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Letter from the Editor-in-Chief

Dear Reader,

Thank you for lending your time to our scholarship. Our dedicated team of over two hundred editors labored over these pages to provide an analytical lens through which to view past, present, and future legal issues.

This issue is chock-full of novel perspectives. Our authors braved the uncharted waters of the rise of the Major Question Doctrine and trade with state sponsors of terror. Others looked back to our nation's founding to clarify the period and teach lessons for the present. Some looked into the structure of American government, commerce, and justice, bringing fresh insights to enduring debates. Through joint journal and departmental workshops designed to refine their work, our authors have crafted a style of legal narrative sure to keep you engaged.

We have completely transitioned our citation style to The Bluebook: A Uniform System of Citation. This process has been over a year in the works, and we are so grateful for the whole-of-organization effort that brought this full transition to fruition.

Our editors are the unsung heroes that constitute the backbone of our journal. They have submitted thousands of comments and spent over a hundred hours fixing spelling, syntax, content, and style to ensure our articles meet the highest standards of clarity and accuracy.

Our authors went beyond their call of duty to meet with our Executive Board frequently, adding entire sections to their writing as recommended by our editors, and invested exorbitant amounts of their time to polish their work. Their contributions were a labor of love, as evident from the quality of the articles they produced.

The Executive Board is a uniquely deliberative setting. Mutual respect and admiration constitute its core. Our faculty advisors, Professor Breen and Kabrhel are our guiding lights and remind us of our dedication to Judah Marans. Without resources from the Student Union Allocation Board, this journal wouldn't come to print. We dearly thank all our backers for their support.

Four board members in particular have been instrumental in the Journal. Gonny Nir, my predecessor, is a model I aspire to emulate in this role. Daniel Block, my Co-Editor-in-Chief, has had some of the most thought-out opinions and guidance, vitally keeping us on track and ensuring the Journal runs smoothly. Koby Gottlieb, who is transitioning into Daniel's position, has been a phenomenal collaborator whose efforts have ensured the successful piecing together of a thriving future for the platform. Our outgoing treasurer, Peyton Gillespie, worked tirelessly with our publisher and the university at the final stretch of our programming and editorial process.

Like the crystal back of a timepiece or the open hood of a high-performance vehicle, we hope this brief view into the operations behind the words nourishes your experience and you come back for more.

Sincerely,
Noah Levy
Editor-in-Chief

The Canary in the *West Virginia* Coal Mine: How the Major Questions Doctrine Led to the Demise Of *Chevron*

By Daniel Block[1]

For almost four decades, federal courts ruling on issues of administrative law relied on Chevron v. Natural Resource Defense Council (NRDC).[2] The Chevron Doctrine instructed courts to defer to an agency's reasonable interpretation of ambiguous texts.[3] In 2000, the Supreme Court began sporadically applying a new "Major Questions Doctrine" (MQD) that weakened Chevron's primacy.[4] The MQD, while not named until West Virginia v. EPA (2022), would increasingly undermine basic assumptions of Chevron.[5] Two years after West Virginia, in Loper Bright Enterprise v. Raimondo, the Court found Chevron unworkable, contrary to principles of separation of powers, and incongruent with the Administrative Procedure Act.[6] This article traces the twenty-year leadup to West Virginia and Loper Bright, arguing that, while the MQD began as a rarely used tool for statutory interpretation, the Court's growing hostility toward agency powers led it to expand the MQD into a stringent clear

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[1] Brandeis University, Class of 2025; *Brandeis University Law Journa*l, Editor-in-Chief.

[2] Kent Barnett & Christopher J. Walker, *Chevron and Stare Decisis*, 31 George Mason Law Rev. (2024).

[3] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

[4] Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 Va. Law Rev. 1040 (2023) (The "major questions doctrine operates as a clear statement rule that directs courts not to discern the plain meaning of a statute using the normal tools of statutory interpretation, but to require explicit and specific congressional authorization for certain agency policies.").

[5] West Virginia v. EPA, 597 U.S. 697 (2022).

[6] This paper does not discuss the Court's decision in *Loper Bright*, but argues that MQD cases led to the Court's holding that "Congress expects courts to handle technical statutory questions." *see* Loper Bright Enterprises v. Raimondo, 603 U.S. __, 24 (2024).

statement rule.[7] *This shift reshaped principles of separation of powers, eliminating any need for Chevron deference.*

I. Roadmap

This article begins with an introduction to *Chevron* deference, highlighting its respect for separation of powers and its support for the administration of laws meant to protect people and the environment. Then, a historical analysis of MQD cases will highlight the Supreme Court's growing opposition to administrative deference. Afterward, a review of the first three cases of the "Major Questions Quartet" will show how the MQD is underpinned by poorly defined constitutional values.[8] Then, a close reading of the atextual decision in *West Virginia v. EPA* will argue that the MQD encourages judges to draw from their personal beliefs to hold agencies to an ambiguous and arbitrarily applied threshold defined by "economic and political magnitude."[9] Finally, this article will show how the MQD cases turned *Chevron*'s version of separation of powers on its head, rendering the decades old precedent unworkable and unconstitutional.

II. *Chevron* as Law

In 1979, the Environmental Protection Agency (EPA) created a "bubble" rule under the Clean Air Act (CAA), allowing factories in areas that met the National Ambient Air Quality Standards (NAAQS) to treat all pollutant-emitting sources within a plant as though they were inside a single

[7] John F. Manning, *Clear Statement Rules and the Constitution*, 110 Columbia Law Rev. 399, 401 (2010) (a clear statement rule "insist[s] that Congress express itself clearly when it wishes to adopt a policy that presses a favored constitutional value.").

[8] The term "Major Questions Quartet" comes from Mila Sohoni and refers to *Alabama Ass'n of Realtors v. DHHS, NFIB v. OSHA*, *Biden v. Missouri*, and *West Virginia v. EPA*. *see infra* note 29.

[9] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

"bubble."[10] This meant that emissions could be managed collectively, enabling plants to offset increases from some pollutant-emitting devices with reductions from others, as long as overall emissions remained stable. With the change of presidential administrations in 1981, President Reagan's EPA expanded this rule so that it also applied to factories in areas that did not meet air quality standards, known as "nonattainment" areas.[11] By extending the bubble rule to include plants in these more polluted regions, the EPA allowed factories to receive permits for new or modified equipment even if they increased emissions, provided that the net emissions from the entire plant did not increase.[12]

Arguing that the new policy ran contrary to the CAA's goals of protecting "human health and the environment from emissions that pollute ambient, or outdoor, air," the Natural Resources Defense Council (NRDC) filed a petition for review in the U.S. Court of Appeals for the District of Columbia.[13] Writing for a unanimous panel, then-Judge Ginsburg noted that the *raison d'être* of the nonattainment provisions of the CAA is to ensure reductions in air pollution such that "attainment can be achieved… no later than five years from the date the area was designated nonattainment."[14] Since the bubble rule could only guarantee the maintenance of the status quo, the panel ruled that the EPA's promulgation was an inappropriate interpretation of the statute.[15] The Chevron Corporation

[10] Saideman Ellen, *An Overview of the Bubble Concept*, 8 Columbia J. Environ. Law (1982).
[11] 46 Fed. Reg. 16,280, 16,281 (1981).
[12] For more detail on the bubble rule, *see* Jack L Landau, *Economic Dream or Environmental Nightmare? The Legality of the "Bubble Concept" in Air and Water Pollution Control*, 8 Environ. Aff. (1980).
[13] 42 U.S.C. § 7401; Natural Resources Defense Council, v. Gorsuch, 685 F.2d 718 (1982).
[14] Natural Resources Defense Council, v. Gorsuch, *supra* note 13.
[15] *Id.*; 42 U.S.C. § 7502 (a)(2); 42 U.S.C. § 7502 (c)(2).

intervened and petitioned the Supreme Court to grant *certiorari*.[16]

Writing for a unanimous Supreme Court against NRDC, Justice Stevens determined that, because Congress did not articulate a clear meaning of the term "stationary source," and because the EPA's bubble rule was not "arbitrary, capricious, or manifestly contrary to the statute," the Court should defer to the reasoned rulemaking of the EPA.[17] Justice Stevens' opinion established a two-prong test that would become known as the *Chevron* Doctrine. Under this doctrine, when a court reviews an agency's actions, it must determine at *Chevron* Step One whether Congress explicitly addressed the issue in question. If Congress addressed the issue, the court does not defer to the agency and applies the statute as written.[18] If Congress did not directly address the issue, the court proceeds to determine at *Chevron* Step Two whether the agency's interpretation of the statute is "reasonable" and "permissible."[19] If the agency's interpretation meets this standard, the court defers to the agency's interpretation.[20]

Following its publication, this two-pronged test became the hallmark of Administrative Law. Under *Chevron*, federal courts were instructed to recognize that Congress, which generally lacks the expertise to address complex issues with finely detailed policy prescriptions, reasonably delegates rulemaking authority to agencies.[21] This assumption is supported by Congress's role as a generalist body that enacts broad statutes outlining overarching policy goals (e.g.,

[16] Chevron U.S.A., Inc. v. NRDC, *supra* note 3.
[17] *Id.* at 844.
[18] *Id.* at 842.
[19] *Id.* at 844.
[20] *Id.* at 844; Catherine M Sharkey, *Cutting in on the Chevron Two-Step*, 86 Fordham Law Rev. (2018).
[21] Alli Orr Larsen, *Becoming a Doctrine*, 76 Fla. Law Rev., 27 (2024); Catawba County, N.C. v. E.P.A., 571 F.3d 20 (2009) (explaining that "ambiguity… suggests a congressional intent to leave unanswered questions to an agency's discretion and expertise.").

promoting vaccinations or preventing pollution), while agencies are tasked with implementing these goals by drawing from their "experience with how a complex regulatory regime functions and with what is needed to make it effective."[22] In turn, these agencies, through painstaking administrative procedures, utilize their subject-matter competence to fill in the policy gaps left by Congress.[23]

The *Chevron* doctrine required judges who, like Congress, often lack industry-specific expertise of complex issues, to defer to agencies' reasonable construction of a statute.[24] Some opponents of *Chevron* argue that it violates basic separation of powers principles because it could appear that the Executive Branch usurps both the Legislative Branch's lawmaking authority and the Judicial Branch's Article III charge to interpret statutes.[25] Such a reading of *Chevron* is wrong. *Chevron* upholds the Constitution's separation of powers by affirming Congress' policymaking authority, including its broad discretion to delegate rulemaking to administrative agencies within the Executive Branch that are charged with enforcing the law.[26] Meanwhile, the Judiciary

[22] Loper Bright Enterprises v. Raimondo, *supra* note 6 at 10 (Kagan, J., dissenting).
[23] Rybachek v. U.S.E.P.A, 904 F.2d 1276 (1990) (emphasizing the importance of deferring to agency expertise when there are conflicting readings of a statute); Sierra Club, Inc. v. Bostick, 787 F.3d 1043 (2015) (underscoring the importance to defer when the technical expertise of an agency leads it to a conclusion "substantia[lly] bas[ed] in fact.").
[24] Transcript of Oral Argument, Loper Bright Enters. v. Raimondo, 35–37 (2024).
[25] Nathan Alexander Sales & Jonathan H Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 Univ. Ill. Law Rev. (2009); Abigail Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Non-Interference (Or Why Massachusetts v. EPA Got It Wrong)*, 60 Adm. Law Rev. (2008); Randolph J May & Andrew K Magloughlin, *NFIB v. OSHA: A Unified Separation of Powers Doctrine and Chevron's No Show*, 74 S. C. Law Rev. (2022).
[26] Elena Kagan, *Presidential Administration*, 114 Harv. Law Rev. 2376 (2001) (asserting that "Presidential supervision of administration could

remains crucial in this dance of powers by ensuring that agency rulings remain within the confines of the relevant policy set forth by Congress.[27]

Notwithstanding *Chevron*'s warning to the Legislative Branch that statutory ambiguity will be resolved "within the bounds of permissible interpretations" and its importance in maintaining Americans' health and safety, the conservative Justices of the Supreme Court have deemed it unworkable and in need of replacement.[28] To understand how the Supreme Court arrived at this juncture, it is imperative to interrogate how the MQD was the canary in the coal mine, signaling the death of *Chevron*.

III. The Fall of *Chevron*

Some scholars point to the "Major Questions Quartet" as the primary departure from *Chevron* and adoption of the MQD.[29] However, a closer look at the Supreme Court's administrative jurisprudence reveals that the seeds for overturning *Chevron* were sown by the "elephants in mouseholes" rule initiated in *FDA v. Brown and Williamson Tobacco Corp* and crystallized in *Whitman v. American*

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operate to, contrary to much opinion, to trigger, not just react to, agency action[.]"); E. Donald Elliot, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 Villanova Environ. Law J. (2005) (explaining that the Executive, through agencies, is capable of making pertinent and effective policy as on-the-ground facts change.).

[27] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke Law J. 511 (1989) (explaining that when conducting administrative review, courts only need to determine whether "the agency has acted within the scope of its discretion."); Peter M. Shane, *Chevron Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 Fordham Rev (2014) (showing that *Chevron* requires courts to differentiate lawful from unlawful administrative acts that go beyond any plausible intent of Congress.).

[28] Scalia, *supra* note 27 at 517; Loper Bright Enterprises v. Raimondo, *supra* note 6 (Kagan, J., dissenting).

[29] Mila Sohoni, *The Major Questions Quartet*, 136 Harv. Law Rev. (2022).

Trucking Association. This "elephants in mouseholes" rule existed within the *Chevron* framework. It instructed courts to consider on rare occasions—along with the ordinary meaning, context, and structure of the statute—extratextual ideas of separation of powers and nondelegation.[30] The newly anointed ultra-conservative Supreme Court, however, expanded this interpretation, asserting that any regulation approaching a politically motivated threshold of "too big" is an unconstitutional expression of regulatory power.[31] Thus began the end of *Chevron*.

III.A *The Canary's First Warning*

In the 2000 case, *FDA v. Brown*, the Court addressed the Food and Drug Administration (FDA)'s anti-smoking regulations. These rules were promulgated under the Food, Drug, and Cosmetic Act and aimed to curtail the sale, distribution, and advertisement of tobacco products.[32] While acknowledging the serious public health issue of smoking-related illnesses in the United States, the Court denied the FDA the authority to regulate tobacco products. The Court's holding was partly based on the FDA's duty to ensure the safety and efficacy of the products it regulates, prohibiting the sale of those that would "present a potential unreasonable risk of illness or injury."[33] Justice O'Connor reasoned that because tobacco could never be used safely, the FDA would be statutorily mandated to prevent the sale of tobacco entirely.[34]

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[30] Deacon and Litman, *supra* note 4, at 1040.
[31] Chad Squitieri, *Who Determines Majorness?*, 44 Harv. J. Law Public Policy, 495–497 (2021) (discussing how the MQD allows courts to "exercise its own political discretion to determine whether a policy question is major," thus inviting the court into the political arena.); Deacon and Litman, *supra* note 4 at 1050–1052 (describing how the MQD encourages the courts to consider controversy generated by special interest groups to justify invalidating detested policies.).
[32] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[33] 21 U.S. Code § 360f.
[34] FDA v. Brown & Williamson Tobacco Corp., *supra* note 32 at 142.

However, she found that Congress explicitly forbade a tobacco ban, thus failing the Agency's claim at Step One of *Chevron*.[35]

Justice O'Connor emphasized that Congress had devised a distinct regulatory scheme concerning the sale of tobacco products, "focus[ing] on labeling and advertising," rather than restrictions.[36] Importantly for the Justice, this scheme did not mention the FDA, but delegated enforcement responsibility to the Federal Trade Commission and Federal Communications Commission.[37] Justice O'Connor figured that by providing precise regulatory instructions to specific agencies not including the FDA, Congress intended to preclude the agency from regulating tobacco.[38]

FDA v. Brown illustrates a growing reluctance by the Court to infer implicit delegations of power in cases involving "decisions of such economic and political magnitude" that could otherwise be reasonably justified by a plain reading of statutory text.[39] Justice O'Connor argued that in such cases, courts should be skeptical as to whether Congress delegated broad authority through ambiguous text. While it might be good policy to approach major agency rulings that Congress has not explicitly addressed with a degree of caution, such a legal analysis lacks a clear constitutional or legislative basis. Indeed, Justice O'Connor suggested that her decision was guided by a degree of "common sense," which is hardly the rigorous legal standard required for interpreting complex statutory or constitutional questions.[40] This "common sense" approach further undermines *Chevron*'s view that Congress

[35] *Id.* at 148;156.
[36] *Id.* at 155–156.
[37] *Id.* at 149.
[38] *Id.* at 130. It is important to note that the majority did not claim that the plain text of the statute precluded FDA, rather their reasoning rested in a purposivist reading of extratextual sources.
[39] *Id.* at 160.
[40] *Id.* at 133; Manning, *supra* note 7 at 410.

regularly makes implicit, and often major, delegations of authority through statutory silence.[41]

If one were to compare Justice O'Connor's "common sense" understanding of congressional intent with actual statutory directives, one would find that the Congressional Review Act (CRA) authorizes Congress to nullify agency rulemakings of which it disapproves.[42] Indeed, the CRA explicitly details legislative procedures for reviewing "major" rules.[43] Given this, the absence of congressional disapproval for a rule issued under ambiguous statutory language could reasonably signal legislative approval—or at least acquiescence—that courts should respect.

