“The Sabine River Compact of 1953 . . . required less than one year to negotiate. . . . Because of the relative abundance of water in the Sabine River Basin, the compact has functioned with little controversy.”); Green, supra note 106, at 325 (“Affecting as it does all industries throughout the area, an air pollution control program brings into play the economic rivalries between the jurisdictions.”); David Nice, State Participation in Interstate Compacts, 17 PUBLIUS 69, 76-77 (1987) (finding that compacting increased when states shared trust, sense of interdependence, and perceived ability to work together).

There is also some indication in the literature, which is undeveloped but wholly plausible, that compacting is made yet more difficult when state governments differ ideologically. See Leonard J. Feldman, The Interstate Compact: A Cooperative Solution to Complex Litigation in State Courts, 12 REV. LITIG. 137, 140 (1992) (“It is conceivable . . . that ideological differences between states may make a single compact impossible.”); DERTHICK, supra note 85, at 48 (“[T]he fortunes of electoral politics facilitated cooperation [in negotiating the Delaware River Basin Compact]. Three of the four basin state governors and both of the big city mayors concerned happened to be liberal Democrats.”); see also Meyers, supra note 27, at 38-39 (recounting how partisan politics within Arizona dealt a fatal blow to the state’s ratification of the Colorado River Basin Compact in 1923).

138. See supra text accompanying note 18.
139. See supra text accompanying notes 133-36.
140. See supra note 2 and accompanying text.
141. See supra text accompany notes 90-96.
is rarely, if ever, clearly articulated. At the same time, a democratic view on compacts also suggests that the nature, if not the frequency, of compacts must be rethought. The problem of permanency demands that compacts be limited to situations in which the case for regionalism is most compelling and be tailored to ameliorate the antidemocratic aspects of the compact form. No compact should have a scope larger than what the project absolutely requires. Each should include the most liberal amendment and termination provisions constitutionally permissible (with the narrow, pragmatic, and occasional exception of certain accommodations for bond financing).

As it now stands, the most powerful compacts suggest most strongly that states do not have much of a theory about when and how they should compact, that they enter into compacts without affirmatively desiring permanency. What is most striking about all the compact agencies with real authority is the degree to which they sprang from unusual circumstances and pure chance. The Delaware River Basin Compact, for example, was the synergistic product of a Supreme Court decree, a major flood, and a few very committed advocates.

The compacts that are systematically the least powerful only support the conclusion that states compact without deliberating about the purposes and problems of the form. Most often, state or private

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142. Martha Derthick calls these compacts “political accidents.” See DERTHICK, supra note 85, at 192 (“The main thing to be said about the strong organizations (the leading cases) is that they are political accidents, the product of ad hoc coalitions whose success was fortuitous in important respects. Each resulted from circumstances that singly and in combination were quite special and contained a large element of chance. Natural or social conditions created a singular opportunity for initiatives.”).

143. See id. at 192-93. Martha Derthick, the scholar who has most prominently noted the accidental beginnings of powerful compacts, uses her work to warn compactors against blindly patterning themselves after their more successful predecessors. See id. at 226 (“The principal thing that experience suggests is that pragmatism is the best policy: it leads to the most effective regional organizations.”).

144. See BARTON, supra note 2, at 22 (“In general, the functional characteristics of the Atlantic States Marine Fisheries Commission are similar to the Interstate Oil Compact Commission. Both interstate agencies, while regulatory in form, have been unable (or indisposed) to acquire and wield effective power over the commercial fishermen and oil producers—the groups which they ostensibly are designed to regulate. Instead, fishermen and oil producers have used the compacts to prevent unwelcome governmental influence on their industries. Moreover, the two compact agencies have assisted the fishery and oil industries in securing services and favorable decisions from other governmental agencies.”); LEACH & SUGG, supra note 21, at 216 (“[The states'] concern has been to protect their own power from both the compact agencies and the federal government, and they have done this by using compacts to create agencies for joint state action rather than for regional action philosophically conceived.”); MUY, supra note 34, at 347 (“Unfortunately, the compact institutions created by the states [to forestall federal action] have too often turned out to be paper tigers unequal to the regional water
interests have turned to interstate agreements in order to dissuade federal action. While pragmatically understandable, such resorts are dangerous for democracy. From the point of view of state governments or private interests, they will be bound by federal law if not by compact, and they believe that they have more power to shape the compact. Yet compacts create agencies whose closest democratic supervisors are hindered in a way that Congress is not. While generally weak, the compacts that emerge to avoid federal preemption are strong symbols of a pervasive insensitivity toward or misunderstanding about the particular dangers of an institution that is both highly insulated from popular pressure and near permanent. States and private interests have balanced the risks and rewards of federal action versus interstate compacts from the perspective of their own narrow jurisdictional or power concerns; there is scant evidence that the broader democratic issues that compacts raise have often entered into this calculus. Again and again, compacting states and private advocates have made clear that their primary motivation was simply “to forestall complete Federal domination,” to create “a desperately [needed] alternative to problems.”); Green, supra note 106, at 329 (“It seems highly unlikely that an air pollution control compact will successfully clear the air unless the purpose of those who sponsor the compact, and of those persons who will ultimately serve on the compact commission, is simply to clear the air. If the real motive is to delay or forestall the advent of federal intervention, there will be no effective action.”).

