Ambiguities Embedded in the Systems of Interstate Compacts

Zachary Miller[1]

The United States is noteworthy in that the federal government is the product of a union of autonomous states bound together by the Constitution. The Framers sought to concurrently insert the sovereignty of the states and the strength of the federal government into this binding document through a series of compromise measures. One of these compromise measures was the Compact Clause which outlines the parameters for the enactment of an interstate compact.[2] *Presently, interstate compacts are legally both federal statutes enacted by Congress and contracts entered into by the party states.*[3] *Existing case law and literature surrounding interstate compacts largely presupposes this duality. This article explores the circumstances that led to each of these characterizations and some problems posed by their continued usage, both individually and jointly.*

Overview

The possibility of states forging clandestine agreements with one another remains a perennial danger that the Compact Clause is designed to combat, but one it can never fully eradicate. Congressional consent is the major mechanism for effectuating a defense against this threat. The Framers created this system to mitigate the risk of state insurgency while preserving a degree of state sovereignty for interstate collaboration and achieving mutual policy goals. Essentially, when two or more states uncover a shared interest, they can

[1] Brandeis University Undergraduate, Class of 2025, *Brandeis University Law Journal*, Senior Technical Editor.

[2] U.S. Const. art. I, § 10, cl. 3; Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution. A Study in Interstate Adjustments*, 34 Yale Law J. 685 (1925). *See infra* note 126 for a discussion of additional historical context for the enactment of the Compact Clause.

[3] Stephen P. Mulligan, *Interstate Compacts: An Overview*, (2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10807.

draft a compact and seek the consent of Congress to allow them to ratify and execute the compact. While compacts have historically governed issues such as boundary disputes and water distribution agreements, in the twentieth and twenty-first centuries, compacts have grown to encompass more ambitious policy objectives.[4] The Compact Clause is silent as to what congressional consent indicates, when consent is required, and what constitutes consent. Given the range of subjects an interstate compact could address, Congress's role in this process has been viewed as advisory. Congress's power to provide consent has historically, therefore, been seen as independent of the stringent enumerated powers delegated to Congress by the Constitution.[5]

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[4] Katherine M. Crocker, *A Prophylactic Approach to Compact Constitutionality*, 98 Notre Dame L. Rev. 1185, 1186-1189 (2023). (Interstate compacts have been floated amongst both Democrats and Republicans in recent years to advance political goals. Democrats formulated an interstate compact designed to combat climate change following President Donald Trump's withdrawal from the Paris Accords. Democratic Governor Phil Murphy proposed an interstate compact to implement gun control policies in response to federal inaction following the 2018 Parkland school shooting. Democratic Governor Andrew Cuomo explored an interstate compact to combat the coronavirus pandemic. Conversely, Republicans initiated an interstate compact in opposition to President Barack Obama's immigration policies and to counteract the effects of the passage of the Affordable Care Act.)

An interstate compact has also been discussed to commit member states to allocating their electoral votes to presidential candidates who win the popular vote in their states (the National Popular Vote Compact). This article does not discuss this particular compact and instead offers a generalized critique of the legal frameworks interstate compacts occupy. For an analysis of this compact in the context of compact law, *see* Tara Ross & Robert M. Hardaway, *The Compact Clause and National Popular Vote: Implications for the Federal Structure*, 44 N.M. L. Rev. 383 (2014).

[5] *Some Legal and Practical Problems of the Interstate Compact*, 45 Yale Law J. 324, 328 (1935). ("The essence of Congressional consent is…a grant to the compacting states of permission to compact, and such consent does not make a compact a law of the union in any significant sense. Congress' supervision of compact-making among the states is thus a political function, independent of Congress' other enumerated powers.") The former portion of

First, this article will examine the role that Congress has played in the formation and execution of compacts. This Part of the article will culminate in the 1981 case *Cuyler v. Adams*, which held that compacts are acts of Congress.[6] This article will then examine the Supreme Court's recent interstate compact opinion in the 2023 case of *New York v. New Jersey* and its reliance on the "contract-law rule," which posits that compacts can be governed by common-law contract principles.[7] Here, the article will analyze the application of contract law principles to compacts. Finally, this article will demonstrate the inability of compacts to embody these classifications simultaneously by interrogating lingering questions posed by this judicial duality.

I. The Role of Congress and the Road to Statutory Status

A. *People v. Central Railroad*: Congress as a Notary

In 1870, the Supreme Court heard the case of *People v. Central Railroad*. The State of New York brought a complaint against the Central Railroad Company for seizing "about 800 acres of land and water, and erecting docks, wharves, piers, and other improvements" without authorization from the government of New York.[8] New York alleged that the corporation's conduct violated a compact ratified between New York and New Jersey, with the consent of Congress in 1834, because the compact had placed the approval of the

this excerpt has been abrogated by *Cuyler v. Adams* (*see infra* notes 6 & 38-39; Part I, Section D of this article), but this recognition of the independence of the compact supervision power remains largely intact.

[6] Cuyler v. Adams, 449 U.S. 433 (1981).

[7] New York v. New Jersey, 143 S. Ct. 918 (2023).

[8] People v. Central Railroad, 79 U.S. 455, (1870). *See also* The People v. Central R.R. Co. of N.J, 42 N.Y. 283 (N.Y. 1870). This section's goal is to provide an abstract overview of this particular theory of compact law; rather than to provide the expansive chronology of case law, an endeavor left to subsequent sections of this article. For this reason, discussion of the history chronicled in *infra* note 38 is omitted here.

undertakings within the purview of New York. Conversely, the Central Railroad Company argued that the compact placed the projects within the jurisdiction of New Jersey, the entity from whom the corporation had received approval for its activities. The Court of Appeals ruled in favor of the corporation and interpreted the compact as granting discretion over these assets to New Jersey.[9]

The case was appealed to the Supreme Court where New York contended that questions posed by interstate compacts were fundamentally ones of federal law, by virtue of their prerequisite acquisitions of congressional consent. New York argued this precluded the lower court from adjudicating the matter in the first place and that only the Supreme Court could examine the case. The Supreme Court used this case to decide whether compacts were simply agreements between states or if the consent of Congress converted them into federal law. The Supreme Court chose the former option, that congressional consent did not make compact agreements federal law.[10] As a result, state courts were understood to possess jurisdiction over the adjudications of compact matters and the Court of Appeals' ruling was respected.[11]

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[9] People v. Central Railroad, *supra* note 8 at 455-456.

[10] *Id*.

[11] One area where *Central Railroad* falls short is in its failure to explain why a state is obligated to respect the legislation and judicial proceedings of other states. Specifically, *Central Railroad* was silent as to what rectification mechanisms might have existed if the lower court had found that the Central Railroad Company had actually usurped property from New York. Perhaps the Supreme Court implicitly believed that the Full Faith and Credit Clause of the Constitution would have imbued New Jersey with the obligation to respect and enforce the ruling of the New York court. This clause states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." (U.S. Const. art. IV, § 1, cl. 1). Presently, compacts are confined to the federal court system and deemed to present federal questions which obviates this issue. *See* Part III, Section C and its accompanying notes; *infra* notes 38 & 41 for an explanation of this shift.

The question of whether an interstate compact is transformed into an act of Congress through the acquisition of congressional consent is important. The Constitution requires that the states receive the consent of Congress, but *Central Railroad* held that the core of a compact is the contractual agreement entered into by the states. This understanding of how Congress factors into the development of compacts, espoused in *Central Railroad*, frames Congress merely as a notary.[12] Congress providing its consent to a compact did not transform the compact into a matter of federal law. Thus, Congress was not the policy actor driving the compact and could not be perceived as having any investment in the compact's execution aside from offering its consent.[13] States handled the orchestration of the compact's imperatives through state legislation and adjudications in state courts. Similarly, when two individuals enter into a contract with one another, they are tasked with carrying out the obligations assigned to them under the agreement.[14]

A positive byproduct of *Central Railroad's* jurisprudence, which prevents a compact from instantaneously becoming a matter of federal law, is that it ensures Congress does not acquire legislative powers not afforded to the federal government by the Constitution. States have an inherent series of reserved powers as a condition of their sovereignty that the

[12] A notary is someone legally authorized to officiate a contract to ensure the parties are on the same page. A notary cannot preside over the formation of a contract where they might have a personal interest.
See generally National Notary Association, *What is a Notary Public?* https://www.nationalnotary.org/knowledge-center/about-notaries/what-is-a-notary-public#:~:text=A%20Notary%20Public%20is%20an,exercise%20of%20significant%20personal%20discretion.

[13] People v. Central Railroad, *supra* note 8 at 456. ("We think that…the question [in this case] arose under the agreement and not under any act of Congress. The assent of Congress did not make the act giving it a statute of the United States…The construction of the act…had no effect beyond giving the consent of Congress to the compact between the two States.").

[14] *Id.* at 455-456; American Society of Notaries, *Notary Conflict Of Interest*, https://www.asnnotary.org/?form=conflictofinterest.

Constitution does not explicitly delegate to the federal government. While there is ambiguity in where each entity's domain begins and ends, state powers typically include matters more specific in scope. The federal government generally may not interfere with or take up reserved powers retained by the states.[15] If the federal government was emboldened to complete these localized imperatives, federal power would be unnecessarily overextended and enlarged.[16] However, Congress can utilize its compact consent powers to consider a wide range of subject matters pertaining to the capacity of states to exercise their respective reserved powers.[17] The 1918 case of *Virginia v. West Virginia* posed a complication to the *Central Railroad* framework.[18] Here, the Supreme Court held that Congress's compact consent power affords Congress the ability to enforce and operate any given compact.[19]

[15] Even the Necessary and Proper Clause of the Constitution, which empowers Congress to do what is necessary and proper to achieve an objective, is confined to Congress's explicitly enumerated constitutional powers (U.S. Const. art. I, § 8, cl. 18).
[16] Edward P. Buford, *Federal Encroachments upon State Sovereignty*, 9 Va. Law Regist. 321 (1923); P.F., *Constitutional Law: Encroachment by Treaty Upon the Reserved Powers of the States*, 8 Cal. Law Rev. 177 (1920).
[17] See *supra* note 5.
[18] Virginia v. West Virginia, 246 U.S. 565 (1918).
[19] *Id.* at 601. ("The vesting in Congress of complete power to control agreements between states, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that Congress…was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power. 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."); *Id.* at 605. ("[B]ecause of the character of the parties and the nature of the controversy, a contract approved by Congress and subject to be by it enforced...full opportunity may be afforded to Congress to exercise the power which it undoubtedly possesses.").

B. *Virginia v. West Virginia*: Congress as an Executor

Under *West Virginia*, Congress is a direct executor of interstate compacts. But if Congress has the ability to enforce a compact's execution, compacts cease to simply be a matter upon which two or more states have an agreement. When states come to Congress to ratify an agreement, under the *Central Railroad* theory of compact law, the expectation is that those states will carry out the obligations of the compact. Congress has certain abilities pursuant to its delegated powers, however, and these powers have historically been distinct from Congress's power to consent to the ratification of compacts. Under these parameters, Congress has traditionally been granted the discretion to consider compacts that stray outside the powers delegated to the federal government by the Constitution.[20]

West Virginia offered Congress the unbridled power to ensure the operation of compacts if states fall short of meeting their contractual obligations. In this constitutional framework, a compact that pertains to powers not explicitly delegated to Congress can be absorbed by Congress. *West Virginia* proclaims that Congress can use compacts for policymaking and that Congress can use powers reserved for the states if they cease to operate a compact.[21] If a compact exists as an agreement between states, the states ought to have the autonomy to multilaterally withdraw from a compact that no longer serves their interests and to render any given compact obsolete and non-operational.[22] A notary would not assume the duties of a contract and continue to operate under the contract's parameters if the original signatories no longer sought to enforce the provisions of the contract.

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[20] See *supra* note 5.
[21] *infra* note 44.
[22] *See* Part II for a more in-depth evaluation of the application of contract law principles to compacts and *New York v. New Jersey's* stance on state withdrawal from compacts.

It is worth noting that historically Congress has enshrined a retention of the right to alter, amend, or repeal its consent into the act that provided it.[23] Still, the compact which held the states to the same circumstantial arrangements could not be retroactively amended. The sole mechanism for states to rectify discrepancies in the original language of the compact would be to mutually agree to let an existing compact go dormant and to adopt a new one.[24] *West Virginia*'s framework, which allows Congress to take up old compacts and consider their specifics, exacerbates this rigidity on the state level. Thus, the *West Virginia* opinion tacitly operates within a framework which presumes that Congress is an executor of the compacts it consents to and that Congress has a greater capacity to curate compacts than the states. This deference presents a potential conflict of interest for Congress, as *West Virginia* allows Congress to determine which compacts Congress greenlights while also empowering Congress to inject itself into compacts as an executor.