One year after *FDA v. Brown*, the Supreme Court continued to limit agency rulemaking by building on its burgeoning clear statement rule in *American Trucking*. That case considered the constitutionality of the EPA's authority under §109(b)(1) of the Clean Air Act (CAA) to set National Ambient Air Quality Standards (NAAQS) without considering the financial impacts of implementing such standards.[44] Textually, §109(b)(1) gives EPA the authority to set NAAQS, "the attainment and maintenance of which… are requisite to protect the public health."[45] Justice Scalia determined that the omission of economic considerations in §109(b)(1), and the inclusion of it in many other sections of the CAA, unambiguously foreclosed the EPA's ability to consider any factors beyond public health.[46] Justice Scalia determined that, unless Congress explicitly stated otherwise, it is implausible that Congress would demand, or even allow, the EPA to consider costs that could "cancel[] the conclusions drawn from direct health effects."[47] Such a reading of the statute would

[41] Chevron U.S.A., Inc. v. NRDC, *supra* note 3 at 843–844.
[42] 5 U.S.C. § 801.
[43] *Id.* at (A)(ii).
[44] Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001).
[45] 42 U.S.C. § 7409 (b)(1).
[46] Whitman v. American Trucking Associations, Inc., *supra* note 44 at 467.
[47] *Id.* at 469.

fundamentally alter the operating framework of the CAA. If Congress meant to require the consideration of costs, it knows how to write the words "cost-benefit analysis."[48] As Justice Scalia concisely put it, "Congress… does not, one might say, hide elephants in mouseholes."[49]

To understand *American Trucking*'s relationship to the MQD, it must be read as a limitation of administrative powers. Although the EPA was not asserting that it could consider economic factors, the Court concluded that the agency could not do so even if it wanted. Had Congress intended the EPA to have such authority, it would have explicitly said so as it did elsewhere in the CAA. In other words, the EPA's authority to set NAAQS is not so broad that it can read the CAA in a way that would fundamentally alter the regulatory framework established by Congress. When harmonizing this principle with *FDA v. Brown*, it can be argued that, when administrative agencies issue rulings of significant political and economic magnitude to which Congress did not speak, those rulings inherently disrupt the intended regulatory framework. Simply put, any "major" agency rulemaking that can be read, textually or otherwise, as contradicting congressional intent would fail at *Chevron* Step One.

American Trucking and *FDA v. Brown* operate within *Chevron* Step One analysis.[50] These rulings required courts to consider the breadth of the rulemaking in light of the agency's charge from Congress.[51] If the agency's rulemaking is broader than Congress intended or spoke to, then it fails at Step One. Importantly, neither of the above cases address what would happen if the text of the statute is ambiguous and an agency

[48] Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 232 (2009) (Stevens, J., dissenting); American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 510 (1981) (stating that "when Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.").
[49] Whitman v. American Trucking Associations, Inc., *supra* note 44 at 468.
[50] Deacon and Litman, *supra* note 4 at 1021.
[51] FDA v. Brown & Williamson Tobacco Corp., *supra* note 32 at 159.

rulemaking is not explicitly foreclosed by a direct congressional charge. Nor do these cases discuss what would happen if Congress intentionally wrote ambiguously to allow the agency to determine the best course of action within the prescribed regulatory framework and its stated goals. As demonstrated below, the Court answers by shuffling the MQD between *Chevron* Step One, Step Two, and a new Step Zero, as well as by expanding the indicia for its application.[52] This inconsistent application allowed the Court to scrutinize not just *what*, but *how* federal agencies regulate.

III.B *The Canary's Coughing Fit*

Moving on to a set of cases that further lay the foundation for overturning *Chevron*, Judicial antipathy towards agency powers becomes more pronounced as the Supreme Court narrows the Administrative State's regulatory authority. These cases show how the Court inconsistently invoked the MQD to circumvent otherwise precedent-bound agency deference.[53] These cases demonstrate how the MQD increasingly became a "get-out-of-deference" free card, destabilizing the traditional *Chevron* framework and eventually necessitating its elimination.[54]

In *Gonzales v. Oregon*, the Supreme Court ruled against a U.S. Attorney General's 2001 Interpretive Rule.[55] This rule claimed that under the Controlled Substances Act, the Attorney General (AG) could revoke the licenses of medical professionals who prescribed or dispensed controlled substances for physician-assisted suicide, even in states where such practices were legal.[56] The Court determined that while the AG had the authority to add, remove, or reschedule

[52] Squitieri, *supra* note 31 at 475.
[53] Cass R Sunstein, *Chevron Step Zero*, Public Law Leg. Theory Work. Pap. (2005).
[54] West Virginia v. EPA, *supra* note 5 at 28. (Kagan, J., dissenting).
[55] Gonzales v. Oregon, 546 U.S. 243 (2006).
[56] *Id.* at 249–250.

substances and ensure compliance, he did not have the authority to unilaterally decide the legality of medical practices.[57]

Part of the analysis supporting this conclusion derived from Congress' delegation of medical policy decisions to the Secretary of the Department of Health and Human Services (DHHS), rather than the AG.[58] The Court suggested that if the AG's proposition were accepted, he would have the authority to decide "whether a physician who administers any controversial treatment could be" punished.[59] This would make the AG, rather than the Secretary of DHHS, the ultimate arbiter of permitted medical practices — a delegation too "broad and unusual" to be made through the implicit language of the Controlled Substances Act.[60] Finally, the Court noted in *dicta* that the controversial nature of physician-assisted suicide made the AG's claim all the more suspect.[61]

Gonzales exhibits two new factors materializing within the MQD's framework. First, the mismatch between an agency's actions and the powers delegated to it by Congress; and second, the controversial nature of a regulation.

The *Gonzalez* Court argued that the AG could not regulate medical *uses* of controlled substances, since his authority was limited to regulating *abuses* of controlled substances.[62] On its face, this premise does not seem to disregard *Chevron*'s reverence for an agency's particular expertise. Indeed, *Gonzales* recognized that *Chevron* is predicated on the assumption that agencies typically make decisions within their delegated domain by relying on experts in the relevant field.[63] When an agency attempts to regulate an area in which it traditionally lacks subject-matter expertise, it

[57] *Id.* at 262.
[58] *Id.* at 274.
[59] *Id.* at 268.
[60] *Id.* at 267–268.
[61] *Id.* at 267.
[62] *Id.* at 270.
[63] *Id.* at 267.

becomes quite doubtful that Congress would delegate that authority through ambiguous text.[64] However, subsequent rulings applied this principle too expansively. While *Gonzales* showed respect for DHHS's expertise in medical care policy, recent cases — particularly *Alabama Ass'n of Realtors v. CDC* and *NFIB v. OSHA* — exemplify how the "agency mismatch" principle has become a tool to denigrate the expertise of agencies attempting to address multifaceted issues like climate change and COVID-19.[65]

The Court's recognition of an "earnest and profound debate" over physician-assisted suicide in the country was insufficient on its own to find the AG's actions unconstitutional.[66] Rather, the presence of moral controversy provided reason to doubt that Congress had, through such vague language, authorized the AG to unilaterally prohibit physician-assisted suicide.[67] As explained in Part IV.C, these words, while not binding, foreshadow how some Justices have come to undermine *Chevron* deference and the Administrative State by pointing to the presence of controversy, whether it be large or small, real or imagined.[68]

In *Utility Air Regulatory Group v. EPA*, the Court considered the legality of the EPA's decision to include greenhouse gasses under certain permitting provisions of the CAA, particularly the "Prevention of Significant Deterioration" (PSD).[69] The PSD provisions require "major emitting facilities"

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[64] *Id.* at 268.
[65] Thomas O McGarity, *The Major Questions Wrecking Ball*, 41 Va. Environ. Law Rev. 1, 49–50 (2023).
[66] Gonzales v. Oregon, *supra* note 55 at 249.
[67] Brianne J Gorod, Brian R Frazelle & J Alex Rowell, *Major Questions: An Extraordinary Doctrine for Extraordinary Cases*, 58 Wake For. Law Rev. 599, 619.
[68] Deacon and Litman, *supra* note 4 at 1063.
[69] Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014). The other provision at the heart of the case, Title V, shares many of the same definitions and effects as the PSD provisions, so for clarity's sake, only the PSD provisions will be discussed.

in "areas designated attainment or unclassifiable" to comply with emissions limitations and best practices.[70] The CAA defines "major emitting facilities" as stationary sources with the potential to emit 250 tons per year (tpy) of any air pollutant.[71] Recognizing that greenhouse gasses are emitted at much higher rates than other pollutants, the EPA chose to enforce its interpretation only against facilities that emit at least 100,000 tpy of CO2e.[72]

The Court held that, even if the EPA did not change the numerical definition of "major emitting facilities," the CAA would still preclude the EPA from including greenhouse gasses in the PSD provision. Echoing its reasoning in *Brown*, the Court ruled that the EPA is statutorily required to apply the 250 tpy threshold when establishing rules under the PSD provisions. The EPA conceded that this threshold would be inappropriate for greenhouse gasses, as it would mandate the regulation of millions of smaller sources. As in *Brown*, such an outcome, though plausibly supported by the statute's plain text, would be incompatible with the regulatory framework established by Congress.

The Court reinforced this conclusion by requiring "clear congressional authorization" for agencies claiming "enormous and transformative" expansions of regulatory power.[73] This requirement reflects the "elephants in mouseholes" rule articulated in *American Trucking*. The Court reasoned that the EPA's attempt to include greenhouse gasses in the PSD framework, which traditionally regulated only a few major polluters, would fundamentally alter the statute's scope. While the EPA enjoys authority to regulate greenhouse gasses

[70] *Id.* at 308.
[71] 42 U.S.C. § 7479(1).
[72] Utility Air Regulatory Group v. EPA, *supra* note 69 at 309–310. CO2e, or carbon dioxide equivalent, is a standard unit used to compare the emissions of different GHGs to CO2 based on their global warming potential.
[73] *Id.* at 324.

under the CAA, that authority was deemed insufficiently broad to justify such an extensive expansion of the PSD provisions.[74]

The *Utility Air* framework extends the basic rationale of *FDA v. Brown* and *American Trucking.* Its holding being that, without clear congressional authorization, agency rulings of political and economic significance disrupt the intended regulatory scheme. The primary issue begins when the Court states that it "expect[s] Congress to speak clearly if it wishes to assign agency decisions of vast economic and political significance."[75] Synthesizing this principle with *American Trucking*, it follows that agencies cannot "discover" an unheralded power to regulate conferred through the "ancillary provisions" of statutes; they must find this power in explicit text.[76] Here, *Utility Air* establishes a new *Chevron* carve-out whereby "ambiguous language cannot be invoked to allow an agency to exercise its authority in a sufficiently transformative way."[77] There are three major issues with this seemingly innocuous transformation: (1) how significant a rulemaking must be to require a clear statement from Congress; (2) who determines when this threshold has been reached; and (3) what constitutional compulsion supports the Court's clear statement rule for "major regulations."

As the next section will show, the Court answers this line of inquiry by arrogating to itself the power to "selectively

[74] Massachusetts v EPA, 549 U.S. 497 (2007) (granting EPA authority to regulate GHGs.); Cass R Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Adm. Law Rev. 475, 491 (2021) (arguing that the rationale in *Utility Air* "could easily have been used to justify the opposite result in *Massachusetts v. EPA*". That argument is beyond the scope of this paper, but it is at least worth pointing out that the *Massachusetts* Court gave EPA the authority to regulate GHGs, but the *Utility Air* Court stripped it of substantial enforcement power as it relates to certain provisions of the CAA.).

[75] Utility Air Regulatory Group v. EPA, *supra* note 69 at 321.

[76] *Id.*; Whitman v. American Trucking Associations, Inc., *supra* note 44 at 458.

[77] Cass R. Sunstein, *Chevron as Law*, 107 Georget. Law Rev. 1613, 1677 (2019).

demand that explicit legislative language be used to delegate the authority to answer those questions that courts determine to be major."[78] The Court's synthesis of the above cases leads it to maximalist conclusions that encourage arbitrary judicial policymaking excused by an ambiguously-defined threshold of "political and economic significance."

III.C *The Canary's Last Gasps*

If the old MQD existed within the *Chevron* framework, the "Major Questions Quartet" exemplifies how the new MQD, enunciated in *Utility Air*, comes to function as a half-baked federalism canon and nondelegation doctrine that undermines basic assumptions of *Chevron*.[79] The Quartet's judicial power-grab further turns the Court into a political actor, whereby questions of "political and economic significance" are not decided by legal reasoning but by a jurist's policy preferences and world view.[80] This power of "void for majorness" amounts to a political veto in which a jurist, for their own political and economic reasons, may determine that a policy is "too grand" to stand on ambiguous language.[81] By applying this doctrine arbitrarily to administrative agencies, the Court disrupts forty years of precedent that informed legislative processes and agency rulemaking, causing a sea-change in Administrative Law and ultimately the demise of *Chevron*.

As mentioned in Part II, *Chevron* put Congress on notice that ambiguous statutory text will be interpreted by the Executive, whose agencies issue rules "within the bounds of permissible interpretation."[82] Under *Chevron*, the boundaries of

[78] Squitieri, *supra* note 31 at 495.
[79] Cass R. Sunstein, *supra* note 77 at 1669; Sohoni, *supra* note 29; Alison Gocke, *Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 UC Davis Law Rev. 955 (2024).
[80] Squitieri, *supra* note 31 at 496. (describing that by voiding laws on majorness grounds, courts "act similarly to the President, who for idiosyncratically held political reasons may veto a bill…").
[81] *Id.* at 503–509.
[82] Scalia, *supra* note 27 at 516.

permissible interpretation are not set by the majorness of the resulting policy, but by a plain text reading of the statute.[83] This analysis treats statutory ambiguities as delegating authority to agencies, giving them the flexibility to adjust rules as knowledge evolves and challenges change.[84] The Quartet undermines these assumptions that informed Congress' drafting of complex regulatory schemes, skewing outcomes against regulation and disrupting the legislative compromises that often signal broad delegation.[85]

The first three cases of the Quartet considered whether different administrative agencies had the authority to prevent the spread of COVID-19 through novel regulations.[86] In *Alabama Ass'n of Realtors v. DHHS*, the Court held that the Center for Disease Control and Prevention (CDC) did not have the authority to prevent the spread of COVID-19 by imposing a national eviction moratorium.[87] In *National Federation of Independent Business (NFIB) v. Occupational Safety and Health Administration (OSHA)*, the Court held that because COVID-19 did not pose an exclusively *occupational* risk, OSHA's authority to protect workers from dangerous "agents" or "toxins" could not extend to a vaccine mandate.[88] In *Biden v. Missouri*, the Court agreed with the Government's assertion that the Secretary of DHHS could set health and safety conditions, including a COVID-19 vaccine mandate, for facilities receiving funding from Medicare and Medicaid.[89]

Part of the rationale in the cases in which the Government lost relied on a counter-*Chevron* assumption of the

[83] *Id*.
[84] *Id.* at 517-518.
[85] Sohoni, *supra* note 29 at 286; Squitieri, *supra* note 31 at 505.
[86] Alabama Ass'n of Realtors v. Dept. of Health and Human Services, 594 U.S. ___ (2021); NFIB v. OSHA, 595 U.S. __ (2022); Biden v. Missouri, 595 U.S. __ (2022).
[87] Alabama Ass'n of Realtors v. Dep't of Health and Human Services, *supra* note 86.
[88] NFIB v. OSHA, *supra* note 86.
[89] Biden v. Missouri, *supra* note 86.

purpose of statutory ambiguity. The Court failed to recognize that Congress cannot foresee future problems and uses ambiguous language to ensure flexibility in agency regulations. Instead, it assumed that provisions in decades-old statutes, never previously applied expansively, could not be so applied without a clear statement from Congress.[90] The Court emphasized that neither the CDC nor OSHA had previously used their emergency rulemaking powers to pause evictions or effectuate a vaccine mandate.[91] By contrast, in *Missouri*, the Court noted that the Secretary claimed broader authority than before because the agency "never had to address an infection of this scale and scope."[92]

Although not cited, the only way to reconcile these disparate rationales is with the agency mismatch concept from *Gonzales*. One could argue that the CDC and OSHA had never established such regulations because doing so would touch on matters beyond their subject-matter expertise. DHHS on the other hand, was reasonably expanding upon previous regulations for healthcare facility operations—something undoubtedly within its purview and expertise. This overly broad application of *Gonzales* prevents agencies from adapting regulations as circumstances evolve. It further loads the dice against agencies trying to address multifaceted crises that touch on, but might not be fully encompassed by, their titular responsibilities.[93]

This raises a fundamental question about why federal courts should require a clear statement from Congress to support an agency's claim to regulate issues that involve, but are not fully encompassed by, the agency's core

[90] Alabama Ass'n of Realtors v. Dept. of Health and Human Services, *supra* note 86; NFIB v. OSHA, *supra* note 86.
[91] *Id*.
[92] Biden v. Missouri, *supra* note 86.
[93] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 26 (new ed. 2018).

responsibilities. The Court answers this by detaching the MQD from *Chevron* and inconsistently attaching it to poorly articulated constitutional values of federalism and nondelegation.

