Bridge Over Troubled Waters: The Application of State Law to Compact Clause Entities

Matthew S. Tripolitsiotis†

“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State.”¹

“No State shall . . . pass any . . . [l]aw impairing the Obligation of Contracts.”²

I. INTRODUCTION

Bridges are the “black holes” of the American legal system.³ Consider that workers have the right to unionize and force collective bargaining in both Pennsylvania and New Jersey, while workers on many bridges between Pennsylvania and New Jersey do not enjoy such a right.⁴ New York and New Jersey both have anti-discrimination laws, but those laws do not apply to people working on bridges between the two states.⁵ Maryland, Virginia, and the District of Columbia have all adopted freedom of information laws, but the agency that operates rail bridges between them is not subject to any of those

† Associate, Boies, Schiller & Flexner LLP. University of Pennsylvania Law School, J.D.; Fels Center of Government, University of Pennsylvania, M.G.A.; Villanova University, B.A. The subject of this Article was inspired by the time I spent working in the chambers of Judge Marjorie O. Rendell. I am grateful to her for allowing me to be a member of her chambers and work with one of the most intelligent, thoughtful, and well-respected judges on the Third Circuit Court of Appeals. A great deal of thanks is owed to Kermit Roosevelt, who was instrumental in bringing this Article to publication; Frank Goodman, Nathaniel Persily, Clyde Summers, and Robert Yablon, who provided helpful comments along the way; and Peter Tripolitsiotis, Dede Tripolitsiotis, Angie Viscardi, Charles Viscardi, and Maren Ferro, without whose support I would not be able to succeed. All remaining errors are, of course, my own.

The opinions expressed in this Article are those of the author and are not intended to be those of Boies, Schiller & Flexner LLP.

1. U.S. CONST. art. I, § 10, cl. 3.
2. Id., art. I, § 10, cl. 1.
3. Referring to the international context, one author defines legal black holes as areas “where states in concert . . . have not yet promulgated any norms.” Steven R. Ratner, Does International Law Matter in Preventing Ethnic Conflict?, 32 N.Y.U. J. INT’L L. & POL. 591, 640 (2000). As this Article will demonstrate, Ratner’s definition is equally applicable to the subject of Compact Clause entities.

4. Int’l Union of Operating Eng’rs, Local 542 v. Del. River Joint Toll Bridge Comm’n, 311 F.3d 273 (3d Cir. 2002) (holding toll collectors, maintenance employees, bridge officers, and tellers employed by the Delaware River Joint Toll Bridge Commission did not have the right to force the Commission to enter collective bargaining under New Jersey’s labor laws); see also infra note 220.

policies. These paradoxes stem from the fact that the entities in control of many trans-state resources—entities such as the Port Authority of New York and New Jersey—often exist in a state of legal limbo.

The Constitution provides a mechanism that allows states to enter agreements, or compacts, to address problems that are not neatly contained within state boundaries. These compacts frequently establish an interstate agency empowered to deal with the cross-border concern. A troublesome externality of this constitutional provision is that states often end up creating an orphan of the federal system, subservient only to the original organic agreement and left to fend for itself on important substantive law issues. Litigants have been petitioning the courts to fill in the “black holes” that plague those who receive no protection from compact entities; however, only the legislatures that create these agencies can provide a complete and appropriate remedy. Therefore, the courts should not attempt to apply a patch that they are ill-suited to design.

Entities formed by interstate compact are common in the United States, even if they are not immediately recognized as such. Compact Clause entities often control bridges, ports, and other joint state resources. In the wake of the September 11th attacks, the country repeatedly heard mention of the Port Authority of New York and New Jersey, an agency with which those of us from the New York metropolitan area were already very familiar. The Port Authority performs a vital function for, and has a massive impact on, the area it serves, as evidenced by its mission to meet the “transportation and infrastructure needs” of the New York-New Jersey Area, its $6.8 billion in net

7. See infra notes 12-19.
8. U.S. CONST. art. I, § 10, cl. 3.
9. See, e.g., Local 542, 311 F.3d 273.
10. Compact Clause entities are sometimes referred to as “bi-State compact entit[ies],” see, e.g., Hadley v. N. Ark. Cmty. Technical Coll., 76 F.3d 1437, 1439 (8th Cir. 1996) (using the terms “bi-State compact entity” and “Compact Clause entit[y]” in the same sentence).
12. The Port Authority of New York and New Jersey is often referred to simply as “the Port Authority.”
13. See, e.g., Michael Arena & Dan Janison, Poll Finds No Airport Anger; but Rudy Disputes the Results, NEWSDAY (New York), Aug. 26, 1999, at A29 (noting that “New Yorkers are generally happy with the Port Authority’s management of Kennedy and LaGuardia Airports”); Al Frank, Toll Hikes Possible for PATH, Crossings—P.A. Proposal to Fund Massive Capital Plan, STAR-LEDGER (Newark), Nov. 16, 2000, at 1 (laying out the Port Authority’s proposed toll/fee hikes).
14. The Port Authority’s Mission is:
   To identify and meet the critical transportation and infrastructure needs of the bistate region’s businesses, residents and visitors: providing the highest quality, most efficient transportation and port commerce facilities and services that move people and goods within the region, providing access to the rest of the nation and to the world, and strengthening the economic
Compact Clause Entities

assets,\textsuperscript{15} and its $526 million of annual payroll expenses.\textsuperscript{16} But despite national news coverage of the losses suffered by the Port Authority Police\textsuperscript{17} and of the Port Authority's property interest in the World Trade Center land,\textsuperscript{18} one may be left to wonder, what exactly is the legal status of the Port Authority? Is it a state agency, an independent corporation, or something else?\textsuperscript{19} In many respects, that is a question that pervades this entire Article since the Port Authority and other Compact Clause entities often find themselves in an uncertain position due to the terms of their construction.

Broken down to its simplest form, a Compact Clause entity, such as the Port Authority\textsuperscript{20} or the Washington Metropolitan Area Transit Authority,\textsuperscript{21} is an agency created by an agreement, or compact,\textsuperscript{22} between two or more states, which is approved by Congress.\textsuperscript{23} The problem lies in the fact that, once created, these agencies are beholden only to the compacts that created them. The individual states do not retain power over agencies' internal workings, despite the fact that the compact alone often provides an insufficient set of legal

\begin{itemize}
  \item The Port Authority of New York and New Jersey, HOOVER'S COMPANY PROFILES, July 4, 2003, available at 2003 WL 602221798 (providing background information about the Port Authority that could be helpful in making such a determination).
  \item See Agreement of New York and New Jersey Establishing Port of New York Authority, ch. 77, 42 Stat. 174 (1921).
  \item See BLACK'S LAW DICTIONARY 298 (8th ed. 2004).
  \item Compare id. at 839 (noting that an interstate agreement is "[a]n agreement between states"), with id. at 298 (noting that an interstate compact is "[a] voluntary agreement between states enacted into law in the participating states upon federal congressional approval"). See also infra note 52 (explaining that in some circumstances congressional consent is not needed).
\end{itemize}
guidelines.

At this point, it is important to introduce the fundamental conceptual dichotomy of external versus internal in relation to compact entities.\textsuperscript{24} As explained in the 1970 New York case \textit{Agesen v. Catherwood},\textsuperscript{25} the distinction provides a useful way to classify the varying activities of a compact entity. At one end of the spectrum are acts that have effects wholly external to the compact entity. Such acts give a state the ability to impose its law unilaterally.\textsuperscript{26} On the other end of the spectrum are the internal operations of the compact entity. Because the states agreed to terms on and relinquished sovereignty over these activities, they can no longer exercise unilateral control.\textsuperscript{27} Internal operations include decisions regarding the compensation to be paid by the commission to its officers. Concededly, the external/internal line is not bright; nevertheless, it is essential to the understanding of when and why the states must act together in dealing with the compacts they create.\textsuperscript{28}

In all circumstances, the compact governs the internal operations of the compact entity.\textsuperscript{29} Consequently, most Compact Clause jurisprudence can be analogized to contract law due to the interplay between Clauses 1 and 3 of Article I, Section 10 of the Constitution.\textsuperscript{30} Therefore, if the compact says \textit{X} about the agency and the two compacting states’ laws both say \textit{Y}, \textit{X} prevails.\textsuperscript{31} Unless the legislatures consider such a possibility and approve the compact regardless, this may be an undesirable result. However, legislatures often do not contemplate the myriad of issues that the bi-state entity will face and instead

\begin{itemize}
  \item \textsuperscript{24} For further elaboration of this concept, see Subsection II.B.4.
  \item \textsuperscript{25} 260 N.E.2d 525 (N.Y. 1970).
  \item \textsuperscript{26} See id. at 526-27 (“New York and New Jersey have each undoubted power to regulate the external conduct of the Authority, and it may hardly be gainsaid that the Authority, albeit bistate, is subject to New York’s laws involving health and safety, insofar as its activities may externally affect the public.”). In an “external operations” case, the Compact Clause entity is subject to the same treatment as an individual or corporation when its actions affect the public of the state.
  \item \textsuperscript{27} See C.T. Hellmuth & Assocs. v. Wash. Metro. Area Transit Auth., 414 F. Supp. 408, 409 (D. Md. 1976) (discussing the notion of lost sovereignty); see also infra Subsection II.B.3.
  \item \textsuperscript{28} Agesen, 260 N.E.2d at 527 (“Indeed, given sufficient social or economic justification, the lines of external and internal operation may shift, justifying increased regulation as the impact outside the Authority becomes more pronounced.”).
  \item \textsuperscript{29} For examples of internal operations, see infra note 153.
  \item \textsuperscript{30} Compare U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay”), with U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility”).
  \item \textsuperscript{31} This formula is a result of the states’ inability to impair contracts. It should be noted that the external operations of the agency are subject to the laws of both states as the agency operates within both of their jurisdictions. However, the internal operations are made immune from state interference because the compacting states have given away their sovereignty in that area and allow the compact’s terms to govern. See C.T. Hellmuth, 414 F. Supp. at 409.
\end{itemize}
use vague language that creates great ambiguity. For example, in *Local 542*, both compacting states had a well-developed set of labor laws allowing unionization and requiring collective bargaining. However, because the compact gave the Delaware River Joint Toll Bridge Commission the authority “to appoint employees, determine their qualifications and duties, and fix their salaries,” those laws could not apply to workers on certain bridges between the two states. When the compact is silent regarding a matter of internal operations, no state law applies.

Consequently, compact agencies and entities are said to exist in a “no-man’s land.” They lie somewhere in the space between independent and dependent, sovereign and subject, state and federal. At least three distinct sovereigns—two states and the federal government—create compacts and want to protect their own interests in the compact entity. While it might seem that the agencies are subject to the interests of the sovereigns that created them, each creating sovereign no longer has exclusive control over the area of the agency’s jurisdiction: “Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty . . . .” What remains largely unresolved is the extent to which a state can, and should be able to, protect its individual interests and promote its individual policies, such as collective bargaining rights and state minimum wage laws, after adopting a compact. The courts have not yet definitively answered the question of if, and when, a creator state’s internal substantive law can be applied to compact agencies. However, an

33. Id. at 281.
34. Id. at 279-81.
35. See Note, Charting No Man’s Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts, 111 HARV. L. REV. 1991, 1991 (1998) (“Because the application of [constitutional] doctrines is often guided by categorization of an entity as state or federal, compact entities, functioning in the ‘no man’s land’ between state and federal status, present significant obstacles.”). Charting No Man’s Land analyzes vertical choice of law in a compact situation, while this Article looks to what might be classified as horizontal choice of law. In examining the vertical issues, the author concludes that a federal forum is useful for determining interpretation and enforcement of disputes but also makes note of the usefulness of incorporating state law as federal common law when appropriate.
37. It seems to have been settled that individual states cannot put burdens on the compact through subsequent legislation, as compacts are contracts between states and states are not allowed to pass laws impairing the obligations of contracts. See Kansas City Area Transp. Auth. v. Missouri, 640 F.2d 173, 174 (8th Cir. 1981); Del. River & Bay Auth. v. Carrello, 222 A.2d 794 (Del. Ch. 1966); State v. Hoofman, 9 Md. 28 (1856); Del. River & Bay Auth. v. N.J. Pub. Employment Relations Comm’n, 270 A.2d 704 (N.J. Super. Ct. App. Div. 1970), aff’d, 277 A.2d 880 (N.J. 1971). What is not settled is if and when state substantive law that does not necessarily impair the contract, but rather speaks in the compact’s silence, can be applied.
answer is necessary as compacts are often silent on important issues to which compacting states’ laws directly speak.\textsuperscript{39}

Some courts have attempted to find a way to fill compacts’ large legal voids by trying to determine what laws of the compacting states match and then applying matching laws to the compact entity.\textsuperscript{40} However, this requires a level of mind reading and judicial alchemy that can only lead to disfigured results.\textsuperscript{41} Meanwhile, other courts apply a state’s laws to a compact only when all compacting states explicitly say the law is meant to apply.\textsuperscript{42} While perhaps more true to legislative intent, this approach is both inadequate and inefficient. There is, however, a clear and clean way around this problem, which is common in most contracts—a choice of law clause.\textsuperscript{43}

Choice of law clauses offer the best way to deal with a compact’s legal voids because they preserve the intent of the states and provide a complete and coherent set of governing laws. But until legislatures enact them, the problem remains the courts’. If the courts take parts of laws from each state, the result will inevitably be an incomplete hybrid set of principles that does not reflect the intentions of either state.\textsuperscript{44} Therefore, courts should read compacts in accordance with their express terms, as the Supreme Court has implied they should do.\textsuperscript{45} Such rulings are more likely to encourage legislatures to change their practices by highlighting the large mistakes they are making and the anomalies they are creating when they adopt compacts without choice of law provisions.

This Article begins by exploring the history, nature, and types of Compact Clause entities in Part II. This historical and constitutional analysis will lay the groundwork for understanding the important principles of federalism and contract that pervade the entire discussion. Part III explores the current disarray

\textsuperscript{39} See, e.g., Int'l Union of Operating Eng'rs, Local 542 v. Del. River & Bay Auth., 688 A.2d 569 (N.J. 1997) (holding the same), and E. Paralyzed Veterans Ass'n v. City of Camden, 545 A.2d 127 (N.J. 1988) (holding the same). See also infra Section III.B.

\textsuperscript{40} See infra Subsection III.B.1.

\textsuperscript{41} See infra Section IV.A.

\textsuperscript{42} See infra Subsection III.B.2.

\textsuperscript{43} It is well established that contracting parties can choose what law will govern their contracts, subject to certain constraints. See George F. Carpinello, Testing the Limits of Choice of Law Clauses: Franchise Contracts as a Case Study, 74 MARQ. L. REV. 57, 57 (1990) ("Most conflicts scholars and courts now recognize the principle that the parties to a contract generally may agree upon the law which will govern their relationship."). See generally DAVID P. CURRIE ET AL., CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 101-09 (6th ed. 2001) (endorsing choice of law clauses); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) (same). See also infra Subsection IV.B.2.