145. See GLENDENING & REEVES, supra note 2, at 282-83 (“[M]any compacts, especially in the river basin category, result from activities of private economic groups with special interests in the resources involved . . . . They use the compact device to block stronger national action or control because they feel more competent to deal with the states than with the national government.”); id. at 282-83 (“Substantial evidence exists that the states use compacts to protect their power in the federal system, and such use is applauded by the strong supporters of the states.”); MUYKS, supra note 34, at 346 (“A recurring criticism of compacts is that they are utilized by the states not as positive institutions of regional water management, but to delay necessary action on regional water problems by the federal government.”).

146. See BARTON, supra note 2, at 56 (“The intention in most cases has been to prevent governmental regulation that would be detrimental to the interests of these [private enterprise] groups. Since industries generally enjoy effective access to the . . . agencies of the states in which they are located, at the state level they can more easily prevent regulations which they perceive as inimical . . . .”); id. at 31 (describing the Atlantic States Marine Fisheries Compact and the Interstate Oil Compact Commission, which the respective industries helped create because they believed compacts would dissuade federal regulation and could be controlled); GLENDENING & REEVES, supra note 2, at 282-83.

147. WILLIAM G. LEUCHTENBURG, FLOOD CONTROL POLITICS: THE CONNECTICUT RIVER VALLEY PROBLEM, 1927-1950, at 200 (1953) (quoting W.J. Scott, a principal architect of the New England Pollution Control Compact); see also BARTON, supra note 2, at 177 (“The interstate compact approach to river basin development . . . tends to accentuate state and local parochialism at the expense of regional and national goals in water use policy.”); EDWARD J. CLEARY, THE ORSANCO STORY: WATER QUALITY MANAGEMENT IN THE OHIO VALLEY UNDER
federal control,” which they predicted would be a less favorable means of resolving the problem. In short, Congress would be wise to scrutinize such agreements particularly well.

Compacts as last resorts, the final major category, are much less problematic from a democratic standpoint. After all, the main imperative the problem of permanency creates is to limit compacting to instances of pressing need. Yet here, too, it is apparent that compacting states have not actually focused on the antidemocratic character of compacts. The resort to compacts, even in desperation, can be refined significantly. Currently, many compacts emerge from conundrums that Congress, which is free from the confines of the contract impairment clause, could resolve. For instance, the Delaware River Basin Compact, which established one of the most powerful compact agencies, was enacted

AN INTERSTATE COMPACT 42 (1967) (noting that the Ohio River Valley Water Sanitation Compact “represented an alternate to federal intervention, which the states did not want and which many individuals rejected”).


149. See BARTON, supra note 2, at 56-57 (describing the role that various examples of this type of compact have played in delaying effective action); LEUCHTENBURG, supra note 147, at 250 (arguing that impetus for interstate compacts has come “from those [private] forces which believed that the states, or a combination of states, would be less successful than the federal government in halting the opposition of these private interests”); Interstate Environment Compact: Hearings on S. 907 Before the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 86, 91 (1971) (statement of Donald M. Mosiman of the Environmental Protection Agency quoting official EPA letter to the Judiciary Committee) (“[A] compact which established dilatory procedures, or which provided an inadequate commitment of resources from the signatory States, could have the effect of delaying the establishment of enforceable standards or plans.”).