III.C.1 Federalist Values

In the CDC case, the Court found that the agency's actions encroached on typically state-regulated landlord-tenant relationships.[94] Instead of applying the federalism canon—which presumes that federal laws do not override state laws without a clear statement from Congress—the Court treated the disruption of state law as an indicator of political significance.[95] By doing so, the Court linked the federalism canon to the MQD, creating a superficial constitutional basis for requiring a clear statement from Congress. By invoking federalist principles rather than applying an already established clear statement rule, the Court justified its limitation of statutory text by associating one doctrine with another.[96] This judicial sleight of hand allows the Court to demand an unusually high level of statutory clarity, one that undermines Congress's authority to delegate regulatory powers to agencies.[97] Moreover, later cases show that federalism does not appear to be the primary justification for a presumption against major administrative powers; rather, it becomes one of a myriad of poorly articulated constitutional values used to justify the strangling of the Administrative State.[98]

III.C.2 Nondelegation Values

The more often-discussed constitutional value connected to the MQD's clear statement rule is that of

[94] Alabama Ass'n of Realtors v. Dep't of Health and Human Services, *supra* note 86 at 6.
[95] *Id;* Manning, *supra* note 7 at 434.
[96] Sohoni, *supra* note 29 at 313.
[97] John F. Manning, *The Supreme Court, 2013 Term Foreword: The Means of Constitutional Power*, 128 Harv. Law Rev. (2014).
[98] Sohoni, *supra* note 29 at 283.

nondelegation.[99] The nondelegation doctrine derives from the Legislative Vesting Clause of Article I and "bars Congress from transferring its legislative power to another branch of government."[100] On only two occasions, both in 1935, has the Supreme Court applied this doctrine to invalidate a statute.[101] While its pedigree remains weak, the MQD today camouflages the reemergence of a nondelegation doctrine that provides the Court with a framework to decide not just whether Congress *did* delegate certain powers, but whether Congress *could* do so.[102]

In a fashion similar to the Court's justification via association of constitutional values in the CDC case, Justice Gorsuch justified the application of the MQD in the OSHA case by merely associating the MQD with the seldom-invoked nondelegation doctrine.[103] The Justice explained that the nondelegation doctrine precludes Congress from "hand[ing] off all its legislative powers to unelected agency officials," while the MQD prevents agencies from "exploit[ing] some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment."[104] According to Justice Gorsuch, both doctrines "prevent government by bureaucracy supplanting government by the people."[105] Notably, the main difference between these two theories is which branch of government is inappropriately extending its authority. The nondelegation doctrine polices "improper legislative delegations" from Congress while the

[99] Sunstein, *supra* note 74; Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 Adm. Law Rev. (2014); Gocke, *supra* note 79.
[100] Gundy v. United States, 588 U.S. 128 (2019).
[101] Cass R Sunstein, *Nondelegation Canons*, 67 Univ. Chic. Law Rev., 322 (2000).
[102] *Id.*; Loshin and Nielson, *supra* note 99 at 57; Gocke, *supra* note 79 at 995–997.
[103] NFIB v. OSHA, *supra* note 86, at 5 (Gorsuch, J., concurring).
[104] *Id.*
[105] *Id.* at 6.

MQD polices "abuse[s] of delegated authority" by the Executive.[106]

When considering the purported constitutional compulsions supporting Justice Gorsuch's nondelegation argument, it becomes clear that his framework stands on even shakier constitutional grounds than the federalist principles supporting the outcome in the CDC case. Unlike the federalism canon, the Court has been unable to articulate a workable version of the nondelegation doctrine that demarcates when statutory ambiguity meant to be resolved by the Executive becomes a prohibited delegation of legislative power.[107] Justice Gorsuch's theory purports to resolve this dilemma by asserting that *any* statutory ambiguity that results in a "major" policy is either an unconstitutional expression of agency powers (MQD) or an "unconstitutional delegation of legislative authority" (nondelegation).[108]

For the Justice, this means that, unless the matter is wholly mundane or otherwise interstitial, Congress cannot even expressly and specifically delegate decision-making authority to an administrative agency.[109] This theory of both the MQD and nondelegation doctrine turns on the question of when exactly an agency policy is mundane and when it is "major." As will be discussed in Part IV, no consistent answer is readily available, as the Court has issued "ad hoc, discretionary rulings" that "suffer from the appearance" and reality of jurists' basing the outcome of a case on a knee-jerk reaction to personally detested or favored policies.[110]

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[106] May and Magloughlin, *supra* note 25 at 271; Gocke, *supra* note 79 at 994.
[107] Loshin and Nielson, *supra* note 99 at 56.
[108] NFIB v. OSHA, *supra* note 86, at 6 (Gorsuch, J., concurring).
[109] Gocke, *supra* note 79 at 996; Gundy v. United States, *supra* note 100.
[110] Sunstein, *supra* note 101 at 327; Deacon and Litman, *supra* note 4 at 1065–1069 (asserting that worldviews align closely with policy preferences "judges may be more inclined to perceive issues or policies as politically significant if the policies are opposed by the political party that appointed that judge.").

IV. The End of *Chevron*

IV.A The Canary's Death

Up until this point, the MQD merely warned us of *Chevron*'s death. As demonstrated in *West Virginia v. EPA*, the Court did not listen to the warnings. Instead of leaving the MQD behind and deferring to an agency, the Court continued to plunge deep into the unnavigable mines of "majorness" until its new doctrine finally asphyxiated *Chevron*.

In *West Virginia v. EPA,* the Court determined that the EPA's authority under section 111(d) of the CAA was not so capacious as to allow for the Obama-era Clean Power Plan (CPP).[111] The CPP adopted a "generation shifting" approach to greenhouse gas reduction, whereby power plants would need to shift "from higher-emitting to lower-emitting production" of electricity.[112] Rather than attempt to refine the contours of the MQD and explain the constitutional compulsions for the clear statement rule, the Court's opinion and Justice Gorsuch's concurrence present a hodgepodge of ideas justifying the MQD. The opinion and concurrence attempt to justify the Doctrine's application and provide a broad framework for anti-regulatory judges to wage their war against the Administrative State.

This final section is composed of three parts. Part IV.B will critique the Court's atextual justification for applying the MQD in *West Virginia*. Part IV.C will show how the opinion and concurrence instruct lower courts to rule against agency actions that judges personally find to be too political or too

[111] West Virginia v. EPA, supra note 5; 42 U.S.C. § 7411(d). Not wholly relevant to this article, but still crucial for context, is the issue of standing in the case. The majority and dissent disagreed as to whether any party maintained standing in the case, especially given that an entire presidency and a half had lapsed since the CPP was initially put into place and stayed. Furthermore, the Biden administration claimed that it was not going to reinstate the CPP. Indeed, Justice Kagan characterized the ruling as "an advisory opinion on the proper scope of the new rule EPA is considering."
[112] *Id.* at 705.

costly. Part IV.D will argue that the Court embraced Justice Gorsuch's version of separation of powers from *NFIB v. OSHA*, thus making the MQD impossible to apply so long as *Chevron* breathed.

IV.B *The (A)Textual Justification*

The Court begins its justification for applying the MQD by characterizing Section 111(d) of the CAA as an "ancillary" and seldom employed provision of the statute.[113] This characterization sets the rhetorical foundation for the rest of the Court's opinion.

First, the Court forwards a purposivist argument in textualist's clothing, whereby it establishes an anti-regulatory hierarchy of statutory text in which ambiguous provisions executed through broad regulation are deemed "ancillary" or insufficient to support the agency's ruling. Second, the Court determines that, because the EPA had never interpreted Section 111(d) in such an expansive manner, it is functionally prevented from doing so to address novel issues like climate change.[114] Finally, the Court jettisons textualism and replaces it with a post-hoc anti-regulatory framework that allows the inactions of subsequent Congresses to define the scope of statutes passed by a previous Congress.

As in *American Trucking*, the depiction of certain provisions of statutory text as "ancillary" begs the question of how the Court knows which provisions are unimportant "mouseholes" hiding regulatory elephants.[115] The Court answers by turning its analysis into a fraught search for statutory purpose.[116] Indeed, the Court does not determine the size of the "mousehole" in Section 111(d) by parsing through the language of the provision and situating it within the context of the CAA, but by pointing to the remarks made by one

[113] *Id.* at 703.
[114] Deacon and Litman, *supra* note 4 at 1033.
[115] Loshin and Nielson, *supra* note 99 at 45–46.
[116] *Id.*

architect of the CAA and the EPA's previous rulings pursuant to Section 111(d).[117] This form of statutory construction disregards the normative textualist theory that legislation is often "the result of 'backroom deals' and diverse individual compromises" rather than solely reflecting the views of a few cited legislators.[118]

The Court's framework further ignores Justice Scalia's view that shifting agency interpretations are not indicative of an incorrect interpretation but that agencies change the law in light of new information and "within the limited range of discretion conferred by the governing statute."[119] Both of these textualist presumptions would typically render legislative history and shifting agency interpretations irrelevant to statutory interpretation.[120] Notwithstanding its textualist commitments, the *West Virginia* Court misconstrued ambiguous text as being no more than a legislative afterthought and undeserving of meaningful textual analysis that would likely result in a policy disfavored by the majority.[121]

The third atextual justification for the MQD in *West Virginia* relies on Congress's failure to pass comprehensive legislation addressing climate change despite knowing that greenhouse gas emissions pose an existential threat to humanity.[122] This justification is incongruent with textualism, as it cites inactions of subsequent Congresses as limiting the power of broad legislation passed by a previous Congress.[123] This justification also assumes that legislative inaction exclusively provides evidence of congressional disapproval,

[117] West Virginia v. EPA, *supra* note 5 at 703.
[118] Loshin and Nielson, *supra* note 99 at 52.
[119] Scalia, *supra* note 27 at 518–519.
[120] *Id.*; Conroy v. Aniskoff, 507, U.S. 511, 519 (1993). (Scalia, J., concurring) (writing that "the greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.").
[121] West Virginia v. EPA, *supra* note 5 at 703.
[122] *Id*, at 724.
[123] Deacon and Litman, *supra* note 4 at 1062.

rather than evidence of acquiescence to agency rulemaking or a lack of expertise on exactly how issues should be regulated. As shown below, the atextualist justifications for applying the MQD in this case leads to results that appear to be, or are, arbitrary, inconsistent, politically motivated, and contradictory.

IV.C *The Political Instruction*

To understand how the MQD's application in *West Virginia* promotes arbitrary rulings, one needs to look no further than the list of possible indicia for "majorness" put forth by Justice Gorsuch in his concurrence. The five indicia for majorness that Justice Gorsuch lays out are poorly defined and can be interpreted in an infinite variety of ways.[124] As the Court has noted regarding criminal statutes, poorly defined and limitless rules fail to establish clear standards of enforcement, leading to arbitrary application.[125] While this understanding of arbitrariness pertains to statutory enforcement rather than rulings made pursuant to unclear reasoning, the principle still stands. When one branch of the government, including the Judiciary, establishes vague rules, it leads to inconsistent applications. This is concerning in the world of administrative law because vague rules and standards encourage judges to base decisions on their policy preferences.

First, Justice Gorsuch suggests that policies of "profound political significance" may be implicated in MQD analysis.[126] As shown above, this comes from *FDA v. Brown* and its progeny. Then, Justice Gorsuch seems to expand this theory of majorness, citing *Gonzales* to show that the presence of societal controversy should clue judges into the majorness of an agency's ruling.[127] This idea, in effect, allows controversies

[124] The five indicia of majorness include political controversy, economic significance, federalism, nondelegation, and agency mismatch. Because the last three have already been fleshed out in Part III.C.1-C.2, the discussion here focuses on the first two indicia.
[125] *City of Chicago v. Morales*, 527 U.S. 41, 49-50 (1999).
[126] West Virginia v. EPA, *supra* note 5 at 743.
[127] *Id.*

generated by an increasingly partisan and volatile political landscape to determine when courts stray from normative statutory interpretation.[128] If one party achieves its goals through the Legislature or Executive, the opposing party need not worry, so long as it can generate sufficient controversy. This provides antidemocratic results, as the Executive Branch is barred from using regulation to "end an earnest and profound debate" and legislative inaction is interpreted as opposition to the challenged policy.[129]

Furthermore, the issue of political controversy allows for judicial policy-making. A judge's interpretation of what is sufficiently controversial turns on their political values and worldview, which often closely align with the party that appointed them.[130] This results in an inconsistent adjudication of law, in which an individual judge's political ideology, rather than objective modes of statutory interpretation like textualism, forms the basis for their rulings.[131]

Closely related to the issue of political controversy is that of economic significance. Both the majority opinion and Justice Gorsuch's concurrence take issue with the hefty cost associated with the CPP.[132] For the conservative Justices, the fact that the CPP would result in industries shelling out billions of dollars in fines and compliance costs meant that it was major and required clear congressional authorization.[133] This economic analysis is even more ripe for judicial policymaking when compared to the political controversy analysis. A policy does not need to result in the upending of entire industries to be considered economically significant, although that was a factually incorrect charge made against the EPA. Rather, it

[128] Deacon and Litman, *supra* note 4 at 1051–1052.
[129] *Id.* at 1060; West Virginia v. EPA, *supra* note 5 at 743.
[130] Deacon and Litman, *supra* note 4 at 1065.
[131] *Id.* at 1069.
[132] West Virginia v. EPA, *supra* note 5 at 715, 744.
[133] *Id*.

must be deemed too expensive in the eyes of the presiding jurist.

The economic analysis reeks of judicial policymaking, as it asks whether the economic impact is too significant in relation to the issue in question. This leads to politically motivated, or at least politically informed, weighing of economic factors. Indeed, the conservative Justices' hostility towards the CPP was based on its potential to raise the price of production and home energy, both of which are GOP talking points against the shift from nonrenewable to renewable energy.[134] To be sure, the Justices did not mention the price associated with *inaction*, which in *West Virginia* would likely outweigh the costs of enforcement.[135] No matter which way the analysis is sliced, any determination of majorness that asks for the price tag inevitably results in legislating from the bench, as it requires a jurist to choose between competing values and costs associated with a given policy. This is undeniably a policy determination, and it asks unelected judges to impress their own idiosyncratic economic views upon an electorate that cannot hold them accountable.

Notwithstanding the MQD's opening to judicial policymaking, the conservatives on the Court understand themselves to be issuing legal, rather than policy, decisions. This argument should be taken seriously. To be fair, in almost all cases before the Court, the line between legal and political decisions is hazy. However, the problem of *West Virginia* and the MQD is that the Court reaches legal conclusions—e.g., that Congress did not or could not delegate authority to a given

[134] West Virginia v. EPA, *supra* note 5 at 714; Lisa Friedman, *A Republican 2024 Climate Strategy: More Drilling, Less Clean Energy*, The New York Times, Aug. 4, 2023; Brian Kennedy Tyson Cary Funk and Alec, *What Americans Think about an Energy Transition from Fossil Fuels to Renewables*, Pew Research Center (Jun. 28, 2023).

[135] Solomon Hsiang et al., *Estimating Economic Damage from Climate Change in the United States*, 356 Science 1362 (2017); Adam B. Smith, *U.S. Billion-Dollar Weather and Climate Disasters, 1980 - Present (NCEI Accession 0209268)*, (2020).

agency—based on policy preferences—e.g., a policy is too expensive, controversial, and the like. The only way to justify such conclusions is by endorsing the anti-*Chevron* view that the Judiciary is the exclusive, rather than ultimate, interpreter of statutes.