\textsuperscript{44} See infra Section IV.A.

Compact Clause Entities

in the courts and lack of guidance from the Supreme Court. Part IV argues that, because the courts provide inadequate redress, choice of law clauses are the most efficient and practical means to reach the ends of closing legal black holes. Part IV also questions why legislatures have not already adopted such measures. This entire examination points to one conclusion: Current Compact Clause jurisprudence is inadequate in dealing with the problems posed by compact entities. There must be an unambiguous set of substantive laws that apply to the internal operations of Compact Clause entities—a set of laws that the states should specify.

II. THE COMPACT CLAUSE

Unfortunately, as it currently stands, the Compact Clause remains a largely overlooked part of the Constitution, and its jurisprudence is an underdeveloped area of the law.46 The Clause, and compacts in general, are topics that have received sparse treatment by academics47 and lawyers48 alike. A history is useful as a starting point since the construction and reading of a compact and its applicable laws is directly tied to the uses and purposes of the Compact Clause.

A. A Brief History

Compact usage has undergone a transformation since the colonial era. In their benchmark article on compacts, Justice Felix Frankfurter and James Landis provide a thorough examination of the uses of compacts and interstate agreements in the colonial and early American period.49 Colonial charters, which divvied up land in the new world, were vague and non-exact documents

46. See Del. River Port Auth. v. Fraternal Order of Police, 135 F. Supp. 2d 596, 602 n.7 (E.D. Pa. 2001) (acknowledging “the relatively undeveloped state of interstate compact law”), rev’d 135 F.3d 596 (3d Cir. 2002); Jill E. Hasday, Interstate Compacts in a Democratic Society: The Problem of Permanency, 49 FLA. L. REV. 1, 11 (1997) (“The jurisprudence on compacts is aged. Given the political pressures for devolution and the Supreme Court’s recent attentiveness to state autonomy, this body of law is likely to be revisited.”) (citation omitted). As explained in this Article, circuits and states are split as to when state law can apply to compact entities, while the Supreme Court has stayed silent to this point. See supra note 38.

47. Writing in 1971, Marian E. Ridgeway noted, “Interstate compacts, in domestic United States political literature, have been inadequately examined. MARIAN E. RIDGEWAY, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM, at vii (1971). Over thirty years later, Joseph Zimmerman, writing in his recently published book, makes note of the same problem Ridgeway faced: “Collecting information on interstate cooperation was a major task because of the relative lack of published current information.” ZIMMERMAN, supra note 11, at xi.

48. The authors of Hart and Wechsler’s the Federal Courts and the Federal System explain that the book is useful not only in training future lawyers but also as a tool for practitioners. RICHARD H. FALLON ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, at v (5th ed. 2003) [hereinafter HART AND WECHSLER’S FED. COURTS]. However, in their 1620 pages of text, only about one page is devoted to interstate compacts and their applicable laws. Id. at 287, 739. Given the problems posed by this Article, one would think they deserve a larger place in a discussion of the courts’ role in creating norms for the federal system.

that bred border disputes with some regularity.\textsuperscript{50} As a means of dealing with such disputes, colonies entered into agreements with one another to set an agreed-upon border pending “approval of the Crown.”\textsuperscript{51} This formulation of relationships parallels the current system under the Constitution, which requires Congress to approve agreements made by the states.\textsuperscript{52}

While the current constitutional system parallels the colonial system, the reasons for that parallelism are not clear. A search for answers in the history surrounding the formation of the Constitution has been somewhat fruitless. Frankfurter and Landis note, “The records of the Constitutional Convention furnish no light as to the source and scope of this compact provision of Article I, Section 10. Nor does the Federalist help.”\textsuperscript{53} James Madison’s explanation of the Compact Clause in the Federalist is scant and assuming. He says that the Compact Clause “fall[s] within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark.”\textsuperscript{54} In looking for the framers’ intent behind the Compact Clause, even the Supreme Court has acknowledged, “The records of the Constitutional Convention . . . are barren of any clue as to the precise contours of the agreements and compacts governed by the Compact Clause.”\textsuperscript{55}

Frankfurter and Landis postulate that the framers’ desire to continue the device of interstate adjustments as a tool to deal with ongoing border disputes and other controversies between the states may be one possible reason for the inclusion of the Compact Clause in the Constitution.\textsuperscript{56} At the time of the founding there were still eleven ongoing boundary disputes that the clause could aid in remedying.\textsuperscript{57} Compacts were useful in dealing with those disputes and remain a valid means of settling disputes over borders.\textsuperscript{58} However, what Frankfurter and Landis were advocating in 1925 was an expanded and largely

\begin{itemize}
  \item \textsuperscript{50} Id. at 692.
  \item \textsuperscript{51} Id.
  \item \textsuperscript{52} It is important to note that not all interstate agreements are required to be submitted to Congress for consent before they can be entered.
  \item Congressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause. Where an agreement is not “directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,” it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent. Cuyler v. Adams, 449 U.S. 433, 440 (1981) (quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893)). However, most of the compacts discussed in this Article require congressional consent, as they form a combination that tends to increase political power in the states.
  \item \textsuperscript{53} Frankfurter & Landis, supra note 49, at 694.
  \item \textsuperscript{54} THE FEDERALIST No. 44, at 233 (James Madison) (George W. Carey & James McClellan, eds., 2001).
  \item \textsuperscript{55} U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 460-61 (1978).
  \item \textsuperscript{56} Frankfurter & Landis, supra note 49, at 694.
  \item \textsuperscript{57} Id.
  \item \textsuperscript{58} As recently as 1998, the Supreme Court was still interpreting compacts that were used to settle boundary disputes. New Jersey v. New York, 523 U.S. 767 (1998).
\end{itemize}
untapped application of compacts to deal with issues affecting regions rather than states. Their position is understandably a byproduct of the time in which they wrote: Just four years prior, the New York Port Authority and its joint administrative structure had been formed.

The transformation of the Compact Clause from a tool to resolve disputes between states into a mechanism for dealing with regional problems began in the early twentieth century. The Colorado River Compact, signed in 1928, and the New York Port Authority Compact, signed in 1921, are landmarks that ushered in a new expanded usage of compacts. At the same time that Frankfurter and Landis were arguing for greater use of the Compact Clause, these compacts addressed interstate administrative problems, rather than boundary disputes. The Colorado River and New York Port Authority Compacts were also significant in that while there had been interstate compacts to deal with more than just boundary disputes, prior compacts did not establish a long-term joint system of governance. These two compacts made that leap. The Colorado River Compact created a simple structure in which each state’s chief administrator of the Colorado River was required to “perform such other duties as may be assigned by mutual consent of the signatories from time to time.” This simple cooperative agreement did not create an elaborate interstate compact entity but nevertheless marked a turning point to this new usage of compacts. The Port Authority of New York Compact established a more formal joint administrative agency and devoted lands to that agency.

The Port Authority is used as an example throughout this Article not only

59. Frankfurter & Landis, supra note 49, at 708. One of the examples they give is electric power development. Id. at 718.
60. Boulder Canyon Project Act, ch. 42, 45 Stat. 1057 (1928). The Boulder Canyon Project Act was an agreement between Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming to deal jointly with issues relating to the Colorado River.
62. See FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, THE INTERSTATE COMPACT SINCE 1925, at 3 (1951) [hereinafter ZIMMERMANN & WENDELL, INTERSTATE COMPACT].
63. See Frankfurter & Landis, supra note 49, at 708.
64. ZIMMERMANN & WENDELL, INTERSTATE COMPACT, supra note 62, at 3.
65. Id. at 4-8. Zimmerman and Wendell list a series of compacts as steps leading up to the breakthroughs of the Colorado River and New York Port Authority Compacts but note a flaw in each of the earlier compacts that impeded their functioning. For examples of compacts that required concurrent legislation to deal with interstate problems but did not create a joint administrative system, see Fisheries Compact of New Jersey and Delaware, ch. 394, 34 Stat. 858 (1907), and Agreement of Washington and Oregon Protecting Fish in Boundary Waters, ch. 47, 40 Stat. 515 (1918). See also Frankfurter & Landis, supra note 49, at 730-34 (providing a detailed inventory of the compacts in the early American period).
66. ZIMMERMANN & WENDELL, INTERSTATE COMPACT, supra note 62, at 14.
67. The Port Authority compact created a “Port of New York District,” Agreement of New York and New Jersey establishing Port of New York Authority, ch. 77, art. II, 42 Stat. 174, 175 (1921), a separate body “corporate and politic, having the powers and jurisdiction . . . enumerated,” id. at art. III, 176, and a six commissioner system, three each from New York and New Jersey, to run the authority, id. at art. IV, 176.
because of its sheer size and importance, but also because it is in many respects the "granddaddy" of modern Compact Clause entities. The agency boasts that its joint administrative structure was "[t]he first of its kind in the Western Hemisphere." It traces its roots back 300 years and attributes its eventual founding to "the accident of political history that divided a common port area between what ultimately became the states of New York and New Jersey." Prior to the formation of the compact, disputes over managing the waterway periodically arose. On one occasion, police from New York and New Jersey even shot at each other in the middle of the river. Realizing that cooperation was required to operate the port area effectively, they established a port district to be managed by a bi-state compact entity, which they modeled after the Port of London Authority.

Today there are a large number of compacts, many of which utilize compact entities to study, govern, or operate areas of concern that are not contained by borders. The Council of State Governments listed 195 compacts believed to be in existence in 2002, not including compacts dealing with border disputes. These compacts range from the Historic Chattahoochee Compact, a compact between Alabama and Georgia creating a compact entity to deal with historic preservation and tourism, to the New Hampshire-Vermont Interstate School Compact, a compact that allowed the creation of interstate school districts between the two states. Compacts encompass subject matters as varied as agriculture, crime control, education, energy, facilities, fisheries, development, emergency management, and natural resources. Compact entity scholars note that the most successful compacts have been those that deal with areas traditionally of state concern, such as bridges and tunnels, and those that create bodies to perform studies. All in all, there is a scholarly consensus that

68. See supra notes 14-16 and accompanying text.
69. Port Authority of New York and New Jersey, History of the Port Authority, http://www.panynj.gov/AboutthePortAuthority/HistoryofthePortAuthority/ (last visited Dec. 6, 2004).
70. Id.
71. Id.
72. Id.
73. Id. The Port of London Authority is a “public trust” founded “in 1908 to ‘administer, preserve and improve the Port of London.’” Port of London Authority Web Site, http://www.portoflondon.co.uk/index_site.cfm?site=statutory (last visited Dec. 6, 2004).
74. See ZIMMERMAN, supra note 11, at 54-61 (listing numerous compacts and the purposes they serve).
78. See ZIMMERMAN, supra note 74, at 209.
79. Id.
Compacts are a useful tool to deal with regional issues and that their full value has yet to be realized. Scholars are not the only ones to realize the utility of interstate compacts; government officials have also lauded them. In New York's 1996 Annual Report of the Senate Select Committee on Interstate Cooperation, State Senator Hugh T. Farley writes, "[W]orking with other states and with the federal government continues to bear fruit. As you will see in this Report, many diverse issues are the subjects of interstate and intergovernmental compacts and cooperation." There is every reason to believe the use of compacts could be beneficial far into the future, which makes the subject of this Article all the more critical: What can be done to remedy the legal void created by these compacting states?

B. Compact Clause Doctrine and Its Development

As noted in Section II.A, there is little information about what the Compact Clause explicitly meant to the framers. As the Clause has evolved into a tool of greater utility and expanded usage, the courts have had to keep pace by pronouncing on the meaning and contours of the Clause. Unfortunately, courts have struggled with the norms to be applied in interpreting a compact, and their approaches continue to fluctuate. Nevertheless, a number of fundamental maxims have emerged from the struggle that can inform discussions of Compact Clause questions. Perhaps the most important notion for our purposes is also one of the earliest—compacts are contracts.

1. Compacts as Contracts

Beginning with the 1823 case of Green v. Biddle, the Supreme Court has

80. See id.
81. See, e.g., Christi Davis & Douglas M. Branson, Interstate Compacts in Commerce and Industry: A Proposal for "Common Markets Among States," 23 VT. L. REV. 133 (1998) (calling for states to create common markets through the Compact Clause). "According to one commentator, '[t]here was a sharp increase in the use of compacts during the 1960s, but the number of new compacts has been declining during the past two decades.'" Note, supra note 35, at 1992 n.8 (citing JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM 141-42 (1992)). The reasons offered for the recent decline include "increased federal preemption of state regulation" and the "complexity of interstate problems." Id. Nevertheless, as evidenced by the Port Authority, compacts as old as the 1920s are still vital and active. Furthermore, as this Article contends, a more concrete jurisprudence on compact entities would likely encourage states to employ the device more frequently.
82. "The Council of State Governments, the National Governors' Conference, the National Association of Attorneys General and other groups representing state government have applauded the increasing use of interstate compacts." FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS, at v (1961) [hereinafter ZIMMERMANN & WENDELL, LAW AND USE].
83. N.Y. STATE SENATE SELECT SENATE COMMITTEE ON INTERSTATE COOPERATION, 1996 ANNUAL REPORT 4.
84. 21 U.S. (8 Wheat.) 1 (1823).
recognized compacts as contracts between the states. *Green* arose from the founding of Kentucky as a separate state. Kentucky was formerly a part of Virginia before it won independence from her parent state.\(^85\) *Green* involved a tenant’s rights in land and turned on whether Kentucky or Virginia law was applicable.\(^86\) The Court looked to the compact that governed the separation.\(^87\) Article VII provided that land rights and interests valid under Virginia law would remain in effect in the newly formed state of Kentucky.\(^88\) Nevertheless, Kentucky passed land laws that conflicted with the Virginia laws. The court held that the Kentucky laws violated the compact and were therefore inapplicable.\(^89\) Writing for the majority in *Green*, Justice Story’s first step was to equate compacts between the states with contracts.\(^90\) He noted that, “[i]n fact, the terms compact and contract are synonymous.”\(^91\) While this may seem like an obvious conclusion, it actually has great impact on the powers of the states, because contracts enjoy special protections. Having established that compacts are contracts, Story invoked the Constitution to protect compacts from interference from the states.\(^92\)

\[\text{[T]he duty, not less than the power of this Court, as well as of every other Court in the Union, to declare a law unconstitutional, which impairs the obligation of contracts, whoever may be the parties to them, is too clearly enjoined by the constitution itself, and too firmly established by the decisions of this and other Courts, to be now shaken. . . . [A] State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals.}\]

As such, the compact between Kentucky and Virginia is a contract that cannot be impaired by subsequent legal enactments of Kentucky. This logical scheme gives compacts preeminence over the subsequent legislation of signatory states.\(^94\) As discussed later in this Article, this logic informs the debate over what powers a state preserves when entering into a compact and what laws are to apply to compact entities.