While *West Virginia* may enable Congress to overstep, *West Virginia*'s underlying reasoning highlights a shortcoming in *Central Railroad*'s depiction of Congress as a notary. A notary would not maintain an interest in the affairs of the parties to a contract they officiate, nor would they choose to officiate a contract on the merits of its outcomes. Yet, Congress remains invested in the operations of interstate compacts because the federalist system creates an existential contest for supremacy between the federal government and the states.[25]

[23] *See generally* Part III for a more in-depth evaluation of the ambiguities of congressional consent. Congress authored these provisions because Congress does not inherently possess the right to re-evaluate its consent retroactively.

[24] Richard H. Leach, *The Federal Government and Interstate Compacts*, 29 Fordham Law Rev. 421, 426 (1961).

[25] Federalist Paper No. 1 (Alexander Hamilton). ("Among the most formidable of the obstacles which the new Constitution will have to encounter may…be…the obvious interest of a certain class of men in every State to resist all changes which may hazard a diminution of the

The political process inextricably links states and the federal government in ways that do not exist between the parties to a contract and their notary.[26] Thus, *West Virginia* employs a more accurate portrayal of Congress than *Central Railroad* does.

Still, *West Virginia* affords Congress a tremendous amount of leeway to forward these interests, when some of these interests would be better left to the states to address. Furthermore, *West Virginia*'s jurisprudence leaves Congress room to exploit its consent powers. This possibility was displayed in 1960 by the House Judiciary Committee under the leadership of Chairman Emanuel Celler, a New York congressman who took an interest in the compact between New York and New Jersey that established the Port Authority as an interstate agency.[27] The Port Authority was an unpopular institution within the public sphere during this time.[28] Congressman Celler introduced a resolution that would have required congressional consent for every new project the agency proposed. This resolution was controversial because the Port Authority had been operating within the parameters of its compact and its previous projects did not require congressional approval.[29]

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power…they hold under the State establishments; and the perverted ambition of another class of men, who…will flatter themselves with fairer prospects of elevation from the subdivision of the empire into several partial confederacies than from its union under one government.")

[26] Orie Leon Phillips, *Governmental Powers, State and National, Under our Constitutional System*, 36 Mich. Law Rev. 1051 (1938). *See* Part III of this article for discussions of the federalist challenges posed by the current legal classifications of compacts and the ways in which the relationships between the different levels and branches of government converge to conceal salient legal remedies for compact related inquiries.

[27] Leach, *supra* note 24 at 435-436; An interstate agency or compact agency is "an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties" 33 U.S.C. § 1362(2).

[28] Leach, *supra* note 24 at 436.

[29] *Id*.

When this resolution failed, Celler sought to place investigations into the internal operations of compact agencies within the purview of the Judiciary Committee.[30] Celler's imperatives were not shared by his colleagues, who nullified his efforts to maintain this strict construction of congressional consent.[31] A proposed resolution to Representative Celler's attempted federal encroachment was to establish a clearer adherence to *Virginia v. Tennessee*'s parameters for compact consent within congressional procedure.[32] In 1893, this case evaluated what constituted congressional consent. The Court found that compacts could be granted congressional consent implicitly and that, if a compact was not retroactively nullified by subsequent congressional actions, the compact could be presumed to possess the *implied* consent of Congress.[33]

C. *Virginia v. Tennessee:* A Medium for Congressional Participation

Virginia v. Tennessee demonstrates that there are legitimate questions concerning the efficacy of congressional consent as a safeguard against compacts which may encroach upon the constitutional federalist framework. The Court acknowledged that some compacts cannot be considered until

[30] *Id.* at 437.

[31] *Id.* at 443. For more about this particular controversy and arguments raised during this time see: *Id.* at 436-443; Emanuel Celler, *Congress, Compacts, and Interstate Authorities*, 26 Law Contemp. Probl. 682 (1961); *Congress and the Port of New York Authority: Federal Supervision of Interstate Compacts*, 70 Yale Law J. 812 (1961); *Congressional Supervision of Interstate Compacts*, 75 Yale Law J. 1416 (1966).

[32] Virginia v. Tennessee, 148 U.S. 503 (1893); Leach, *supra* note 24 at 443. This suggestion was eventually adopted in *U.S. Steel v. Multistate Tax Comm'n*. For the full citation of this case and more on its role in this development, *see infra* note 92.

[33] Virginia v. Tennessee, *supra* note 32 at 503. ("An agreement or compact as to boundaries may be made between two states, and the requisite consent of Congress may be given to it subsequently, or may be implied from subsequent action of congress itself towards the two states, and when such agreement or compact is thus made and is thus assented to, it is valid.")

they are fully realized and found that these compacts could elicit retroactive congressional consent. The Court held that congressional consent is only required for agreements which encroach upon the "just supremacy" of the federal government, by finding that the word "compact" in the Compact Clause is *noscitur a sociis*.[34]

In an article Celler published to elucidate his perspective on federal oversight of compact operations, he argued for narrowly applying *Virginia v. Tennessee* because the case dealt with a compact Congress had already ostensibly provided with consent through prior legislation.[35] While there is a practical rationale for the standard espoused by *Virginia v. Tennessee*, it is not in the best interest of public policy to have a compact take shape and be retroactively denied consent by Congress. If the compact is nullified, this nullification would result in a waste of the resources consolidated by each state to fulfill its respective duties.

Furthermore, the legitimate interest in preserving the federal republic is inadequately forwarded by the implied consent doctrine. Under *Virginia v. Tennessee*'s doctrine of implied consent, there may be times where a compact bears the imprimatur of Congress despite the fact that Congress has

[34] *Id.* at 519. ("Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."). A Latin phrase meaning it is known by its associates, *noscitur a sociis* is a statutory interpretation technique that derives the meaning of an ambiguous word from the Legislature's use of associated words in the sentence. The "United States" is sometimes used by the Court to refer to the country, and sometimes to monolithically refer to the federal government.

See generally section D of this Part and Part III of this article for a discussion of the difficulties the Supreme Court has had in deriving the nature and parameters of congressional consent from a practical and "political" standpoint and differentiating between the various branches and departments of the federal government.

[35] Celler, *supra* note 31 at 685.

never directly evaluated the compact. As a result, states can implement unconstitutional compacts unbridled by the safeguards embedded in prerequisite congressional deliberations. The Court justified permitting states to enact unconstitutional compacts under the assumption that Congress would subsequently learn of their unconstitutionality and dismantle them. It is dangerous to assume that Congress can be fully aware of the parameters of a compact Congress did not review.

This is especially true when, under *Virginia v. Tennessee*, the only compacts Congress is intended to review are ones which may encroach upon the supremacy of the federal government. If three individuals enter an agreement, it would be inequitable for two individuals to enter the agreement with direct consent; while one individual is subsumed into the agreement through implied consent without being able to formally review the agreement. It is especially inequitable when that individual can only withdraw their consent through subsequent actions that explicitly showcase their disinterest.

In addition to its implementation of an implied consent doctrine, *Virginia v. Tennessee* established the "just supremacy" standard. This extrapolation is intriguing because it seeks to provide a consistent safeguard for state sovereignty by limiting the congressional consent prerequisite to agreements which can encroach on federal power. One could argue, however, that this remedy is inadequate even when Congress is given the opportunity to review and consent to a compact. If the enactment of a compact which encroaches on federal power is only checked by congressional consent, Congress can erroneously consent to a compact that jeopardizes the constitutional supremacy of the federal government. As previously stated, the *West Virginia* case afforded Congress the ultimate authority on the passage of a compact through its consent.[36] But under the American system of government, it is

[36] To effectuate the "ultimate power of final agreement" doctrine, the Supreme Court in *West Virginia* countered the argument that it had

not the role of Congress to interpret legal documents and assess their constitutionality; that power is associated with the judiciary.[37]

The quandary of whether Congress ought to be thought of as an executor of or as a notary to interstate compacts was further occluded by the 1981 case of *Cuyler v. Adams*, where the Supreme Court solidified a transformation doctrine. The Court found that any compact that acquires congressional consent and pertains to a matter appropriate for congressional legislation is transformed into federal law.[38] *Cuyler*'s

undermined the explicit delegation of original jurisdiction of interstate disputes to the Court by the Constitution (see *infra* note 99). West Virginia v. Virginia*, supra* note 18 at 603. ("[T]here [is not] any force in the suggestion that the existence of the power in Congress to legislate for the enforcement of a contract made by a state under the circumstances here…is incompatible with the grant of original jurisdiction to this court to entertain a suit between the states on the same subject. The two grants in no way conflict, but cooperate and coordinate to a common end, that is, the obedience of a state to the Constitution by performing the duty which that instrument exacts.").

[37] Federalist Paper No. 51 (Alexander Hamilton & James Madison); U.S. Const. art. III, § 2, cl. 1; Marbury v. Madison, 5 U.S. 137 (1803). In this case, the Supreme Court ruled that it could assess the constitutionality of laws and strike down unconstitutional ones. While this power is not enshrined in the Constitution, this power known as "judicial review" has become a major norm of constitutional law. See *infra* note 126 for an additional explanation of this anomalous conflict between compact consent and judicial review.

[38] In *Cuyler v. Adams*, the Court referred to this as the "law of the Union" doctrine (*see* Cuyler v. Adams, *supra* note 6 at 439 n.7). This doctrine's prudence had long been contested prior to its incorporation in *Cuyler* (see *supra* note 5). The "law of the union" compact doctrine originated in Pennsylvania v. Wheeling & Belmont Bridge Company, 54 U.S. 518, 566 (1851). In the 1851 case, the Supreme Court regarded the compact in contention as a law of the union because it amassed the sanction of Congress. Neither the parties nor the Court in *People v. Central Railroad* acknowledged this precedent. This left the question of whether compacts were the "law of the union" without a clear answer for a substantial portion of American history. For an overview of this historical dilemma and a contemporary perspective on the law of the union doctrine prior to the Court's opinion in *Cuyler v. Adams*; *see generally* David E. Engdahl,

transformation doctrine fundamentally altered the legal status of interstate compacts, by dubbing them federal statutes and centralizing adjudications of compact disputes in the federal judiciary.[39]

Construction of Interstate Compacts: A Questionable Federal Question, 51 Va. L. Rev. 987 (1965). See *infra* note 127 for how Engdahl's analysis was factored into the opinions authored in *Cuyler v. Adams*.

Hinderlider v. La Plata Co., 304 U.S. 92 (1938) directly dealt with the repercussions of the conflicting doctrines of the 1851 opinion in *Wheeling* and *Central Railroad*. In this case, the Court was hesitant to concede that compacts were acts of Congress but the Court sought to afford itself jurisdiction over the matter (*see* Engdahl at 998-1003). Justice Louis Brandeis deemed *Hinderlider* a question of federal common law to justify the federal bench's usurpation of the case (Hinderlider v. La Plata Co. at 110). This justification was particularly flimsy because that same year Justice Brandeis wrote for the Court in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938) where he would proclaim that there is no general federal common law and state judicial and legislative authorities ought to be deferred to, by federal courts, in cases that do not deal with the Constitution or Acts of Congress; cases that do not present a federal question.

Two years after *Hinderlider*, the Court would decide *Delaware River Commission v. Colburn* (*infra* note 103) where the Court would directly attempt to reconcile the discrepancy between *Central Railroad* and the Court's 1851 opinion in *Wheeling* by overturning *Central Railroad* and holding that compacts presented federal questions as a result of their acquisition of congressional consent through federal statutes. For a more in-depth discussion of the Court's opinion in *Colburn* and the development of the "federal question" doctrine in compact cases see Part III, Section C of this article. Ultimately, *Cuyler v. Adams* resolved this entire debacle by unequivocally ruling that compacts are federal statutes. However, as this article argues, the decision in *Cuyler* has garnered mixed results.

[39] Cuyler v. Adams, *supra* note 6 at 434. ("[W]here Congress has authorized the States to enter into a cooperative agreement and the subject matter of that agreement is an appropriate subject for congressional legislation, Congress' consent transforms the States' agreement into federal law under the Compact Clause, and construction of that agreement presents a federal question."); *Id*. at 438. ("Although the Court of Appeals did not reach this constitutional issue, it held that it was not bound by the state court's result because the…interstate compact [is] approved by Congress and is thus a federal law subject to federal rather than state construction. Before reaching the merits of the…decision, we must determine whether that conclusion was correct. We hold that it was.").