IV.D *The Canary Dies*

The first three articles of the Constitution lay out the separation of powers. The Legislature makes the laws, the Executive enforces the laws, and the Judiciary interprets the laws. There are, however, nuances to this basic understanding. Of relevance here is *Chevron*'s view that statutory enforcement requires at least some degree of Executive interpretation of vague statutory language. As discussed in Part III.C.2, Justice Gorsuch understands the MQD to protect against nondelegation issues by forbidding the Executive from citing ambiguous statutory language to fill in major policy gaps. For Justice Gorsuch, any ruling made pursuant to ambiguous statutory language that results in policies affecting more than day-to-day operations would constitute a forbidden exercise of the Executive's enforcement power. While it remains unclear whether all of the conservative Justices are prepared to join Justice Gorsuch in the most extreme application of that anti-regulatory posture, endorsing the Justice's reconceptualization of separation of powers in *NFIB v. OSHA* is the only way for the conservatives on the Court to coherently support the conclusions of *West Virginia* and eventually *Loper Bright*.[136]

[136] This article focuses on Justice Gorsuch's framework of the MQD because it appears to be the dominating conceptualization. However, it remains worth noting that not all conservative Justices agree that the MQD functions as a clear statement rule. Indeed, Justice Barrett understands the MQD to support ordinary principles of communication. As Cass Sunstein writes, for Justice Barrett, "the MQD is relevant to what the best interpretation is, but if Congress is best understood to have said 'actually I meant that sort of [major policy],' or perhaps better, 'I meant the sort of [major policy] that the relevant agency deemed' appropriate, then the fact

As mentioned in Part III.C.2, the MQD renders the *Chevron* doctrine incompatible with principles of separation of powers. It does so by undermining *Chevron*'s basic legal fiction that statutory ambiguities delegate regulatory authority to agencies who define vague terms to determine the scope of their regulatory power. The Court's framework in the MQD cases stipulates that only clear congressional authorization can be understood to grant agencies expansive powers.[137] Taken to its most extreme end, this understanding renders Executive interpretations of ambiguous text antithetical to the entire federal project, and prevents administrative agencies from using their subject-matter expertise to fill in policy gaps left by Congress.

The Court's framework further turns *Chevron*'s version of separation of powers on its head. First, it asserts that Congress cannot divest itself of its legislative powers by telling an agency to adopt what the agency deems to be, for example, the "best," most "economically feasible," or "safest" policy.[138] Instead, Congress must articulate policy prescriptions with an impractical level of specificity so that agencies know exactly what Congress understands to be the "best," most "economically feasible," or "safest" policy. This framework has the deregulatory effect of kicking important issues to a Congress that has often purposefully declined to determine exactly how issues should be regulated.[139]

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that a major question is involved is neither her nor there." *see* Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 Fla. Law Rev. 251 (2024).

[137] West Virginia v. EPA, *supra* note 5 at 722.

[138] Indeed, in *West Virginia*, the CPP was promulgated pursuant to the EPA's interpretation of the ambiguous statutory phrase "best system of emissions reduction."

[139] McGarity, *supra* note 65 at 37 ("it is beyond naïve to suggest that allowing federal courts to strike down consequential agency actions taken under fresh interpretations of old statutes will cause Congress to suddenly spring into action and refresh those statutes or write new statutes to address newly emerging problems.").

While purporting to give the electorate a chance to decide how it is regulated, this anti-*Chevron* version of the balance of powers undemocratically dispossesses the Executive of much of its duty to "take care that the laws be faithfully executed."[140] It does so by limiting the Executive Branch's ability to act on issues where Congress's intent is not explicitly clear but can be reasonably gleaned from the text of the statute. This limitation undermines the Executive's duty to execute laws by restricting its ability to interpret and apply statutory provisions in light of new circumstances, advancing science, and novel policy needs.[141] Perhaps most problematic for *Chevron*'s version of separation of powers is that the Executive cannot resolve statutory ambiguities when they inevitably exist.[142] Rather, as Chief Justice Roberts wrote in *Loper Bright*, it is the exclusive role of the Judiciary to determine the "single, best meaning" of a statute.[143] This means judges, who are not experts in much beyond law, decide what is the one "best," most "economically feasible," or "safest" policy.[144]

This is a maximalist judicial power grab that justifies legislating from the bench by claiming that the Court's legal expertise legitimizes its exclusive authority "over every open issue – no matter how expertise-driven or policy-laden – involving the meaning of regulatory law."[145] By anointing itself as the exclusive, rather than ultimate, interpreter of statutes, the Supreme Court rejects any need for agency deference, rendering *Chevron* unworkable, contrary to the separation of powers, and in need of overturning.

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[140] U.S. Const. art. 2, § 3, cl. 5.
[141] McGarity, *supra* note 65 at 36.
[142] West Virginia v. EPA, *supra* note 5 at 740; Sunstein, *supra* note 102 at 323.
[143] Loper Bright Enterprises v. Raimondo, *supra* note 6 at 22.
[144] *Id.* at 17–18 ("when the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA, is as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits.").
[145] *Id.* at 3 (Kagan, J., dissenting).

V. Conclusion

Over the past twenty years, the Supreme Court has transformed the Major Questions Doctrine from a rarely used tool of statutory interpretation into a rigid clear statement rule, weakly grounded in the Constitution. In doing so, the Court undermined the foundational principles of *Chevron v. NRDC*. Most notably, the MQD cases reveal how the Court disregarded *Chevron*'s vision of the separation of powers and the appropriate disposition of ambiguous statutory text. As these two doctrines sat on increasingly diametrically opposed ends, the Court's desire to constrain administrative powers left overruling *Chevron* as the only logical conclusion.

This outcome was solidified with Justice Gorsuch's reconceptualization of the separation of powers in *OSHA v. NFIB* and the Court's endorsement of that approach in *West Virginia v. EPA*. After *West Virginia*, so little remained of *Chevron* deference that its overruling was essentially a formality. To be sure, the seemingly natural progression of MQD cases to *Chevron*'s demise should not be mistaken as validation of the Court's approach. Rather, it highlights the Roberts Court's troubling approach to precedent. As Justice Kagan and legal commentators have observed, the Court often erodes important precedents by selectively ignoring when they should be applied, then calling the original decision into question.[146] This cycle continues until the Court constructs enough self-justified reasoning to formally overrule the precedent. The MQD cases exemplify this manipulative approach to *stare decisis*, undermining the stability of bedrock legal principles.

The Court has attempted to frame its manipulation of precedent and *stare decisis* as a long overdue defense of its constitutional role, claiming in *Loper Bright Enterprises v. Raimondo* that overruling *Chevron* safeguards distinctly

[146] *Id.*; Richard L. Hasen, *The Chief Justice's Long Game*, The New York Times, June 25, 2023.

"judicial" skills like statutory interpretation. Chief Justice Roberts, in particular, has argued that this is simply the Court "saying what the law is."[147] As this article makes clear, this justification is a smokescreen. The MQD cases — particularly Justice Gorsuch's politics-laden definition of what constitutes a "major question" — reveal the Court's repeated forays into policymaking. By deciding which issues qualify as "major" and dictating their resolution, the Court encroaches on policymaking authority that belongs to the Legislative and Executive Branches.

Now, without the judicial guardrail that was *Chevron*, unelected judges are empowered to impose upon the electorate their subjective views on matters of vast political and economic importance. This invites judicial activism, where administrative policies become increasingly susceptible to arbitrary and politically motivated interference. This new era of statutory interpretation threatens to destabilize critical regulatory efforts, with potentially disastrous consequences for governance, environmental protection, and the public good.

[147] Loper Bright Enterprises v. Raimondo, *supra* note 6 at 7.

Second to One: Walking in the Shoes of a Giant

Noah Levy[1]

This book review of John Adams by David McCullough situates the reader in President Adams' tumultuous position during the American Revolution. In the spirit of the law, the article utilizes his legal milestones to reveal the inherent risk in his actions and the rewards of living by a cause.

The Time

Boston is crumbling, and you are fleeing your home as a penniless refugee. Rewind: what just happened? While it may be out of fashion in the twenty-first century, imagine being a proud colonial British farmer in the 18th century. The sunrise is a signal to pick up a plow or force someone else to, depending on local values. When the yield is plentiful, mighty British trade routes are convenient to export surpluses. Most goods are English and support "the good life." There is a scuffle in Boston, and the royal taxes become increasingly pervasive. The situation escalates, and suddenly, your fellow countrymen are declaring independence. Which side do you choose?

In retrospect, it is easy to declare allegiance to the winners, but it would have been a dangerous decision in the historical milieu. Britain was the world's major superpower, with the most powerful army, navy, and commerce network. Rebelling would put one's life and livelihood at catastrophic risk. Playing it safe by remaining loyal to the Crown would result in being among the thousands who fled in haste.[2] Through riveting storytelling, David McCollough, the author of *John Adams,* illustrates that those who risked treason for liberty were the unlikely victors.

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[1] Brandeis University, Class of 2025, *Brandeis University Law Journa*l, Editor-in-Chief.

[2] David McCullough, John Adams 76 (2001).

The Man

John Adams faced a far more arduous decision than many of his countrymen. Put yourself in his shoes, coming from a patrilineage of New England farmers with a prestigious maternal heritage.[3] The family works hard to put food on the table, taking advantage of vast land holdings.[4] Your father is a deacon who recognizes your potential to follow in his footsteps.[5] Breaking the family's long-standing maxim against selling land, he parts with ten of his seventy-five acres to send you to Harvard.[6] You toil in books while others labor in the soil. While not exceedingly rich, the harvest provides a life of relative comfort.

Thinking you "would make a better lawyer than preacher" leads to employment as a schoolmaster after graduation to save up for a legal apprenticeship.[7] The work is exhausting and builds on a preexisting yearning for more prestige. Sociological research shows that periods of major societal upheaval lend to excellence.[8] Later on, arguing as Vice President that President Washington should be referred to as "his excellency" may be a tacit early recognition of the time's significance. There lies a desire to seal the prestige of the position in perpetuity. While ambition is externally viewed as vain, a fire burns within.

Two years of legal training culminates in admission to the Massachusetts Bar. A cascade of success emerges, including moving your law office from Braintree to Boston, beginning to acquire land, and becoming "Boston's busiest attorney."[9] Many newly minted law school graduates say they'll put in their time with "white shoe" law and move on to

[3] *Id.* at 30.
[4] *Id.* at 32.
[5] *Id.* at 34.
[6] *Id.* at 35.
[7] *Id.* at 37.
[8] Malcolm Gladwell, Outliers: The Story of Success, 60 (2008).
[9] McCullough, *supra* note 2 at 63.

other work. You embody this modern ideal, yet you refuse to forgo the time's iconic metal-clasped, black colonial shoes, appearing before the "superior court… in more than two hundred… cases" in a single year.

Your public profile grows, serving as Braintree's surveyor and selectman. Then, early in a soon-to-be storied career, a crossroads emerges. A dear friend, Jonathan Sewall, shares "an offer you cannot refuse" to lead the "office of advocate general in the Court of Admiralty," a plush royal position and a massive career advancement.[10] The thirst for prominence has never been closer to being satisfied. Yet, in the face of the Stamp Act, you begin a legal movement for national independence instead, halting the prospect of immediate ascendancy. You campaign with the historic phrase, "no taxation without representation," building out ironclad revolutionary ideals.[11] You have "no difficulty saying no" to Sewall.[12] Having everything to lose, you inextricably tie your fate to a budding nation. Achieving the coveted societal status of a landowner warrants the conviction of expanding liberty to your countrymen through war.

Soon after choosing a side, an opportunity arises to exercise your values. The people of Massachusetts are outraged at the events of the Boston Massacre. No lawyer will take the British soldier's case until the one and only John Adams Esq. rises to the occasion. This choice leads to "public scorn… painful in the extreme."[13] Being extremely self-conscious and loathing criticism, the negative publicity scars your ego, which is a surprisingly grounding experience. Nevertheless, the "principle" that "no man in a free country should be denied the right to counsel" trumps all personal considerations. Unknowingly, this will aid political ambitions later.

[10] *Id.* at 64.
[11] *Id.* at 61.
[12] *Id.* at 64.
[13] *Id.* at 66.

The Government

While some have the initial instinct to take up arms or aimlessly bash the present circumstances, you take a more calculated path, detailed in various publications. The instrumental ideas you authored in *Thoughts on Government* recognize that the "form of government which communicates… happiness… to the greatest number of persons… is the best."[14] The subject is a government with three branches: the executive, legislative, and judiciary. Each should be independent to serve as a check on the others. In the face of war, there is a release valve called "militia law," where the executive takes the reins of the state to straighten out conflict.[15] You pride yourself in solutions, so deride Thomas Paine's *Common Sense*, which identifies a problem without proposing an adequate fix. These seminal works, endowed with legal prowess, will constantly inform your activism.

Congress is indecisive when debating independence. Some prefer a semi-autonomous status, others sovereign freedom.[16] You leverage your oratorical skills to keenly apply procedural rules and ensure the effectiveness of the debates.[17] The first attempt at a declaration failed, leaving two more weeks for negotiations. You draw on your lawyering days to whip together a unanimous final vote.[18]

Authoring the *Declaration of Independence*'s preamble is an honor. Modern readers can see that it alone can serve the document's purpose. The document explains that government legitimacy lies upon the consent of the governed to provide the "unalienable rights" to "life, liberty, and the pursuit of happiness."[19] Since the British Crown was "destructive towards

[14] John Adams, *Thoughts on Government*, 1 (1776), http://founders.archives.gov/documents/Adams/06-04-02-0026-0004 (last visited Jan 2, 2025).
[15] *Id.* at 2.
[16] McCullough, *supra* note 2 at 126.
[17] *Id.* at 123.
[18] *Id.* at 129.
[19] John Adams, *Preamble to the Declaration of Independence*, (1776).

these ends[,] it is the Right of the People… to abolish it… and to institute [a] new Government." The circumstances in the colonies were "reduced[ed to] despotism," and it was the "duty" of Americans to "throw off such government."

As if signing the document is not a sufficient mortal risk, you double down by championing it with vigor. Leading up to the vote, you defended it in a speech that Thomas Jefferson describes as having "a power of thought and expression that moved us from our seats."[20] While unbeknownst at the time, McCullough will say it was "the most powerful and important speech heard in the Congress since it convened, and the greatest of [your] life." Later, the British will write a list of founding fathers to pardon in the case of reunification. "Adams" is absent, corroborating the risk inherent in these choices.[21]

The Statesman

The precarious global circumstances make it abundantly clear that America needs global support, so you become its top statesman, liaising between France, Britain, and the Netherlands.[22] A vital duty is to negotiate terms for peace with Britain, defense from France, and financing from the Dutch. The Treaty of Paris cements American independence, defense from France provides naval armaments in the war, Dutch loans finance the War of Independence, and the correspondence you spearhead with France leads to the conditions necessary for Jefferson's Louisiana Purchase.[23] Your spoken legal eloquence serves your pursuit of liberating America.

The U.S. Constitution is modeled after the values you enshrined in authoring Massachusetts', which will become "the

[20] McCullough, *supra* note 2 at 127.
[21] *Id.* at 158.
[22] *Id.* at 384.
[23] *Id.* at 586.

oldest functioning written constitution in the world."[24] The constitutional role of the vice president comes easily.[25] You dutifully undertake your job and go above and beyond to preside over all the Senate's sessions.

As president, the law holds the fledgling republic together. With the nearing prospect of war with France, your long-term ambition of establishing a Navy to maintain the borders and reactionary measures of the Alien and Sedition Acts attempt to maintain unity in tumultuous times.[26] The Navy is one of the most vital institutions for America's independence. It critically aids Madison's defense of the shore during the War of 1812. Though initially a critic of the branch, Jefferson will come to admit his mistake in judgment in personal correspondence.[27] The Alien and Sedition Acts neglect the First Amendment, acutely policing speech. The administration does not prosecute anyone under the Alien Act but does police the Sedition Act by imprisoning Republicans who have slandered you. You judge these actions to be necessary as a temporary measure during times of war.[28] While your heart may be in the right place to promote unity in a divided time, history will prove this measure wrong. The legacy of this mistake will perpetually cast a dark shadow over the period in the history books.

As the nation's second presidency is coming to a close and the government is becoming increasingly partisan, it seems a fruitful time to bolster the courts. You nominate justices that will be called the "midnight judges" despite being confirmed more than a week before leaving office.[29] If you lived until the twenty-first century, you could take this historical inaccuracy up with its chief propagator, Lin-Manuel Miranda. Yet, among

[24] *Id.* at 225.
[25] *Id.* at 434.
[26] *Id.* at 499, 504.
[27] *Id.* at 606.
[28] *Id.* at 505–506.
[29] *Id.* at 563.

the judges is Justice John Marshall, who will become the most celebrated justice to have served on the Supreme Court.[30] Along with these appointments, you create six more circuit courts to protect against the despotism of unfettered power, as strengthening the courts by any means is among your central values. Nonetheless, these courts will not survive Jefferson's impending presidency.[31]

You believe parties are destructive to the government's functioning, as factions definitionally cause more, not less, disagreement.[32] This leads to the maintenance of Washington's cabinet and the consideration of appointments void of partisan loyalties.[33] At the cost of mental well-being, you endure the slander and subversion of the cabinet to sustain the people's best interests.