150. See LEACH & SUGG, supra note 21, at 177-78 (describing formation of Ohio River Valley Water Sanitation Compact) (“Then came the severe droughts of 1930 and 1934, which so reduced the amount of available water in the rivers that only the most callous could ignore any longer the prevailing stench or overlook the menace it represented to the public health throughout the region.”); MYERS, supra note 34, at 331 (“The record of compact negotiations suggests that where there has been sufficient motivation to reach agreement, negotiations have been expedited. This certainly was true with respect to the Upper Colorado River Compact negotiations in 1946-48, when future development in the basin was dependent on reaching agreement . . . .”); Darr, supra note 30, at 358 (“The compact has come to be seen as a device of ‘last resort’ due to the difficulties of implementation and its variable success in practice.”); Leach, supra note 43, at 668 (“One is impressed, first of all, by the fact that the interstate authority has more often than not been ground reluctantly out of the necessities of the case rather than adopted easily and early in the search for solution to an interstate problem. Indeed, it appears that the common pattern has been for the authority device to be used as a sort of last resort.”); id. (“Certainly the Port of New York Authority was born out of desperation over a seemingly hopeless impasse between New York and New Jersey over the increasingly complex problem of transportation in the port area. It was accepted finally as the only way remaining to settle the bitter wrangling and bickering that had marred the relations between the two states.”).
when only the need for coordinated action in the basin was clear. Although the Supreme Court had allocated the river's water, the multiplicity of federal agencies with overlapping jurisdiction in the basin were unable to respond effectively to a disastrous flood and rapidly escalating pollution problems, or to devise a comprehensive development plan. At the same time, much of the federal bureaucracy actively opposed a basin compact and instead offered to respond to state concerns by consolidating federal activity. The basin needed regional coordination, but when a small core of devoted proponents ultimately pushed through their interstate compact, the alternatives had been left largely unexplored.

Given the commitment compacts entail, states should resort to compacts that create ongoing, active enterprises only when no other viable option remains. The tension between democracy and permanency demands that such compacts be enacted only when their advantages are most compelling: when geography, economics, or a prisoner's dilemma of interstate competition require a regional solution; when any interstate agreement must be a compact because it may infringe on federal power; and when trusting the matter to Congress is not a realistic possibility.

As a first step, such a project requires a systematic examination of the distinction between compacts and other interstate agreements, which can take the form of ordinary interstate contracts or uniform laws that depend on reciprocation. While courts have found that a number of interstate agreements do not require congressional consent, they have not

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151. See DERTHICK, supra note 85, at 48.
152. See id.; MUYS, supra note 34, at 331-32.
153. See MUYS, supra note 34, at 331-32.
154. See id.
155. See DERTHICK, supra note 85, at 192-93.
156. See id.
157. The Pecos River Compact was also established in the face of a pressing problem that Congress could have resolved. As Richard H. Leach and Redding S. Sugg, Jr. have reported:

If it had not been for the fact that all the while [New Mexico and Texas] were bickering, the waters of the Pecos were becoming scarcer and decreasing in quality, the logic of a solution by compact might never have been brought home to either state. . . . To attack all of [the river management] problems successfully was admittedly beyond the capacity of either state alone, yet neither state wished to turn them over for solution to the federal government. An interstate compact seemed to be the least disagreeable means of attacking them.

LEACH & SUGG, supra note 21, at 159.
158. See supra text accompanying notes 20-33.
provided much of an underlying theory for making the distinction. Although there is abundant case law and literature on the reaches of federal power, scholarly discussion about which classes of interstate agreements must take the compact form has similarly consisted of the loose use of shibboleths like “[m]ental health, criminal law, education, and child welfare compacts are a few examples of compacts in traditional state areas that do not require congressional consent”—which a jurisprudence that tends to give states more leeway in matters they have historically dominated only encourages. This difference has been so inadequately conceptualized that states are frequently unable to determine whether an agreement requires congressional consent, and routinely seek approval in doubtful cases. This practice is dangerous because it directly binds the agreements to the compact jurisprudence on permanency, but the extent of the problem is again unclear because neither the courts nor the scholarly