The Court’s ruling in *Green* accepts the notion that a state *can* contract

---

87. Id.
88. Id. (“[A]ll private rights and interests of lands, within the said District, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State.”).
89. Id. at 13.
90. “If we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious, that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract.” Id. at 92.
91. Id. But see supra note 23.
92. See U.S. Const. art. I, § 10, cl. 1.
94. Hasday, supra note 46, at 3. See infra text accompanying notes 147-150 for a discussion on why some parts of compact entity operations are immune from previous legislation of the signatory states as well.
away its sovereignty via contract. The importance of the states of the union as sovereign entities is a fundamental building block of our federal system. Nevertheless, the Court acknowledged, “Every government has, and from the nature of sovereignty must have, the exclusive right of regulating the descent, distribution, and grants of the domain within its own boundaries; and this right must remain, until it yields it up by compact or conquest.” As a result, states can create Compact Clause entities which are not subject to either state’s laws, because both states surrendered their sovereignty over designated matters.

2. Defining the Federal Interest

Following Green, most of the Supreme Court’s subsequent decisions dealt with the place of Compact Clause entities and agreements within the federal system. While not as pivotal as Green’s pronouncements, these decisions help explain how compacts should be treated when problems arise. The congressional consent element of the Compact Clause involves the federal government as an interested party in the compact; however, what effect that has on the compact has been much debated. In order to appreciate the history of the debate, it is necessary to keep in mind the potential spectrum of classifications of compacts. The most hands-off approach from a state’s perspective is to view a compact as merely “an agreement consented to by Congress,” invoking minimal congressional involvement. An intermediate standard, termed “the law of the Union,” suggests the potential that federal common law could be used to govern the interpretation of the compact. Finally, the most hands-on perspective is to consider the compact as a federal statute. As discussed below, this might result in unwanted externalities. The precise meanings of the standards are difficult to pin down since their distinctions have never been clearly fleshed out by the courts. This Subsection seeks to describe where the courts stand today on the federal interest question, how they arrived there, and the implications of their view.

Twenty-eight years after Green, the Court made what appeared to be another important pronouncement on compacts in Pennsylvania v. Wheeling & Belmont Bridge Co. Citing Green, this case labeled compacts afforded with congressional consent as the “law of the Union.” This label suggests that compacts that receive congressional consent take on a stature equal to federal

---

95. Green, 21 U.S. at 12 (emphasis added).
97. See infra text accompanying notes 104-107.
98. See infra text accompanying notes 100-103, 108-117.
99. See infra text accompanying notes 118-123.
100. 54 U.S. (13 How.) 518 (1851) (recognizing the supremacy of an act of Congress that approved a compact over state legislation).
101. Id. at 566 (“This compact, by the sanction of Congress, has become a law of the Union.”).
law, which might give guidance as to the place of compacts in the federal system—state, federal, or a third type of entity. It also provides a reminder of the federal interest, which can be easily forgotten when concentrating on the parties who made the agreement rather than the party who approved it.

However, two subsequent decisions of the Court cast a great deal of doubt onto the "law of the Union" doctrine. First, the Court denied a writ of error in New York v. Central Railroad because the question of the case arose under a compact—an agreement consented to by Congress—rather than under an act of Congress. The holding in Central Railroad suggested that compacts are not equivalent to acts of Congress as federal law, in contradiction to Wheeling & Belmont Bridge Co. The Court in Central Railroad focused on Congress's actual role in the compact process. It asserted that compacts have some lesser federal stature due to the fact that Congress merely consents to their enactment. More than sixty years later, in Hinderlider v. La Plata River & Cherry Creek Ditch Co., the Court cited Central Railroad rather than Wheeling & Belmont Bridge Co. as the controlling precedent. Hinderlider seemingly solidified a view of weak emphasis on the federal element.

Then, beginning in 1940, there was a rebirth of the law of the Union doctrine, and the Court continues to follow such an approach. In Delaware River Joint Toll Bridge Commission v. Colburn, the Court rejected the encroachment made on the law of the Union doctrine by Central Railroad and Hinderlider. It noted, "[T]he construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal 'title, right, privilege, or immunity' ...." However, this was not a complete return to the strong language of Wheeling & Belmont Bridge Co. because it did not classify a compact as federal law.

In the 1959 case of Petty v. Tennessee-Missouri Bridge Commission, the Court held that federal law governs the interpretation of compacts. After citing

---

102. Note, supra note 35, at 1998. Most compacts require congressional consent unless they do not affect political power.
103. The author of Charting No Man's Land argues that attempting to pigeonhole compacts into a simple understanding of the federal system, with all entities as either state or federal, is an exercise in futility. Rather, compacts exist in a no-man's land. Id. at 1991.
104. 79 U.S. (12 Wall.) 455 (1870).
105. Id. at 456.
106. 304 U.S. 92 (1938).
107. Id. at 109. See also Marlissa S. Briggett, Comment, State Supremacy in the Federal Realm: The Interstate Compact, 18 B.C. ENVTL. AFF. L. REV. 751, 762 (1991) (providing a more in-depth discussion of the threats to the "law of the Union" doctrine).
108. 310 U.S. 419 (1940).
Compact Clause Entities

Colburn and West Virginia ex rel. Dyer v. Sims\(^ {111} \) for the proposition that compacts present a federal question,\(^ {112} \) the Court reversed the Court of Appeals and held that federal law, rather than state law, determines whether compact entities can be sued.\(^ {113} \) The majority declared, "This is not enlarging the jurisdiction of the federal courts but only recognizing as one of its appropriate applications the business activities of an agency active in commerce and maritime matters."\(^ {114} \) Justice Frankfurter in a dissenting opinion agreed that a compact presents a federal question, but argued that "a federal question does not require a federal answer by way of a blanket, nationwide substantive doctrine where essentially local interests are at stake."\(^ {115} \) Frankfurter viewed the Compact Clause as a protection to guard the national interest rather than a way to change the compacting states' policies.\(^ {116} \) The Court has yet to subscribe to this view.\(^ {117} \)

Most recently, in Cuyler v. Adams,\(^ {118} \) the Court cemented the "law of the Union" doctrine's emphasis on the federal interest in compacts and added the idea that compacts are equivalent in stature to other federal law. Explaining Petty, the majority wrote, "This holding reaffirmed the law-of-the-Union doctrine and the underlying principle that congressional consent can transform

\(^ {111} \) 341 U.S. 22 (1951).
\(^ {112} \) 359 U.S. at 278.
\(^ {113} \) Id. at 278-79. The Court did not consider Missouri's and Tennessee's position on suits against a public corporation, but rather looked to federal law. The compact in question had a "sue and be sued" clause. The Court reasoned that Congress might not have approved the compact if there had been no such provision and therefore state law could not hold something contrary to what Congress approved. If Congress wanted to allow state law to control, it could have agreed to that. Id. at 280.
\(^ {114} \) Id. at 281.
\(^ {115} \) Id. at 285 (Frankfurter, J., dissenting).
\(^ {116} \) Frankfurter writes:
The constitutional requirement of consent by Congress to a Compact between the States was designed for the protection of national interests by the power to withhold consent or to grant it on condition of appropriate safeguards of those interests. The Compact may impair the course of interstate commerce in a way found undesirable by Congress. Or the national interest may derive from the necessity of maintaining a properly balanced federal system by vetoing a Compact which would adversely affect States not parties to the Compact. To imply from a congressional consent changes in the law of the Compact States of merely local concern, such as dislodging a State's policy on suability for torts attributable to the administration of the bridge (while necessarily leaving unaffected the State's suability for torts not attributable to its administration), would constitute a complete disregard of the purpose of the Constitution in requiring congressional consent to Compacts. Such disregard would introduce a wholly irrational disharmony in the application of local policy.

Id. at 288-289. Cf. West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951) (Frankfurter, J.) ("[W]e are free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States.").

\(^ {117} \) Rather, it is well settled that compacts approved by Congress are to be interpreted as acts of Congress. Hart & Wechsler's Fed. Courts, supra note 48, at 739. The authors of Hart & Wechsler's Fed. Courts ask if there is a place for state law in the interpretation of a compact, or act of Congress. Id. at 739 & n.13. For a discussion of two differing answers to a part of that question, see the discussion of the New York and New Jersey Views in Section III.A of this Article.

\(^ {118} \) 449 U.S. 433 (1981).
interstate compacts into federal law.”\(^\text{119}\) While the Court downplays the difference between a “law of the Union” and “federal law” characterization, the distinction actually can have significant effects.\(^\text{120}\) One scholar, L. Mark Eichorn, has argued that this move of classifying compacts as federal law opens a Pandora’s box of disincentives for states to form compacts. States, for example, may worry that the federal government will assume control of compact agencies and that agency officers will be subject to federal law enforcement.\(^\text{121}\) He notes that the holding in \textit{Cuyler} “threatens to fundamentally recast the nature of federal and state relations in an important and growing area of the law.”\(^\text{122}\) While \textit{Cuyler} cemented compacts as federal law, the nature of the actual derivative compact agencies/entities, as opposed to the compacts themselves, remains unsettled.\(^\text{123}\)

3. Sovereignty and Its Surrender

President Ronald Reagan said, “State problems should involve state solutions.”\(^\text{124}\) However, the conceptual framework behind Reagan’s statement—the same framework we were all taught in school, where issues are either state or federal—does not hold up under closer scrutiny.\(^\text{125}\) Regional problems, like managing the port district of New York, may call for regional solutions such as those advocated by Frankfurter and Landis.\(^\text{126}\) In essence, there is a third class of entity, in between state and federal. When regional problems arise, the Compact Clause can be a valuable tool. What that means to the states, the federal government, and their respective sovereignties is crucial to understanding the ability of each to protect its own interest in the compact entity.

Understanding the nature of compact entities and its implication for

\(^{119}\) \textit{Id.} at 439, n.7.

\(^{120}\) L. Mark Eichorn, \textit{Cuyler v. Adams and the Characterization of Compact Law}, \textit{77 VA. L. REV.} 1387, 1405 (1991) (citing Engdahl, \textit{supra} note 109, at 1015; \textit{ZIMMERMANN \& WENDELL, INTERSTATE COMPACT}, \textit{supra} note 62, at 7). The distinction between the two concepts may appear opaque. However, the term “federal law” has distinct meanings in other realms that could be imported into the compact field.

\(^{121}\) \textit{Id.} Whether or not this “Pandora’s Box” characterization has panned out has yet to be studied. However, there may also now be \textit{Printz} problems. \textit{Printz v. United States}, 521 U.S. 898 (1997), decided six years after Eichorn’s article, held that state officers cannot be forced to execute federal law. Clearly, characterizing compacts as “federal law” could possibly bring about \textit{Printz} problems, which would add another problem to \textit{Cuyler’s} Pandora’s Box.

\(^{122}\) Eichorn, \textit{supra} note 120, at 1405.

\(^{123}\) \textit{See Note, supra} note 35, at 1998.

\(^{124}\) President Ronald Reagan, Address at Oradell, N.J. (June 20, 1984), \textit{in SIMPSON’S CONTEMPORARY QUOTATIONS} 70 (James B. Simpson ed., 1988).

\(^{125}\) “[B]ecause interstate compact agencies occupy such an unusual position in our federal structure, it is undesirable, if not impossible, to apply a single categorical definition of these entities in every doctrinal area.” \textit{Note, supra} note 35, at 1991.

\(^{126}\) Frankfurter & Landis, \textit{supra} note 49, at 708.
sovereignty begins with recognizing that compacts are legal creations,\textsuperscript{127} established by a legal mechanism—the contract.\textsuperscript{128} Without a compact, or contract between the states, there would be no compact entity.\textsuperscript{129} Therefore, as noted early on in \textit{Green},\textsuperscript{130} much of the law applicable to compact entities is determined by the compact itself and contract law.\textsuperscript{131} "[C]ontract law affects compacts no differently than other instruments of agreement that are classifiable as contracts."\textsuperscript{132} Thus, compact law is contract law.\textsuperscript{133}

When compact entities are created, the states in effect contract away sovereignty with the approval of Congress. The requirement of congressional consent makes the United States an interested party to the contract, albeit with interests different from those of the compacting states. The consent requirement helps to safeguard the national interest.\textsuperscript{134} Justice Ginsburg discussed the nature of the state/federal relationship in the context of compacts between two states that create bi-state entities: "Bistate entities occupy a significantly different position in our federal system than do the states themselves. The states, as separate sovereigns, are the constituent elements of the Union. Bistate entities, in contrast, typically are creations of three discrete sovereigns: two states and the Federal Government."\textsuperscript{135} Taking things a step further, Justice Brennan directly stated that compact entities are so divorced from their creator states that there is no way compact entities or agencies can be seen as an arm of any one state.\textsuperscript{136} This reasoning underlies the conclusion that, once formed, compact entities become Frankenstein-like figures—the creators lose control of the created, but for the ability to terminate them.\textsuperscript{137}

To form this new entity, states must give up some of their own

\textsuperscript{127} West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951) ("But a compact is after all a legal document."); ZIMMERMANN \& WENDELL, LAW AND USE, supra note 82, at 1 ("Interstate compacts are legal instruments.").

\textsuperscript{128} RIDGEWAY, supra note 47, at 291 ("In our federal system it is essential that states, like persons, have legal mechanisms through which mutual activities can be accomplished jointly under proper and binding terms.").

\textsuperscript{129} Again, this puts to the side agreements between the states that are not required to be put in compact form pursuant to \textit{Virginia v. Tennessee}, 148 U.S. 503, 519 (1893). See supra note 52.

\textsuperscript{130} Green v. Biddle, 21 U.S. (8 Wheat.) 1, 92 (1823).

\textsuperscript{131} See Texas v. New Mexico II, 482 U.S. 124, 128 (1987) ("[A compact] remains a legal document that must be construed and applied in accordance with its terms."); Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting) ("Compact is, after all, a contract.").

\textsuperscript{132} ZIMMERMANN \& WENDELL, LAW AND USE, supra note 82, at 3.

\textsuperscript{133} Id. at 7.

\textsuperscript{134} West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 27 (1951).


\textsuperscript{136} Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 312, 314 (1990) (Brennan, J., concurring).

\textsuperscript{137} Just as states can enter agreements to create a compact entity, they can enter agreements to terminate one. It is important to keep in mind that this Article concerns itself with instances where one compacting state's interests are not adequately cared for by the courts. That concern is never present when the compacting states work in concert. Termination of a compact by bilateral action is an example of the states acting in concert.
Both compacting states relinquish exclusive control over a physical space and/or issue area as adequate consideration for the compact:

The creation of an interstate agency requires each State to relinquish to one or more sister States a part of its sovereignty. Each State's sovereign will is circumscribed by that of the other States in the compact and circumscribed further by the veto power relinquished to Congress in the Constitution.