D. *Cuyler v. Adams*: Compacts as Acts of Congress

The power that *West Virginia* affords Congress to upkeep compacts, coupled with *Cuyler*, enables Congress to usurp reserved powers for itself. *West Virginia*'s framework allowed Congress to use compacts as instruments for its own policymaking; *Cuyler* deemed compacts federal statutes. These rulings disincentivize states from respecting their obligations under a compact because Congress can assume a compact's responsibilities on a state's behalf. As previously mentioned, a primary motivation for the Compact Clause was the Framers' concern about states entering into clandestine agreements with one another. However, states can theoretically place a compact before Congress with a mutual intention of abstaining from fulfilling the compact's obligations. In this paradigm, Congress will absorb the duties of these states and keep the compact in effect. This incentivizes states to relinquish their reserved powers and instead incentivizes states to afford Congress powers the federal government was not explicitly delegated by the Constitution.[40]

While *Cuyler* only held that compacts pertaining to subjects appropriate for congressional legislation bear the imprimatur of federal law, presuming they meet the definition of a compact under *Virginia v. Tennessee*, the common takeaway has been that all compacts are federal law. In *Washington Metro. Area T.A. v. One Parcel of Land*, the Fourth

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This Section exclusively discusses the ramifications of the majority opinion authored in *Cuyler v. Adams* as it pertains to the statutory status of compacts. See Part III for more about the implications of *Cuyler* coupled with the character of compacts as contracts. See *infra* note 127 for an overview of the dissenting opinion in *Cuyler*.

[40] Kevin J. Heron, *The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements*, 60 St John's Law Rev. 1, 23 (1985). ("If Congress were permitted to create arrangements [with the prerogatives and objectives of compacts]…pursuant to its commerce power, the power of the states under the Compact Clause would essentially be nullified and they would be deprived of the element of state sovereignty specifically retained in the Constitution.").

Circuit held that congressional consent delegates federal powers to those involved in a compact's operation, rather than simply viewing *Cuyler* as dubbing compacts federal law for interpretation purposes. This generalized the *Cuyler* precedent beyond merely subject matters appropriate for federal legislation.[41] It has even been posited that *Cuyler* partly overturned *Virginia v. Tennessee* because *Cuyler* framed congressional consent as the prerequisite for something being

[41] Washington Metro. Area T.A. v. Land, 706 F.2d 1312 (4th Cir. 1983).

Regarding the common takeaway being that even compacts with subject matters not appropriate for federal legislation still become federal law, *see* 1317 n.9. ("[S]tate agreements whose subject matter is appropriate for federal legislation…which do not threaten to increase the political power of the states at the expense of the federal government…that do…not receive congressional consent will not be invalidated for lack of consent, but a compact that is consented to by Congress will thereby become federal law.").

On the question of federal prerogatives for compact enforcement, *see* 1318-1319. The Fourth Circuit grappled with the question of whether a compact is delegated federal power or if it is a document merely interpreted on the federal level because state courts would be unable to provide a neutral forum for compact dispute adjudication (see Part III, Section C for a discussion of the evolution of compact interpretation and the development of the "federal questions" doctrine and see generally West Virginia ex rel. Dyer v. Sims, *infra* note 115, for an overview of the centralization of compact disputes in the federal court system to maintain the impartiality of compact proceedings). Ultimately, the Fourth Circuit held that Congress could delegate federal powers to forward compact executions and to interstate agencies.

The Fourth Circuit permitted a compact agency to nullify a provision in the Maryland Constitution because the compact agency was understood to have been empowered to do so by way of its attainment of congressional consent. By allowing the compact agency to act in a manner inconsistent with the constitution of a signatory state, the Fourth Circuit afforded compact agencies more power than the states that create them because a state *cannot* pass a law in conflict with its constitution. (*See* Eichorn, *infra* note 42 at 1409.) On appeal, the Supreme Court declined to address the finding in this case. Nevertheless, in *New York v. New Jersey* (New York v. New Jersey, *supra* note 7 at 924) the Supreme Court held that the fact that compacts are federal laws means compacts preempt "contrary state law."

considered a compact, whereas *Virginia v. Tennessee* vested this evaluation in the subject matter of the compact and its impact on the just supremacy of the United States.[42] This framework can pose a significant danger as polarization increases in Congress, as the political makeup of Congress can determine which compacts are approved.[43]

Furthermore, if compacts are acts of Congress then, congressional consent is a mechanism for Congress to contemplate whether its own laws comply with the Constitution. Traditionally, the Supreme Court is the branch of government tasked with judicial review. In *Virginia v. Tennessee*, by interpreting Congress's consent power as one that requires Congress to strictly scrutinize a compact, the Supreme Court abdicated its judicial review imperatives to Congress. The *Cuyler* doctrine does more than permit Congress to circumvent constitutional checks placed on Congress, however.

Prior to *Cuyler*, there were already complications surrounding the procedure for providing consent to interstate compacts. Compacts were rarely examined by all members of Congress. Instead, compacts were delegated to the committees that dealt with the subject matter of the compact. There were also ambiguities regarding whether Congress could examine the merits of the compact or whether Congress's consent power exclusively pertained to its analysis of a compact's effect on the federal structure of the union.[44] There have also been times

[42] *See infra* note 127; *See also* L. Mark Eichorn, *Cuyler v. Adams and the Characterization of Compact Law*, 77 Va. Law Rev. 1387, 1393-1394 (1991).

[43] *Id.* at 1395-1396.

[44] With regard to these ambiguities, *West Virginia v. Virginia* holds "that the power of Congress to grant or withhold assent to such contracts carries with it the duty and power to see to their enforcement when made operative by its sanction. This power is plenary, limited only by the general rule that acts done for the exertion of a power must be relevant and appropriate to the power exerted. As a national power it is dominant and not circumscribed by the powers reserved to the states." (Virginia v. West Virginia, *supra* note 18

when Congress has actively lobbied for a compact through consent-in-advance legislation, before compacts had been submitted for approval, which advocated for states to create them.[45] The status of compacts as federal law creates ambiguities because Congress could theoretically bypass constitutional limitations on its power with the enactment of a compact. But, before *Cuyler*, a major issue stemmed from a paradigm that imposed an antithetical separation of powers issue. The lack of a focal point within Congress led the branch to defer to executive branch agencies on the validity of certain compacts.[46]

While the integration of executive branch agencies may produce better policy outcomes and ensure that compacts are examined by those with subject-matter expertise, this integration presents a grave danger to the constitutional doctrine of separation of powers. If compacts are acts of Congress, then two constitutionally detrimental scenarios can unfold. Firstly, Congress can defer to the executive branch to determine whether to offer its consent. This outcome is

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at 566). As a result, Congress is encouraged to evaluate policy issues and take an active role in compacts. Whereas, *Virginia v. Tennessee* limits congressional discretion to matters that encroach upon the "just supremacy of the United States" which proffers a more hands-off approach to compact evaluations (*see supra* note 34). It was not until *U.S. Steel Corp v. Multistate Tax Comm'n* that the Court directly applied the "just supremacy" standard (see *infra* notes 92-93). *But see* Cuyler v. Adams*, supra* note 6 which would revive ambiguity surrounding what standard the Court truly preferred and what standard ought to be deferred to soon after.

[45] U.S. Steel Corp. v. Multistate Tax Comm'n*, infra* note 92 at 485 (White, J., dissenting); Leach, *supra* note 24 at 429. The compact at bar in *Cuyler v. Adams* was an example of such an instance, see *infra* note 106 for an overview of this relevant example of a compact consented to prior to the compact's construction.

[46] *Id.* at 428-430. This section emphasizes the separation of powers predicament posed by the integration of executive agencies into compact ratifications and the implications of conceptualizing compacts as federal laws from a federalist standpoint. For a broader discussion of the implications of encroachments upon separation of powers principles and compact issues concerning federalism, *see* Part III.

antithetical to the Constitution because it enables the executive branch to make legislative considerations and allows for external actors to influence the development of a contract that the Constitution explicitly limits to certain parties.[47]

Secondly, this doctrine empowers states to formulate agreements that usurp prerogatives from Congress as the federal legislative branch. It empowers states to potentially enact federal law and vests interstate compact agencies with the imprimaturs afforded to federal agencies without the procedural safeguards encased in congressional deliberations. This danger is heightened by the implied consent doctrine of *Virginia v. Tennessee* which, after *Cuyler*, empowers states to enact federal laws without receiving the direct prerequisite consent of the federal legislature.[48]

Thus, throughout the nineteenth and twentieth centuries, the nature of the relationship between Congress and

[47] For examples of compacts ratified with executive input, *see Id.* at 430 (internal citations omitted). ("Although the Constitution mentions only the Congress in connection with compacts, agencies in the executive branch have also come to have a number of relations with both compacts and compact agencies. Congress itself has been responsible to some degree for bringing executive agencies into the picture…[I]n the Eighty-sixth Congress the Senate Committee on the Judiciary asked the Department of Justice, the Department of Interior and the Bureau of the Budget for comments on the compact for a new boundary between Arizona and Nevada which the Committee had before it for consent. And the House Committee on Public Works, while considering the Northeastern Water and Related Land Resources Compact, solicited opinions from eight executive agencies which it felt might have an interest in the proposed compact."). Agency input is not the only way the Executive Branch has inserted itself into compact enactments. President Franklin D. Roosevelt vetoed the Republican River Compact in 1942 after Congress consented to it. See generally: Linda Hein, *FDR vetoes Republican River Compact*, MCCOOK GAZETTE (October 12, 2001), https://www.mccookgazette.com/story/1046711.html.

[48] Eichorn, *supra* note 42 at 1405; Washington Metro. Area T.A. v. Land, *supra* note 41; *Some Legal and Practical Problems*, *supra* note 5 at 328. ("[M]ost compacts, even when they affect interstate commerce or some other federal province…have not been subjected to Congress' legislative deliberation[s]").

the compacts it consents to has evolved. In *People v. Central Railroad*, the Supreme Court regarded Congress as nothing more than a notary to compacts. In this way, Congress had the opportunity to preview a range of compacts that states would then operate and enforce. In *Virginia v. West Virginia*, Congress was afforded the capacity to see through the operation of compacts. *West Virginia* provided Congress a far larger role in the compact process than that of a notary and factored Congress in as more of an executor.

Virginia v. Tennessee obscured the role of Congress in the process because not all compacts required congressional consent and compacts could sometimes receive the implied consent of Congress. Finally, *Cuyler v. Adams* stated that all compacts are matters of federal law. *Cuyler* affords compacts a legal status equivalent to the statutory documents directly authored by Congress. There is a major difference between being legally recognized as a contract's notary, an executor of a contract, an author of a contract, or all three. Nevertheless, the Supreme Court ascribes all of these roles to Congress in interstate compact matters. Concurrently, the Court regards Congress as the body afforded the power to evaluate a compact's constitutionality.[49]

The devolving of all of these responsibilities onto Congress is a result of the inherent ambiguity posed by the Compact Clause's prerequisite mandate of congressional consent. The endowment of all of these roles upon Congress is antithetical to the cultivation of prudent public policy and the safeguarding of constitutional norms. The Court's deference to Congress to assess the constitutionality of compacts is largely unparalleled in constitutional law. *Virginia v. Tennessee* tasks Congress with evaluating the impact of compacts on the federalist structure. In all other cases, the Supreme Court possesses judicial review and the imperative of preserving the dictates of the Constitution. This is because the Supreme

[49] For further discussion of the complications of concurrent ascriptions, *see* Part III of this article.

Court's subject-matter expertise qualifies the Court to make constitutional evaluations in a way Congress cannot.

Furthermore, the separation of powers doctrine correctly recognizes that a conflict of interest is posed by allowing a Legislature to review its own laws. Under *Cuyler*, compacts are laws of Congress. There are no direct examples of improprieties resulting from this arrangement; nonetheless, the existence of these ambiguities poses detrimental consequences for the United States. These ambiguities further prove detrimental as a result of their entanglement with the perception of compacts as contracts and the Supreme Court's ascription of contract law principles to compacts. In the next part, this article will use the Court's recent opinion in *New York v. New Jersey* as a backdrop for demonstrating the ineffectiveness of arbitrating compact disputes with contract law principles.

II. Compacts as *de jure* Contracts

A. *New York v. New Jersey*: Unilateral Withdrawal for Party States and the "Contract-Law Rule"

In 2023, the Supreme Court decided the case of *New York v. New Jersey*. This case arose in 2018 when New Jersey sought to unilaterally withdraw from a compact it had entered into with New York in 1953 that was designed to mitigate the spread of organized crime. The Supreme Court found that New Jersey had the right to unilaterally withdraw from the compact. Thus, the Court held that any state can unilaterally withdraw from a compact which does not contain a set duration of time for its execution.[50] The Court held that compacts that impose active obligations, such as the exhaustion of labor and resources, have traditionally been understood to be governed

[50] New York v. New Jersey, *supra* note 7 at 920. *See infra* notes 71 & 134 and the accompanying references for more background about the circumstances of the case.

by the principles of contract law under a doctrine the Court termed the "contract-law rule" for this case.[51]

Finally, the Court held that it was incumbent upon states to include language which expressly allows or prohibits withdrawal. The Court reasoned that states clearly enumerating withdrawal terms would alleviate future confusion; and this decree countered New York's contention that a ruling in New Jersey's favor would induce a slippery slope of states unilaterally withdrawing from compacts. In the absence of a specified duration of time, however, states retain this right to unilaterally withdraw from compacts.[52]

New York v. New Jersey's understanding of compacts, wherein compacts are differentiated on the basis of the activeness or passiveness of the obligations a compact carries, is useful for preserving the autonomy of a state to successfully unilaterally withdraw from a compact. This opinion's deference to the "contract-law rule" is not firmly rooted in historical jurisprudence. While compacts may have been analogized to contracts throughout American history, in early Supreme Court jurisprudence, compacts were largely recognized as treaties. This initial view of interstate compacts posited that, upon the acquisition of congressional consent, states were restored to their full sovereignty under the parameters of any given compact to ensure its execution.[53]

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[51] *Id.* at 925. ("To be clear, the contract-law rule…does not apply to other kinds of compacts that do not exclusively call for ongoing performance on an indefinite basis—such as compacts setting boundaries, apportioning water rights, or otherwise conveying property interests.").