159. See United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472-73 (1978) (involving reciprocal tax agreements); New York v. O'Neill, 359 U.S. 1, 11-12 (1959) (upholding the Uniform Law to Secure the Attendance of Witnesses from Within or Without the State in Criminal Proceedings); St. Louis & San Francisco R.R. v. James, 161 U.S. 545, 562 (1896) (upholding an agreement between states to extend a railroad line); McComb v. Wambaugh, 934 F.2d 474, 479 (3d Cir. 1991) (upholding the Interstate Compact on Placement of Children); Fraser v. Fraser, 415 A.2d 1304, 1306 (R.I. 1980) (upholding the Uniform Reciprocal Enforcement of Child Support Act); State v. Doe, 178 A.2d 271, 275 (Conn. 1962) (upholding compacts for the care of the poor); Ex parte Tenner, 128 P.2d 338, 341 (Cal. 1942) (upholding the Uniform Act for Out-of-State Parolee Supervision).

In addition the Supreme Court has speculated about agreements to which the compact requirements would not apply. See Virginia, 148 U.S. at 518 (listing as possible examples small land sales between states, joint action against epidemics, and contracts for transporting one state’s goods through another).

160. HARDY, supra note 39, at 16. Paul T. Hardy adds (with Herbert H. Naujoks’ agreement) that “neither compacts created to establish channels of interstate cooperation nor recommendatory commissions require congressional consent because they are designed only to improve interstate relations or to provide joint study and advisory mechanisms.” Id.; see also Herbert H. Naujoks, Compacts and Agreements Between States and Between States and a Foreign Power, 36 MARQ. L. REV. 219, 225 (1953). Without support or much analysis, Frederick Zimmermann and Mitchell Wendell have similarly contended that “interstate compacts which integrate state services, state administration or state law in areas where state action is usual or predominant do not require Congressional consent.” ZIMMERMANN & WENDELL, supra note 93, at 24.

161. See HARDY, supra note 39, at 13 (“The congressional consent requirement has been and continues to be the most litigated and contested aspect of interstate compacts.”); RIDGEWAY, supra note 59, at 46-47 (suggesting difficulty of arriving at “fixed policy or formula” for determining which compacts require consent).

162. See Celler, supra note 63, at 686; Ellickson, supra note 60, at 1654-55; Engdahl, supra note 75, at 69-70.

163. See supra text accompanying notes 72-78 (discussing Cuyler v. Adams).
literature has produced a coherent explanation of the status of non-compact interstate agreements under the contract impairment clause.

Courts, compacting states, and scholars should draw on the rich jurisprudence about the scope and nature of federal power to determine, more precisely and more reasonably, which types of agreements may "encroach upon or interfere with the just supremacy of the United States." When they have done so, and have determined that a particular proposed agreement must be a compact, actual resort to the compact form should be highly contextual, dependent on the availability and adequacy of federal action. Most crucially, there certainly will be some instances in which Congress simply has no will to act and cannot be persuaded otherwise. As noted above, the federal legislature has had a notoriously difficult time allocating between states and between public and private interests. To the extent that a problem only concerns a small region of the country, Congress may be even more inclined to skirt divisive issues. In addition, there may be situations in which Congress, although freed from the bonds of permanency, is still less able to devise a solution that responds to and furthers collective self-determination. For instance, a number of commentators have argued that the states are more likely than Congress to understand the particularities of regional problems, more able to tailor diverse and innovative solutions to these particularities, more responsive to regional variations in citizen preferences, and more motivated to regulate as


165. See supra text accompanying notes 83-86.

166. See ZIMMERMANN & WENDELL, supra note 93, at 52 (arguing that interstate compacts offer "[a] rich variety of combinations . . . for tailoring the intergovernmental arrangement to cover jurisdictional gaps"); Kearney & Stucker, supra note 2, at 213-14 ("[The compact] is an extraordinarily flexible instrument for establishing a legal basis for intergovernmental relations."); Muys, supra note 81, at 325 ("Perhaps the chief advantage of the compact approach to river basin management is its adaptability to the particular needs of a basin.").