This model of lost sovereignty hinges on the idea that a compacting state now needs a sister state to act in areas where it previously could have acted alone. If a state wants to impose its labor laws, or any other laws that will affect the internal operations of the compact entity, it must make sure that the other parties to the compact approve. Essentially, by creating a compact entity, states agree to relinquish unilateral control of certain matters in order to realize the expected efficiencies of the new entity.

Pairing this notion of lost sovereignty with the notion of compacts as contracts discussed above, it stands to reason that states can preserve some of their sovereignty by contracting around the loss. Outside of defenses like unconscionability and public policy prohibitions, contracting parties can select any governing terms they wish. In Texas v. New Mexico, the Court held that once Congress gave consent and the compact was entered into, no court could order relief inconsistent with the terms of the compact. The compact is to govern all challenges. The corollary of the Court's reasoning is that the states can retain certain sovereign rights in the compact itself, which the courts are in turn required to respect. According to the Ninth Circuit in Seattle Master Builders Ass'n v. Pacific Northwest Electric Power & Conservation Planning Council, "A state can impose state law on a compact organization only if the compact specifically reserves its right to do so." This suggests that such a construction is possible. Yet, states are careful about allowing state laws to apply to a compact entity so as to preserve the agency's teeth and effectiveness. By negotiating away sovereignty, each state can be assured

---

139. Feeney, 495 U.S. at 299, 314, 315 (1990) (Brennan, J., concurring); See also Hellmuth, 414 F. Supp. at 409. But see Hess, 513 U.S. at 55 (O'Connor, J., dissenting) (disagreeing with majority view that sovereignty is given up when entering into a bi-state compact within the context of a sovereign immunity inquiry).
140. RIDGEWAY, supra note 47, at 298 ("A compact . . . as long as it exists, diminishes the freedom of the state to act independently in a particular sphere of interest, and since it has no real control over the acts of its fellow compacting members, it is always bound to a degree by their sins of omission and commission.").
142. Id. at 564 ("One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.").
143. 786 F.2d 1359, 1371 (9th Cir. 1986), cert. denied, 479 U.S. 1059 (1987) (emphasis added).
144. But see Hasday, supra note 46, at 22 (suggesting that some view compact entities as "toothless").
Compact Clause Entities

that its partner state will not have the power to alter the compact entity without its consent.

Taken as a whole, we are left with a picture of compact entities as orphans of the federal system. They are beholden neither to the states, since they gave up sovereignty for efficiency’s sake, nor to Congress, since, once approved, Congress has no more executory powers over compact entities than it does over any private corporation.\textsuperscript{145} The only thing the entities are beholden to is the organic compact that created them.\textsuperscript{146} However, when the compact is silent on a given issue, what is left to control this orphan, if anything?

4. Internal Versus External Operations

It has been explained that states contract away their sovereignty over certain areas to the compact entity, but it must be emphasized that this does not impair a state’s ability to regulate the compact entity’s contacts with the state. Here, the internal/external distinction, as articulated by the New York Court of Appeals in \textit{Agesen v. Catherwood},\textsuperscript{147} provides a well-reasoned explanation. In holding that the New York rate of wages statute could not be applied to the Port Authority,\textsuperscript{148} the court explained that the general intent of the compact made the internal operations of the compact entity free from unilateral control, no matter when the state statute was enacted.\textsuperscript{149}

Because compacts are written to be the final statement on the compact entity’s internal operations, unilateral action cannot be allowed. As the Court of Appeals explained, “New York and New Jersey have each undoubted power to regulate the external conduct of the Authority . . . ”\textsuperscript{150} However, when push comes to shove, the internal operations must be kept independent of unilateral control, unless agreed to by both compacting states in the compact itself. That is the only way to be true to the purpose behind negotiating and drafting a compact in the first place.

State control can apply to the external operations\textsuperscript{151} of the compact entity since such operations do affect affairs in the states.\textsuperscript{152} Thus, a state can exercise jurisdiction under normal concepts of contact with the state. Yet, often, if not always, states leave the internal operations\textsuperscript{153} of the compact entity free from

\textsuperscript{145} Any federal laws that would apply to a private entity, such as federal minimum wage laws, should apply to compact entities as well.

\textsuperscript{146} Of course, the exception remains that unilateral control could be part of the agreement.

\textsuperscript{147} 260 N.E.2d 525, 526 (N.Y. 1970).

\textsuperscript{148} Id. at 527.

\textsuperscript{149} Id. at 526.

\textsuperscript{150} Id. at 526.

\textsuperscript{151} The Second Circuit has classified external operations regulations as items such as health, safety and environmental laws. Dezaio v. Port Auth. of N.Y. & N.J., 205 F.3d 62, 65 (2d Cir. 2000).

\textsuperscript{152} Id.

\textsuperscript{153} Examples of internal operations include minimum wage requirements, \textit{Agesen}, 260 N.E.2d at
interference by the compacting states,\textsuperscript{154} except for the right to appoint officials to run the entity. This helps to ensure one state does not impose its will on the compact entity without the consent of its fellow compacting state.\textsuperscript{155} For if any state could unilaterally reach the wholly internal operations of the compact entity, the agreement would serve little purpose.\textsuperscript{156}

To understand the internal/external distinction better, it may be useful to think of Compact Clause entities as foreign corporations. Foreign corporations are organized under and pursuant to the laws of a foreign country. They must comply with that foreign country's laws, but their wholly internal operations are not subject to regulation by any one U.S. state. Nevertheless, when a foreign corporation transacts business so as to have an effect in an American state, that state can assert jurisdiction on the basis of the contacts with the state. Similarly, compact entities are organized under a compact and must comply with the rules laid out in the compact. Additionally, they are resident in the United States and must adhere to applicable U.S. law. However, because states have contracted away their sovereignty to the compact entity, the entity does not exist in any given U.S. state and is therefore free from regulation on the basis of location. Yet, the states can still regulate compact entities, as they can foreign corporations, when their actions affect the health or welfare of the citizens of the state through sufficient contacts with the state. While the line between internal and external is blurred at times—especially when the states created the internal procedures—it is conceptually necessary.\textsuperscript{157}

Even recognizing that the internal operations of a compact entity are free from state regulation, the question does not end there. Because the states create the compact entity from nothing more than their pen and ingenuity, they can

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{154} When states do not include qualifying language in their agreements, some courts hold that they have ceded control and jurisdiction over internal operations to the agency's management. The compacting states cannot alter this control without approval. See Agreement of New York and New Jersey Establishing Port of New York Authority, ch. 77, arts. VI, VII, XIV, 42 Stat. 174, 177, 178 (1921); Washington Metropolitan Area Transit Authority Compact, Pub. L. No 89-774, art. V, 80 Stat. 1324, 1328 (1966); Compact Between Pennsylvania and New Jersey Creating Delaware River Joint Toll Bridge Commission, ch. 833, arts. I, II, 49 Stat. 1058, 1059, 1060 (1935); \textit{Dezaio}, 205 F.3d at 65 ("[I]nternal operations of the Authority—unlike its external conduct which is subject to each of the Compact State's health and safety laws—are independent from the unilateral control of either State without the other's concurrence." ); \textit{Agesen}, 260 N.E.2d at 526 (holding that the minimum wage laws of New York and New Jersey did not apply to the Port Authority as wages are an "internal" operation).
\item \textsuperscript{155} See \textit{Seattle Master Builders Ass'n v. Pac. N.W. Elec. Power & Conservation Planning Council}, 786 F.2d 1359, 1370 (9th Cir. 1986).
\item \textsuperscript{156} The ability of either state to reach the internal operations of the compact entity brings to mind an image of both states' legislatures in a deadlock with one attempting to apply its laws and the other attempting to prevent the application of the first state's laws in favor of the application of its own laws. It could create a vicious cycle with the compact entity caught between two states each trying to impose its will.
\item \textsuperscript{157} The \textit{Agesen} court explained, "Indeed, given sufficient social or economic justification, the lines of external and internal operation may shift, justifying increased regulation as the impact outside the Authority becomes more pronounced." 260 N.E.2d at 527.
\end{itemize}
\end{footnotesize}
craft it in any manner they wish, including in such a way as to retain some control over the internal operation in the compact itself.

5. "Concurred in" Versus Silent Compacts

Some states have included modest protections of sovereignty in their compacts. Between the notion that “either state can affect the internal operations of the compact entity” and “no state can affect the internal operations of the compact entity” is the idea that both states can affect the internal operations of the compact entity when acting jointly. This concert of action doctrine has been conceptualized in a number of compacts. It is a mechanism to fill the holes in the compact through joint state action without going through the formal amendment and congressional approval process. Simple contractual language such as “Amendments and supplements to this compact to implement the purposes of thereof may be adopted by the action of the Legislature of either state concurred in by the Legislature of the other” allows the states, acting jointly, to exercise a great deal of control over the internal operations of the compact entity.

Compacts that contain such mechanisms for the states acting in concert to modify the compact are labeled as “concurred in” language compacts. Compacts with “concurred in” language give the states a greater amount of freedom to make decisions regarding the law applicable to the internal operation of the compact entity without worrying about congressional consent or contract concerns. Yet many compacts lack such language. They are referred to as “silent compacts,” since they are silent regarding the ability of the states to modify the compact in any way. It is important to recognize the category into which a compact falls, as some courts see the “concurred in” language clause as an opening through which they can apply substantive state law to the Compact Clause entity.

Interpreting compacts with “concurred in” language has produced mixed results, as shown in Part III of this Article. One way of deciding whether state law can apply to compact entities is to decide if explicit modification of the compact is required or if implicit modification is allowed. Explicit

158. This is a reductio ad absurdum proposition. If true, either state could legislate in the area possibly creating conflicting obligations that the entity could in no way meet.


160. Id.

161. Once congressional consent is given, it arguably carries through to any legislation to which a legislation-enabling clause, or “concurred in” language provision, gives rise.


modification of a compact entails the legislatures of both states declaring that a
given law is meant to apply to the compact entity.\textsuperscript{164} For courts that require
explicit modification, evidence of a similar policy is not sufficient.\textsuperscript{165} Implicit
modification, by contrast, may lead to the opposite result: If a court determines
that compacting states have evidenced a singular policy or joint goal, it allows
the laws that carry out that policy to apply to the compact entity.\textsuperscript{166} Courts have
been split in their reaction to these differing approaches. Fortunately, the
negative byproducts of both views can be avoided by including a choice of law
clause in compacts, as Part IV explains.

6. Amending Versus Applying

A state attempting to apply its substantive laws to the internal workings of a
compact entity does not merely constitute the state exerting its powers over its
sovereign land, but rather constitutes a modification of the compact since the
state contracted away its sovereignty when it entered the compact. While
difficult, this concept is a cornerstone of Compact Clause jurisprudence. It
stems from the idea that compacts create entities that are no longer beholden to
their creators,\textsuperscript{167} and to apply a law to the internal operations of a Compact
Clause entity would be to change what was provided for in the compact—
whether that means adding, removing, or changing the obligations of the
entity.\textsuperscript{168} Courts accept this premise regardless of whether they adopt an
implicit or explicit modification standard.\textsuperscript{169} They recognize that to apply state
law is to change a compact that has gone through the formalized approval
process.

A theoretical stumbling block is that contracts are generally seen as
incorporating applicable state law. As the Second Circuit explained, “When
parties enter into a contract, they are presumed to accept all the rights and
obligations imposed on their relationship by state (or federal) law.”\textsuperscript{170} While

\begin{verbatim}
165. Id.
proposition that neither state may unilaterally impose its legislative will on the bi-state agency is that the
agency may be subject to complementary or parallel state legislation.”).
by compact, however, are not subject to the unilateral control of any one of the States that compose the
168. See, e.g., Hasday, supra note 46, at 2 n.3 (explaining that state legislation cannot burden the
that neither creator state can unilaterally impose additional duties, obligations, etc.).
modification view).
170. Resolution Trust Corp. v. Diamond, 45 F.3d 665, 673 (2d Cir. 1995).
\end{verbatim}
this might lead one to think state law, at the time of enactment, should be incorporated into the agreement, there is an “except-ion] where a contrary intention is evident.” That intention is evident when states contract away their sovereignty. Private parties cannot do the same because they are not sovereign entities. Because states are agreeing to contract away their sovereignty over the internal operations of the compact entity, it follows that they do not intend to incorporate state law. This is not to say that federal law is not incorporated. Because the federal government merely consents to the agreement and is not a party to its formation, it is not giving up sovereignty. It maintains power to regulate the compact entity as an interstate entity and therefore federal minimum wage laws and the like apply to compact entities.

The necessity of keeping the internal operations of the compact entity free from unilateral control casts the terms of the debate as “amending” rather than “applying.” States are free to apply their laws to the external operations of the compact entity, but to encroach on the entity’s internal operations amends what was meant to be the final word in the compact. This widely accepted view is useful in that it helps keep states from stepping on each other’s toes. However, courts disagree on the circumstances under which amendments to the compact are permissible.

III. THE CURRENT DISARRAY IN THE COURTS

The courts have yet to provide a coherent jurisprudence on how to deal with the legal black holes in which Compact Clause entities often exist. There are splits between and within federal circuits, conflicts within individual courts, and the courts of compacting states have even interpreted the legal standards differently for the same compact entity. Throughout all of this, the Supreme Court has maintained a consistent silence, denying petitions for certiorari submitted by parties seeking a definitive judgment.