The Legacy

You question your self-worth on account of criticism from all angles yet stay wedded to your ideals. You are open-minded but remain resolute to acknowledge when you are right. When the odds are stacked against you, you double down. Time will count billions who ride the tide, but you break the current. Your project will become a force for good that lifts billions from poverty, serves as a model for governance, and flourishes for 248 years and counting. You could have been on that boat to London and reconstituted a law practice abroad. Watching your city recede into the horizon would have hurt, but the feelings would have been temporary. Instead, you will not give up on your freedom without a fight and will secure a seat in the annals of history for taking the road never traveled.

[30] *Id.* at 560.
[31] *Id.* at 577.
[32] *Id.* at 422.
[33] *Id.* at 518.

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

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[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.

State Responsibility for State Sponsors of Terror

Koby Gottlieb[1]

This article explores the international legal obligations of states to cease trading with state sponsors of terrorism, focusing on Article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. Using the principles of customary international law, including the prohibition on the use of force and non-intervention, this article evaluates state accountability for aiding terrorism as applied to China. The paper asserts that international trade with state sponsors of terrorism, such as China's trade with Iran, constitutes a breach of international law.

Roadmap

This paper looks at the implications for Iran's trading partners, particularly China, in light of Iran's support for terrorism.[2] It is important first to establish the theoretical framework underpinning this argument by analyzing the mens rea and actus rea elements of state responsibility. Throughout, the paper will apply relevant aspects of the elements of state responsibility to both Iran and China while also exploring international legal concepts on the use of force, non-intervention, and terrorism. In doing so, it will become clear that China's trade with Iran is illegal under international law.

Background

The Islamic Revolutionary Guards Corps (IRGC) is a terrorist organization that supports other terrorist organizations, including Hezbollah, the Houthis, and various additional

[1] Brandeis University, Class of 2026, *Brandeis University Law Journa*l, Copy Editor.

[2] Nader Uskowi, Temperature Rising: Iran's Revolutionary Guards and Wars in the Middle East xiv–xvi (2019).

militias.[3] The Iranian Office of the Supreme Leader controls and aids the IRGC, including subsidiary groups within it.[4] China was one of the largest importers of Iranian goods compared to other countries in 2022, substantially contributing to the Iranian economy.[5] Since the IRGC and the Office of the Supreme Leader control over five hundred businesses, accounting for almost half of the Iranian economy, China's contributions to the Iranian economy undoubtedly assist the IRGC.[6]

Hezbollah causes significant human casualties to civilians and considerable destruction of property across the world. One notable case is the attack on a Jewish community center in Argentina in 1994 that killed eighty-five people, wounded three hundred, and leveled the recreation center.[7] The Inter-American Court of Human Rights — a regional human rights-centered court represented by judges from across the Western Hemisphere — ruled in January 2024 that Hezbollah committed the attack with support from Iran; Iran is also likely to have ordered the attack.[8] Notably, the Court held that this attack was an act of terrorism, likely due to civilians being the target of this attack.[9]

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[3] *Id.*

[4] *See generally* AUGUSTUS R. NORTON, HEZBOLLAH: A SHORT HISTORY (New paperback edition ed. 2014); TREVOR JOHNSTON ET AL., *Could the Houthis Be the Next Hizballah? Iranian Proxy Development in Yemen and the Future of the Houthi Movement*, 51–71 (2020).

[5] World Integrated Trade Solution, *Iran, Islamic Rep. Trade Balance, Exports and Imports by Country 2022*, (2022).

[6] USKOWI *Supra* note 2 at xiv–xvi.

[7] Memoria Activa Vs. Argentina, 43 (2024).

[8] Decisions by the Court are binding on states that accept the American Convention on Human Rights as binding. See American Convention on Human Rights, 33, 61-62 (1969).

[9] Memoria Activa Vs. Argentina, *supra* note 6 at 1; Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT. LAW 231, 233–234, 242 (1982).

State Responsibility

Since 1955, the International Law Commission (ILC), a group of thirty-four individuals elected by the United Nations General Assembly (UNGA), has developed the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, determining the limits of state responsibility in international law.[10] The Draft Articles, especially Article 16, serve as the backbone for this paper.[11]

Article 16 concerns states aiding or assisting other states in committing internationally illegal acts.[12] Since there is not a substantial contextual difference between "aiding" and "assisting," these terms will be used interchangeably in line with the United Kingdom's opinion.[13] The Commentary sets forth three conditions that limit the scope of responsibility of states in aiding or assisting:

> First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.[14]

There is both a mens rea element and an actus reus element. The first condition and part of the second condition — "the aid or… of that act" — touch on the mens rea element,

[10] James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 The American Journal of International Law 874, 874 (2002); Stephen C. McCaffrey, *The Thirty-Seventh Session of the International Law Commission*, 80 American Journal of International Law 185, 185 (1986).

[11] United Nations, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 66 (2001).

[12] *Id.*

[13] State Responsibility – Comments and Observations Received from Governments, 53rd Session, 52 (2001).

[14] United Nations, *supra* note 11 at 66.

while part of the second condition — "must actually do so" — and the third condition touch on the actus reus element. As shown below, China meets each of these conditions for state responsibility.

The *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnian Genocide Case)* further elaborates on the case law surrounding state responsibility. The *Bosnian Genocide Case* was a case in the International Court of Justice (ICJ) that determined that the Bosnian Serb armed forces perpetrated genocide in the town of Srebrenica, Bosnia and Herzegovina, in July 1995.[15] Decisions by the ICJ reflect international law.[16] In this case, the ICJ regards Article 16 as customary international law which is binding, according to the ICJ Statute.[17] The ICJ does not specifically regard the attached commentaries to Article 16 as part of the canon of customary law, but they may still be a source of customary law.

Furthermore, the ICJ's Statute recognizes "judicial decisions and teachings of the most highly qualified publicists" as a source of customary law.[18] In 2001, the final presentation of the Draft Articles included commentaries by numerous respected international lawyers.[19] These include Sir Ian Brownlie, James Crawford, and John Dugard — some of the leading international lawyers in scholarship and practice.[20]

[15] Vojin Dimitrijević & Marko Milanović, *The Strange Story of the Bosnian* Genocide *Case*, 21 Leiden Journal of International Law 65, 65 (2008).
[16] Alain Pellet, Decisions of the ICJ as Sources of International Law? 56–57 (2018), http://crde.unitelmasapienza.it/it/pubblicazioni/gmls-2018 (last visited Jan 20, 2025).
[17] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice 420 (2007); Statute of the International Court of Justice, 38(b).
[18] *Id.* at 38(1)d.
[19] Summary Records of the First Part of the Fifty-Third Session, 1 (2001).
[20] Philippe Sands, *Sir Ian Brownlie Obituary*, The Guardian, Jan. 11, 2010; Philippe Sands, *James Crawford Obituary*, The Guardian, Jun. 13, 2021; Curriculum Vitae and Publications of John Dugard, 20 Leiden Journal of International Law 983 (2007).

Thus, these individuals fit the requirement of "most highly qualified publicists," and as such, the Commentary to the Draft Articles carries an important weight in determining international law. Crawford suggests reading the Draft Articles with the Commentary and even the preparatory work of the ILC.[21] For this article, the first important part of the Draft Articles is the mens rea element of Article 16.

The Mens Rea Element

In the *Bosnian Genocide Case,* the ICJ determined that for a state's assistance of another state to constitute wrongdoing, the assisting state must do so "in full awareness that the aid supplied would be used to commit" a crime.[22] The assisting state must also be aware of the "specific intent" of the perpetrating state.[23] The International Criminal Tribunal for Rwanda was established by the United Nations Security Council (UNSC) in 1994 to prosecute those responsible for genocide in Rwanda.[24] International legal terms used by the Tribunal clarify the meaning of the same terms because, according to the ICJ Statute, Tribunals help interpret international law.[25] The Tribunal ruled that "specific intent" requires that the perpetrator of a crime intended the result of the crime.[26] The ICJ in the *Bosnian Genocide Case* determined that states must have "at the least" this knowledge of intent, suggesting that the claim of responsibility necessitates some knowledge.[27]

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[21] James Crawford, State Responsibility: The General Part 87 (2013).
[22] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice 423 (2007).
[23] *Id.* at 421.
[24] Resolution 955 Establishment of an International Tribunal and adoption of the Statute of the Tribunal, (1994).
[25] Statute of the International Court of Justice, *supra* note 17 at 38(1)d.
[26] The Prosecutor Versus Georges Anderson Nderubumwe Rutaganda, 59 (1999).
[27] Georg Nolte & Helmut Philipp Aust, *Equivocal Helpers—Complicit States, Mixed Messages and International Law*, 58 ICLQ 1, 14 (2009).

Nevertheless, states do not need complete certainty; near-certain knowledge that assistance provided to one state will perpetuate a crime is sufficient for the assisting state to be responsible under Article 16.[28] Professor John Quigley, a scholar of international law, confirms and further explains this idea in the *European Journal of International Law*.[29] He regards the United States' intervention in Lebanon in 1958 as unlawful and Germany as complicit because Germany intended to assist the United States by sending American airplanes to Lebanon.[30] While Germany was not *entirely* certain that the United States would use these airplanes unlawfully, they were "practically certain" that the United States would use these airplanes unlawfully.[31] The "practically certain" designation insinuates that while Germany was not aware of the United States' "specific intent," they still had significant knowledge of the United States' intentions.

Since the Inter-American Court of Human Rights has addressed Iran's ties to Hezbollah, when applying the above principles to China, it is reasonable to conclude that China is aware of this ruling and its implications for trading with a state sponsor of terror.[32] The challenge is determining whether China knows that the money it uses to buy Iranian goods will go to support terror. Researchers, journalists, and government institutions have all confirmed the IRGC's hegemony over the Iranian economy by controlling about half of the entire

[28] CRAWFORD, *supra* note 21 at 408.
[29] John Quigley, *Karim Khan's Dubious Characterization of the Gaza Hostilities*, EUROPEAN JOURNAL OF INTERNATIONAL LAW: TALK! (May 28, 2024).
[30] The status of the US intervention is unrelated to the purpose of this paper.
[31] J. Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRITISH YEARBOOK OF INTERNATIONAL LAW 77, 112–113 (1987).
[32] Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUMAN RIGHTS QUARTERLY 439, 439 (1990).

economy.[33] The wide range of sources confirming this fact reinforces the idea that China knows about the IRGC's control over the Iranian economy. Accordingly, it is "practically certain" that China knows a significant portion of its trade with Iran finances terrorism around the world.

Another example to illustrate the standard for the necessary level of knowledge to hold an assisting state responsible is the *Corfu Channel Case,* where the ICJ issued a ruling after several British ships were damaged and several civilians were injured in 1946. This incident occurred after the British hit mines in Albanian territorial waters.[34] Despite publicly saying it did not know about mines in its territorial waters, Albania "must have known" about this unlawful behavior.[35] The Court considers knowledge as a state's ability to recognize unlawful activities, making it responsible even if it publicly denies awareness. Since, as mentioned earlier, it is "practically certain" that China knows about its unlawful trade with Iran, China cannot avoid responsibility by denying awareness.

There are two additional considerations regarding the legal standards of due diligence and willful ignorance of the assisting state. Article 16 and the Commentaries do not refer to any duty of due diligence to investigate whether assistance might be used unlawfully. In addition, they do not mention how to treat an assisting state that is willfully ignorant. Instead, they stay neutral on both points.[36] The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, in

[33] Uskowi, *supra* note 2 at xvi; Julian Borger & Robert Tait, *The Financial Power of the Revolutionary Guards*, The Guardian, Feb. 15, 2010; Treasury Targets Billion Dollar Foundations Controlled by Iran's Supreme Leader, (2021).
[34] Dafina Buçaj, *The Obligation to Prevent Transboundary Cyber Harm: Expand the Regulatory Regime or Continue Deflecting Responsibility*, 54 The George Washington International Law Review 219, 252 (2023).
[35] The Corfu Channel Case, International Court of Justice 19 (1949).
[36] Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, 14–15.

interpreting the "had reason to know" standard of Article 7(3) of the Statute of the International Tribunal, provides further insight into the principles of due diligence and willful ignorance. [37] The Tribunal indicted Tihomir Blaškić for alleged violations of international law against Bosnian Muslims between May 1992 and January 1994. After being found guilty, Blaškić appealed.[38] The Statute of the ICJ regards tribunals as a source of international law.[39] The Appeals Chamber ruled "that the mental [mens rea] element 'had reason to know' as articulated in the Statute, does not automatically imply a duty to obtain information… [but] responsibility can be imposed for *deliberately* [sic] refraining from finding out but not for negligently failing to find out."[40] This decision indicates that under international law, states do not have an active duty to conduct due diligence on other countries, but if there is publicly recognized evidence and the assisting state intentionally ignores it, then the state should be held responsible. So, China does not have a duty of due diligence to investigate the details of how its trade with Iran aids terrorism. However, China cannot claim willful ignorance, especially if there is substantial and public evidence suggesting that Iranian terror benefits from Chinese trade. Since there is substantial public evidence showing China must be "practically certain" that Iranian terror benefits from Chinese trade, China cannot claim willful ignorance.

The Commentary explicitly mentions the need for intent but does not clearly define it. Moreover, the Commentary's use of the words "with a view to facilitate"

[37] Blaskic Case, The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 406 (2004).
[38] Antonio Cassese, The Oxford Companion to International Criminal Justice 610–611 (2009).
[39] Statute of the International Court of Justice, *supra* note 17 at 38(1)d.
[40] Blaskic Case, *supra* note 37 at 406.

suggests that the assisting state must have intent in aiding.[41] Terms used in the Rome Statute can help elucidate the use of these terms in other circumstances, such as the concept of intent here, since the Statute is a document of international law.[42] The Rome Statute of the International Criminal Court (ICC) concerns itself with crimes committed by individuals, as opposed to states.[43] The Rome Statute defines intent as when "in relation to conduct, that person means to engage in the conduct; in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of event." [44] For China to meet the threshold of intent, it must purposefully trade with Iran while either meaning to support terrorism or knowing that trading with Iran will aid Iran's terrorist activities.

The ICC further developed the concept of intent in the *Bemba Case*. In the case, the ICC initially sentenced Jean-Pierre Bemba, a politician in the Democratic Republic of Congo, in 2016 for crimes against humanity and war crimes, but later acquitted him in 2018.[45] The ICC further explains its definition of intent in two ways: first and second degree. The first degree is when an individual acts in a manner with the desire to bring about the elements of the crime. The second degree is when an individual knows that the elements of the crime will almost inevitably arise by the commission or omission of an act, even if there is no desire for the elements of the crime to arise.[46] China's intent is quite easy to prove based

[41] UNITED NATIONS, *supra* note 11 at 66.
[42] Statute of the International Court of Justice, *supra* note 17 at 38(1)d.
[43] The Rome Statute of the International Criminal Court, , *in* THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 593, 595–596 (Kevin Jon Heller & Markus Dubber eds., 2020).
[44] Rome Statute of the International Criminal Court, 30(2) (1998).
[45] The Prosecutor v. Jean-Pierre Bemba Gombo, 1, 752 (2016); The Prosecutor v. Jean-Pierre Bemba Gombo, 196–198 (2018).
[46] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 358–359 (2009).

on the second degree of intent. As explained above, China is "practically certain" that its trade with Iran aids Iran's terror. Regardless of whether China wants to support terror, it still has intent based on the second degree. In summary, China has the requisite level of knowledge, under the mens rea element of Article 16, that its trade with Iran supports terror.

The Actus Reus Element

While the previous section described the mens rea element, this section will evaluate the actus reus element by determining the legality of states aiding terror and ascertaining its universality. First, it is important to establish a definition of terrorism to understand why aid to the IRGC should be ceased immediately. Unfortunately, there is not one clear definition of terrorism under international law.[47] The League of Nations, the UNGA, the Secretary-General of the United Nations (UN), the UNSC, and others have all passed their own, and sometimes contradictory, definitions of terrorism.[48] Due to the variety of definitions, this paper will adopt the view of terrorism espoused by the Special Tribunal for Lebanon. Established by the UNSC in 2007, the Special Tribunal for Lebanon primarily prosecuted those responsible for the assassination of the former Lebanese Prime Minister Rafik Hariri.[49] This definition works best because of the wide-ranging methodology taken by the Appeals Chamber in the Special Tribunal for Lebanon, whereby they consulted international treaties, UN resolutions, and domestic legislative and judicial practices to determine the customary law view of terrorism. The view of terrorism taken by the Special Tribunal has three key elements which must all

[47] Ben Saul, Defining Terrorism in International Law 7 (2008).
[48] Convention for the Prevention and Punishment of Terrorism, (1937); Resolution 49/60 Measures to Eliminate International Terrorism, (1995); Kofi Annan, *Statement to the General Assembly*, (2005); Resolution 1566, (2004).
[49] Jan Erik Wetzel & Yvonne Mitri, *The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country*, 7 Law Pract Int Courts Trib 81, 81–82 (2008).

be fulfilled: "the perpetration of a criminal act;… the intent to spread fear among the population… or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; when the act involved a transnational element."[50] With this definition of terrorism, it is important to further investigate Iran's terrorist actions by looking at the international legal principles of the use of force and non-intervention.