[52] *Id.* at 926. ("New York argues that allowing New Jersey to withdraw would have sweeping consequences for interstate compacts generally. But…for any current and future compacts, States can propose language expressly allowing or prohibiting unilateral withdrawal if they wish to do so.").

[53] Gerald Stapp, *Interstate Compacts and the Federal Treaty Power*, 29 Denver Law Rev. 211, 212-214 (1952). *See generally* Rhode Island v. Massachusetts, 37 U.S. 657 (1838).

This interpretation neglected the intent of the Framers of the Constitution to maintain federal hegemony in international relations and ensure a united front on the world stage.[54] If this were the underlying conceit, it is unlikely that the Framers would have even implemented the Compact Clause because the Clause would have afforded Congress a means of forfeiting the federal government's supremacy in foreign policy.[55] Overall, the twentieth century observed a shift characterized by compacts becoming more active instruments of policy; this zeitgeist also likely served as the impetus for the shift to contract principles.[56]

So, where did *New York v. New Jersey* get the "contract-law rule" from? *New York v. New Jersey* cited the 2013 case *Tarrant Regional Water District v. Herrmann* to strengthen the presumption that interstate compacts ought to be construed as contracts governed by the principles of contract law.[57] *Tarrant* undergirded this assertion by citing the 1987 case *Texas v. New Mexico*.[58] *Texas v. New Mexico*, in turn, cited a 1959 dissenting opinion authored by Justice Felix Frankfurter in the case of *Petty v. Tennessee-Missouri Bridge Comm'n*.[59] In his dissent, Justice Frankfurter wrote that a

[54] Federalist Paper No. 3 (John Jay). ("It is of high importance to the peace of America that she observe the laws of nations…[I]t appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies.").
[55] Stapp, *supra* note 53 at 214.
[56] *Congressional Supervision of Interstate Compacts*, *supra* note 31 at 1426 n.61; Frederick L. Zimmerman & Mitchell Wendell, *New Experiences with Interstate Compacts*, 5 Western Political Quarterly 258 (1952).
[57] New York v. New Jersey, *supra* note 7 at 924.
[58] Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614, 615 (2013). ("Because interstate compacts are construed under contract law principles… the Court begins by examining the Compact's express terms as the best indication of the parties' intent.") (internal citations and quotation marks omitted).
[59] Texas v. New Mexico, 482 U.S. 124, 128 (1987) ("a compact when approved by Congress becomes a law of the United States…but '[a]

"Compact is, after all, a contract. Ordinarily, in the interpretation of a contract, the meaning the parties attribute to the words governs the obligations assumed in the agreement."[60]

Perhaps the incorporation of contract language was most prudent for the Court to apply in *New York v. New Jersey*. Indeed, using vocabulary associated with the development of a contract is helpful, and this article has relied upon this framework to construct its analogies. In any case, this chronology demonstrates that the "contract-law rule" is not as entrenched in American jurisprudence as the Court implicitly surmised in *New York v. New Jersey*. It is important to assess the history of any given doctrine that a Supreme Court opinion reveres because if the opinion champions that outlook, the philosophy will continue to reverberate in American jurisprudence. In this matter, the doctrine of treating compacts like contracts is important because this doctrine supposes a correspondence between interstate compacts and the contracts entered into by individuals. While the contract doctrine may be more analogous to a compact than the treaty doctrine, this doctrine's novelty is important to emphasize because continuing to entrench the doctrine into American jurisprudence can have detrimental effects on public policy. The potential drawbacks of the "contract-law rule" will be discussed below in the second Section of this Part.

B. *Trump v. Trump* and the Democratic Caveat of the "Contract-Law Rule"

Following the distribution of the opinion in *New York v. New Jersey*, the case was cited in the 2023 case *Trump v. Trump*; this case was heard in the New York State Supreme

Compact is, after all, a contract.' It remains a legal document that must be construed and applied in accordance with its terms.") (internal citations omitted).

[60] Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting). See Part III, Section C for a more in-depth discussion of this case. The citation of this dissenting opinion is noteworthy against the backdrop of the duality discussed generally in Part III.

Court in New York County.[61] This case arose after President Donald Trump sued his niece, Mary Trump, for attempting to publish a book that cast him in a negative light by revealing personal details of their familial dealings. Mary Trump's conduct allegedly violated the terms of a confidentiality agreement she had previously signed. One of the questions before the court in *Trump* was whether this confidentiality agreement was terminable at will, as the confidentiality agreement contained no end date.[62] At first glance, *Trump* is an unusual case for a citation of an interstate compact dispute. However, this citation highlights the dangers of conceptualizing interstate compacts as contracts.

Mary Trump's attorneys argued that because New Jersey was permitted to withdraw from its compact agreement in *New York v. New Jersey*, the court was obligated to permit Mary Trump to withdraw from her confidentiality agreement. The court found that these cases were too incongruent for *New York v. New Jersey* to be an applicable precedent to the facts of *Trump* because New Jersey's compact obligations were actions, whereas the confidentiality agreement binding Mary Trump imposed an obligation of inaction and silence.[63] It is noteworthy that the *Trump* court's sole consideration, regarding the applicability of *New York v. New Jersey*, was the nature of each agreement's impositions. If the obligations imposed upon New Jersey were ones of inaction or if Mary Trump's obligations were active in nature, perhaps the court would have used New Jersey's victory to assess Mary Trump's options.

It was this discrepancy, the passivity of the confidentiality agreement, that led the court to refrain from applying *New York v. New Jersey*. The adverse underlying presumption here is that the principles that govern individuals and those that govern states are similar enough for courts to

[61] Trump v. Trump, 80 Misc. 3d 765 (N.Y. Sup. Ct. 2023).
[62] *Id.* at 766-768, 777.
[63] *Id.* at 778 n.9.

sometimes apply them interchangeably.[64] Whether or not Mary Trump now wishes to unilaterally withdraw from the confidentiality agreement, she signed it. There is no denying that the Mary Trump who sought to withdraw from the confidentiality agreement is the same Mary Trump who signed the agreement at its inception. Mary Trump is a specific individual with the absolute ability to assess and scrutinize the agreement she enters. The signatories to any given interstate compact, however, are the states.

Unlike individuals, states are not inherently monolithic entities. Rather, states are constructs which individuals create to settle their affairs in an orderly fashion.[65] This fact creates complications when the inanimate idea of a state is tasked with serving as a signatory to an agreement. The state encompasses all of the local municipalities, corporations, and people who reside and operate within it. Mary Trump's decision to sign a contract only inhibits her own autonomy. A state, by signing onto an interstate compact, inhibits the autonomy and liberty of its *entire constituency*. Mary Trump does not have to build a

[64] The personhood of states was addressed in Monell v. Department of Soc. Svcs., 436 U.S. 658 (1978). This case assessed whether local governmental agencies could be held liable in accordance with a provision in the Civil Rights Act of 1871 that explicitly contained the term "person(s)." That case assessed the peoplehood of states in a manner more narrow in scope than the evaluations of this Section. Additionally this Section's evaluations are distinct from those made in Citizens United v. FEC, 558 U.S. 310 (2010) for two major reasons. Firstly, the unique longevity contained in the promise of a government juxtaposes the subject matter of this Section from a corporation whose affairs occupy a comparatively brief duration of time. Secondly, governmental actors are uniquely linked to the democratic will of the populace. Whereas corporations, like individuals, perennially operate to advance their own interests without an equivalent direct mechanism of democratic accountability; nor do the imperatives of corporations bear democratic imprimaturs in a manner congruent to government. These factors, taken together, confine the evaluations of this Section to the applicability of contract law principles to governmental actors in the context of interstate compacts.

[65] John Locke, *Concerning the True Original Extent and End of Civil Government*, (1689).

coalition or reach a consensus to relinquish her own autonomy and sign an agreement. She *would*, however, have to obtain the consent of others to compromise their autonomy and sign an agreement on their behalf.

Given that a state is truly an amalgamation of entities with a plethora of interests, a state risks unduly inhibiting the autonomy of segments of its constituency when that state signs onto a compact that poses adverse consequences for the forwarding of those members' interests. By equating the conditions of an interstate compact with those of a contract, the judicial system ascribes states a monolithic capacity to discern the merits of an agreement. A presumption of states as monolithic actors may impose no impediments on the autonomy of the entities within a state in the context of water distribution agreements, property rights matters, or border disputes. But, the principles of contract law and the presumption of transitivity explicitly arise in the case of the compacts which have the greatest capacity to inhibit the autonomy of the states and the entities which exist within the framework of the state.[66]

Perhaps compacts are an instance where states relinquish aspects of their autonomy for a common interest. However, by framing the state as the signatory, courts create a paradox because ascribing a state the capacity to discern is inherently impossible. Given that the state is a nonhuman entity and a union of a plurality of interests, there must be some body that courts are *actually* offering the power to make considerations on the merits of prospective compacts. If the state is the signatory and it is a monolithic personification of a population, perhaps the name of the state is truly a moniker for that state's government. For the doctrine of transitivity to truly be applicable, however, the body that possesses the signatory prerogatives must remain intact throughout the duration of an agreement's execution. While Mary Trump sought to withdraw from her agreement, she remained the same entity throughout

[66] See *supra* notes 51-52.

the confidentiality agreement's enforcement. The same is not true for a state government, which possesses compact signatory capabilities.

An individual's decision about signing a contract differs from a state's decision about signing onto a compact because the entire constituency is impacted by a compact's officiation. A source of pride in democratic societies is that constituents have a say in the composition of the government and the policy directions the elected government takes. The rigidity and perceived permanence of compacts prevents the public from exercising these rights and altering the trajectory of political affairs. While imposing contractual obligations upon states might be beneficial for ensuring obligations are upheld, there are tremendous drawbacks in empowering states to sign themselves onto indefinite agreements unbridled by the checks and balances of a democratic society.[67]

If public sentiments surrounding the continuity of a compact have shifted, democratic and federalist intuitions would point towards offering states the unilateral ability to withdraw to comply with the mandate of their voters. This interpretation of compact obligations, however, precludes state officials from unilaterally withdrawing from a compact that fails to comport with the democratic will of the people. Ultimately, any particular governmental administration seeks to implement legislation or policy agenda items that will outlast them. This prerogative is an inherent aspect of civic engagement and service in government. Perhaps this goal is inherently at odds with the democratic process's commitment to flexibility and a system which consistently alters its course based on the will of the people.

However, even if one were to argue that the interest in stable public policy ought to outweigh the interest in preserving this democratic check, this scenario offers little room for state governments to implement new policies in

[67] Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency* 49 Fla. L. Rev. 1, 7-8; 16 (1997).

response to progressions in the circumstances of the underlying problem that any given compact is enacted to solve.[68] The compact in *New York v. New Jersey* was enacted in 1953 to slow the spread of organized crime; New Jersey sought to withdraw more than 60 years later. Throughout this time, the composition of each state's government underwent significant changes. Furthermore, the nature of the issue did not remain stagnant, despite the continuity of the compact. Yet the trajectory of state policies was immovably beholden to the pre-existing compact. This critique is not specific to interstate compacts and it is an issue that plagues any fledgling executive administration assuming office following the ratification of agreements and laws by their predecessors.

Interstate compacts can exist for longer periods of time than any given contract may exist between two individuals. There is no lifespan for a compact signed by theoretical entities in the same way that a contract between individuals ceases to be operational upon the death of one of the signatories. This truth is the result of the limited lifespans of humans and the regulatory influence of the democratic process, which consistently alters the composition of governments. In this way the state government, which possesses the prerogative to consider the compacts onto which a state becomes a signatory, cannot assess the validity of a compact that exists prior to the ascension of that particular administration. On the one hand, this framework offers compacts stability and continuity irrespective of changes in the ideological or governmental composition of one particular state. If an individual signed a contract and then immediately sought to withdraw after they changed their mind, the goods and services promised in the contract might not be delivered. On the other hand, there is an inherent difference between individuals and states that inhibits an equivalent perception of these signatories.[69]

[68] *Id.* at 10.