167. See Felix Frankfurter & James M. Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 YALE L.J. 685, 708 (1925) ("With all our unifying processes nothing is clearer than that in the United States there are being built up regional interests, regional cultures and regional interdependendencies. These produce regional problems calling for regional solutions."); Meyers, supra note 27, at 52 ("Those who wish to bring decision making closer to the voter will care [if compacts decline in use]. The action of a state legislature approving or disapproving a compact is more likely to express the views of more voters in a signatory state than is approval or disapproval by the Congress."); Zerbe, supra note 22, at 238 ("Federal control . . . has unfortunately resulted in unduly uniform and in some cases overly severe standards. It is easy to suggest, as is done here, that [water pollution] standard-setting and enforcement authorities be set up on a regional basis conforming to the hydrological characteristics, or that at least some geographical diversity in water quality and effluent standards be
effectively as possible.\textsuperscript{168} Whatever the general veracity of such claims, they suggest the ways in which federal solutions can, in particular circumstances, be less responsive to public needs than compacts.

If the federal government will not or cannot adequately address a problem that requires a regional solution and that cannot avoid the purview of the Compact Clause, responsible states should weigh the urgency and magnitude of the issue they confront against the difficulties the compact form itself creates. In making this assessment, states must consider the extent to which their potential compact could be made less problematic in democratic terms.

In general, the less discretionary power a compact agency permanently wields, the less it impinges on the people’s continued ability to collectively determine their own fates. At the same time, creating compact agencies with so little authority that they are unescapably ineffectual is worse than pointless; it is a reckless use of a potentially dangerous institution. Negotiating between these two principles requires a subtlety not often found in compacting, but the outlines of such a procedure are clear. Above all else, a compact’s scope must be tailored as narrowly as possible. When the New York-New Jersey Port Authority was established, one of its most urgent tasks was to standardize railroad equipment—a straightforward assignment that clearly demanded interstate coordination and helped spur the Authority’s creation.\textsuperscript{169} But the Authority’s jurisdiction was drafted very broadly, to cover the coordination of all transportation in the region. This did nothing to stop the compact agency from moving beyond prosaic issues like railroad gauge setting or facility maintenance to deciding matters like the overarching character of regional transportation, in which the identity of the decisionmaker was at least as important as the need for a decision to be made.\textsuperscript{170}

Yet limiting the discretion of a compact agency is only half a remedy at most. Another way of characterizing discretion is the ability to respond to changing circumstances. While compact agencies have done little to reach out to the public, they have not been oblivious to reality and making them so hardly seems desirable. The clear solution, of course, is to facilitate democratic intervention into compact agencies. At

\footnotesize{\begin{itemize}
  \item \textsuperscript{168}Allowed.
  \item Zimmermann, \textit{supra} note 99, at 180 (quoting 1967 Republican Coordinating Committee) ("To us it is evident that programs to combat air pollution must be tailored to meet the varied needs of individual regions and areas.").
  \item \textsuperscript{169}See \textit{Briggett, supra} note 63, at 753.
  \item \textsuperscript{169}See \textit{BARTON, supra} note 2, at 86.
  \item \textsuperscript{170}See \textit{supra} text accompanying notes 122-31.
\end{itemize}}
present, the states and Congress radically under-utilize existing mechanisms of control. These tools could be employed more frequently and made stronger. But Congress is several steps removed from compact agencies, and the states—the democratic institutions closest to their compacts—have proven unable or unwilling to engage in the careful monitoring that veto authority, reporting requirements, and the like demand. The more sweeping powers of termination and amendment—and exploring the limits of the contract impairment clause—thus become crucial, both because termination and amendment are the most serious threats any administrative agency can face and because they are a means of control that the states may actually be able to utilize relatively effectively.

States have not yet tested the constitutional boundaries. With few exceptions, agency compacts require unanimous consent for amendment and withdrawal or termination. Nevertheless, placing the Constitution’s demands aside for one moment, the policy case for permanency in agency compacts is weak. Unlike boundary disputes in which simple resolution overshadows all other considerations, the legitimate justification for agency compacts—furthering the public interest by addressing a problem that requires a regional solution—in no way suggests that heightening the efficacy of current policies, to the