Lower courts vary greatly in their rulings on when state law can apply to

173. Such power comes not from the Compact Clause, but simply from the Commerce Clause. See U.S. CONST. art. I, § 8, cl. 3.
175. See, e.g., Int'l Union of Operating Eng'rs, Local 68 v. Del. River & Bay Auth., 688 A.2d 569, 576 (N.J. 1997) (Garibaldi, J., dissenting) (criticizing strongly the majority opinion by stating, "The Court has done what the Legislatures of New Jersey and Delaware have not. . . . I believe that the Court does not have the power to amend the Compact unilaterally or to impose additional duties and obligations, arising under New Jersey law, on the DRBA without Delaware's consent.").
the internal operation of a compact entity. Many courts make a distinction based on whether the compact has a "concurred in" language clause. Yet, even those that look for such a clause do not uniformly apply the same legal standards. This Part outlines and critiques the major approaches courts have taken with regard to both silent compacts and compacts with "concurred in" language clauses. In determining whether state law should apply to a compact entity, the courts place a great deal of weight on the compact itself and whether or not it contains provisions allowing for amendment by the states.\footnote{177 See Texas v. New Mexico I, 462 U.S. 554, 567 (1983) (looking to the language of the compact). As the Supreme Court explained, "If there is a compact, it is a law of the United States, and our first and last order of business is interpreting the compact." \textit{Id.} at 567-68.}

\subsection*{A. Silent Compacts}

When a compact makes no provision for modification by joint action of the states nor contains a mechanism by which states can apply their laws to the internal operations of a compact entity, the courts' hands are significantly tied. Considering the problems that states have modifying compacts with "concurred in" language,\footnote{178 See infra Section III.B.} it is no surprise that the problems greatly increase when the organic compact is silent on the issue of amendment. The case law on this subject is sparse, as many of the most prominent compact agencies have organic compacts that contain "concurred in" language.\footnote{179 See, e.g., Waterfront Commission Compact of New York and New Jersey, ch. 407, art. XVI, 67 Stat. 541, 557 (1953).} However, in \textit{International Union of Operating Engineers, Local 542 v. Delaware River Joint Toll Bridge Commission}, the Third Circuit recently ruled that silent compacts could not be amended by implicit modification.\footnote{180 311 F.3d 273 (3d Cir. 2002).} In deciding whether the labor laws of New Jersey could apply to the workers of the Delaware River Joint Toll Bridge Commission (DRJTBC), the court noted that "the absence of the 'concurred in' language is fatal.\"\footnote{181 Id. at 280.} Since the compact creating the DRJTBC was silent on the subject of modification but empowered the Commission to deal with issues of employment,\footnote{182 Compact Between Pennsylvania and New Jersey Creating Delaware River Joint Toll Bridge Commission, ch. 833, arts. I, II, 49 Stat. 1058, 1059, 1060 (1935).} applying New Jersey's labor laws would have flown in the face of the language of the compact. When the legislatures have not shown intent to modify the compact, the court held that it "will not amend it for them.\"\footnote{183 Local 542, 311 F.3d at 280.} The case for judicial restraint is particularly strong in the case of silent compacts.\footnote{184 "Judicial restraint dictates that we not divine a way for them [to amend the compact that's not there]." \textit{Id.} "To read into the Compact any collective bargaining requirements would be to rewrite the agreement between the two states without any express authorization to do so. That is simply not our}
The Local 542 court only found one other decision dealing with the issue of the application of state law in the context of a silent compact, which it harshly rebuked. That other case, *International Union of Operating Engineers, Local 68 v. Delaware River & Bay Authority* from the New Jersey Supreme Court, read practicality as a trump over the compact’s silent language. The New Jersey Supreme Court found a right to collectively bargain even though the compact made no mention of such a right. The Third Circuit pointed out that the New Jersey Supreme Court was willing to do this “in spite of the fact that the compact did not clearly authorize modification through legislation ‘concurred in’ by both states, and neither New Jersey nor Delaware had expressed any intent to amend the compact or apply state labor laws to the Authority.” The Third Circuit agreed with the district court that “absent concurred in [language], there would be no basis, whatsoever, to look to any parallel legislation.”

The Local 542 court was cognizant of the complex realm of sovereignty in which it was operating, and that guided its interpretation of the compact. Moreover, because compacts are at least analogous to federal law, the court examined the compact at issue with reference to the principles of statutory interpretation. Consequently, the court looked back to an 1861 Supreme Court case, *Jefferson Branch Bank v. Skelly*, to support the proposition that “principles of statutory interpretation . . . require [courts] to strictly construe surrenders of sovereignty.” *Skelly* required that surrenders of sovereignty be made “in terms too plain to be mistaken” because of the importance of sovereignty to the federal system. Having determined that a compact is a surrender of sovereignty, that surrender must be handled carefully. To read practicality as a trump card over requiring evidence of express intent and the “silent” language of the compact used to preserve a static compact is truly an exercise in judicial activism.

---

185. See id. at 279 (“The only case to address a bi-state compact in a similar setting is *International Union of Operating Engineers, Local 68 v. Delaware River & Bay Authority . . .*”).
187. Local 542, 311 F.3d at 281.
188. Id.
189. Id. (quoting the unreported District Court opinion).
190. See supra Subsection II.B.2 (discussing Cuyler).
191. Local 542, 311 F.3d at 276 (“Our role in interpreting the Compact is, therefore, to effectuate the clear intent of both sovereign states, not to rewrite their agreement or order relief inconsistent with its express terms.”).
192. 66 U.S. 436 (1861).
193. Local 542, 311 F.3d at 280.
195. See supra Subsection II.B.3.
196. Whenever one begins discussing statutory interpretation, the dichotomy of textualist versus functionalist comes rushing to mind. It is an active and vibrant debate that has spawned volumes of material. See George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 321 n.1 (1995) (providing a sampling of the various publications on the subject); see also William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (discussing the
treat cavalierly a state’s surrender of sovereignty would be to strike a blow to the future use of compacts, because states would not want to have their former sovereign sphere subject to modification by an outside court.\(^{197}\)

Following on this notion, one of the three judges in *Local 542* would have taken things a step further and required a heightened standard in dealing with the modification of silent compacts.\(^{198}\) In a footnote to her opinion for the court, Judge Rendell noted, "Judge Roth is of the opinion that in the case of a bi-state compact that contains no provision for amendment, Congressional consent to any modification would be required."\(^{199}\) That is to say that states could not implicitly or explicitly apply laws to compact entities created by silent compacts. In order to get state substantive law to apply to the internal operations of a silent compact, Judge Roth would require the states to go through a formal approval process and again receive Congressional consent. That is because, strictly speaking, modifying a silent compact is a changing of the compact.

While the court never reached the merits of the issue of congressional consent as an entire panel, Judge Roth’s analysis seems directly on the mark. To allow otherwise would be tantamount to allowing the modification of a contract without the agreement of one of the parties. Congress is a necessary party to the formulation of the compact and therefore it, as well as all of the compacting states, must approve any change to the compact that is not explicitly pre-sanctioned by the compact itself. The reasoning here is similar to the requirement that modifications be in writing when a contract falls within the Statute of Frauds. Under the Second Restatement of Contracts, in determining

---

\(^{197}\) This situation actually came to bear with one state objecting to a sister state’s determination that its law could apply. *See infra* notes 245-248 and accompanying text.

\(^{198}\) The court never reached the issue of what is required to modify a silent compact. Rather, the holding is simply that the New Jersey View cannot apply to silent compacts. *Local 542*, 311 F.3d at 280. I have not found another decision where this issue is addressed.

\(^{199}\) *Id.* at 280 n.7.
Compact Clause Entities

whether a modification must be in writing, "the second contract is treated as containing the originally agreed terms as modified" and the determination is made upon that second contract.201 Similarly, to decide whether congressional consent is necessary to amend a silent compact, courts should look to the compact as modified and determine if, taken as a whole, that compact affects the political power of the states vis-à-vis the federal government and thereby requires congressional consent.202

Even though ensuring legislative intent is a paramount goal in dealing with silent compacts, there are still practicality concerns. The district court and the unanimous court of appeals in Local 542 paid great attention to the interests of the states. Yet, nowhere in these well-reasoned opinions is there a mention of the paradox that results from the holdings: Workers in both New Jersey and Pennsylvania have the right to unionize and to receive the benefits that come with it, but workers on bridges between the two states do not. Arguably, there was no need to discuss this paradox, as it is a direct result of the terms of the contract the states chose to enter. If those affected by the paradox want to seek redress, the proper forum is the legislature and not the courts. But given the lengthy amount of time it takes to amend a compact,203 this redress seems problematic from both a theoretical and practical perspective. The only way around such a problem appears to be in a more careful crafting of the language of the compact because the courts alone simply cannot provide an adequate solution.

B. "Concurred in" Language Compacts

There are two predominate views regarding the modification of "concurred in" language compacts.204 First, the New Jersey Supreme Court and some district courts in the Third Circuit205 have adopted an implicit modification

201. Id. at § 149(2).
203. One notes that it takes "something like geological time." Hasday, supra note 46, at 19 (quoting Harold J. Laski, The American Democracy 156 (1948)).
204. I center my discussion and examples on the New York/New Jersey area and the Second and Third Circuits. The purpose is two-fold. On one hand, given the number and age of compacts in the region, they have been the most fertile grounds for decisions. More importantly, the New Jersey View is perfectly juxtaposed to the New York View. It should be kept in mind, however, that these issues do reach across the country. E.g., Kansas City Area Transp. Auth. v. Missouri, 640 F.2d 173, 174 (8th Cir. 1981) (noting that one party cannot impose a burden on a compact entity); Nebraska ex rel. Benjamin Nelson v. Cent. Interstate Low-Level Radioactive Waste Comm'n, 902 F. Supp. 1046, 1049-50 (D. Neb. 1995) (discussing the impact of relinquishing sovereignty and the need for concurrence); Redbird Eng'g Sales, Inc. v. Bi-State Dev. Agency of Mo.-Ill. Metro. Dist., 806 S.W.2d, 695, 701 (Mo. Ct. App. 1991) (applying the New Jersey View). However, the cases discussed seem to encompass the totality of the arguments made.
205. The Third Circuit has not ruled on compacts containing "concurred in" language to date. However, they did give a New Jersey state court's decision allowing implicit modification preclusive
view. This view holds that equivalent legislation in the compacting states applies to compact entities even if the states have not expressly stated their intention that it apply. Allowing implicit modification has been labeled the New Jersey View. Meanwhile, the New York state courts, many of the federal courts in New York, including the Second Circuit, and some district courts in the Third Circuit have required explicit modification, i.e., a showing through statute or legislative history that both states meant for legislation to apply to the compact entity. For this reason, requiring explicit modification has been dubbed the New York View.

1. Assessing the New Jersey View

In 1988, the New Jersey Supreme Court, in *Eastern Paralyzed Veterans Ass'n v. City of Camden*, laid the foundations of the New Jersey View. This case is cited for the proposition that joint policy evidenced in statute is a concurrence to modify the compact. Yet, this was neither the holding of the case nor sound reasoning by the *Eastern Paralyzed Veterans* court in dicta. In *Eastern Paralyzed Veterans*, the New Jersey Supreme Court declined to apply New Jersey's construction laws to the Delaware River Port Authority absent a showing of agreement between the states. This holding would seem to be an adoption of an explicit modification view. However, subsequent courts have seized on the logic of the opinion rather than its holding. The seized-upon language comes after the court cites *C. T. Hellmuth & Associates v. Washington Metropolitan Area Transit Authority* and a litany of other cases for the proposition that a state cannot unilaterally impose its will on a compact entity. After stating that principle, the court makes a logical progression that is a fallacy. It notes, "The corollary of the proposition is that both states acting as one might be able to effect. See *Del. River Port Auth. v. Fraternal Order of Police*, 290 F.3d 567 (3d Cir. 2002) [hereinafter *Fraternal Order of Police II*]. When the New Jersey Supreme Court took this as an endorsement of the implicit view in *Ballinger v. Del. River Port Auth.*, 800 A.2d 97, 102 (N.J. 2002), the Third Circuit quickly rejected such a reading noting they did not reach the merits of the case in *Fraternal Order of Police II. Local 542*, 311 F.3d at 279 n.5.

206. See infra Subsection III.B.1.
207. *Local 542*, 311 F.3d at 277.
208. See infra Subsection III.B.2.
209. *Local 542*, 311 F.3d at 276.
212. *E. Paralyzed Veterans*, 545 A.2d at 134.
214. *E. Paralyzed Veterans*, 545 A.2d at 133.
impose their will on the compact. The court’s logic does not hold because it neglects to consider explicit joint state action as the standard and jumps right to the more liberal test of “complementary or parallel.”

The New Jersey Supreme Court employed the language of *Eastern Paralyzed Veterans* eight years later in *Bunk v. Port Authority of New York & New Jersey.* In deciding to apply New Jersey’s worker’s compensation laws to the Port Authority, the court determined that they were “similar” to New York’s laws on the matter and therefore met the complementary or parallel standard as laid out in *Eastern Paralyzed Veterans.* In *International Union of Operating Engineers, Local 68 v. Delaware River & Bay Authority,* the New Jersey Supreme Court again found that the “parallel and complementary” labor laws of New Jersey and Pennsylvania allowed New Jersey to apply its labor laws to the Delaware River and Bay Authority.

*Local 68* is in direct tension with *Delaware River & Bay Authority v. New Jersey Public Employer Relations Commission (PERC),* an earlier case in which the same court affirmed a holding that the New Jersey state agency with jurisdiction over employment issues had no power over a compact entity. It held, “If PERC is to have jurisdiction over plaintiff and its employees, such power must be expressly given to it by the Legislatures of New Jersey and Delaware, and not inferred by the courts.” Yet, in *Local 68,* the court made such an inference and gave itself jurisdiction to rule that unionization and the rights such a classification conferred would be permitted. *Local 68* and *PERC,* when taken together, hold that while an executive agency must wait for authorization from the legislatures of the two states to exercise jurisdiction over compact entities, the judicial branch has the power to make the same determination without pre-clearance from the legislature.

While logically problematic, the New Jersey View also contains a number of positive byproducts that must not be overlooked. One Pennsylvania court noted that compact agencies “do not exist in vacuum.” However, that court then held that state regulations could apply to the external, but not internal, operations of a compact entity. Therefore, under the court’s holding, the

216. *Id.* at 122.
219. *Id.* at 707.
220. It bears noting that, as a theoretical premise, unionization can take place even in the absence of legal norms—or in legal black holes—as there are no constraints to stop collective action. In a Hobbesian-like state of nature, see generally THOMAS HOBBES, *LEVIATHAN* ch. 13 (Penguin Books 1985) (1651), a group of like-minded individuals can come together in a union. However, what is lacking is a set of legal norms that require an employer to recognize this union and bargain collectively with it, and, therefore, workers lack rights they would have outside of the “black hole.”
222. *Id.*
internal operations of a compact entity do exist in a vacuum. An implicit modification view allows the states to reach the internal operations of a compact entity more easily than the explicit view with its stricter requirements of showing intent. A court can determine, based on an analysis of the existing laws of the compacting states, which of those laws can regulate the internal operation of the compact entity. Thus, when a compact fails to articulate a set of labor or discrimination laws to govern it, the courts will identify and apply common elements from the states' laws, rather than forcing the compact entity to languish in a legal black hole.

These benefits, however, cannot overcome the weaknesses of the New Jersey View. Giving the courts the kind of power that must be exercised under the New Jersey View risks encroachment on states' prerogatives and subversion of the legislative process. Allowing state courts to determine that state laws are substantially similar could lead to state courts in different states making different determinations as to whether a law is to apply to the compact.223 Also, one must believe there is something inherently prejudicial about allowing a state court to make a determination that its state's laws can apply to a compact entity while the other state's court system is silent.224 Possibly the biggest problem with the New Jersey View is that it does not guarantee the fulfillment of legislative intent. There could be laws a legislature does not intend to apply to a compact entity. For courts to read into the laws an intent to modify, add, or change a compact requires a level of judicial activism that should be avoided, especially considering that legislatures have the opportunity to make their intentions clear.