[69] New Jersey v. New York, 523 U.S. 767 (1998). (Clarifying a dispute regarding Ellis Island pursuant to a compact between New York and New

The elimination of this system of indenturing state governments to the compacts entered into by their predecessors is a significant victory of *New York v. New Jersey*. By allowing states the autonomy to unilaterally withdraw from an agreement that does not specify a set duration of time, the issue of indefinite compacts is obviated. The issue of state immortality highlights the inefficacy of equating the legal obligations of individuals and states. *New York v. New Jersey* affords state governments the autonomy to determine their destinies regarding pre-existing compacts. Ultimately, however, *New York v. New Jersey* does not fully rectify this matter of indenturing state governments to pre-existing compacts. The Supreme Court addressed the slippery slope argument raised by New York, in defense of holding New Jersey to the compact, by finding that states could be held to pre-existing compacts if a duration of time was specified within the terms of the compact or if withdrawal was expressly prohibited.[70]

While the delegation of this responsibility to include terms of withdrawal to states obviates any indefinite obligation based on an omission of withdrawal capabilities, this still may require subsequent gubernatorial administrations to oversee the completion of pre-existing compacts because of the continuity of the state as the signatory. There are policy merits to this framework because it ensures that a state continues to uphold its obligations to another state irrespective of the political whims of a particular gubernatorial administration. However, this landscape has the detrimental effect of insulating interstate compacts from the democratic process.

The lack of a perfectly fitting analytical unit of measurement for interstate compacts speaks to the unique legal status of the states that undergird the United States of America. The states are not sovereign nations capable of treaty-making. Simultaneously, they are not individuals capable of

Jersey enacted in 1834 that remained binding upon the party states in 1998 using common law contract principles.)

[70] See *supra* note 52.

contract-making. The goal of the Compact Clause was to balance the supremacy of the federal government with the desire to offer states the autonomy to formulate agreements for forwarding shared interests. Ultimately, this balancing act is extremely delicate and points to a deeper fragility which underlies the federalist structure of the United States.

The first two parts of this article each dissected a distinct characteristic that the Supreme Court has imputed to interstate compacts. Part I examined the jurisprudence surrounding Congress's role in the formation and execution of interstate compacts, and Part II examined the "contract-law rule" applied to interstate compacts. Despite isolating these attributes from one another to explain them and their connections to interstate compacts, interstate compacts are legally an embodiment of both of these characteristics. This duality doctrine, however, obscures a clear roadmap for efficiently arbitrating interstate compact disputes. Some of the major lingering questions over the character of compact law will be expounded upon below in the final part of this article.

III. The Undynamic Duality: Compacts as Federal Statutes *and* Contracts

A. The Duality and the Rights of the Federal Government in Interstate Compact Disputes

This Part of the article will discuss the various problems with the duality doctrine. This first Section discusses the negative consequences the duality poses for states because their contractual disputes can be hampered by federal interests. *Virginia v. West Virginia* recognized Congress as an executor while *Central Railroad* conceptualized Congress as a notary. This discrepancy highlights a fundamental confusion regarding the status of interstate compacts and Congress's role in their development and execution. In tandem with this enigma exists the dual classification of compacts as federal statutes under *Cuyler*, and as contracts entered into by party states. If Congress can pick up the responsibilities of a compact and

maintain a compact's operativeness, a compact is further juxtaposed in its legal status from a contract entered into exclusively by two or more parties. There is no expectation that a third party can continue to operate a contract after the signatory parties have opted to terminate it. But *New York v. New Jersey* empowers states to withdraw from a compact and render the compact inactive. This highlights the inability of these attributes to harmoniously characterize a compact.

While *New York v. New Jersey* held that states can unilaterally withdraw from a compact, this opinion does not speak on whether Congress can still restore a dormant compact. Therefore, the *West Virginia* problem of Congress potentially usurping state prerogatives and unilaterally undertaking compact imperatives remains viable. Perhaps the United States filing its own brief in *New York v. New Jersey* in support of New Jersey highlights a federal indifference to the maintenance of this particular compact.[71] Regardless, *West Virginia* appears to remain controlling in the case of this power. Along the same lines of this federal retention of the power to maintain a dormant compact, the federal government has been empowered to extend a compact dispute; despite the fact that compact disputes are contractual disputes amongst states.

In 2024, the Supreme Court decided *Texas v. New Mexico and Colorado*.[72] This matter began in 2013 when Texas sued Colorado and New Mexico for grievances accrued during joint participation in a compact.[73] By 2024, the litigant states had reached a resolution to this legal battle and sought a consent decree[74] from the Court in accordance with the

[71] Brief for the United States as Amicus Curiae, New York v. New Jersey, 143 S.Ct 918 (2023).

[72] Texas v. New Mexico and Colorado, 144 S. Ct. 1756 (2024). This article was largely completed prior to the publication of this ruling.

[73] *Id.* at 1761.

[74] A consent decree is enacted by a presiding court to approve a settlement agreement and bind the parties of a lawsuit to the settlement's agreed-upon terms. The consent decree is a common law mechanism independent of the consent mechanisms of compact law. *See Black's Law Dictionary* (9th ed.

settlement they had reached.[75] The federal government, however, opposed the settlement agreement and argued against the Court providing a consent decree.[76] The federal government had an interest in the outcome of this dispute, and the continuity of the compact, because of the federal government's obligations to the neighboring country of Mexico and various indigenous tribes in the region.[77] In 2018, in a prior ruling, the Supreme Court permitted the federal government to enter this particular dispute because the Court recognized "distinctively federal interests" in the matter at bar.[78]

In the 2018 decision, the Supreme Court held that it was possible for the federal government to have interests in the execution of a compact independent from those of the states and permitted the federal government to insert itself into a compact dispute as a party. But, the 2018 opinion attempted to avoid creating a slippery slope whereby the federal government could invariably insert itself into compact disputes. The Court clarified that:

> Viewed from some sufficiently abstract level of generality, almost any compact between the States will touch on some concern of the national

2009) at 471. The Supreme Court was the body tasked with providing the consent decree in this matter because the Court possesses original jurisdiction over interstate disputes (see *infra* note 99). Also, the settlement agreement reached by the states was not an interstate compact.

[75] Texas v. New Mexico and Colorado, *supra* note 72 at 1761.

[76] *Id*.

[77] Texas v. New Mexico, 583 U.S. 407, 407–412 (2018); see generally: Rachel Reed, *Supreme Court Tackles Water Rights in the West in* Texas v. New Mexico and Colorado, Harvard Law School Today, (March 13, 2024) https://hls.harvard.edu/today/supreme-court-tackles-water-rights-in-the-west-in-texas-v-new-mexico-and-colorado/.

[78] Texas v. New Mexico, *supra* note 77. The Supreme Court had already published an opinion pertaining to this particular legal battle, since it began in 2013, by the time the Court was tasked with considering a consent decree in 2024. To reach the determination made in the 2018 case, the Court relied upon Maryland v. Louisiana, 451 U.S. 725, 746 n.21 (1981).

> government—foreign affairs, interstate commerce, taxing and spending. No doubt that is the very reason why the Constitution requires congressional ratification of state compacts. But just because Congress enjoys a special role in approving interstate agreements, it does not necessarily follow that the United States has blanket authority to intervene in cases concerning the construction of those agreements.[79]

In the 2024 case, the states argued that the federal government did not have standing to obstruct their attainment of a consent decree.[80] The compacting states argued that the federal government did not have a compelling enough interest in the matter at bar to halt the consent decree because the compact was a water distribution agreement and the federal government was not a party who would be apportioned water.[81] Nonetheless, the Court regarded the interests that justified the entrance of the federal government into the matter in 2018 as compelling enough for the Court to consider the federal

[79] Texas v. New Mexico, *supra* note 77 at 413. This justification is interesting because it neglects to mention the implied consent doctrine of *Virginia v. Tennessee* in its recounting of the congressional consent requirement. Along these same lines, the 2018 majority opinion is interesting in its parallel to *U.S. Steel v. Multistate Tax Comm'n* (*infra* note 92 at 479 n.33). While the 2018 majority opinion does not cite *U.S. Steel*, *U.S. Steel* similarly conceded that any compact poses the capacity to touch a federal interest. *U.S. Steel* held that the existence of a "federal interest" was irrelevant to whether a compact required congressional consent and instead emphasized "threats to 'federal supremacy'" as a criterion distinct from that of the federal interest (see *infra* note 92); the 2018 majority opinion conceded that any compact can touch on a national concern but conjectured that this truth did not necessarily confer the right to intervene in any interstate dispute upon the federal government. As discussed in Part I, Section D of this article, *Cuyler* may have shifted the metric of a compact to its acquisition of congressional consent rather than its impact on federal supremacy. Nevertheless, the 2018 opinion makes use of *U.S. Steel*'s framing device.

[80] Texas v. New Mexico and Colorado, *supra* note 72 at 1767.

[81] *Id*.

government's opposition and deny the consent decree on the basis of the federal government's grievances.[82]

Justice Neil Gorsuch, who authored the 2018 case's majority opinion, filed a dissenting opinion in the 2024 matter. Justice Gorsuch's dissent argued that the majority's conduct set a dangerous precedent by permitting the federal government to exercise unprecedented authority over interstate disputes, a constitutional mechanism the political branches of the federal government traditionally possessed no role in, by prolonging this case against the wishes of the litigating states.[83] Justice Gorsuch argued that once the dispute between the states died, the original jurisdiction of the Court died with it. The only course of action the Court *could* have taken in this case, according to Gorsuch, was dismissing the federal government's claims without prejudice.[84]

This division amongst the ranks of the Court poses an interesting dilemma as far as the duality is concerned. If a compact were exclusively a federal law, then the states would remain beholden to the federal government in a manner similar to any other law; the majority's jurisprudence would unequivocally prevail.[85] If a compact were exclusively a contract between party states, then Justice Gorsuch would be correct as contractual disputes cease and consent decrees are granted upon the acquisition of a consensus amongst the parties without examining the interests of nonparties. Justice Gorsuch would have been further vindicated because most other interstate original jurisdiction cases deal with state prerogatives and leave no room for input from the federal government.[86]

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[82] *Id*.
[83] *Id.* at 1772 (Gorsuch, J., dissenting). For an overview of original jurisdiction, see *infra* note 99; see generally Sections B-D of this Part for more about the delineation between the political and the constitutional and the role of compact cases as a convergence of these questions in the wake of the duality.
[84] *Id.* at 1779 (Gorsuch, J., dissenting).
[85] *Id.* at 1763.
[86] *Id.* at 1772-1779 (Gorsuch, J., dissenting).

Compacts are anomalous in that they exist as an amalgamation of federal, interstate, and state political apparatuses. Therefore, the duality doctrine and the legal character of compacts transcend the binary between the majority and dissenting opinions in the 2024 case because each faction of the Court was only looking at half of the equation for adjudicating a compact dispute.

Even before the emergence of the duality, however, the Supreme Court inconvenienced states by enshrining the vantage point of the national government into interstate compact disputes. In the 1854 case *Florida v. Georgia*, despite confirming that the United States was not legally a party to the dispute, the Supreme Court invited the Attorney General of the United States to an original jurisdiction dispute over a compact enumerating the boundary between two states.[87] The Court extended this invitation to the Attorney General against the wishes of both of the party states so that the Attorney General

[87] Florida v. Georgia, 58 U.S. 478, (1854). Notably, Maryland v. Louisiana, *supra* note 78, which the 2018 and 2024 opinions rely upon to support their integration of the federal government into the interstate proceeding, makes no mention of this historical event to support its finding that the federal government is entitled to make a case for "distinctively federal interests" in interstate original jurisdiction hearings. Additionally, neither the 2018 nor the 2024 opinion mentions this historical fact about the *Florida v. Georgia* opinion. Although Justice Gorsuch acknowledged the sometimes unconventional structure of original jurisdiction interstate hearings in his 2018 majority in *dicta*. "Our role in compact cases differs from our role in ordinary litigation. The Constitution endows this Court with original jurisdiction over disputes between the States. And this Court's role in these cases is to serve as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force. As a result, the Court may, [i]n this singular sphere… regulate and mould the process it uses in such a manner as…its judgment will best promote the purposes of justice." Texas v. New Mexico, *supra* note 77 at 412 (citations and internal quotation marks omitted). Gorsuch noted that "[u]sing that special authority," the Court "sometimes permitted the federal government to participate in compact suits to defend 'distinctively federal interests' that a normal litigant might not be permitted to pursue in traditional litigation."

could raise issues neither of the states wanted addressed.[88] Despite the fact that the intervention of the Attorney General might have led to a settlement neither of the party states wanted, and the fact that this matter was a dispute between two states, the Court felt that the Attorney General's attendance was vital to ensuring that federal interests were defended.[89] If compacts are federal law, then it is reasonable to allow the federal government to be represented in compact disputes. But if compacts are also contracts, this poses a major impediment upon the ability of a compact dispute's party states to procure expeditious and amicable settlements congruent with those awarded in traditional contractual disputes.