171. See supra text accompanying notes 111-13.
172. See supra text accompanying notes 111-16.
173. See supra text accompanying notes 99-110.
174. See MUY’s, supra note 34, at 63 (listing specific examples).
175. See HARDY, supra note 39, at 21 ("[O]ften amendment and revision of a compact can be accomplished only by a return to the original negotiation and ratification process."); Forer, supra note 81, at 342-43 ("No water compacts to date have a built-in mechanism permitting the parties to adjust their rights in accordance with changed conditions."); Leach, supra note 43, at 671 (describing the Missouri-Illinois Bi-State Development Agency).
176. See MUY’s, supra note 34, at 19-20 ("[As of 1971,] [n]one of the [water] compacts specify a termination date, either absolute or conditional. Almost all follow generally the approach of the Arkansas River Compact between Colorado and Kansas which provides that it ‘shall remain in effect until modified or terminated by unanimous action of the states and in the event of modification or termination all rights then established or recognized by this compact shall continue unimpaired (art. IX).’ Such provisions simply appear to state the obvious effect which would flow from the agreement absent any express provision to the contrary."); Heron, supra note 58, at 11-12 ("A typical provision for termination is contained in the Colorado River Compact, which provides that the compact can be terminated only by the unanimous agreement of the signatory states."). Some of the exceptions to unanimity have done little to facilitate the prospect of democratic control. See MUY’s, supra note 34, at 157; Grad, supra note 81, at 829 (discussing and quoting the Delaware River Basin Compact, which is in effect for ‘‘an initial period of 100 years,’ renewable for additional [century] periods unless any party gives notice of intention to terminate between the twenty-fifth and the twentieth year before the end of the term.").
extent permanency accomplishes that, should take precedence over the ability to respond to subsequent changes in the democratic consensus.

What’s more, an examination of two of the most compelling reasons for agency compact finality reveals that permanency’s contribution to effectiveness is often uncertain. Agreements meant to resolve prisoner’s dilemmas are subject to disintegration if fear of betrayal rises. However, making exit from a prisoners’ dilemma compact easier would not make the compact any less judicially enforceable against a state while it remained a member.177 The departure of a state might trigger the collapse of the entire agreement. But until that happened, states would know that every party state was required to comply until it gave notice of withdrawal. As long as the agreement remained mutually beneficial, states would have strong incentives to cooperate: They could be punished for cheating, and public departure would threaten an agreement that served their ultimate interests. States surely would withdraw, or attempt to amend the compact, when they ceased to prefer the established prisoner’s dilemma solution. However, at this point, the compact would have lost its purpose anyway.

Similarly, the demands of bond financing, important only for compacts that involve huge capital projects, can also be accommodated. In general, agency compacts that permit termination and amendment could rely on bonds, as long as they provided for the distribution of debt and property among the states at withdrawal. While some states have debt limitations in their constitutions,178 it is entirely unclear whether these provisions would apply to compact-derived obligations.179 If they

177. On the enforceability of compacts in federal court, see Delaware River Joint Toll Bridge Comm’n v. Colburn, 310 U.S. 419, 427 (1940); Virginia v. West Virginia, 246 U.S. 565, 591 (1918); Virginia v. West Virginia, 78 U.S. 39, 55 (1870). On the availability of specific performance, see Kentucky v. Indiana, 281 U.S. 163, 178 (1930). On Congress’ right to enforce compacts, see Virginia, 246 U.S. at 601 (“It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between states carried with it the right, if the contract was assented to and hence became operative by the will of Congress, to see to its enforcement.”).

178. See BARTON, supra note 2, at 88; MUYS, supra note 34, at 302.

179. See MUYS, supra note 34, at 303 (“Although any predictions in this area are highly speculative, it appears to this writer that the most direct, plausible and persuasive legal analysis of the relationship to compact agencies of the myriad of state constitutional provisions applicable to the state and its subdivisions is that such provisions were not designed to encompass interstate ventures by a state through the compact device.”).

Under current case law, it is clear that if states compacted with the understanding that their constitutional debt limitations would not apply, they would be bound to their agreement regardless of subsequent state constitutional interpretation. See West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951) (stating federal court interpretation of interstate controversies is supreme). However, such unilateral constitutional interpretation by one state administration would be democratically undesirable.
do, states would have to take the possibility of acquiring their compact debt into account when measuring their total debt levels. This would surely be politically unpopular, as it would move self-financing compacts onto the state budget. However, states could mitigate this problem in various ways: by strictly limiting the amount a compact agency could borrow; by requiring, subject to later amendment, that all the agency’s financial obligations come due within a limited period after the compact’s inauguration; by choosing to withdraw only after the compact’s debt was paid and imposing substantial penalties on states that did otherwise; or by attempting to amend their constitutions. All of these alternatives seem preferable in democratic terms to binding a state tightly to one policy and one agency indefinitely.