2. Assessing the New York View

As opposed to the New Jersey View, the New York View requires more in order to guarantee that state laws are intended to modify the compact in such a way as to affect the internal operations of the compact entity. After explaining the internal/external dichotomy in Agesen v. Catherwood,225 the New York Court of Appeals adopted an express requirement test in Malverty v. Waterfront Commission of New York Harbor.226 Decided the same year as Eastern Paralyzed Veterans, the case in which the New Jersey Supreme Court laid out the rationale that would lead to the implicit modification view, Malverty

223. For example, in dealing with the Delaware River Joint Toll Bridge Commission, a Pennsylvania court may determine that there are not parallel and complementary laws while a New Jersey court holds the opposite. While preclusion law might solve this, it will not solve the problem of different states applying different tests of "parallel and complementary."
224. See infra Subsection IV.B.1 (discussing the possibility of exclusive federal court jurisdiction in determining the "parallel and complementary" standard).
Compact Clause Entities

straightforwardly presents the rationale for requiring explicit modification. In the past, the New York legislature had clearly stated that certain legislation was meant to apply to a compact entity pending the passage of "concurrent" legislation by its partner state.\(^{227}\) So, when there was no such showing in *Malverty*, the court thought it was clear that the legislature did not intend to modify the compact.\(^{228}\) Similar policy goals do not necessarily amount to a desire to modify the compact because the legislatures do not automatically intend all state policies to apply to bi-state entities.\(^{229}\)

A series of cases out of the federal district courts further cemented this rationale. In *Baron v. Port Authority of New York & New Jersey*,\(^{230}\) the federal district court adopted the New York View and performed the same analysis as in *Malverty*.\(^{231}\) Later in *Settecase v. Port Authority of New York & New Jersey*,\(^{232}\) the same court further explained the reasoning behind *Malverty*.\(^{233}\) After defining "concur" as "acting together," the court wrote, "According to those definitions, a state would not likely be said to have concurred in legislation by the other simply because it happened to enact legislation similar in language and effect. Concurrence implies an intent to act jointly."\(^{234}\) This language evinces a concern that the court not apply state laws to the agency unless the legislatures expressly intended for such.

Perhaps the greatest danger that the New York View seeks to address is that the courts will find themselves doing what the legislatures of the compacting states have not done. Ironically, one of the best descriptions of this concern comes from a case out of the New Jersey courts. In her dissent to *Local 68* and its adoption of the "parallel and complementary" view, Judge Garibaldi notes the virtues of an explicit modification standard:

The Court has done what the Legislatures of New Jersey and Delaware have not—amend the congressionally-approved Interstate Compact. . . . The Court does not have the power to amend the Compact unilaterally or impose additional duties and obligations, arising under New Jersey law, on the DRBA without Delaware's consent. . . . The Legislatures of both States could readily enact concurrent legislation requiring the DRBA to enter into collective negotiations with its employees thereby designating an entity more appropriate than the Chancery Division to decide the myriad of issues that will arise during the course of collective

\(^{227}\) Id. at 422.
\(^{228}\) Id.
\(^{229}\) Id.
\(^{231}\) Id. at 929 (holding that the absence of any reference to the Port Authority from the text or legislative history of Human Rights Law and LAD indicated there was no intent to modify the internal operations of the compact entity); see also *Rose v. Port Auth. of N.Y. & N.J.*, 13 F. Supp. 2d 516 (S.D.N.Y. 1998) (performing the same analysis).
\(^{233}\) Id. at 535.
\(^{234}\) Id. at 534; See also *Del. River Port Auth. v. Fraternal Order of Police*, 135 F. Supp. 2d 596 (E.D. Pa. 2001), rev'd on other grounds, 290 F.3d 567 (3d Cir. 2002).
negotiations. They did not, however, choose to follow such a course. As such, the courts of New Jersey lack the authority to unilaterally grant such power. \footnote{235}

Other courts echo the argument that the courts are the wrong place to seek redress for applying state law to a compact entity. The court in Delaware River Port Authority v. Fraternal Order of Police, for example, notes that allowing for implicit modification could hamper the development and use of compact entities. States will be cautious of entering into an agreement if their will might be implied rather than required to be explicitly shown, thereby putting their interests at risk. \footnote{236}

The strengths of the New York View are the weaknesses of the New Jersey View and vice-versa. While the New York View provides more safeguards to preserve legislative intent, it lacks a great deal of practicality. Adhering to the New York View can create oddities where a person is subject to discrimination laws on both sides of the Hudson River, but workers on bridges that span the Hudson do not receive those protections. \footnote{237} Even courts that have adopted the New York View recognize this fact. \footnote{238} In essence, a direct tension exists between the desire to ensure that the will of one state is not compromised by its sister state and the practical need to have a set of laws that apply to compact entities, whether those laws deal with labor, discrimination, or the like.

C. Taking a Stand Against Uncertainty

1. The Supreme Court's Current Reticence

While the lower courts have been wrestling with the problems and paradoxes posed by compact modification and re-examining judicial and legislative roles, the Supreme Court has avoided the issue, declining to give guidance to lower courts struggling to develop a clear jurisprudence. The Court has denied certiorari in cases that have adopted the New Jersey View \footnote{239} as well as in cases that have adopted the New York View. \footnote{240} While it is recognized that the Court takes very few cases per year, \footnote{241} the Court is ill advised to continue to maintain its silence on this topic.

\footnote{236} 135 F. Supp. 2d at 608.
\footnote{237} Dezaio v. Port Auth. of N.Y & N.J., 205 F.3d 62 (2d Cir. 2000).
\footnote{238} See, e.g., Settecase v. Port Auth. of N.Y. & N.J., 13 F. Supp. 2d 530, 535 (S.D.N.Y. 1998) (admitting that "the New Jersey view may be practical").
\footnote{241} See Kevin H. Smith, Certiorari and the Supreme Court Agenda, 54 OKLA. L. REV. 727, 729-30 & nn.8-10 (2001) (noting that the Supreme Court grants certiorari in only about seven percent of cases).
In *Local 68*, the Supreme Court was presented with New Jersey’s adoption of the “parallel and complementary” standard of implicit modification over Justice Garibaldi’s strong dissent, but it decided against reviewing the case. Many parties considered this an important issue as shown by at least five amici briefs.\(^{242}\) Of note is the number of other Compact Clause entities that supported a writ of certiorari. The Port Authority of New York and New Jersey, the Delaware River Port Authority, and the Waterfront Commission of New York Harbor all requested that the Court look at the “parallel and complementary” standard and the problems the standard poses.\(^{243}\) Clearly these compact entities were motivated by self-interest: They did not want a new set of norms applying to them.\(^{244}\) However, even more interesting than the compact entity amici is the fact that the State of Delaware was an amicus as well.

Delaware, one of New Jersey’s fellow compacting states in the compact at issue in *Local 68*, filed an amicus brief in support of granting the writ of certiorari.\(^{245}\) The state objected to the New Jersey Supreme Court’s standard.\(^{246}\)


\(^{243}\) See Amicus Curiae Brief in Support of the Petition for a Writ of Certiorari to the Supreme Court of New Jersey, *supra* note 242, at *5* (“This Court should grant review to protect the integrity of these compacts by preventing creator states from unilaterally—and impermissibly—imposing their laws or policies on bi-state or interstate compact entities without the express consent of the legislatures of the other creator states.”); Brief Amicus Curiae of the Port Authority of New York and New Jersey in Support of Petitioner, *supra* note 242, at *2* (“The Port Authority respectfully urges the Court to grant the DRBA’s Petition for Certiorari to review the decision of the New Jersey Supreme Court because that decision ignores the carefully considered methods set forth in the DRBA Compact for imposing duties and obligations on the bi-state agency and establishes a precedent that conflicts with the decisions of the highest court of other states and is harmful to other Compact Clause entities by imposing duties and obligations by inference.”); Brief Amicus Curiae of the Waterfront Commission of New York Harbor in Support of Petitioner, *supra* note 242, at *11* (“[T]his Court should grant certiorari and resolve the conflict between the directly contrary rulings of the New York and New Jersey high courts as to the manner in which additional duties or obligations may be imposed upon a bi-state entity established pursuant to the Compact Clause with the consent of Congress.”).

\(^{244}\) See Brief Amicus Curiae in Support of the Petition for a Writ of Certiorari to the Supreme Court of New Jersey, *supra* note 242, at *15* (“The New Jersey Supreme Court’s imposition of New Jersey’s labor policies on the DRBA—and, by extension, on its other bistate and interstate compact entities—amounts to an improper interference with the rights of the other creator states. Its ruling directly contravenes the policy decision of the creator states’ legislatures not to bind their bi-state and interstate entities to either state’s labor laws or policies.”) (citation omitted); Brief Amicus Curiae of the Port Authority of New York and New Jersey in Support of Petitioner, *supra* note 242, at *7-8* (“[T]he *Local 68* decision] also creates uncertainty as to what laws apply to Compact Clause entities, especially in New Jersey. . . .”); Brief Amicus Curiae of the Waterfront Commission of New York Harbor in Support of Petitioner, *supra* note 242, at *11* (“Before the Waterfront Commission is presented with such confusion and uncertainty . . .”).

This bears out the concern explained earlier: The "parallel and complementary" standard does not ensure the partner state's agreement. Rather, the compacting state may—and in this case did—object to the standard and its results. Delaware eloquently explained its concern:

If allowed to stand, the New Jersey high court's decision would vest in the state courts of one contracting state the power to rewrite the Compact, thereby violating the basic principle that 'bi-state entities created by compact...are not subject to the unilateral control of any one of the States that compose the federal system.'247

Yet, when presented with a case of one state objecting to a compacting sister state's compact standard, the Supreme Court remained silent, staying out of a situation where Delaware accused New Jersey of "undermining the principles of state sovereignty underlying the compact clause."248

Three years after refusing to take up the New Jersey standard in Local 68, the Court declined to consider the New York View in Dezaio v. Port Authority of New York & New Jersey.249 By allowing both Dezaio and Local 68 to stand, the Supreme Court is abstaining from action and allowing differing standards to persist, providing no guidance to the lower courts. When the opportunity next presents itself, the Court should not pass up the chance to pronounce on this aspect of constitutional law again.

2. Building a Coherent Compact Clause Jurisprudence

The best test case for the Supreme Court would be one based on a compact with "concurred in" language. "Concurred in" language compacts are more susceptible to either the New York or New Jersey View and would give the Court less of an opportunity to give a narrow holding as the Third Circuit did in Local 542250 when it was presented with a silent compact. Additionally, the case must be about the application of state law to the internal operations of a compact entity as opposed to the external operations, so to avoid the out explained in Agesen v. Catherwood.251 Lastly, it should deal with a law that affects people affiliated with the compact entity. Anti-discrimination laws, as in Dezaio, and labor laws, as in Local 68, present the Court with the additional public policy concern of leaving workers without protections they would have in either compacting state. While public policy is generally an argument of last

246. Id. at *11 (arguing that the Local 68 decision is "plainly mistaken").
248. Id. at *4.
251. 260 N.E.2d 525, 526 (N.Y. 1970) (explaining that regulating the external operations of a compact entity are not modifications to the compact).
Compact Clause Entities

resort,\textsuperscript{252} it does give the Court a human element to deal with, which may provide context for the legal principles involved in the case. Still, all of this could be rendered moot by a choice of law clause, as explained in Part IV \textit{infra}.

While the Supreme Court has not considered the application of state law to the internal operations of Compact Clause entities, it has taken the opportunity to speak on the potential sovereign immunity of compact entities. These decisions might give guidance as to the Court’s view on compact entities. While forecasting how the Court will respond to Compact Clause entities based on its sovereign immunity pronouncements is an inexact science, several indicators are worth noting.

There are two seminal decisions on sovereign immunity and Compact Clause entities. The first, \textit{Lake County Estates, Inc. v. Tahoe Regional Planning Agency},\textsuperscript{253} was a case challenging the Ninth Circuit’s holding that the Tahoe Regional Planning Agency, a compact entity, was entitled to Eleventh Amendment protections.\textsuperscript{254} In reversing the Ninth Circuit in part, the Supreme Court began its analysis by looking at the nature of compact entities.\textsuperscript{255} For the purposes of trying to find an analogy, it makes two interesting statements. On one hand, it notes:

Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment.\textsuperscript{256}

This language suggests that, because states can provide for what they want in a compact, the Court will not hold the Eleventh Amendment applicable absent a clear signal from the states.\textsuperscript{257} One must wonder if the Court would also preclude courts from amending the compact implicitly, so as not to violate the Compact Clause’s requirement of consent and agreement. Another interesting note is the Court’s declaration that, “while TRPA [a Compact Clause entity], like cities, towns, and counties, was originally created by the states, its authority to make rules within its jurisdiction is not subject to veto at the state level.”\textsuperscript{258} The Court is thus distinguishing compact entities on the grounds that the states no longer have control over those entities once they are created.

The second seminal case, \textit{Hess v. Port Authority Trans-Hudson Corp.},\textsuperscript{259}

\begin{thebibliography}{9}
\bibitem{253} 440 U.S. 391 (1979).
\bibitem{254} Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1977).
\bibitem{255} \textit{Lake County Estates}, 440 U.S. at 399.
\bibitem{256} \textit{Id.} at 401.
\bibitem{258} \textit{Lake County Estates}, 440 U.S. at 402.
\bibitem{259} 513 U.S. 30 (1994).
\end{thebibliography}
discussed above, also provides some insight. As a foundation for its holding, the Court recognizes that there are three distinct parties to a compact whose interests need to be protected. Again, the Court refuses to analogize Compact Clause entities to other state-created entities. It notes that "ultimate control of every state-created entity resides with the state, for the state may destroy or reshape any unit it creates." However, states cannot "destroy or reshape" compact entities, so it follows that they are not state agencies. This indicates that the Court is cognizant of the importance of compact freedom from state control. Consequently, one might reasonably believe that it will adopt the New York View as it favors ensuring legislative intent and keeping the state courts from imposing additional control on compact entities. While the Court has stayed out of the fray to date, it will need to address the issue directly in order to give guidance to the befuddled lower courts.

If and when the Supreme Court eventually takes an appropriate case, its opinion will undoubtedly reflect the ever-present tension between the desire to fill "black holes" and the need to protect the contracts and interests of the states. The Court's opinion will likely draw upon Hess's discussion of the nature of Compact Clause entities as a jumping-off point. From there, it would be appropriate for the Court to identify the different types of compacts and different approaches other courts have taken and then endorse one of those views.