Thus, the duality imposes a legal methodology antithetical to the timely amelioration of compact disputes by hampering these contractual disputes with evaluations of the interests of nonparties. Specifically, the Supreme Court has come to examine federal interests as a distinct factor in the Court's interrogations of interstate compact disputes because of the federal nature of compacts post-*Cuyler*. The contractual characterization of compacts falls short because America's federal system requires the Supreme Court to examine federal interests. The fate of the contract's parties, therefore, resides in the external interests of nonparties; this would not be the case in other contractual disputes. Concurrently, the statutory identification of compacts fails because of the stringent constitutional limitations placed on the Court's original jurisdiction in interstate cases. Overall, the Court's conduct in *Florida v. Georgia* is also worthy of examination for its postulations of the nature of congressional consent, a lingering unresolved element of the Compact Clause. In this way, *Florida v. Georgia* further muddles Compact Clause jurisprudence as this next Section will demonstrate.

[88] *Congressional Supervision of Interstate Compacts*, *supra* note 31 at 1429.
[89] *Id.* at 1429-1430.

B. Political vs. Constitutional Consent: The Mystery of Equity and the Nature of Congressional Consent Under the Duality

As a result of silence embedded in the Compact Clause, there are still lingering questions about the nature of congressional consent. If the criteria for congressional consent are policy-based then Congress can be more readily regarded as a party, as it was in *West Virginia*. If the criterion is simply ensuring states are on the same page to conduct their affairs, Congress can be conceived of as a notary as it was in *Central Railroad*. If congressional consent is an evaluation of the constitutionality of the compact and its compliance with the federalist framework, as *Virginia v. Tennessee*'s just supremacy standard posits, then Congress is tasked with considerations of constitutionality in its consent deliberations; despite the fact that the Judiciary is otherwise entrusted with this kind of evaluation.

The Court affirmed in *Florida v. Georgia* that "a question of [the] boundary between States is…a political question, to be settled by [an interstate] compact made by the political departments of the government."[90] In this case, the Court also opined that congressional consent "is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interest of the others."[91] In *U.S. Steel Corp. v. Multistate Tax Comm'n*, the majority referred to these principles from *Florida v. Georgia* as *dicta*.[92] In his dissent, however, Justice Byron White interpreted the principle of *Florida v. Georgia* as a binding truth in an attempt to neatly divide up interstate compact responsibilities

[90] Florida v. Georgia, *supra* note 87 at 494.
[91] *Id*.
[92] U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 466 n.18. (1978). The majority opinion in this case is noteworthy for its expansion of the "just supremacy" standard and its contention that this standard is also applicable to compacts that create interstate agencies. See *Id*. at 452–453.

between the courts and Congress. Justice White averred that "Congress does not pass upon a submitted compact in the manner of a court of law deciding a question of constitutionality. Rather, the requirement that Congress approve a compact is to obtain its political judgment".[93]

Regardless of whether these elements of *Florida v. Georgia* were intended to be *dicta* or a compulsory roadmap for the evaluation of congressional consent, *Florida v. Georgia* highlights the weighty burdens the Court imposes upon Congress and congressional consent deliberations. *Florida v. Georgia* ostensibly tasks Congress with evaluating equitability issues, in a compact, that have the potential of affecting *non-signatory* states by deeming these considerations "political." Irrespective of the complexity of the responsibility this theory delegates to Congress and the ambiguity surrounding what distinguishes a "political" question from a "constitutional" one, this dichotomy is a commendable effort to distinctly define and characterize congressional consent. In the wake of the Court's opinion in *Cuyler* and the emergence of the duality, however, this solution was diluted. This

[93] *Id.* at 486 (footnotes omitted). In this passage, Justice White also stated that an interpretation of the Compact Clause that reads its mandate as one requiring states to seek "the political consent [of] Congress affords that such consent may be expressed in ways as informal as tacit recognition or prior approval, that Congress be permitted to attach conditions upon its consent, and that congressional approval be a continuing requirement." As discussed in *infra* note 130, White's conception of congressional consent as a "continuing requirement" is unsupported. Additionally, his theory of congressional equitable oversight was nullified by the subsequent decision of the Court in *Cuyler v. Adams* and the emergence of the duality; as well as by his failure to account for *Virginia v. Tennessee*'s implied consent doctrine in this aspect of his opinion. The implied consent doctrine is such that Congress does not directly officiate every compact enacted to ensure they take an equitable form. Justice White's references to prior approval and tacit consent further demonstrate the instability of his proposal. Nonetheless, White's delegation of political oversight to Congress and constitutional oversight to courts is worth discussing to decipher the nature of congressional consent.

dysfunctionality can be seen in the Court's 2010 opinion in *Alabama v. North Carolina*.[94] According to *Alabama v. North Carolina*, congressional deliberations are also the sole venue where any equitability issues imposed upon a compact's *signatory* states can be rectified.

In *Alabama v. North Carolina* Justice Antonin Scalia, writing for the Court, declared that "an interstate compact is not just a contract; it is a federal statute enacted by Congress. If courts were authorized to add a fairness requirement to the implementation of federal statutes, judges would be potent lawmakers indeed. We do not—we cannot—add provisions to a federal statute."[95] While the Supreme Court certainly cannot insert provisions into a federal statute, the Court should still be able to adjudicate issues stemming from inequities in a contract and provide relief to any aggrieved parties. If compacts are a contract, then the states should be able to judicially redress grievances posed by the compact. However, despite the Court's concession that every contract imposes a duty of good faith and fair dealing upon the parties, the Court has "never held that an interstate compact approved by Congress includes an implied duty of good faith and fair dealing."[96] The fact that interstate compacts are an exception to this fundamental rule of contract-making further complicates conceptualizations of interstate compacts as contracts.

Alabama v. North Carolina's preclusion on equitable judicial intervention and judicial enforcement of an implied duty of good faith and fair dealing, safeguards largely guaranteed to parties in contract law, is a direct result of the Court's decision in *Cuyler*. The Court has rendered itself incapable of adjudicating and resolving inequities embedded in interstate compacts. In addition to this dilemma, the Court demonstrated the incongruence of compacts and contracts on federalist grounds; the Court deemed itself unable to read

[94] Alabama v. North Carolina, 560 U.S. 330 (2010).
[95] *Id.* at 351–352.
[96] *Id.* at 351.

absent terms into an agreement of states.[97] The Court's federalist objection highlights the incompatibility of contract law principles and interstate compacts. As, generally in contract law, courts are permitted to supplement agreements with incomplete or ambiguous terms by judicially filling these gaps to maintain the continuity and enforceability of the contract.[98]

It is the unique constitutional relationship between states, Congress, and the courts that has led the Court to deny states this recourse. Yet, despite the Court recognizing these structural conflicts of interest, the Court remains the exclusive venue with original jurisdiction for arbitrations of interstate disputes.[99] A court would not usually refrain from adjudicating a contract dispute because of who the notary was. But when it comes to interstate compacts, the Court has abdicated its duty to equitably arbitrate interstate disputes because compacts are concurrently a contract between the party states and a federal statute; a contract between the parties and an imperative of the

[97] *Id.* at 352. ("We are especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented.") The Court's description of the branches who consent to compacts as "political" is noteworthy. In Baker v. Carr, 369 U.S. 186 (1962) the Court provided some parameters for what a political question outside the Court's reach might look like. Still, the term remains opaque in the context of compact law. In *Alabama v. North Carolina*, the Court surreptitiously deemed questions of compact equitability "political" and pushed them squarely outside the domain of the Court and into the custodianship of Congress. The Court delegated this responsibility, of ensuring equitability amongst the states, to Congress despite the fact that the Court possesses original jurisdiction for resolving interstate disputes (see *infra* note 99).

[98] U.C.C. § 2-204(3) (2002).

[99] Alabama v. North Carolina, *supra* note 94 at 344; U.S. Const. art. III, § 2, cl. 2. This constitutional provision explicitly delegates original jurisdiction of legal disputes between states to the Supreme Court; compact cases that are not intrinsically arbitrations of *interstate* disputes are heard throughout the federal court system, as a result of the evolution of the "federal question" doctrine highlighted in Section C of this Part.

contract's notary. This perception of Congress as both an author *and* curator of compacts only emerged from the likening of compacts to congressionally-authored federal statutes in *Cuyler*.[100] Thus, the duality doctrine is detrimental to the interests of party states and prevents the Supreme Court from performing its duties. This is especially disconcerting when one recalls the fact that the Supreme Court voluntarily absorbed compact disputes into the federal judiciary in a controversial maneuver in *Petty v. Tennessee-Missouri Bridge Comm'n*.

C. Compacts as Federal Questions and the Derivation of Meaning Under the Duality

People v. Central Railroad rejected the notion that compacts were federal laws and instead as contracts between the two states. *Central Railroad* did not regard compact disputes as federal questions and held that state courts could hear cases pertaining to them. As previously stated, *New York v. New Jersey*'s "contract-law rule" is predicated on a chain of citations originating from Justice Frankfurter's dissenting opinion in *Petty v. Tennessee-Missouri Bridge Comm'n*, that a "Compact is…a contract." Frankfurter's ideological distance from the majority was a result of the majority's finding that a compact dispute presented a federal question because of a compact and compact dispute's interstate nature. Justice Frankfurter's notion in *Petty*, that the parties retain the ability to assign the meaning to the words that govern their obligations, stemmed from his desire to imagine compacts exclusively as contracts.[101]

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[100] Alabama v. North Carolina, *supra* note 94. Similar to Justice White's dissent in *U.S. Steel*, this setup fails to account for the implied consent doctrine from *Virginia v. Tennessee*. This mechanism is such that Congress does not actually serve as a curator of every compact, let alone serve as every compact's author.

[101] Petty v. Tennessee-Missouri Bridge Comm'n, *supra* note 60 at 285 (Frankfurter, J., dissenting). (While Justice Frankfurter acknowledged that compacts presented a federal question, he argued that "a federal question

Both Justice Frankfurter and the majority cite *Delaware River Commission v. Colburn*'s holding that a compact presents a federal question.[102] *Colburn* overturned *Central Railroad* and held that a compact presents a federal question because a compact's congressional consent is *bestowed* through the enactment of a federal statute.[103] It must be noted that *Colburn* falls short because it fails to account for the fact that compacts could also be effectuated with implied consent under *Virginia v. Tennessee* in its emphasis on the prerequisite consent statute's centrality; although *Colburn* cited *Virginia v. Tennessee* to affirm its contention that "[t]he Compact clause does not make the Supreme Court the final arbiter with respect to the interpretation of interstate compacts."[104]

Justice Frankfurter argued that while *Colburn* was correct in stating that congressional consent conferred a federal character to compact disputes, compacts concurrently possessed the intrinsic character of a contract. It would therefore appear that Justice Frankfurter's definition of a compact, a contract where parties determine the meaning of the words, directly conflicts with *Cuyler*.[105] After *Cuyler*, any effort of a single state to unilaterally alter the provisions of an

does not require a federal answer by way of a blanket, nationwide substantive doctrine where essentially local interests are at stake.").

[102] *Id.* at 277–280; 285 (Frankfurter, J., dissenting). See *supra* note 38 for more details about the historical relationship between the localized approach perpetuated in *Central Railroad* and championed by Frankfurter in *Petty* with the federal "law of the union" doctrine concurrently promoted by the Court in the 1851 *Wheeling* opinion and in *Delaware River Commission v. Colburn* (see *infra* note 103). While *Petty* cited *Colburn*, *Petty*'s majority held that the interstate nature of compacts conferred a federal question to them, irrespective of the existence of a federal statute bestowing congressional consent.

[103] Delaware River Commission v. Colburn, 310 U.S 419, 427 (1940).

[104] *Id.* at 423. A premise that was subsequently undermined by the regime discussed later in this Section.

[105] See *supra* notes 40 and 104. See also: Reiser, *infra* note 109 at 1999.

active compact–as Congress can–risks encroaching upon the Supremacy Clause.[106]

Under *Cuyler,* compacts are understood to present federal questions because the compacts themselves are federal statutes. One justification for *Cuyler* is that making compacts a matter of federal law ensures that there is a uniform interpretation and application of any given compact; *Cuyler* unequivocally held that compacts would be dealt with as federal laws. But, in the case of contracts, different interpretations of the terms by the different parties do not inherently hinder the execution of the contract.[107] Hence Justice Frankfurter's assertion that "in the interpretation of a contract, the meaning the parties attribute to the words governs the obligations assumed in the agreement."[108] Furthermore, parties will typically specify within the contract which laws they wish to have govern the contract's provisions.[109]

One of the reasons Justice Frankfurter articulated for his distance from the majority was that the party states had not given authorization to have their dispute heard in the federal court system, as the case arose because an individual had filed the suit against the compacting states.[110] The Eleventh

[106] Bush v. Muncy, 659 F.2d 402, 410–412 (4th Cir. 1981). The Supremacy Clause (U.S. Const. art. VI, cl. 2) affirms the supremacy of the federal government over the states. *Bush v. Muncy* is noteworthy because it adjudicated a lingering question of the Interstate Agreement on Detainers, the compact at bar in *Cuyler* that sparked the transformation doctrine. As noted on page 411 of *Bush v. Muncy*, Congress approved the compact before states had ever drafted the compact's language. Nevertheless, the moment multiple states joined the compact, the compact became a matter of federal law and the Supremacy Clause prohibition took hold.