Given the arguments against permanency in agency compacts, there is no good reason for states to constrain themselves more than the Constitution demands. This, of course, makes determining what the Constitution mandates paramount. As a preliminary matter, Congress not only has unlimited power to amend or override ongoing compacts, but it also can control the duration of compacts by granting consent for only a limited period of time. While this occurs rarely now, such a policy would be a better rule than exception. Automatic termination would guarantee that the party states have an opportunity to reconsider their compacts periodically, while renewal proceedings would augment the likelihood of serious congressional review. At the same time, predetermined termination dates would only partially ameliorate the problem of binding states to policies that they no longer support. Until the preset termination time arrived, states would still be subject to the contract impairment clause, the contours of which remain largely

180. See supra text accompanying note 52.
181. See HARDY, supra note 39, at 18; Heron, supra note 58, at 16. Congress initially limited its consent to the Atlantic States Marine Fisheries Compact to 15 years, but later repealed this limit. See ch. 286, 56 Stat. 269, 270 (1942) (enacting legislation containing time limit); ch. 763, 64 Stat. 467, 467 (1950) (repealing time limit provision). Congress decided to limit its consent to the Interstate Compact for the Conservation of Oil and Gas to four-year periods because of concern that the agreement would violate antitrust laws. See ch. 781, 49 Stat. 939, 940-41 (1935); MUYs, supra note 34, at 376.
182. In fact, Congress has been somewhat more thorough about overseeing the Interstate Oil Commission, which is subject to expiring consent. See ch. 781, 49 Stat. 939, 940-41 (1935). However, this clearly has much to do with the particular concerns that spurred Congress to limit its consent in the first place. See BARTON, supra note 2, at 14-15 (describing public hearings on consent renewal and recounting Congress’ 1955 decision to require annual report from United States Attorney General on whether compact commission had violated antitrust laws). But see RIDGEWAY, supra note 59, at 22-23 (complaining that until 1955 Congress renewed compact “with little more than the most cursory examination of matters” and that Congress made little fuss when the Attorney General did not issue required reports from 1959 to 1962).
unknown. Although unilateral nullification, revocation, or amendment is clearly prohibited if the specific compact does not so provide,\textsuperscript{183} the extent to which a compact may permit alteration by less than unanimous consent is uncertain. A test of this limit is long overdue.

While the full scope of such a project will require decades of judicial development, its preliminary outline can be sketched. The long history of compacts prohibiting unilateral revocation or amendment has left some case law suggesting that such proscriptions are integral to the compact form. Most notably, the Supreme Court in \textit{Northeast Bancorp, Inc. v. Board of Governors} (1985)\textsuperscript{184} termed the inability “to modify or repeal . . . unilaterally” a “classic indicia of a compact.”\textsuperscript{185} In addition, a number of scholars have argued that the line of Supreme Court cases holding that compacts become federal law upon congressional consent\textsuperscript{186} should be read to mean that a state’s ratification of a compact binds it irrevocably, making withdrawal impossible—at least without congressional assent.\textsuperscript{187}

At first approximation, these arguments can all be overcome. Its \textit{Northeast} dicta notwithstanding, the Court has also suggested, albeit much less recently, that a compact provision explicitly reserving the ability to alter, amend, or repeal has “peculiar significance” for the rights of party states.\textsuperscript{188} Moreover, the Court has described its holding

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\footnotesize\textsuperscript{183} See \textit{Sims}, 341 U.S. at 28 (“It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified . . . .”); \textit{Green v. Biddle}, 21 U.S. (8 Wheat.) 1, 13 (1821) (striking down a Kentucky law that diminished the power of a compact).


\footnotesize\textsuperscript{185} \textit{Id.} at 175; see also \textit{Seattle Master Builders Ass’n v. Pacific Northwest Elec. Power & Conservation Planning Council}, 786 F.2d. 1359, 1363 (9th Cir. 1986) (finding that the pact in question “satisfies all [the \textit{Northeast Bancorp}] indicia” of a compact, including the requirement that there be “conditional consent by member states in which each state is not free to modify or repeal its participation unilaterally”); \textit{Id.} at 1372 (Beezer, J., dissenting) (emphasizing the requirement that a compact be binding upon member states).