When placed side by side, the New York View is more logically and legally sound than the New Jersey View, despite the New Jersey View's justified concern about filling legal black holes. As shown below, there are other, more complete ways to fill those holes, which produce superior results. Simply stated, the New Jersey View does not do enough to adequately address the interests of all compacting states. The case-in-point, discussed above, is the fact that Delaware filed an amicus brief with the Supreme Court objecting to the New Jersey Supreme Court's application of the New Jersey View and its implicit modification standard to a compact to which Delaware was a party. In other words, the criticism that the New Jersey View does not adequately protect the interests of all compacting parties came to fruition with one state making its objections known to the Supreme Court. While the New York View leaves black holes in place, it guards against such an occurrence. Furthermore, since the legislatures can provide a more complete alternative than the courts,

260. See supra Section II.B.
261. Hess, 513 U.S. at 40-42.
262. Id. at 47 (refusing to analogize compact entities to cities and states).
263. Id.
265. See infra Part IV.
266. See supra notes 243-248 and accompanying text.
the New York View will suffice and the New Jersey View should be avoided.\textsuperscript{268}

Given these points and the way both the Second and Third Circuits have analyzed the New Jersey View,\textsuperscript{269} the Supreme Court might very well unanimously accept the New York View. The Third Circuit went so far as to point out that it felt that the New Jersey View was based on a "misrepresentation of compact law."\textsuperscript{270} If the Court does divide, although I doubt it will substantially, the textualist justices will likely push for the New York View, or for a stricter standard requiring congressional consent, while the more functionalist justices may push for the New Jersey View. However, even the most functionalist justice has to be wary of interposing norms when the legislatures could have but did not. As much as there is a desire to fill black holes, it must be done in a manner that ensures concurrence of the states.

IV. AN ANSWER IN THE LEGISLATURES

The best way around the problem of legal black holes is not found in the courts, but in the legislatures, which have the ability to employ a judicially sanctioned contract tool—the choice of law clause.\textsuperscript{271} Legislatures can provide a much more complete remedy than the courts could ever construct, and they should therefore take the opportunity to use a choice of law clause in every compact. In the absence of such a clause, the courts can only give malformed results, because they face an impossible choice between respecting legislative intent and improving the functionality of compact entities.

A. An Incomplete Alternative in the Courts

The primary reason for a choice of law clause is that the courts cannot provide a complete alternative, even if the legislatures give them license to try. States' laws cannot always be reconciled without mismatches. Furthermore, given the sensitive interplay of interests involved in compact entities, the sovereign actors themselves are best situated to negotiate the governing norms. Each of these points will be taken in turn to show that the legislatures of the

\textsuperscript{268} See infra Part IV.

\textsuperscript{269} See, e.g., Int'l Union of Operating Eng'rs, Local 542 v. Del. River Joint Toll Bridge Comm'n, 311 F.3d 273 (3d Cir. 2002); Dezaio v. Port Auth. of N.Y. & N.J., 205 F.3d 62 (2d Cir. 2000).

\textsuperscript{270} Local 542, 311 F.3d at 280.

\textsuperscript{271} The choice of law clauses discussed in this Part vary from traditional notions of choice of law clauses since the contracting parties are sovereigns and thus have powers that other parties lack. Compacting states can use their legislative powers to make a set of laws or select a set of laws to apply to the compact, while, for example, two non-sovereign parties could not choose a different minimum wage law to apply to their new partnership unless they had a "substantial relationship" to a state with such a law and the law would not be "contrary to a fundamental policy" of a state with a greater interest. See \textit{Restatement (Second) of Conflict of Laws} § 187 (2)(a-b) (1988); \textit{infra} text accompanying notes 317-319.
compacting states are the only ones that can provide adequate relief from legal black holes while at the same time ensuring that the interests of the states are not overlooked.

1. Square Pegs & Round Holes: The Problems of Reconciliation

The Supreme Court once explained, "Gauging actual control [of a compact entity], particularly when the entity has multiple creator-controllers, can be a 'perilous inquiry,' 'an uncertain and unreliable exercise.'" Trying to determine whether the states have implicitly modified the compact and if legislation is "parallel and complementary" is a similarly perilous and uncertain task. Such an exercise has been difficult for the courts in other realms, and there is no reason to believe it will be any easier in this case. The problem lies in the fact that state laws do not neatly match up; therefore, even if it was good policy, the courts will only be able to construct malformed sets of laws that reflect neither state's complete policy. In attempting to give both compacting states a half-loaf, they are creating a brand of bread that neither state would choose to eat.

This problem of malformed results can be seen in Justice Garibaldi's objections to the New Jersey Supreme Court's endorsement of the "parallel and complementary" standard. In that case, which dealt with the Delaware River and Bay Authority ("DRBA"), she pointed out the differences between Delaware's and New Jersey's laws:

Although the labor laws of New Jersey and Delaware are based on similar public policies, they differ in the following manner: (1) each States' statute describes a different procedure for determining the employee-bargaining unit; (2) the provisions for determining unfair labor practices and enforcing the statutes are different; (3) the New Jersey statute provides for arbitration of disputes whereas the Delaware statute does not; and (4) neither statute indicates in its declaration or purpose that it intended for the statute to apply to the DRBA.

A court could not adequately match up these differing laws and apply them to the compact entity without establishing a law that is clearly opposed to one, if not both, of the state's policies. Very aptly, Justice Garibaldi observes that

---


273. See Arthur R. Miller & David Crump, Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 64-65 (1986) (explaining that it is often difficult to determine which state's laws apply in large multistate class actions).

274. Since the compacting states freely chose to enter an arrangement, they should not be subject to results they would not have agreed to or expected.


276. It must be noted that the New Jersey Supreme Court majority did not try to match up the laws, but rather used the "parallel and complementary" standard to enable New Jersey courts to apply the New Jersey laws, in total. Even though the court conceded that the labor laws of the two states were "not identical," id. at 576, the court saw no problem in "conclud[ing] that a bi-state agency, such as the
to allow the courts to try to fit these laws together would create a situation where, "[r]ather than acting as a court, the Chancery Division will be acting as an administrative agency."\textsuperscript{277} The courts are neither authorized nor expected to perform this function.\textsuperscript{278}

With a slight change in the facts—and an adoption of the New Jersey View—the Court in \textit{Local 542} might have also been unable to reconcile laws that seemed otherwise parallel and complementary. The union wanted a determination that the labor laws of New Jersey and Pennsylvania were parallel and complementary and should be applied to allow workers on bridges controlled by the DRJTBC to receive union recognition.\textsuperscript{279} The labor laws of the two states were substantially similar:\textsuperscript{280} "Both acts provide[d] for an election among public employees to determine whether they wish[ed] to be represented by a labor union and require[d] public employers to bargain collectively with the selected union."\textsuperscript{281} However, there was a substantial difference between the two sets of labor laws that did not come to play in the case, but conceivably could in another compact between New Jersey and Pennsylvania:\textsuperscript{282} "It has long been the rule in [New Jersey] that public employees may not strike."\textsuperscript{283} Yet, legislation in Pennsylvania explicitly gives public employees the right to strike.\textsuperscript{284} If a Compact Clause entity is held to be a public employer, these two laws cannot be reconciled without clearly going against the policy of one of the two states. Neither policy encompasses the other; they are mutually exclusive. The determination of which view should prevail when laws contradict each other like this is best left to the states to negotiate, rather than having the courts try to choose between them.

An analogy can be drawn between the malformed results that occur when courts attempt to reconcile compacting states’ laws and apply them to a compact entity and the conflicts of law principle, \textit{dépeçage}. \textit{Dépeçage} is

\textsuperscript{277} \textit{Id.} at 579-80.
\textsuperscript{279} \textit{Int’l Union of Operating Eng’rs, Local 542 v. Del. River Joint Toll Bridge Comm’n}, 311 F.3d 273, 274-75 (3d Cir. 2002).
\textsuperscript{281} \textit{Local 542}, 311 F.3d at 275.
\textsuperscript{282} The \textit{Local 542} court noted, "Neither party argues that the Commission should be deemed a ‘public employer’ under either states’ laws, nor do we think that it is." \textit{Id.} at 275 n.3. However, it is possible that under a different compact the states would try to construct a multistate public employer.
\textsuperscript{284} \textit{PA. STAT. ANN. tit. 43 § 1101.1003 (West 2002).}
defined as “applying the rules of different states to determine different issues” in the same case. In his influential book, *The Choice of Law Process*, David Cavers sets up a hypothetical court with conflicts scholars as judges and predicts what each would say about the hypothetical case *Adams v. Knickerbocker Nature Society*. According to “Judge” Brainerd Currie, there is no more serious mistake than to indulge in an unprincipled eclecticism, picking and choosing from among the available laws in order to reach a result that cannot be squared with the interests of any of the related states. . . . [A]nalysis should not result in the cumulation of negative policies to produce a result not contemplated by the law of either state.

The same analysis holds true for trying to reconcile laws in order to apply a set of legal norms to a compact entity. Incomplete and malformed results should be avoided, especially when legislatures can explicitly choose a well-thought-out and complete set of norms. By restraining themselves from providing a patchwork solution, the courts can help force legislatures to deal with these sensitive issues.

2. The Negotiation Process Values

The actual process of negotiating the compact is a value added by the legislatures’ involvement for which the courts cannot provide an adequate substitute. The negotiation process arguably gives as much identity to the compact as any of the parties do. “Negotiation is a basic, special form of human communication” that “helps people achieve goals and resolve problems.”

The intrinsic value of negotiation must be considered when addressing compact-related disputes. Negotiation partners trade or pair up interests in exchange for other rewards. When the compacting states go through this

287. *Id.* at 38.
290. See SHELL, *supra* note 288, at 8 (“Knowledge about the negotiation process and bargaining strategy . . . puts you on the road to improved negotiation results.”).
process to reach an agreement, the balance they strike may be reflected in many elements of the compact. For example, one state may want to trade its interest in appointing more board members to the compact entity in exchange for the other state’s interest in contributing fewer funds to the agency. This trade off could result in the agency being dominated by the residents of one state; however, that outcome would be a bargained-for exchange, which the parties want the courts to enforce. As courts recognize, “Our role ... is not to redistribute these risks and opportunities as we see fit, but to enforce the allocation the parties have agreed upon.” Recognizing the value of this process will prove to be important when courts are considering whether or not to set aside its results.

Due to the delicate balance of interests that must be struck when creating a Compact Clause entity, the compacting sovereigns must negotiate to reach a deal that is acceptable to both parties. In any negotiation, the parties can bargain when their interests conflict. This process is a slow and deliberate exercise designed to bring about the “trading that allows bargainers to express the intensity of their preferences.” A world in which bargaining is no longer important “may result in a parochialism in which states [would] surrender nothing because there are no suitable concessions to receive in return.” When the courts take that process value out of the equation by determining when laws are parallel and complementary, they may very well be imposing an outcome to which the states would not have otherwise agreed. States, however, can use the negotiation process to prevent the courts from having such problems left on their doorsteps. A negotiated choice of law clause in compacts would achieve such a result.

B. Legislative Options

Below are two legislative options that could aid in remedying the problems posed, one of which is clearly preferable. If the courts continue to employ an implicit modification standard, the problem remains that something seems amiss when one state’s courts determine that its laws can apply while the other state’s courts have not opined on the issue. One way around this would be to grant the federal courts exclusive jurisdiction to make the “parallel and complementary” determinations, since they are less tied to the parties.


293. See SHELL, supra note 288, at 169-73 (discussing “issue trading” and how parties can use interests to reach deals).

294. Hasday, supra note 46, at 22. See also VINCENT V. THURSBY, INTERSTATE COOPERATION: A STUDY OF THE INTERSTATE COMPACT 138 (1953) (explaining that the process of negotiating these compacts is “a slow and cumbersome process at best”).

295. Hasday, supra note 46, at 22.

296. See supra Subsection III.B.1.
However, given the problems already discussed in making a "parallel and complementary" determination and the advantages of the New York View, this option is not preferable, as it prolongs the life of the New Jersey View. Rather, a second approach of including choice of law clauses would more clearly and squarely address the problems.

1. **Exclusive Federal Court Jurisdiction**

An obvious answer to the concerns raised above over the potential unfairness of state courts making the "parallel and complementary" inquiry would be to have Congress vest power exclusively in the federal courts to make "parallel and complementary" determinations. The federal courts are perceived to be less biased toward any one state. The fact that the compacts are federal law already allows such review but does not require it. A requirement of federal review is needed to protect all of the states involved. While removal is always an option, Congress would be best served to pass a statute giving the federal courts exclusive jurisdiction over compact entities. Compacts are within Congress’s legislative jurisdiction due to their interstate character, and such a statute would, at a minimum, give decisions applying the problematic "parallel and complementary" standard a greater degree of objectivity since they will not be coming from the interested compacting states’ courts.

Whenever one proposes vesting the federal courts with exclusive jurisdiction, efficiency concerns must be acknowledged. The federal courts' backlog is well documented. Judge Richard Posner of the Eighth Circuit has even suggested considering the impact on overcrowded dockets when crafting


299. Concededly, such a requirement is not constitutionally required as there is no precedent barring a state’s courts from ruling on a contract to which the state is a party.

300. Removal is an unattractive solution as it allows the plaintiff to file in state court and places the burden on the defendant to make the removal petition. Such a system is inefficient.

301. Whether or not courts are actually motivated by that interest—or if there is an interest at all—remains an open question. The appearance of an interest to the sister state creates enough of an issue that it should be avoided, if possible. See infra note 311.

opinions. Given that backdrop, adding to the backlog should always be closely scrutinized to ensure that the proposed action is necessary. Yet, if the implicit view of New Jersey is to be accepted, I can think of no other alternative that will not offend notions of fairness.

Parallels can be drawn between the rationales behind both diversity jurisdiction and exclusive Supreme Court jurisdiction for disputes between the states and the argument for exclusive federal court jurisdiction in making the implicit modification judgment. Diversity jurisdiction grew out of the desire to provide a neutral forum in suits involving citizens of different states. And while there have been efforts to curb diversity jurisdiction as a result of the backlogged federal docket, that jurisdiction remains. This is likely a result of the recognition, albeit diminished in today’s world, that diversity jurisdiction serves an important function. In the compact context, the provision of a neutral forum at least removes the appearance of impropriety and unjustice that results when one state’s courts determine that its laws apply to an area over which it has surrendered sovereignty. There is a reason that the Supreme Court is vested with exclusive jurisdiction over disputes between the states— to provide a neutral forum. While Compact Clause cases are not suits

304. Given the small number of active compacts, approximately 200, the additional burden on the federal docket would be but a drop in the bucket. Nevertheless, considering the importance of docket overload, the concern is worth raising.
305. See Patrick J. Borchers, The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon, 72 Tex. L. Rev. 79, 79 (1993) (“[T]he consensus is that diversity has existed and exists to provide a neutral forum for out-of-staters against perceived local bias by state courts.”).
306. See Patrick L. Sealey, Note, An Alternative Approach to Diversity Jurisdiction for Corporations: Parent-Subsidiary Corporations, 20 J. Corp. L. 497, 497-98 (1995) (“Congress has made many attempts to abolish or limit diversity jurisdiction. These attempts are largely efforts to ease the workload of the federal judiciary.”).
307. See Alice M. Noble-Allgire, Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined from the Face of Plaintiff’s Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant’s Equal Access to Federal Courts, 62 Mo. L. Rev. 681, 748 n.244 (1997) (“Congress so far has declined to take such drastic action, however. Rather than eliminating diversity jurisdiction entirely, it has chosen instead to restrict the number of diversity cases by increasing the amount in controversy requirement over the years.”).
308. Even though Justice Frankfurter, who wrote so influentially on the Compact Clause, was a major opponent of diversity jurisdiction, see William A. Braverman, Note, Janus Was Not a God of Justice: Realignment of Parties in Diversity Jurisdiction, 68 N.Y.U. L. Rev. 1072, 1096-1100 (1993) (explaining Justice Frankfurter’s disdain for diversity jurisdiction since he saw it as a means for corporations to evade state law and federalist principles), it does not seem that he would have had a problem with exclusive federal court jurisdiction here since there are legitimate interstate issues that need to be decided.
310. Daniel Meltzer explained: [O]ne jurisdiction that was particularly free from controversy was that in disputes between two states. Its necessity is apparent: on the one hand, each state might lack power to subject the other (absent its consent) to suit; on the other, the exercise of jurisdiction raises an obvious
between the states, they end up implicating disputed state laws and should therefore receive similar protection from the potential bias of state courts.