Article 2(4) of the UN Charter expresses the fundamental principle on the use of force in saying: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[51] According to the ILC in 1966, the Charter's view on using force is consistent with customary international law.[52] UNGA Resolution 2625 further clarifies the principle of the use of force. The ICJ recognized this resolution as customary law in the *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua Case)*. This case was brought to the ICJ by Nicaragua after the United States allegedly used military force against Nicaragua. Based on the principle of the use of force, the Court declared that "every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State."[53] The challenge with employing the principle of the use of force is that in the

[50] The Prosecutor v. Ayyash et al., 85 (2011).
[51] United Nations Charter, 2(4) (1945).
[52] United Nations, Yearbook of the International Law Commission 1966, Vol. II 20 (1966).
[53] Case Concerning Military and Paramilitary Activities in and Against Nicaragua, ICJ 191 (1986); Resolution 2625 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, (1970); Thomas J. Pax, *Nicaragua v. United States in the International Court of Justice: Compulsory Jurisdiction or Just Compulsion?*, 8 Boston College International and Comparative Law Review 471, 471 (1985).

Nicaragua Case, the ICJ determined that acts must be "classified as an armed attack rather than as a mere frontier incident" to be forbidden based on this approach.[54] According to legal commentators, an armed attack can refer to the use of force when it causes "serious consequences… human casualties, or considerable destruction of property".[55] This limitation by the Court's ruling means that arming and training terrorist forces violates the principle of the use of force, but simply funding these forces does not. Instead, funding may be a problem under the principle of non-intervention.[56] Only a limited number of acts of aggression are considered armed attacks; the remainder are frontier incidents.[57] The high number of civilian casualties and destruction of property in the attack on the Jewish community center show that Hezbollah's attacks can be considered armed attacks. By organizing, assisting, and participating in these attacks through Hezbollah and the IRGC, Iran violates the use of force principle.

Based on the principle of non-intervention, UNGA Resolution 2625 declares that "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State."[58] The limitation of this principle is that for an entity to violate it, the terrorist activities must be conducted with the intention of bringing about change regarding "matters in which each State is permitted, by the principle of State sovereignty, to decide freely," including "political, economic, social and cultural

[54] Case Concerning Military and Paramilitary Activities in and Against Nicaragua, *supra* note 53 at 195.
[55] YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 193 (Fourth edition ed. 2005).
[56] Case Concerning Military and Paramilitary Activities in and Against Nicaragua, *supra* note 53 at 228.
[57] JOHN H. CURRIE, PUBLIC INTERNATIONAL LAW 504 (2. ed ed. 2008).
[58] Resolution 2625 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, *supra* note 53.

system, and the formulation of foreign policy" by the victim state.[59] Terrorism, according to the Special Tribunal for Lebanon, includes cases where the terrorist organization intends to alter "matters in which a state is permitted to decide freely." Therefore, the non-intervention principle encompasses most acts of support to a terror organization. The principles on the use of force and non-intervention are customary principles that have their ultimate authority in Article 2 of the UN Charter and are thus incumbent on all states.[60]

The recent Houthi attacks on Israel also demonstrate Iran's violation of international law. In December 2024, the Houthis fired rockets targeting Israel for several nights.[61] These attacks may not be considered armed attacks because the Houthi strikes have only killed one Israeli and have only caused limited damage, thereby not fulfilling the criteria of "human casualties."[62] Therefore, these attacks do not necessarily violate the principle of the use of force but could violate the principle of non-intervention. The Houthis are firing these rockets to try to force Israel to end the war in Gaza, a highly political matter.[63] Because the Houthi rebels are using Iranian funds and weapons to interfere with Israeli political matters, Iran has violated the principle of non-intervention by financing the rebels.[64] Since these attacks are ongoing, Iran is currently in violation of this principle.

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[59] Case Concerning Military and Paramilitary Activities in and Against Nicaragua, *supra* note 53 at 205.
[60] United Nations Charter, *supra* note 51 at 2.
[61] Stuart Winer & Emanuel Fabian, *Houthis Fire Missile at Central Israel for 4th Night in Past Week; IDF Intercepts It*, Dec. 25, 2024.
[62] Greg Myre & Daniel Estrin, *Drone Strikes Tel Aviv, Killing One. Houthis Claim Responsibility*, NPR, Jul. 19, 2024; Tia Goldenberg, *Israel Struggles to Deter Escalating Attacks From Yemen's Houthi Rebels as Other Fronts Calm*, AP News, Jan. 3, 2025.
[63] Yemen's Houthis 'will not stop' Red Sea Attacks Until Israel Ends Gaza War, Al Jazeera, Dec. 19, 2023.
[64] Uskowi *Supra* note 2 at xiv–xvi

Acts that violate both the principles of the use of force and non-intervention violate the key elements of terrorism.[65] However, that does not imply that all acts of terrorism necessarily fall under one of either the principles of the use of force or non-intervention. There could be a case where a state only provides funds to a terrorist organization, thereby possibly violating the principle of non-intervention. If the terrorist organization only commits attacks to spread fear and not to effect change concerning "matters in which each State is permitted," then a state aiding terror would not necessarily be committing a crime. Nevertheless, this is not a concern because of the nature of state sponsors of terror who act with the intent to alter the political and security conditions of the victim state. Therefore, state sponsors of terror support terror organizations that have a goal of changing "matters in which each State is permitted."[66]

Conclusion

As demonstrated, trade with Iran violates international law. The only remedy is for states to cease all trade with Iran or violate international law. Another option would be for the UNSC to pass a resolution imposing economic sanctions on Iran, which would be incumbent on all states.[67] Whether or not the UNSC passes a resolution, trade with Iran and other state sponsors of terror remains illegal, requiring all states to cease such activity. Although international law is not enforceable,

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[65] *See* The Prosecutor v. Ayyash et al. *supra* note 50 at 85 "The perpetration of a criminal act;… the intent to spread fear among the population… or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; when the act involved a transnational element"

[66] Magdalena Kirchner, Why States Rebel: Understanding State Sponsorship of Terrorism 239–240 (2016).

[67] Rebecca Barber, *An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions*, 70 ICLQ 343, 346–348 (2021); *See Anne Van Aaken & Betül Simsek, Rewarding in International Law, 115 Am. J. Int. Law 195 (2021).*

states may have a desire to comply with it and, therefore, should cease trade with Iran on their own accord.[68] States must not assist other states in committing internationally unlawful acts. There are both mens rea and actus reus elements to this responsibility. Since support for terrorism is illegal under international law, it is illegal for states to support those who aid terrorist organizations or commit terror attacks themselves. Using China and Iran as a case study, this article demonstrates why all states, including China, must halt trade with Iran due to its support for terrorism.

[68] Anthony D'Amato, *Is International Law Really Law*, 79 Nw. U. L. Rev. 1293, 1293 (1984).

The Sedition Act of 1798 as a Federalist Legal Instrument

Jack Granahan[1]

The Sedition Act of 1798, enacted alongside the other Federalist-proposed Alien and Sedition Acts, stands as the most egregious violation of the First Amendment's Free Speech and Free Press Clauses in American history. This law, passed by a predominantly Federalist Congress and signed into law by President John Adams, criminalized the uttering and publishing of criticism of the federal government.[2] *This paper aims to demonstrate that the Sedition Act constituted more than just a national security measure that the Federalists supported on the grounds of empowering a strong, central government. Rather, as shown by the motives of the law described by Federalist politicians and the biased trial proceedings of those charged under the law, the Sedition Act was a calculated act of legal instrumentalism that sought to empower the Federalists by punishing anti-Federalist dissenters.*

I. Introduction

The American political climate of the late 1790s was defined by ideological conflict: Federalists supported a centralized federal government, while Democratic-Republicans supported a decentralized, agrarian vision.[3] In 1797, Federalist John Adams was inaugurated as president, allowing the Federalists to aggressively pursue their agenda.[4] This included pushing for a war with France in the wake of the XYZ Affair, which saw the French government extort bribes from American diplomats as a prerequisite for negotiation. The fiercely anti-authoritarian Democratic-Republicans, who largely sympathized with the French republican government, opposed

[1] Brandeis University, Class of 2026.

[2] An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790).

[3] Gérard Hugues, *Norms for a Misuse of Authority: the Alien and Sedition Acts*, 74 Rev. Fr. d'Études Am. 93, 95 (1997).

[4] Douglas Bradburn, *A Clamor in the Public Mind: Opposition to the Alien and Sedition Acts*, 65 Wm. & Mary Q. 565 (2008).

this war. As a consequence of this anti-war sentiment and other criticisms of the Adams administration, Adams and the Federalist majority in both houses of Congress sought to reduce anti-Federalist political activity through legislative means.[5]

In the summer of 1798, this effort came to fruition with the implementation of the Alien and Sedition Acts. In addition to three acts that regulated immigration and citizenship law, this collection of legislation concluded with the Sedition Act. Among other provisions, this statute made "writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States" a crime punishable by a fine of up to $2,000 (equivalent to over $51,000 in 2024) and up to two years in prison.[6] This paper argues that the Sedition Act was based on an instrumentalist interpretation of the First Amendment meant to empower the Federalists by suppressing political dissent by the Democratic-Republicans.

Legal instrumentalism refers to the commandeering of specific interpretations and applications of legal texts as "instrument[s] of social change."[7] The Alien and Sedition Acts conform to this practice. The first three parts of the act, which pertain to immigration and naturalization, constitute a clear effort to combat the "French peril" alleged by many Federalists following the XYZ Affair.[8] Meanwhile, the Sedition Act was designed to crack down on Democratic-Republican opposition to, among other policies, the Federalists' march towards a war with France. The Sedition Act and its accompanying interpretation of the First Amendment was used by the Federalists as a legal instrument against the Democratic-Republicans. This use of legal instrumentalism can

[5] *Id.* at 565-566.
[6] An Act, *supra* note 2.
[7] Steven Quevedo, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 Ca. Law Rev. 119, 125 (1985).
[8] Hugues, *supra* note 3 at 95-96.

be illustrated through Federalist attempts to justify the subversion of the Constitution, Democratic-Republican explanations of the law's implications, and the individuals who would be prosecuted for sedition.

II. Sedition and Freedom of Speech

Democratic-Republicans slammed the Sedition Act as a blatant violation of the First Amendment to the Constitution, which states that "Congress shall make no law […] abridging the freedom of speech, or of the press."[9] New York Representative Edward Livingston declared that the Sedition Act was "an abridgement of the liberty of the press, which the Constitution has said shall not be abridged," and that the proper constitutional response to defamatory criticism of the government is "to disprove the fact" rather than "to prosecute the man who makes the charge."[10] In other words, seditious content must be met with correction instead of prosecution.

It was also evident to the Democratic-Republicans even before passage that the Sedition Act was an explicit attempt by the Federalists to clamp down on Democratic-Republican speech and presses. While the law worked its way through Congress, Vice President Thomas Jefferson, an unabashed Democratic-Republican, stated that "the object of [the Sedition Act] is the suppression of the [Democratic-Republican] presses."[11] North Carolina Representative Nathaniel Macon attacked the bill on the House floor, proclaiming that it would "produce more uneasiness, more irritation, than any act which ever passed the Legislature of the Union."[12] Several counties in northern Virginia, a Democratic-Republican stronghold known for its frequent public meetings at which citizens freely

[9] U.S. Const. amend. I.
[10] Wendell Bird, *Criminal Dissent: Prosecutions Under the Alien and Sedition Acts of 1798* (2020).
[11] *Id.* at 18.
[12] Walter Berns, *Freedom of the Press and the Alien and Sedition Laws*, 1970 Sup. Ct. Rev. 109, 121 (1970).

criticized the federal government, issued official resolutions condemning the Sedition Act. Some of these resolutions "mimicked the laudatory petitions of the Federalists and sent their complaints directly to Adams."[13]

Federalists took different stances on the applicability of the First Amendment to the Sedition Act. Many Federalist legal scholars asserted that, due to the importance of the journalistic integrity of newspapers in the revolutionary effort for American independence, government officials were entitled to freedom against "slanderous commentary in the press."[14] Some Federalist judges argued that the Constitution did not apply to wartime legislation and that English common law could be used as a precedent for American law without the First Amendment. This led some to turn towards the lengthy history of English common law statutes prohibiting "seditious libels" and "any dangerous or offensive writings" to preserve, in the words of Sir William Blackstone, "peace and good order, […] government and religion."[15]

Additionally, a common Federalist argument supporting the law postulated that defaming the government during a period of such fierce hostilities with France was akin to aiding the enemy during wartime.[16] Meanwhile, Connecticut Representative Samuel Dana focused primarily on the defamatory nature of seditious speech, arguing that "the liberty of uttering malicious falsehood" does not exist in the Constitution.[17]

These arguments may initially suggest that the impetus for the passage of the Sedition Act was grounded in sensible governance. However, even some arguments posed by supporters of the law challenge this interpretation, as they

[13] Bradburn, *supra* note 4 at 569.
[14] Hugues, *supra* note 3 at 94.
[15] Bird, *supra* note 10 at 42.
[16] Ralph Frasca, *"Treasonable Expressions": James Bell and the Emerging Legal Right to Criticize*, 86 Pa. Hist. 67, 73 (2019).
[17] Bird, *supra* note 10 at 46.

demonstrate that the law was an attempt to suppress Democratic-Republican newspapers. Connecticut Representative John Allen gave the first speech in favor of the Sedition Act while it was still in Congress. He referred to the Democratic-Republicans as "the Jacobins of our country" who sought to use "all the presses in the nation" as a means of overthrowing the federal government, urging the Federalists to "wrest it away from them."[18] Numerous Federalist supporters of the law also referenced President George Washington's 1793 statement that partisan newspapers (particularly those associated with Democratic-Republicans) were "stuffing their papers with scurrility and malignant declamation."[19]

The *Gazette of the United States*, a prominent Federalist newspaper, regularly characterized Democratic-Republican newspapers as "nest[s] of traitors" and "set[s] of revolters to France," calling for those running these newspapers to be prosecuted to the fullest extent of the law.[20] These Federalist condemnations of Democratic-Republican newspapers are indicative of the Sedition Act's purpose as a vehicle for the suppression of the Democratic-Republican press.

III. Common Law Sedition Prosecutions

Even more damning against the Federalists, however, was the political affiliation of the individuals who were charged and prosecuted under the Sedition Act. The accused were all associated with Democratic-Republican publications or were prominent political dissidents who opposed the Adams administration.[21] Before the passage of the Sedition Act, several Democratic-Republican dissidents had been charged with seditious libel under the common law. This followed the aforementioned trend of Federalist judges adhering to Blackstone's common law rather than the Constitution during

[18] *Id.* at 45.
[19] *Id*. at 18.
[20] *Id*. at 33.
[21] Bird, *supra* note 10 at 385.

times of war. The most notable of these common law sedition prosecutions was that of Benjamin Franklin Bache, the grandson of the eponymous founding father, as well as the founder and editor-in-chief of the Philadelphia-based *Aurora General Advertiser*.[22]

After its establishment, the *Aurora* quickly became a prominent dissident newspaper. Vice President Jefferson had previously stated that Bache's newspaper had the potential to become the primary "[Democratic-]Republican vehicle of news established between the seat of government and all it's [sic] parts."[23]A relentless advocate of a free press, Bache criticized attempts by the Federalist-dominated Congress to "muzzle the press" by restricting reports of a physical attack on Vermont representative Matthew Lyon, a Democratic-Republican, by Connecticut representative Roger Griswold, a Federalist.[24] This advocacy on Lyon's behalf made Bache a key target of the Federalist crackdown on Democratic-Republican speech.

One source of Bache's contempt for President Adams came from his continued support of the Jay Treaty, signed in 1795 by President Washington, which strengthened ties between the U.S. and monarchist Great Britain at the expense of relations with republican France. Bache slammed President Adams in the *Aurora* for his support of the treaty, rhetorically asking: "How has [Adams] protected liberty? By writing in favor of monarchy and encouraging the suppression of the right of free opinion. How has he patronized religion? By promoting war."[25] After the *Aurora* repudiated Adams, Bache was charged at the behest of Secretary of State Timothy Pickering, a devout Federalist, with "libeling the President and the Executive Government, in a manner tending to excite sedition and opposition to the laws, by sundry publication and

[22] Frasca, *supra* note 16 at 68.
[23] Bird, *supra* note 10 at 58.
[24] *Id*. at 71.
[25] Frasca, *supra* note 16 at 68.

re-publication."[26] Mere days before his case was set to go to trial, Bache fell victim to Philadelphia's yellow fever epidemic; he died prematurely, denying Federalist judge John Sloss Hobart the ability to try him for speaking out against the Federalist government.[27]

IV. The Lyon Trial

The first individual to be criminally charged under the Sedition Act was Congressman Lyon of Vermont in the summer of 1798.[28] Lyon, an Irish-born immigrant, had previously faced fierce xenophobia from Federalists in Congress on account of his ethnic background, culminating in the cane attack on Lyon by Congressman Griswold.[29] Lyon was also the editor-in-chief of *The Scourge of Aristocracy*, a newspaper intended to promote "the [Democratic-]Republican interest."[30] This put a target on Lyon's back, and in July of 1798, the Federalists found their excuse to charge Lyon with seditious libel.