\footnotesize\textsuperscript{186} See \textit{Cuyler v. Adams}, 449 U.S. 433, 440 (1981); \textit{Delaware River Joint Toll Bridge Comm’n v. Colburn}, 310 U.S. 419, 427 (1940). This principle is known as “the law of the Union” doctrine. \textit{Cuyler}, 449 U.S. at 438 n.7. \textit{Cuyler} expanded the doctrine by holding that every interstate agreement concerning “an appropriate subject for congressional legislation” becomes a compact—and thus federal law—upon congressional consent, regardless of whether such consent was constitutionally necessary. \textit{Id.} at 440.

\footnotesize\textsuperscript{187} See David E. Engdahl, \textit{Construction of Interstate Compacts: A Questionable Federal Question}, 51 VA. L. REV. 987, 1019-20 (1965); \textit{John M. Winters, Interstate Metropolitan Areas} 15 (1962) (commenting that “the methods whereby compacts will be changed” hinge on the law of the Union doctrine); see also \textit{Hardy, supra} note 39, at 10 (assuming, without elaboration, that compact impairment clause limits less-than-unanimous amendment “to additions to the basic arrangements rather than . . . fundamental changes in the original agreement”).

\footnotesize\textsuperscript{188} See \textit{Louisville Bridge Co. v. United States}, 242 U.S. 409, 418 (1917) (“Congress is
that compacts are federal statutes as an insignificant twist on compact law, which undercuts the notion that the "law of the Union" doctrine has significantly tightened the bonds of compacting. In addition, Congress has occasionally provided that states may not terminate a compact without its approval, implying that states can act without Congress when no such explicit limitation exists. Even if the law of the Union doctrine does mean that Congress has to approve compact withdrawals, it is uncertain whether this step is a constitutional requirement or a default rule that specific compact provisions could override. More fundamentally, it is unclear how barring unilateral amendment or withdrawal would serve the purposes of the contract impairment clause. While the Supreme Court has been strict in keeping states to their agreements, prohibiting all unilateral action would essentially disallow a certain category of contracts. Indeed, if the ultimate goal of the contract impairment clause is to promote contractual rights—to allow people and entities to order their own affairs as they see fit through contracting—then the clause may actually support flexibility in drafting.

The Court may very well come to such a conclusion, given its renewed concern for state autonomy. If it does, the problem of permanency will all but vanish, and agency compacts will become an extremely attractive regional solution. States would have no good reason to bind themselves tightly, and hopefully Congress would be wise enough to reject any new compacts that did otherwise. Although preexisting compacts that make amendment and termination difficult would remain, unhappy states would presumably put enormous pressure on Congress to override its consent legislation, allowing them to reestablish their interstate agreements, if at all, under the new regime. Until this happens, however, compacts should be resorted to only in the most compelling cases and the least dangerous form. Their scope should be tailored as narrowly as practically possible, and their provisions on amendment and termination should be as liberal as constitutionally permitted.

not prevented by the Constitution from passing laws that impair the obligation of contracts, and in its enactments the presence or absence of [an explicitly reserved right to alter, amend, or repeal the compact to which it is consenting] has not the same peculiar significance that it has in state legislation. It is no doubt a circumstance, but not by any means conclusive.

190. See Heron, supra note 58, at 16.
191. See Engdahl, supra note 187, at 1019-20 (implicitly taking latter view).
192. See supra note 187.
193. See supra text accompanying notes 3-13.
V. CONCLUSION

Long ignored, the democratic tension within compacts forces a reevaluation of all of compact law. In this new light, the meaning of agency compacts and compacting is transformed, a multitude of practices surrounding compacts become much more understandable, and the need to judiciously limit the use and nature of compacts becomes clear. For the moment, the antidemocratic content of the Compact Clause strips this form of state activism of almost all of its appeal. But if the Supreme Court ever frees compacts from the problem of permanency, they may become extraordinarily useful. Even in an era of devolution, solutions must often extend beyond one state’s boundaries.