This option, however, is a second best alternative. It should not be taken as an endorsement of the New Jersey View, and it obviously has its own problems. People will question whether state biases really exist and will be reluctant to toy with the jurisdiction of the Supreme Court. Furthermore, while the federal courts may be more neutral, there is no reason to believe that they possess some special ability to perform the exceptionally difficult task of making the "parallel and complementary” inquiry and matching up laws that do not readily interconnect. Given these problems, a choice of law clause provides the only adequate solution.

2. Choice of Law Clauses

The contractual nature of the compact relationship enables states to select a set of legal norms to apply to the compact entity. "Most conflicts scholars and courts now recognize the principle that the parties to a contract generally may agree upon the law which will govern their relationship." This well-recognized principle has evolved over time and over the objections of *lex loci contractus* and *First Restatement of Conflicts* champion Joseph Beale.

Beale's objection was based on the notion that parties should not have the ability to perform the "legislative act" of choosing the applicable law. Judge problem, in Amar's words, of "home field advantage." It is no doubt because neither of these alternatives is tolerable that Justice Story called federal jurisdiction over such disputes "essential to the preservation of the peace of the nation."

---

311. Whether or not it was motivated by actual bias, I need only point to Local 68, where New Jersey decided to apply its laws in total to a compact entity and where Delaware later objected to such action as amicus in support of granting a writ of certiorari, see supra Subsection III.C.1., as evidence of the states in dispute. Such disputes should be settled in a neutral forum.

312. See supra Section IV.A.


314. *Lex loci contractus* is a Latin phrase that stands for the proposition that the law of the place of contracting should govern. See Miliken v. Pratt, 125 Mass. 374, 381 (1878) (noting Justice Joseph Story's recognition of *lex loci contractus* as a common law principle).

315. Joseph Beale was the reporter of the *Restatement (First)* of Conflict of Laws, which was radically different from the current *Restatement (Second)* of Conflict of Laws in its focus on the place of wrong and the place of contract. See David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 61 n.16 (2003).

316. See CURRIE, supra note 43, at 103 (noting that "Professor Beale objected" to the parties choosing their own governing law).

Learned Hand went a step further, noting, “People cannot by agreement substitute the law of another place; they may of course incorporate any provisions they wish into their agreements—a statute like anything else—and when they do, courts will try to make sense out of the whole, so far as they can.” 318 In clarifying the Beale position, Hand lends support to the ability of the states to select legal norms to apply to the Compact Clause entities that they create, because they are in essence incorporating existing legal norms into their agreements. The choice of law clause I advocate has little to do with choosing a law to govern the interpretation of the compact, but rather involves the states adopting a clause identifying the legal norms, on topics such as labor, that are to be incorporated into the compact. Furthermore, Beale’s objection to individuals performing “legislative acts” does not apply because the contracting parties are the states themselves, with legislatures taking an active role in agreeing to the compact. 319 Surely, Beale could not object to state legislatures determining what laws will apply to a new governmental agency.

Moreover, Beale’s and Hand’s objections can be put aside given the broader rule that has evolved. The current Restatement allows contracting parties to choose the law to govern their agreement subject to certain constraints. 320 Thus, the ability of the states to select a set of legal norms for their compact entities stands on even firmer ground. If a choice of law clause meets the narrower allowance of Beale/Hand, it must pass the broader allowance of the Second Restatement.

Stripped down, the modern doctrine allowing choice of law clauses, explained in most any conflicts casebook or treatise, 321 has its roots in the autonomy and expectations of parties. The Second Restatement of Conflicts explains:

Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. 322

Correspondingly, the states and those affected by the internal operations of

319. For a description of the role of legislatures in drafting compacts today, see Note, supra note 35, at 1993: [A]fter the compact terms are formulated by a group of interested officials, one state enacts the compact terms as part of an enabling statute, which constitutes an offer. The offer may be accepted by other states through the enactment of statutes including the same (or virtually the same) compact terms.
320. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1988). Some of these constraints include minimum contacts with the chosen state’s law.
compact entities are entitled to “justified expectations” that lay out their “rights and liabilities,” and the best way to do this is to allow the states engaged in these “multistate transactions” to “choose the law to govern” the compact entity.

Interpreting the modern rule, Judge Posner has concluded that, when made explicitly, contractual provisions can select the law to govern tort disputes as well as contractual disputes. In a malpractice case, where the state-run hospital wanted to be sure of the law that would apply to its care of patients, Posner noted:

Thus, all the hospital had to do if it wanted to spare itself the uncertainty of having to defend under the law of a different state was to specify clearly and comprehensively in its contract that California law would apply to torts as well as contract disputes, and it did not do so.

Similarly, if the compacting states do not want to have legal black holes, or would object to another state applying its law to a compact entity without the approval of its fellow compacting states, all a state has to do is include a choice of law clause in the compact.

The choice of law clause for a compact can be as simple or as complex as the drafters wish to make it. There can be clauses that simply select one state’s

---

323. Kuehn v. Children’s Hosp., 119 F.3d 1296, 1302 (7th Cir. 1997) (“[W]hat the cases actually hold is that such a provision will not be construed to govern tort as well as contract disputes unless it is clear that this is what the parties intended. When it is clear, the provision is enforced.”) (citations omitted).

324. Id.

325. This Article takes as an assumed premise that, given the opportunity and an awareness of the problem, states would want to avoid creating legal black holes. After all, legal black holes deprive their citizens of rights they would otherwise have, see Int’l Union of Operating Eng’rs, Local 542 v. Del. River Joint Toll Bridge Comm’n, 311 F.3d 273 (3d Cir. 2002) (holding that while workers have the right to union recognition in both New Jersey and Pennsylvania, they don’t have the right on certain bridges between the two states), and they create great uncertainty that risks being filled in by a body other than the state’s own legislature. But see infra text accompanying note 331 (discussing reasons states may not want to include choice of law clauses).

As it stands, states are not taking enough of the heat for this problem. Most of the cases cited in this Article were brought by an individual or entity against a Compact Clause entity. Blame is placed on the entity for its actions. See, e.g., Local 542, 311 F.3d at 274 (noting that suit was brought because the DRJTB failed to recognize the right of its employees to organize). However, the administrators of the entities are simply following the rules of the compact as given to them by the states. It is the states who created these problems, not the entities—a fact that can be easily overlooked.

Therefore, the focus must be turned back on the states. The members of the Third Circuit panel in Local 542 attempted to do this when they noted that while they “affirm the District Court’s grant of summary judgment to the Commission,” they “leave it to the legislatures of New Jersey and Pennsylvania to amend the Compact and apply their collective bargaining laws to the Commission, should they choose to do so.” Id. at 281-82. In doing so, the court pointed the finger back at the states. More often courts need do this in denying relief so as to illuminate the availability of redress to the litigants and correctly focus the inquiry.

By making the legislators aware of the anomalies they are creating, they are more likely to realize the need to include choice of law clauses. Given the complexity of the problem and its relatively recent appearance in court rulings, it is possible the legislatures are not even fully aware of the problem. Court decisions and publications like this may help get their attention.

326. See, e.g., Brief Amicus Curiae of the State of Delaware in Support of Petitioner, supra note 242, at *11.
Compact Clause Entities

labor laws, discrimination laws, and the like to govern the internal operations of the compact entity. At the other end of the spectrum, the states can get together and form a completely new set of labor laws, discrimination laws, and the like for the compact entity through negotiation and collaboration. There are also many options between the two extremes. However, with every type of compact choice of law clause comes important issues that need to be addressed. For example, if the states decide that one of the compacting state’s laws will fill the gap and apply to the entity, they must also decide if those laws are to stay static after the time of enactment or if they will change as the state’s laws are amended. An alternative choice of law clause can simply adopt an implicit or explicit modification view of the compact.327 No matter how they choose to do it, a choice of law clause in any form will fill the void at least in part, if not completely. The merits of each type of compact choice of law clause warrant further examination and analysis that is too extensive for the confines of this Article; however, their utility as a general matter is clear.328

I would propose, as one option, a choice of law clause that incorporates one state’s substantive laws into the compact with subsequent changes in that state’s substantive laws to be applied to the compact as well, as long as they are not objected to by any compacting sister state within a set period of time (say, 60 days or so). Such a clause would address multiple concerns: First, by selecting one state’s laws, it would establish a complete and coherent set of norms to apply to the compact entity. Rather than taking bits from here and pieces from there, a unitary and integrated set of laws would apply. Additionally, by having the states select the applicable set of laws, the process values of negotiation would be maintained, and states would be precluded from deciding unilaterally that its laws are to apply.329 Because state laws have already been interpreted by courts, there would be a greater degree of certainty about what the laws mean. By tracking the changes in state law, the legal norms to apply to the compact entity would stay current and the entity would not be trapped in an ancient and arcane legal environment. Meanwhile, the right of objection in sister compacting states would prevent one state from making changes that the other state finds objectionable.330

It must be asked why, then, if choice of law clauses are such a

327. While this alternative is problematic, as explained in Section III.B, it is better than no choice of law clause at all, as it will at least ensure the legislative will and give the judiciary some form of guidance.

328. This Article does not seek to analyze the merits and problems of the compact choice of law options presented here. Rather, it aims to point out the utility and necessity of a choice of law clause in general, leaving the analysis of different potential clauses to a later piece, by this author or another.


330. Additionally, if an objection is made, the old laws stay in place, thereby leaving a full set of laws applicable to the entity and avoiding the problem of gaps in the applicable set of laws.
commonsense solution, have legislatures not yet begun to use such clauses en masse. While it is easy to assume that legislatures would want to fill in legal black holes,\(^3\) it must be acknowledged that it is always easier to pass the problem along rather than confront it head on. Deciding which laws should apply and spelling them out in the compact would surely lengthen the negotiation process and delay agreement as the interested parties would need to come to decisions on a whole new set of issues. Writing such a clause might open up a can of worms that the legislatures would prefer to keep closed for the sake of getting the compact finished.

Given that in entering a compact a state is already yielding sovereignty, I do not foresee an unwillingness by the states to select one state’s laws over the other’s in exchange for other consideration. Rather, I see it as a time-consuming task in the already drawn out process of compact agreement and amendment. However, in agreeing to a compact without such a clause, legislatures must be aware of the myriad problems they are creating by promulgating no legal norms and no means of adequate redress for the affected parties. If nothing else, this Article aims to alert legislators and other interested parties to the problems that arise by taking the easy road and not addressing issues of internal substantive laws in the compact itself.

V. CONCLUSIONS

It is concededly difficult to sit as a judge and tell a plaintiff, “Sorry, but you do not enjoy the rights you would have on either side of the bridge you work on.” However, until courts are willing to do so, they will enable legislative inaction and thereby perpetuate the problem by providing incomplete relief. Instead, they should follow the Supreme Court’s instructions to read the compact, not rewrite it, and put the problem back in the laps of the legislatures.\(^3\)

The Court explained in Texas v. New Mexico II that a compact is “a legal document that must be construed and applied in accordance with its terms.”\(^3\) This builds upon the Court’s assertion in Texas v. New Mexico I that “unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.”\(^3\) By interpreting the compact and not expanding upon it, the courts may be able to force the states’ hands. The Third Circuit understood this premise in Local 542 explaining, “To read into the Compact any collective bargaining requirements would be to rewrite the agreement between the two states without any express

\(^{31}\) See supra note 325.
\(^{34}\) 462 U.S. at 564.
authorization to do so. That is simply not our role.\textsuperscript{335} The argument I put forward points out that the courts can abstain from trying to reconcile the laws of differing states by reading the compact strictly according to its terms.\textsuperscript{336} The policy and legal reasons laid out in this Article support such an approach. Only judicial restraint will signal to legislatures that they have a responsibility to fill in the legal black holes they have created.

Any endorsement of the implicit modification view must address the problem, which has already been borne out, that one state may object to the "parallel and complementary" determination of its sister state.\textsuperscript{337} The presence of such an objection definitively reveals that the "parallel and complementary" determination was either incorrect or not desired by the sister state. Such a result should always be avoided when dealing with interstate entities because ongoing cooperation is essential to the success of interstate compacts.

Compact entities are clearly a vital tool to deal with problems that are too big for any single state but do not rise to a national concern. With the courts currently searching for a uniform way to address the applicability of state law to compact entities, rules and norms need to be established. Most of the problems identified in this Article can be avoided in the drafting of the compact.\textsuperscript{338} A choice of law clause ensures that the will of the compacting states will be carried out. The judiciary is simply incapable of crafting decisions that both preserve legislative intent and ensure practicality. Until the legislatures of the compacting states are willing to act, the courts will continue to face unsolvable conundrums. Only the states can adequately restore order to the legal black holes that are many of the bridges in America.

\begin{itemize}
\item \textsuperscript{335} Int'l Union of Operating Eng'rs, Local 542 v. Del. River Joint Toll Bridge Comm'n, 311 F.3d 273, 281 (3d Cir. 2002).
\item \textsuperscript{336} Additionally, it seems that courts are required to reject the "parallel and complementary" standard if there is no "concurred in" language. The "parallel and complementary" standard may be unconstitutional based on the language of the compact as shown in Section III.A.
\item \textsuperscript{337} See supra notes 245-248 and accompanying text (explaining Delaware's objection, as amicus in support of certiorari, to the New Jersey Supreme Court's determination that the two states' laws were "parallel and complementary" and should therefore be applied to the compact entity).
\item \textsuperscript{338} In discussions on this topic with me, Prof. Clyde Summers suggested a checklist to help states in the drafting of compacts. The choice of law clause must be a part of the checklist or a substitute for it.
\end{itemize}