[107] Eichorn, *supra* note 42 at 1406–1407.

[108] Petty v. Tennessee-Missouri Bridge Comm'n, *supra* note 60 at 285 (Frankfurter, J., dissenting).

[109] Eichorn, *supra* note 42 at 1406–1407; Dana Brakman Reiser, *Charting No Man's Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts* 111 Harv. L. Rev. 1991 (1998).

[110] Petty v. Tennessee-Missouri Bridge Comm'n, *supra* note 60 at 284–285 (Frankfurter, J., dissenting).

Amendment to the federal Constitution grants states immunity from lawsuits filed by the citizens of other states. One of the majority's findings in *Petty* was that, by signing onto the compact at bar, the signatory states had waived their immunity under this amendment. Whereas, in Justice Frankfurter's view, the suit could only reach the federal court system if the states individually authorized the suit to proceed.[111]

In deeming compact cases adjudications of federal questions, the majority in *Petty* placed them squarely in the domain of federal courts; further eroding the foundations of *Central Railroad*.[112] *Petty*'s articulation of the federal nature of compacts would be carried over into the *Cuyler* regime.[113] Thus, one area where the duality fails to forward expedient resolutions to interstate compact disputes is in its attempt to circumvent the issue of whether compacts present federal questions. By conceiving of compacts as federal statutes, one makes compact disputes the concern of federal courts *exclusively*. However, this relegation stifles the expeditious resolutions to compact disputes that could be reached as a result of the *contractual* character of compacts.

In his dissenting opinion in *Petty*, Justice Frankfurter analogized compacts to contracts to justify localizing control of compacts for states and to evade the "federal question" pronouncement. The majority in *Petty* held that "the meaning of a compact is a question on which this Court has the final

[111] *Id*. at 275–279 for the majority's rationale for the compact's role as a waiver. Until *Cuyler v. Adams* unequivocally deemed compacts federal questions, however, the question of whether a state waived their Eleventh Amendment protections by signing onto a compact was evaluated on a case by case basis. See Frank P. Darr, *Electric Holding Company Regulation by Multistate Compact*, 14. Energy Law J. 357, 366–368 (1993) and the cases cited therein.

[112] Petty v. Tennessee-Missouri Bridge Comm'n, *supra* note 60 at 278–280. See also: *supra* note 38.

[113] New York v. New Jersey, *supra* note 7 at 920; Reiser, *supra* note 109 at 1999.

say."[114] To reach this conclusion, the majority deferred to *West Virginia ex rel. Dyer v. Sims*' declaration that "[j]ust as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts."[115] The *Sims* opinion was authored by Frankfurter. He differentiated his dissenting opinion in *Petty* from his majority opinion in *Sims* by stating that *Sims* was more narrow than how the majority sought to use it in *Petty*; to confirm that all compact disputes should be arbitrated on the federal level because compacts fundamentally presented a federal question.[116]

Regardless of which opinion correctly invoked *Sims*, the issue of federal jurisdiction has been deleteriously rendered moot as a result of the duality. Firstly, the debate over whether compacts present federal questions was superseded by the designation of compacts as federal statutes. Secondly, while the federal court system has been made the domain of compact disputes, jurisdiction over derivations of the meaning of terms in a compact has been denied to both the parties and the Court. As shown by *Alabama v. North Carolina*, the duality detrimentally altered compact law because the Court cannot serve as the arbiter of a compact's meaning without raising constitutional qualms for itself.[117] The Court effectively

[114] Petty v. Tennessee-Missouri Bridge Comm'n, *supra* note 60 at 278.
[115] West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951). The central question in *Sims* was whether a West Virginia state court could impartially adjudicate a compact dispute arising between West Virginia and its sister states. The Supreme Court held that the state court could not be permitted to be the arbiter of such a dispute and the Court consolidated that authority inside the federal judiciary. This marked a further departure from the jurisprudence of *Central Railroad* wherein the Supreme Court deferred to the judgment of the New York State Court of Appeals. *Sims* is also worth studying in the context of the dilemma the Court faced in *Hinderlider v. La Plata Co.* and the absorption of compact disputes into the jurisdiction of the federal bench (see *supra* note 38).
[116] Petty v. Tennessee-Missouri Bridge Comm'n*, supra* note 60 at 284 (Frankfurter, J., dissenting).
[117] See *supra* note 97.

rejected Frankfurter's roadmap for handling compacts like contracts by deeming compacts federal laws, but the Court continues to analogize compacts to contracts when it is convenient as evidenced by the citation of Frankfurter's dissenting opinion in the post-*Cuyler* era.

Concurrently, as shown in this Section, the fact that jurisdiction over compact disputes now resides on the federal level means that party states cannot determine the meanings of the terms in the agreements they enter. While there has been an effort made to delineate between the responsibilities of Congress and the Court, the Court has abdicated the prerogative it provided itself to derive meanings.[118] Thus, the duality proves further adverse to prudent public policy and expedient conflict resolution in its occlusion of who clarifies the meanings of the terms of a compact. One other matter that remains contentious in compact law is who can withdraw from a compact. This next Section advocates extending this right to withdraw to Congress using the framework espoused in previous Sections.

D. Congress and the Right to Unilateral Withdrawal

Whether Congress is a party afforded the same prerogative to unilaterally withdraw, afforded to states by *New York v. New Jersey*, remains unanswered. As previously explained, Congress sometimes affords itself the ability to repeal its consent and alter a compact as a condition of its consent. Congress has also occasionally limited its consent to a specified duration of time.[119] While Congress has historically had the opportunity to include language that permits its withdrawal of consent, there has never been an explicit judicial codification of this right. If Congress is intended to be a party to a compact like states, then this exclusive prerogative of unilateral alterations poses an inequity because Congress can alter the contents of a compact while individual states cannot.

[118] See Section B of this Part.
[119] Heron, *supra* note 40 at 16.

The existence of this inequity further complicates the application of contract law principles to compact jurisprudence.

Regardless, at first glance, this privilege uniquely afforded to Congress settles the query of whether Congress can unilaterally withdraw its consent from a compact. If Congress had to include these provisions to exercise this prerogative, Congress did not intrinsically possess the right to withdraw its consent at will once a compact was ratified. Instead, Congress only retained this right when Congress remembered to include these provisions. Therefore, if a compact is silent on mechanisms of withdrawal at its ratification, one might deduce that Congress withdrawing its consent is expressly forbidden.

Putting aside the fact that the implied consent doctrine means Congress cannot always proactively codify these stipulations, this hypothesis is challenged by *New York v. New Jersey*. One of New York's arguments for binding New Jersey to the compact was that there was a broader historical tradition of pre-1953 compacts remaining silent on unilateral withdrawal, but nonetheless being understood to forbid withdrawal. The Court rejected this interpretation because several compacts ratified prior to 1953 contained provisions which explicitly prohibited member states from withdrawing. The Court postulated that this language would have been unnecessary if, historically, a compact which was silent on withdrawal had presumptively been understood to forbid withdrawal.[120]

Given this holding, Congress ought to similarly be afforded the prerogative to withdraw consent from a compact which is silent on congressional withdrawal. In this way, congressional withdrawal conditions for consent can serve merely as recitations of a right Congress invariably holds. There has been little jurisprudence assessing the constitutionality of the inclusion of consent withdrawal provisions. A federal court was tasked with adjudicating a question about the constitutionality of congressional conditions

[120] New York v. New Jersey, *supra* note 7 at 925-926.

for consent in *Tobin v. United States*.[121] This case arose from the controversies surrounding the Port Authority during the tenure of Emmanuel Celler as Chair of the House Judiciary Committee. In *Tobin*, the appellant argued that congressional consent was irrevocable once consent was provided because congressional consent irreversibly restored states to their full sovereignty to effectuate the obligations of any given compact.[122]

In this case, the court stated that no case existed which could affirm or dispute the notion that Congress possessed a constitutional right to attach conditions related to repealing its consent; or alter the terms of a compact. Ultimately, the court did not provide a definitive resolution to this discrepancy and limited its discussion of constitutional doctrine surrounding the Compact Clause and congressional conditionality. The court in this case did not wish to explicitly bestow this right upon Congress because, by its own admission, the court had "no way of knowing what ramifications would result from a holding that Congress has the implied constitutional power 'to alter, amend or repeal' its consent to an interstate compact."[123]

The court in *Tobin* also confessed that, if its opinion in *Tobin* further addressed the retractability of congressional consent, the court had "[n]o doubt the suspicion of even potential impermanency would be damaging to the very concept of interstate compacts."[124] The underlying presupposition here is that the intention behind all interstate compacts is for them to serve as permanent agreements. Perhaps the court in *Tobin* was conflating impositional compacts with historical treaty compacts. Regardless, *New York v. New Jersey* would later undermine this assertion

[121] Tobin v. United States, 306 F.2d 270 (D.C. Cir. 1962).
[122] *Id.* at 273. (Within this framework, the court in *Tobin* clarified that the appellant meant "sovereign[ty] in the narrow sense of being free to conclude an interstate compact, not sovereign[ty] in the broad sense of being free of the Constitution.")
[123] *Id*.
[124] *Id.*

through its formation of unilateral withdrawal mechanisms for states in compacts without a specified duration of time.

The court in *Tobin* stated that congressional inclusions of consent withdrawal provisions may have been permissible as an implied power. Although the court cautioned that Congress cannot confer a power that the federal government does not constitutionally possess upon itself, as a condition of its provision of consent. *Tobin*'s declaration that Congress cannot confer powers upon itself as a condition of congressional consent was supported by a citation of the case *Coyle v. Smith*. In *Coyle*, the Supreme Court ruled that Congress could not impose conditions relating to matters outside of its constitutional purview to provide states with consent for their objectives.[125] While the majority opinion in *Cuyler* omits any reference to *Tobin* or *Coyle*, *Cuyler* overturns *Tobin* because *Cuyler* insulates compact consent from the jurisdiction of the *Coyle* rule, while *Tobin* subjects compact consent to the *Coyle* rule.[126]

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[125] Coyle v. Smith, 221 U.S. 559 (1911). *Coyle* was adjudicated while Oklahoma was seeking statehood. Congress conditioned its consent to Oklahoma's admission into the union, as a state, upon Oklahoma acquiescing to Congress's preferred location for Oklahoma's capital city. The Supreme Court ruled in favor of Oklahoma which served as the precedent for the court in *Tobin* to declare that "[i]f Congress does not have the power under the Constitution, then it cannot confer such power upon itself by way of a legislative fiat imposed as a condition to the granting of its consent."

[126] Cuyler v. Adams, *supra* note 6 at 439-40. ("The requirement of congressional consent is at the heart of the Compact Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority. [*See*] Frankfurter & Landis,...[*supra* note 2 at] 694-695.").

The Court's citation of the seminal 1925 article is thought-provoking. On the cited pages, the 1925 article makes an argument about why Congress is uniquely qualified to be making these consent judgments and attempting to address the issues dissected in Section B of

The transformation doctrine in *Cuyler* undoubtedly poses a major divergence from the jurisprudence of *Coyle*.[127] If the transformation doctrine and the jurisprudence of *Cuyler* means compacts are not subject to the *Coyle* rule, Congress cannot be accused of usurping powers the federal government was not delegated by incorporating conditional provisions into compacts that exceed Congress's delegated powers. This development creates a risk of Congress potentially inserting unconstitutional conditions into compacts. Therefore, this insulation of compacts from *Coyle*'s controlling jurisdiction poses negative repercussions for those seeking a judicial curtailment of Congress's ability to usurp powers. But the exemption of compacts from the *Coyle* rule is a positive

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this Part. The 1925 article does not necessarily speak to the retractability or conditionality of consent here, instead merely addressing the intent of the Framers to endow Congress with the consent power. Here, the 1925 article supposes that the consent mechanism was afforded to Congress as a "republican transformation of the needed approval by the Crown" to enter intercolonial arrangements under British law.

The importation of this monarchical procedure coupled with the terseness of the Compact Clause likely created the anomalous ambiguities embedded in the nature and retractability of congressional consent in the case of interstate compacts. The situation was likely complicated further by the advent of judicial review and the formation of a dichotomy between political judgments and constitutional judgments as domains of the legislature and the courts, respectively.