During this time, *Spooner's Vermont Journal* published a letter written by Lyon that lambasted President Adams for maladministration. This letter was written and sent to the press two weeks before the passage of the Sedition Act, so charging Lyon with seditious libel would arguably violate the constitutional prohibition of *ex post facto* criminal charges (that is, a criminal charge levied against a defendant for actions committed prior to the criminalization of said act).[31] Nevertheless, Lyon was indicted under the Sedition Act in October of 1798. The indictment accused Lyon of attempting to "stir up sedition, and to bring the president and government of the United States into contempt," citing Lyon's statement that

[26] Bird, *supra* note 10 at 67.
[27] Hugues, *supra* note 3 at 97.
[28] Bradburn, *supra* note 4 at 580.
[29] *Id*. at 580.
[30] Bird, *supra* note 10 at 89.
[31] *Id.* at 91.

condemned the President's "continual grasp for power, […] unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice."[32]

Lyon's trial exemplified a kangaroo court. Federalist-influenced Supreme Court associate justice William Paterson presided over the trial, and his conduct was fraught with judicial irregularities. Paterson personally disqualified jurors whom he believed viewed the Sedition Act as an unconstitutional statute, and even instructed the jury to convict Lyon on the grounds that the defendant had admitted to writing the supposedly seditious letter.[33] Paterson's instructions to the jury required them to convict Lyon if it was determined that Lyon's letter portrayed President Adams " odious or contemptible," prohibiting the jury from assessing the validity of Lyon's criticisms.[34] Most glaringly, Paterson specifically invalidated Lyon's defense that the law he was being charged under violated the First Amendment. According to Paterson, the constitutionality of the Sedition Act had already been settled by Congress, and "the guilt consists in the publication" and the publication exclusively.[35] Therefore, it was no surprise when Lyon was found guilty of seditious libel. He was ordered to pay a fine and legal costs totaling $1,060.96 (equivalent to over $27,000 in 2024) and sentenced to four months in prison, with this incarceration to continue until the fine and legal fees were paid.[36]

In November of 1798, Lyon ran for reelection and became the first and only individual to win a congressional election while imprisoned.[37] Lyon was accordingly designated by a Democratic-Republican newspaper from Connecticut as "the first martyr to the cause of liberty, under this law [the

[32] Lyon's Case, 15 F. Cas. 1183, (C.C.D. Vt. 1798).
[33] Hugues, *supra* note 3 at 98.
[34] Lyon's Case, *supra* note 32.
[35] Bird, *supra* note 10 at 94.
[36] *Id*. at 95.
[37] Bradburn, *supra* note 4 at 580.

Sedition Act].”[38] Lyon’s reelection was hailed as a victory for the Democratic-Republican Party, but it was perhaps even more important as a demonstration of backlash against the draconian Sedition Act and the dubiously impartial prosecution of Lyon. From the blatant hatred faced by Lyon for his Irish heritage (coupled with endemic anti-French xenophobia), to the *ex post facto* indictment of Lyon, to Justice Paterson’s politically biased charge of the jury without consideration for Lyon’s argument of constitutionality, the congressman’s show trial was indicative of the Sedition Act’s role as an instrument designed to infringe upon the freedoms of speech and the press held by Democratic-Republicans.

V. The Final Wave of Sedition Prosecutions

Following a lengthy hiatus in enforcing the Sedition Act, a new wave of prosecutions took place between 1799 and 1800, this time focusing almost exclusively on Democratic-Republican newspaper editors. Due to Congressman Lyon’s continued Democratic-Republican advocacy as editor of *The Scourge of Aristocracy*, he would once again be charged during this campaign of indictments, though the charges against him would never be served, as he left Vermont after his retirement from Congress.[39] Another victim of this return of the Sedition Act was Democratic-Republican stalwart Anthony Haswell, the editor-in-chief of the *Vermont Gazette*. Haswell was charged with seditious libel in October of 1799, with his indictment citing his self-published defense of the previously imprisoned Lyon, in which Haswell stated that Lyon was being held “by the oppressive hand of usurped power in a loathsome prison, deprived almost of the right of reason, and suffering all the indignities which can be heaped upon him by a hard-hearted

[38] Bird, *supra* note 10 at 97.
[39] *Id*. at 284-285.

savage."[40] In essence, Haswell described Lyon as a political prisoner of a tyrannical Federalist regime.

In the same publication, Haswell castigated President Adams for supporting the pro-British Jay Treaty, claiming that "the administration publicly notified that Tories, men who had fought against our independence, who had shared in the desolation of our homes, and the abuse of our wives and daughters, were men who were worthy of the confidence of the government."[41] The demonstrably prejudiced Justice Paterson presided over Haswell's trial, refusing to accommodate the time necessary for the defendant to call witnesses and even referring to him as "a seditious libeller of your government, a convict justly suffering the penalty of a mild law" in the presence of the jury.[42] Needless to say, Haswell was found guilty and sentenced to two months in prison and a $200 fine (equivalent to over $5,000 in 2024).

Despite the relatively short length of the sentence, it still took its toll on Haswell; two months of inactivity left the *Vermont Gazette* bankrupt, and nine months after his release from prison, Haswell stated, "I have been reduced to distress, and almost to penury."[43] This was far from an accident. The prosecution of a Democratic-Republican newspaper editor for criticizing a government agent's treatment of an imprisoned congressperson, especially before a judge as politically skewed as Paterson, likely had a specific intended impact: the elimination of that individual as a threat to the Federalist administration in power.

The Federalist strategy of targeting outspoken Democratic-Republican figures continued with the prosecution of Democratic-Republican lawyer Thomas Cooper in Pennsylvania. Cooper had previously fled England due to

[40] United States v. Haswell, 26 F. Cas. 218 (C.C.D. Vt. 1800).
[41] *Id*.
[42] Bird, *supra* note 10 at 280.
[43] *Id*. at 281.

unresolved sedition charges.[44] Cooper's experience with newspaper editing started and ended with a two-month-long stint as an editor for the *Sunbury and Northumberland Gazette*.[45] Still, this was more than enough time for Cooper to find himself in hot water with the Federalists. In a leaflet distributed in Northumberland County, Pennsylvania in November of 1799, Cooper lamented how the Adams administration had left the US "saddled with the expense of a permanent navy" and "threatened [...] with the existence of a standing army," and commented that the nation's credit was "reduced so low as to borrow money at eight percent in time of peace, while the unnecessary violence of official expressions might justly have provoked a war."[46] Arguably the most innocuous statement to result in a criminal charge under the Sedition Act, Cooper's criticism of President Adams was nevertheless deemed libelous enough to have the lawyer indicted. In a trial heard by Supreme Court Associate Justice and staunch Federalist Samuel Chase, Cooper was forbidden from having the appropriate witnesses for his argument subpoenaed, leaving him unable to call any witnesses in his defense.[47] Additionally, Chase told the jury that the criminalization of supposedly seditious press "is necessary to the peace and welfare of this country," ordering the jurors to render a guilty verdict if Cooper had published the pamphlet and did so with the intent to defame (both of which Cooper had admitted to).[48] Cooper was convicted of seditious libel, receiving an unusually harsh sentence of six months in prison and a $400 fine (equivalent to over $10,000 in 2024). This egregious punishment, along with the fierce repudiation of jurors who did not follow his strict procedural guidelines, was

[44] *Id*. at 291-292.
[45] *Id*. at 293.
[46] United States v. Cooper, 25 F. Cas. 631 (C.C.D. Pa. 1800).
[47] Bird, *supra* note 10 at 296.
[48] *Id.* at 298-299.

one of many demonstrations of Justice Chase's explicit Federalist bias–a staple of Sedition Act prosecutions.[49]

The penultimate indictment under the Sedition Act was that of James T. Callender, a prominent Democratic-Republican writer and contributor to the Richmond *Examiner*. In early 1800, Callender published *The Prospect Before Us*, a book in which he wrote that the "reign of Mr. Adams has been one continued tempest of malignant passions," describing the "grand object" of the Adams administration as "to exasperate the rage of contending parties" and "to calumniate and destroy every man who differs from his opinions."[50] Callender had previously drawn criticism from Federalist publications for referring to President Adams as a "hoary headed incendiary" and former President Washington as a "venal poltroon" (a combination of archaic terms describing a coward who is susceptible to corruption and bribery).[51] Consequently, Callender was indicted on seditious libel charges, and once again, presiding Justice Chase issued a warrant for the writer's arrest.[52]

As in previous trials heard by Chase, the defendant was railroaded. Utilizing common law libel standards, Chase charged that Callender could only be acquitted if he proved his condemnation of Adams as an aristocrat and an actor for British interests to be factual. In the judge's words, "You must prove both these points, or you prove nothing."[53] When Callender's attorney attempted to argue that the Sedition Act infringed upon the defendant's First Amendment rights, Chase reportedly said that "it is not competent to the jury to decide on this point."[54] Yet again, a guilty verdict for seditious libel was produced; Callender received a nine-month prison sentence and

[49] United States v. Cooper, *supra* note 46.
[50] United States v. Callender, 25 F. Cas. 239 (C.C.D. Va. 1800).
[51] Berns, *supra* note 12 at 121.
[52] Bird, *supra* note 10 at 306.
[53] United States v. Callender, *supra* note 50.
[54] Bird, *supra* note 10 at 308.

a $200 fine. Following the Democratic-Republican takeover of Congress, Chase would be unsuccessfully impeached in 1804 for showing bias during jury selection and courtroom procedure, even after his repeated instances of prejudiced conduct in seditious libel cases.[55]

VI. Conclusion

In total, thirty-nine individuals, all Democratic-Republicans, were criminally indicted for violating the Sedition Act between 1798 and 1800.[56] These defendants included newspaper editors, members of Congress, and other prominent Democratic-Republican figures. Virtually all of these cases shared common features. The vast majority were presided over by Federalist-appointed judges, often with political biases too severe to overlook. Most of these judges rejected any arguments questioning the constitutionality of the law itself. Many were also arguably tainted by xenophobic sentiments, be they against the Irish, the French, or other groups. It is difficult to ignore the evidence that the Sedition Act was a legal instrument of the Federalists, with the specific goal of using either a misinterpretation or an outright rejection of the First Amendment to disenfranchise their political opponents.

Yet, the repugnance of the Sedition Act still succeeded as an exercise of what happens when the unalienable is alienated; that is, when an erroneous interpretation of constitutional rights is weaponized by a political faction as a legal tool. Following the historic Democratic-Republican victory in the 1800 presidential and congressional elections, the federal government allowed the Sedition Act to expire.[57] This raises the question: did the Democratic-Republican revolution in Congress usher in the demise of the Sedition Act? Or alternatively, did Democratic-Republican commitment to the

[55] *Id.* at 308-312.
[56] *Id*. at 385.
[57] *Id*. at 368.

First Amendment in the face of Federalist revisionism cause the meteoric rise of the former's party? If the latter answer is the case, then surely a similar fall from political power would occur among any group that were to create a similar restriction of freedom of speech and press today.

A Debate Decided: Civil Liberties for Guantanamo Bay Detainees

Lanie Hymowitz[1]

As of January 2025, the infamous detention camp at the Guantanamo Bay Naval Base remains open and operational. This article provides a historical overview of how "Gitmo" and its unique jurisdictional standing came to be. Particular attention is paid to statutory and judicial developments following the 9/11 attacks during George W. Bush's presidency and the launching of the Administration's War on Terror. These measures sanctioned the detention of individuals at Guantanamo Bay, with few opportunities to pursue legal recourse for the potentially extralegal circumstances of their imprisonment.

Introduction

The legal tug-of-war between ensuring national security and the free exercise of civil liberties in the United States is as old as American jurisprudence itself. This debate reached a degree of unparalleled vigor in light of the September 11th attacks, when the promise of domestic safety seemed especially uncertain. In response to this uncertainty and fear, a military prison in Guantanamo Bay, Cuba, opened for the purpose of detaining suspected terrorists. The prison would ultimately cause the three branches of the federal government to confront the quintessential American debate over national security and civil liberties time and again throughout the 2000s.

The Guantanamo Bay detention camp was, and remains, an embodiment of the forceful stance the United States government takes to combat perceived international threats in the prolonged "War on Terror."[2] It is the very

[1] Brandeis University, Class of 2026.

[2] The "Global War on Terrorism" is an international military campaign by the United States against militant Islamist groups, primarily from 2001 to 2021, with the U.S. withdrawal from Afghanistan. This article will focus on

foundations of the Guantanamo Bay Naval Base and subsequent military prison that engorge the executive branch with expansive powers over national security. The 1934 Cuban-American Relations Treaty and the Authorization for Use of Military Force Resolution blur the lines of both Guantanamo's sovereignty and the limitations on executive power respectively. The Supreme Court heard multiple cases concerning detainee rights during the administration of President George W. Bush. Though the Supreme Court generally ruled in favor of protected legal rights for Guantanamo detainees, the response from Congress tended to assert vigorous security measures, even if such actions countered the views of the Supreme Court. The disagreements between the executive and legislative branch against the judicial branch represents limited effectual justice for Guantanamo detainees. Post-9/11 America's proclivity for fervent executive action devalued the civil liberties of detainees, which I argue allowed for abuses of justice.

Cuba-United States Relations in the Early 20th Century

The origins of Guantanamo Bay precede 9/11, dating back to the era of early American imperialism. Following the Spanish-American War in 1898, Cuba was subject to American military occupation. Under these colonial pressures, the Cuban government incorporated the Platt Amendment into the Cuban constitution in 1901.[3] The Platt Amendment functioned as an exchange between the United States and Cuba, with the United States affording Cuba a greater degree of sovereignty in exchange for provisions that would permit continued American presence. Section VII of Platt mandated that the Cuban government "sell or lease to the United States lands necessary for coaling or naval stations…to be agreed upon with the

the War on Terror as it unfolded during the presidency of George W. Bush (2001-2009).

[3] Jana K. Lipman, Guantanamo: A Working-Class History Between Empire & Revolution, 23 (2008).

President of the United States," giving the United States President oversight over a portion of Cuban territory, to be used at their discretion.[4] This stipulation was fortified by a 1903 treaty, which was accompanied by a lease agreement between the two countries. Article III of the 1903 lease states that the, "United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba," yet, "the United States shall exercise complete jurisdiction and control" over the naval base.[5] The idea of what "ultimate sovereignty" means for Cuba is unclear, as it seems to stand in direct contradiction to the United States exerting complete control over the same portion of land. The "legal invention" of ultimate sovereignty illustrates that actual Cuban authority over Guantanamo Bay was weak in comparison to the robust power of the United States in the region.[6] Effectively, Platt and the 1903 agreements fundamentally entangled the two states thenceforth.

The Platt Amendment was repealed by President Franklin Delano Roosevelt in 1934 as part of Roosevelt's "Good Neighbor" international policies, framed as a departure from colonialism in Latin America.[7] Platt, as well as the 1903 treaty, were replaced with the Cuban-American Treaty of Relations in 1934. While other provisions of Platt were nullified, the new treaty fortified the guarantee of a naval base through a lease agreement which remains the governing language regarding the status of Guantanamo Bay.[8] The treaty prohibited Cuba from interfering with the base, stating "[s]o long as the United States of America shall not abandon the said naval station of Guantanamo…the station shall continue to have the territorial area that it now has."[9] In effect, the treaty

[4] Platt Amendment, 31 Stat. 895 (1901) § VII; Lipman, *supra* note 3 at 23.
[5] Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations (1903) § III.
[6] Lipman, *supra* note 3 at 24.
[7] President Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933), transcript available at The Avalon Project.
[8] *Id*.
[9] Cuban-American Treaty of Relations, 48 Stat. 1682 (1934) § III.

gave the United States military the power to continue its activities in Guantanamo Bay, irrespective of the desires of the Cuban government. While the United States ostensibly recognized Cuba had "ultimate sovereignty" over Guantanamo Bay, it was evident that the United States could freely use the base for its own purposes.