[127] Cuyler v. Adams, *supra* note 6 at 452 (Rehnquist, J., dissenting). ("[The transformation] proposition is…contrary to the established rule in other contexts. The most fundamental example was discussed in *Coyle* v. *Smith*…"). *See generally Id.* at 450-455 for *Cuyler*'s dissenting opinion. In this dissent, relying on *U.S Steel*, future Chief Justice William Rehnquist argued that the intent of the parties and the attainment of consent did not inherently convert state legislation into a compact as he believed the majority was suggesting. Rehnquist instead sought to constrain the definition of a compact to the subject matter of the policy initiative and the policy initiative's proximity to the federal government. Justice Rehnquist borrowed from Engdahl, *supra* note 38, to advance his argument; though it is worth noting that Engdahl's article precedes *U.S Steel*, in addition to preceding *Cuyler*. For a broader analysis of Rehnquist's Compact Clause jurisprudence, see generally Eichorn, *supra* note 42.

distinction for those seeking a legalization of the retractability of congressional consent from compacts. If compacts are federal law, it would be logical to afford Congress unique leeway to contemplate its consent in this area.

The consent Congress grants for admitting new states, into the union, mirrors the passive compacts states have historically entered. In this way, it is understandable that Congress would not be afforded the capacity to withdraw its consent to statehood because that would pose tremendous implications for the status of a state's sovereignty and the stability of political and social dynamics throughout the country. Nonetheless changing circumstances in the underlying exigence of a compact, and the protective capabilities the Compact Clause was designed to enshrine, necessitate providing Congress the right to retract its consent.[128] *New York v. New Jersey* affords states the capacity to unilaterally withdraw from active compacts, absent provisions pertaining to the duration of time a compact must remain intact, whereas states cannot easily withdraw from compacts that enforce boundary lines or map out water distribution.[129] Analogously, Congress ought to be afforded a similar prerogative to withdraw its consent in situations where a compact has an active impact on the political sphere and the federalist system.[130]

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[128] *Congress and the Port of New York Authority*, *supra* note 31 at 816.

[129] See *supra* notes 51-52.

[130] In his article advocating increased federal control over compacts, *supra* note 36 at 685-686, Congressman Celler cited the case Louisville Bridge Company v. United States 242 U.S. 409 (1917) to support the assertion that Congress retains the right to periodically consider the status of its consent. *Louisville* dealt with a contract between Congress and a corporation rather than an interstate compact. As was the case in Part II, Section B; the position of this article remains that laws governing individuals and corporations cannot inherently transitively be applied to states.

In his dissent in *U.S. Steel Corp. v. Multistate Tax Comm'n*, Justice White cited Celler as evidence the Court had recognized that "Congress must possess the continuing power to reconsider terms approved in compacts" (*supra* note 92 at 486 n.10). White also cited Pennsylvania v.

The supremacy of the federal government would certainly be threatened if Congress could not withdraw consent from a compact and instead had to remain stagnant as states undertook policy objectives in interstate capacities for indefinite periods of time. Furthermore, in the wake of the Court's decision in *Texas v. New Mexico and Colorado*, there is even more of an impetus for the Supreme Court to rule that Congress bears the right to withdraw its consent to a compact; irrespective of the nature of interstate compacts as contracts. Ultimately, it is rational to enshrine a retention of the right to withdraw from compacts to Congress in subsequent cases.

Just as a scenario in which *states* cannot withdraw from a compact or let a compact go dormant is dystopian, a scenario in which *Congress* cannot withdraw its consent is dystopian. If the *de facto* and *de jure* reality is that compacts are contracts in contemporary jurisprudence, it would be illogical for courts to retain a preclusion on Congress's capacity to withdraw its consent. It is inequitable for some parties to retain the right to unilaterally withdraw from an agreement while others remain indefinitely bound to it. Additionally, if compacts are acts of Congress, Congress should be permitted to evaluate whether compacts should continue to remain in effect. *New York v. New Jersey* codifies a right to unilateral withdrawal for states; Congress should be afforded a similar right to withdraw its consent.

IV. Conclusion

The interstate compact is an anomalous facet of American constitutional law with a unique purpose and an

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Wheeling & Belmont Bridge Co., 59 U.S. 421, 433 (1855) (White erroneously listed the year of the 1855 *Wheeling* decision as 1856 in his dissent). In the 1855 opinion, "[t]he question…[wa]s whether or not the [interstate] compact can operate as a restriction upon the power of Congress under the Constitution to regulate commerce among the several states" in the area of a compact's domain. This is markedly different from a verdict on Congress's right to withdraw or modify the consent it provides to a compact. Nevertheless, Justice White's discussion of this particular issue was *dicta*. This question remains in need of a definitive answer.

anomalous ratification process. As a result of the distinctiveness of compacts, a perennial issue in American history has been ascribing them a coherent body of law for judicial dispute resolution. In *Cuyler v. Adams*, the Supreme Court ruled that compacts are federal laws. At the same time, the Supreme Court has defined compacts as contracts between states eligible for adjudication using contract law principles. In *New York v. New Jersey*, the Court held that the "contract-law rule" permits states to unilaterally withdraw from compacts lacking a set duration of time or explicitly codified withdrawal mechanisms. Presently, both *Cuyler v. Adams* and *New York v. New Jersey* are binding precedent. Therefore, compacts possess a dual status as contracts and statutes. This duality is ineffective for elucidating remaining ambiguities posed by the Compact Clause.

The Framers designed the Constitution to limit the power of the national government by building the principles of federalism, democracy, and a separation of powers into their new nation.[131] This article has demonstrated that each of these constitutional norms are threatened by the Supreme Court's jurisprudence pertaining to the Compact Clause: the Supreme Court's dual-conception of interstate compacts as state-based solutions to localized problems and as congressional policies challenges the principle of federalism. *Virginia v. Tennessee* held that not all compacts require the involvement of Congress and that some could even attain the *implied* consent of Congress. Concurrently, *Cuyler* declared that all compacts are federal law and *Virginia v. West Virginia* asserted that Congress can intervene to ensure a compact is carried out. These cases, taken together, blur the lines between state and federal government and endanger the Federalist checks which undergird the United States.

The permanency of compacts juxtaposed with the impermanence of governmental administrations and the exigencies of their policy imperatives highlights the

[131] See *supra* note 37.

incompatibility of the Compact Clause with democratic intuitions. This incompatibility with democratic values plagues compacts whether compacts are statutes, contracts, or both. It was not until *New York v. New Jersey* that states were afforded the opportunity to unilaterally withdraw from obligation-imposing compacts to comport with the changing nature of policy issues and the mandates of voters.[132] Even so, the continuity of the *Cuyler* doctrine means that states undertaking a compact are executing federal laws. Thus, states withdrawals from compacts amount to states nullifications of federal law. In this way, the duality doctrine imposes tremendous strains on the constitutional and political infrastructure of the United States.

Even in *Alabama v. North Carolina*, where the Court expressly worked to reach its decision in the manner that best comported with the duality, the Court took no issue with the inclusion of a provision in the compact at bar permitting states to withdraw from the compact by enacting laws to repeal it.[133] If a compact was *merely* a contract, then there would be no need to further examine the Court's apathy to this provision's inclusion. But a compact is also a federal statute, and this provision invited a state to enact laws that discontinued the state's participation in the execution of federal laws. If compacts were merely contracts, these measures would exclusively constitute withdrawals from contracts. Since compacts are also statutes, these withdrawals are state nullifications of federal statutes.[134]

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[132] See *supra* note 52.

[133] Alabama v. North Carolina, *supra* note 94 at 351-352. The Court presupposed that North Carolina could withdraw from the compact in this case and referred to the compact's enumerated procedures for withdrawal as the basis for this presupposition. The Court specifically assessed whether North Carolina's withdrawal was in "bad faith." This was discussed in Part III, Section B of this article; the Court found that an interstate compact does not inherently confer a duty, upon the parties, to act in good faith.

[134] The Court in *Alabama v. North Carolina* had the liberty to comment on the withdrawal provision despite its contention that courts could not alter

As for the separation of powers doctrine, the Supreme Court has been reluctant to decide whether congressional consent is a political consideration or a constitutional one. Under *Virginia v. West Virginia* and *Florida v. Georgia*, the consent power is policy-based and a political consideration; and under *Virginia v. Tennessee*, that power is constitutionally-based as shown by the just supremacy

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federal statutes. The precedent that the Court in *Alabama v. North Carolina* relied on to make this determination held that "[o]nce congressional consent is given to an interstate compact as required by the Compact Clause, the compact is transformed into a law of the United States, and *unless the compact is unconstitutional*, no court may order relief inconsistent with its express terms." Texas v. New Mexico, 462 U.S. 554, (1983) (emphasis added). A clear exception is outlined in this rule because a state effort to nullify a federal law—as compacts are—would amount to a violation of the Supremacy Clause of the Constitution. (See *supra* note 106 for an overview of the Supremacy Clause.) But because of the duality's concurrent conception of compacts as contracts, where withdrawal provisions are permitted, the Court in *Alabama v. North Carolina* took no umbrage with these provisions irrespective of their dubious constitutional foundations. The Court in *New York v. New Jersey* expanded the right to withdrawal to compacts lacking expressly codified withdrawal provisions. See generally Parts II and III of this article for a discussion of the impact of the *New York v. New Jersey* decision in this light.

The realities of any given compact's dissolution may differ on the basis of a number of criteria, including whether a compact launched an interstate agency; nonetheless, this proliferation of compact withdrawal capabilities remains concerning as state initiations of withdrawals from compacts invariably constitute nullifications of binding federal statutes. Former New Jersey Governor Chris Christie was initially hesitant to sign the bill commencing New Jersey's withdrawal from the compact, at bar in 2023's *New York v. New Jersey*, because he believed that such an action was in violation of federal law. Governor Christie ultimately signed the bill immediately prior to his departure from the governor's office in 2018. Christie's reservation further demonstrates the ambiguities perpetuated by the duality and the negative repercussions the duality poses for governmental affairs.

Ryan Hutchins, *Christie, Reversing Himself, Signs Bill to Abolish Waterfront Commission*, POLITICO (January 15, 2018), https://www.politico.com/states/new-jersey/story/2018/01/15/christie-reversing-himself-signs-bill-to-abolish-waterfront-commission-189692.

standard. While the policy-based doctrine poses federalist issues, the *Virginia v. Tennessee* approach poses separation of powers issues. *Virginia v. Tennessee*'s approach presumes Congress has the capacity to make evaluations of the constitutionality of legislation by evaluating a compact's impact on the constitutional system and the preservation of the federal government's supremacy.

While the Supreme Court is afforded original jurisdiction for interstate disputes in all other contexts, *Virginia v. Tennessee* uniquely positions deliberations surrounding the constitutionality of an interstate compact within the purview of Congress. This framework affords Congress discretion in a subject matter, evaluations of constitutionality, where congressional deference is not otherwise typically provided. Additionally, *Virginia v. Tennessee*'s implied consent doctrine means that Congress does not always even directly make these evaluations despite being tasked with them. In the wake of *Cuyler*, this means states can enact laws of Congress without the direct consent of Congress.

While these prerequisite evaluations have been reserved for Congress, the Court has consolidated jurisdiction over disputes surrounding active compacts in the federal court system. This was the result of *Delaware River Commission v. Colburn*, *West Virginia ex rel. Dyer v. Sims*, and *Petty v. Tennessee-Missouri Bridge Comm'n*; these cases were decided during the 1940s and 1950s as part of a national shift favoring the interstate compact as a policy solution. These cases centralized interstate compact disputes on the federal level to adapt to the changing political landscape. After *Cuyler* in 1981 and the emergence of the duality, however, this situation proved disastrous for those seeking expeditious judicial resolutions of contractual disputes under a compact. This is because the Court cannot effectively balance both of the characteristics a compact embodies.

In *New York v. New Jersey*, the Court veered too close to the contract view of compacts by enumerating withdrawal

privileges at the expense of the continuity of federal law. In *Texas v. New Mexico and Colorado*, in 2024, the Court veered too far in the direction of the statute characterization. The Court granted the federal government the ability to prolong a dispute for which the compacting states had already reached an expeditious settlement. When the Court tries to acknowledge both of these attributes, the Court fails to deliver decisive jurisprudence as evidenced by the opinion in *Alabama v. North Carolina*. As stated, the Court permitted the inclusion of a withdrawal provision in the compact at bar that amounted to a state nullification of a federal statute; but the Court also rendered itself incapable of ensuring that compacts comport with contractual principles of equity and fair dealing because compacts possess the legal status of federal laws. Thus, given the presence of these issues and the implications they continue to pose for American constitutional law and public policy, the frameworks surrounding interstate compacts pose ambiguities that require amelioration.