The Cuban-American Treaty of 1934 carved out a legal loophole for American presidents and the military. Despite the letter of the law holding that Cuba was leasing the land to the United States, America effectively owned Guantanamo Bay.[10] As such, the United States could reasonably deny having sovereignty over the area while simultaneously carrying out any government operations deemed necessary. The lack of a formal "check" on American actions in the Guantanamo Bay Naval Base would thus ensnare the territory in what legal scholars have dubbed a "legal black hole."[11]

Cuba-United States Relations in the Early 20th Century

The legal foundation for using the base as a detention camp began with the Authorization of Use of Military Force of 2001 (AUMF), a joint resolution passed by Congress within a week of the September 11th attacks.[12] The resolution conferred upon the President the authority to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001" to ensure national security to the utmost degree.[13] The broad language of the resolution, which vaguely defined "force," gave President George W. Bush and subsequent presidents an immeasurable arsenal of powers to thwart suspected terrorist threats.

[10] Lipman, *supra* note 3 at 28.
[11] Amy Kaplan, *Where Is Guantánamo?*, 57 Am. Q. 831, 831–58 (2005).
[12] Michael C. Dorf, *The Detention and Trial of Enemy Combatants: A Drama in Three Branches*, 122 Pol. Sci. Q. 47 (2007).
[13] Authorization for Use of Military Force, 115 Stat. 224 (2001) § II.

The AUMF and the Cuban-American Treaty of Relations of 1934 work in synchrony to diminish the boundary between the free exercise of civil liberties and the exertion of government authority. Acting as the launching pad for authoritative government action to fight the War on Terror, the AUMF, is amplified by the 1934 Treaty. As discussed earlier, the sovereignty of Guantanamo Bay outlined in the 1934 Treaty allowed the United States to deny legal responsibility through a supposed lack of jurisdiction over the naval base. This prospect was made all the more perilous by an executive endowed with nearly unchecked wartime powers by the AUMF.[14]

The robustness of executive power during the "War on Terror" was further exacerbated by President Bush's military order, "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism," issued in November of 2001.[15] President Bush declared that if "there is reason to believe" a captured individual has acted with or aided a terrorist cause, the individual would be detained in a location selected by the Secretary of Defense and tried by a military commission.[16] The order neglects to require a thorough review before an individual is detained, as grounds for detention can be based upon mere suspicion. Moreover, the order begins by stating that the authority to make such an order is found in "the Constitution and…the Authorization for Use of Military Force Joint Resolution."[17] This military order extended the AUMF to apply to operations in Guantanamo Bay, as "necessary force" meant that government authorities (in their view) did not need to provide a solid rationale for an individual's detention in the

[14] Lisa Hajjar, *Guantánamo's Legacy,* 19 Ann. Rev. L. & Soc. Sci. 58 (2023).
[15] A military order, similar to an executive order, is a directive by the President of the United States that dictates actions of armed forces personnel.
[16] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).
[17] *Id*.

prison. Thus, the government created an avenue to sweepingly deny the Fifth Amendment right of due process to detainees.

The first prisoners detained at Guantanamo Bay arrived at the base in January 2002. These prisoners were described by General Michael R. Lenhert, the first commandant of the prison, as the "worst of the worst," perhaps to justify the treatment that was to follow.[18] The Bush administration aimed to treat Guantanamo Bay as a "battle lab"; information would be extracted from these detainees that would inform the American government's strategy in the War on Terror.[19] Potential obstacles to the process of extracting information from prisoners——such as prohibitions on torture——were rebuffed by President Bush in a confidential memo the following February. The memorandum, titled "Humane Treatment of Taliban and al-Qaeda Detainees," stated that, "none of the provisions of [The Geneva Conventions] apply to our conflict with al-Qaeda."[20] The Bush administration's rationale was that the Geneva Conventions of 1949 applied to "high contracting parties," or countries that agreed to Geneva protocols. Press Secretary Ari Fleischer claimed that as an international organization that is not recognized as a governing authority, al-Qaeda members, "are not covered by the Geneva Convention, and are not entitled to POW [Prisoner of War] status."[21] Per the Third Geneva Convention, POW status affords an individual the right to be "treated humanely in all circumstances."[22] By this reasoning, even if a person's

[18] Hajjar, *supra* note 14 at 58.
[19] *Id*.
[20] Memorandum from President George W. Bush to the Vice Pres., Sec. of State and Def., Att'y Gen., Chief of Staff to the Pres., Dir. of Central Intelligence, Ass't to the Pres. for Nat. Sec. Aff's, and Chair of the Joint Chefs of Staff, regarding the Humane Treatment of Taliban and al-Qaeda Detainees, § 2(a) (Feb. 7, 2002).
[21] *Statement by the Press Secretary on the Geneva Convention* (Feb. 7, 2003) (statement of Ari Fleischer).
[22] *Protected Persons: Prisoners of War and Detainees*, Int'l Comm. of the Red Cross,

detention in Guantanamo Bay proves gravely unjust, and therefore inhumane, a detainee was not protected by Geneva and had little standing to challenge their detention. This assertion functions as a way for Guantanamo Bay detainees to have as little legal protection as possible.

The Fight for Due Process for Guantanamo Bay Detainees

The central infractions of this newly applied "law of war" concerned the right of detainees to question their detention, and to assert their rights of due process, rights that could feasibly be overridden based on the Cuban-American Treaty and the AUMF. Changes regarding the legal process of Guantanamo Bay would be primarily derived from a back-and-forth between the Supreme Court and Congress. The first challenges to Guantanamo would come before the Supreme Court in 2004 from *Hamdi v. Rumsfeld* and *Rasul v. Bush*, concerning the plaintiffs' right to habeas corpus, the right to challenge their imprisonment.[23]

Yaser Hamdi, the plaintiff in *Hamdi v. Rumsfeld*, was an American citizen captured in Afghanistan in 2001. Due to his citizenship, Hamdi had the explicit right to question his detention under the Fifth Amendment and thus, the question squarely before the Supreme Court was whether his detention violated his right to due process. The plurality decision authored by Associate Justice Sandra Day O'Connor would hold that despite his status as an "enemy combatant," the Fifth Amendment gave Hamdi the right to be heard by a neutral decision-maker.[24] The provisions of the AUMF, and the subsequent military order that authorized the detention camp, had been the legal basis to deny procedural due process for detainees. Although the plurality disagreed with this reasoning,

https://www.icrc.org/en/law-and-policy/protected-persons-prisoners-war-and-detainees.

[23] Jonathan Hafetz, Habeas Corpus after 9/11: Confronting America's New Global Detention System, 4 (2011).

[24] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

the opinion did not challenge the legality of the AUMF; instead, it prescribed additional actions to be taken, with the AUMF's framework remaining in place.

Associate Justice David Souter, however, challenged the ethics of the AUMF in a concurring opinion. Souter claimed that "the World War II internment was thus ordered under the same Presidential power invoked here and the intent to bar a repetition goes to the action taken and authority claimed here."[25] In making the damning comparison of the powers of the AUMF to the military orders that called for the internment of Japanese-Americans during World War II, Souter shed light on the profound scope of presidential power under the resolution. So long as the AUMF remains in place, as the plurality opinion asserted, egregious deprivations of civil liberties, akin to those that occurred during Japanese internment, are enabled at Guantanamo Bay.

While Hamdi concerned constitutional interpretation, in *Rasul v. Bush*, Guantanamo's complex sovereignty and governing documents also played a key role. The case's numerous plaintiffs held citizenship from England, Australia, and Kuwait, and filed federal suits stating that they were not granted a hearing or access to counsel before their detainment. The District Court for the District of Columbia, and the appellate court, held that the plaintiffs were effectively filing writs of habeas corpus.[26] The District Court drew upon the 1950 case *Johnson v. Eisentrager* for its reasoning, a case that concerned German war criminals held in an American-operated prison in Germany. The majority in *Eisentrager* held that, "nonresident enemy aliens, captured and imprisoned abroad, have no right to a writ of habeas corpus in a court of the United States."[27] Thus, the District Court's ruling was based on the assumption that Guantanamo Bay is "abroad" relative to the

[25] *Id.*, at 600 (Souter, J., concurring in part, dissenting in part, and concurring in judgment).
[26] Rasul v. Bush, 542 U.S. 466 (2004).
[27] Johnson v. Eisentrager, 339 U.S. 763 (1950).

United States, and therefore non-American citizens detained at Guantanamo Bay did not have a right to habeas corpus.

As opposed to *Eisentrager*, the Supreme Court's majority opinion in *Rasul* relied on *Braden v. 30th Judicial Circuit Court of Kentucky* (1973). This case extended writs of habeas corpus to individuals, should their legal custodian be under the jurisdiction of the United States.[28] The majority reasoned that because the Department of Defense was under United States jurisdiction, claims made by foreign nationals on their detention could be heard, though the Court held that Cuba still retained "ultimate sovereignty" over Guantanamo.[29] While the majority simply looked at laws in place surrounding Guantanamo's sovereignty, Justice Antonin Scalia's dissent demonstrated how ideas of sovereignty put forth in the Cuban-American Treaty of 1934 remained up for interpretation.

Justice Scalia was a proponent of originalism, a legal philosophy concerned with understanding the original intention and text of law. Scalia concluded that the 1934 treaty did not "render Guantanamo Bay the sovereign territory of the United States" and that Guantanamo had "never before been thought to be within [American] jurisdiction."[30] Despite the United States exercising significant control over the territory in the 2000s, on the basis of the Cuban-American Treaty, Scalia adamantly denied American jurisdiction over Cuba. Scalia seemed to recognize the "legal black hole" the treaty created, suggesting the United States could avoid this predicament by creating a separate district court for Guantanamo Bay, as was done with the Panama Canal Zone.[31] The government's avoidance of confronting the treaty's loophole indicates that the treaty was perceived as a tool for enabling more aggressive

[28] Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973).
[29] Rasul v. Bush, *supra* note 26.
[30] *Id*., at 502 (Scalia, J., dissenting).
[31] *Id*.

security measures by denying jurisdiction, and thus detainee rights.

Scalia's reasoning would lend legal credence for Congress to pass the Detainee Treatment Act in 2005.[32] The original text of the Detainee Treatment Act (DTA) stated that except in certain circumstances (left undefined), "no court, justice, or judge shall have jurisdiction to hear or consider…an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay."[33] The DTA appeared to circumvent the *Rasul* ruling, reflecting on the question of jurisdiction for Guantanamo Bay, which in part relied on the interpretation of the Cuban-American Treaty. As the passage of the AUMF illuminated, increasing executive authority was viewed as a reliable countermeasure against terror in the 2000s. The DTA's passage illustrates how ambiguity over Guantanamo's sovereignty was leveraged to deny habeas corpus and strengthen executive power, even amid calls for individual rights, as seen in *Rasul*.

Congressional and Judicial Disagreements over Guantanamo Continue

The Supreme Court would hear two more high-profile cases, *Hamdan v. Rumsfeld* (2006) and *Boumediene v. Bush* (2008), both concerning the right to question one's detention status at Guantanamo Bay. Both cases further exemplified the battle between the Supreme Court and the executive and legislative branches, first demonstrated by *Rasul* and the subsequent passage of the DTA. A pattern emerged wherein Congress would pass a law regarding the legal processes of Guantanamo Bay, the President would support and sign the bill into law, and the Supreme Court would partially reject the law.

[32] Hajjar, *supra* note 14 at 60.
[33] Detainee Treatment Act, Pub. L. No. 109–148, §§ 1001–1006, 119 Stat. 2680, 2739–44 (2005) (codified in scattered sections of 10, 28, & 42 U.S.C.).

This would then cause Congress to respond with a different bill, thereby perpetuating a cycle in the name of national security.

In *Hamdan*, the Supreme Court reviewed the Detainee Treatment Act and addressed the military commissions being used to try suspected terrorists.[34] These commissions were first discussed in President Bush's military order in November of 2001 before being more concretely defined by Military Commission Order No. 1 in March of 2002.[35] These commissions differed from ordinary courts of law in the United States, as they permitted hearsay testimony and evidence obtained through coercion; all in the effort to gather higher volumes of evidence.[36] Salim Ahmed Hamdan's legal team argued that his military commission violated both the Uniform Code of Military Justice, an American code, and the Geneva Conventions.[37]

Hamdan split the court, with Justice Stevens' majority opinion joined only by the liberal wing of the court, and only in part. The majority rejected the government's argument that Guantanamo Bay existed outside of the scope of Geneva, preventing further legal insulation of the territory. Crucially, the majority also held that "neither the AUMF nor the DTA can be read to provide specific, overriding authorization for the commission convened to try Hamdan."[38] In doing so, the majority defined a clear limit on the AUMF, something that had not been done in their earlier decisions. While this limit applies to the trials of detainees, it did not include a limitation on the circumstances or grounds of a detainee's detention. In this area, the AUMF continued to provide room for exploitation. Additionally, Stevens' opinion stated that the

[34] Hamdan v. Rumsfeld*,* 548 U.S. 557 (2006).
[35] Ida L. Bostian, *One Step Forward, Two Steps Back: Hamdan v. Rumsfeld and the Military Commissions Act of 2006*, 5 Santa Clara J. Int'l L. 219 (2006).
[36] *Id*.
[37] Hamdan v. Rumsfeld*, supra* note 34.
[38] *Id*.

AUMF "acknowledge[s] a general Presidential authority to convene military commissions," acknowledging an inherent legitimacy to military commissions and leaving open the possibility for an altered form of these commissions to continue.[39]

With the publication of the *Hamdan* decision, a familiar pattern reemerged; Congress passed the Military Commissions Act of 2006 (MCA) as a circumvention of the Supreme Court's stance.[40] The MCA both forbid any detainees subject to a military commission from "[invoking] the Geneva Conventions as a source of rights" and precluded legal actors in the United States from asserting jurisdiction "to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States."[41]

The MCA would be challenged in *Boumediene v. Bush*, the last notable Guantanamo case adjudicated under the Bush administration. *Boumediene* had multiple "moving parts"; the constitutionality of the MCA, as well as continued considerations of the application of the Fifth Amendment and the Geneva Conventions in military commissions.[42] Despite its many legal complexities, *Boumediene* would ultimately boil down to a simple conclusion: the majority held that Section 7 of the MCA, which denied a court's ability to hear a writ of habeas corpus, was an unconstitutional suspension. The majority unequivocally held that "Petitioners have the constitutional privilege of habeas corpus."[43] *Boumediene* addressed the two-pronged issue of sovereignty and criminal rights by upholding the right of habeas corpus in the face of encroachment by the executive branch, even while

[39] *Id*.
[40] Lisa Hajjar, *The Counterterrorism War Paradigm versus International Humanitarian Law: The Legal Contradictions and Global Consequences of the US 'War on Terror'*, 44 Law & Soc. Inquiry 935 (2019).
[41] U.S. Congress, House, *Military Commissions Act of 2006*, H.R. 6166, 109th Cong. (2006).
[42] Boumediene v. Bush, 553 U.S. 723 (2008).
[43] *Id*.

acknowledging that Guantanamo is "outside sovereign U.S. territory."[44] Despite the *Boumediene* holding, habeas corpus cases continued to face challenges. Under the Obama administration, "the DC Circuit Court overturned every [detainee] victory and instructed lower-court judges to accept the reliability and accuracy of government evidence."[45] The "debate" over national security measures was firmly decided, as it had been for years. From the passage of the AUMF to the persistent obstacles against habeas corpus cases, the United States government views Guantanamo Bay prisoners as a mere tool for asserting executive and military power, rather than human beings entitled to basic legal rights.

Concluding Thoughts

The continued denial of detainee rights lies in the structural integrity of Guantanamo. The AUMF carved out broad warmaking powers to fight the War on Terror, which the executive and legislative branch was unwilling to relinquish. The story of Guantanamo Bay is not necessarily unique, but an example of how the branches of government may interplay in a battle between civil liberties and national security. The September 11 attacks prompted the legislative and executive branches to create and execute measures to bolster national security, such as the AUMF and the military orders authorizing Guantanamo's creation. The Supreme Court then "checked" the power of these branches and the powers they exercised, first through *Hamdi* and up to *Boumediene.* There is a clear separation of powers in the reactionary nature of Congress to the decisions of the Supreme Court, but I argue that the tug-of-war surrounding Guantanamo Bay resulted in power that was divided unequally among the branches. The rulings of *Hamdi, Rasul, Hamdan,* and *Boumediene* all supported a bolstering of detainee rights to a certain extent, but in each instance, Congress was able to usurp, at least in part, these

[44] *Id*.
[45] Hajjar, *supra* note 14 at 65.

decisions. The firm commitment to the interest of national security left detainees without justice.

The lesson to be learned from the early years of Guantanamo Bay is that the mechanisms that enable injustice may not be discernible from a surface level viewing. The lack of civil rights for detainees was not just a matter of the presidential administration, as habeas petitions were consistently denied under a Democratic president. The problems that must be addressed is that the framework of Guantanamo itself must be reexamined in today's context, but perhaps even more significant, is the imbalance of power that exists particularly with an engorged executive branch.