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Charting No Man's Land: Applying Jurisdictional and Choice of Law Doctrine to Interstate Compacts

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NOTES

CHARTING NO MAN'S LAND: APPLYING JURISDICTIONAL AND CHOICE OF LAW DOCTRINES TO INTERSTATE COMPACTS

I. INTRODUCTION

The Constitution empowers states to create interstate compacts[1] to address the many problems occurring among or in multiple states, such as establishing boundaries or running a transportation system. Many complicated structural constitutional doctrines[2] are particularly difficult to apply to interstate compact agencies. Because the application of these 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. This Note traces two related examples of how courts apply structural constitutional doctrines to interstate compact agencies: federal jurisdiction and vertical choice of law. Drawing lessons from courts' efforts to apply these doctrines, this Note suggests that because 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. Rather, compact agencies may be best accommodated within existing doctrine by using a functional methodology. Such a technique would consider the realities of the compact at issue and thereby determine how it would be best reconciled with the relevant doctrine's underlying rationale.[3]

This Note begins by introducing the interstate compact device. Part II explains the constitutional authority for compacts, how they are formed, and their historical and present uses. Part III then surveys the treatment of interstate compact agencies under doctrines of federal jurisdiction and vertical choice of law. In examining these issues, Part IV argues that a functional approach best serves the constitutional values protected by both of these doctrines and by the Compact Clause itself.

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[1] *See* U.S. CONST. art. I, § 10, cl. 3.

[2] This Note uses the term "structural constitutional doctrines" to refer to the various judicial doctrines created to interpret constitutional provisions touching upon the ideals of federalism and separation of powers, as well as doctrines created to protect those ideals.

[3] This methodology is modeled after the approach taken by the Supreme Court in *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30 (1994). *Hess* itself is discussed below at pages 96–98.

II. THE INTERSTATE COMPACT DEVICE

In the colonial and early federal period, compacts were used almost exclusively to settle boundary disputes.[4] Although this use of compacts remains viable, the uses for compacts have diversified over the years.[5] One of the first modern compacts to break out of the boundary dispute mold was between New York and New Jersey, establishing the Port of New York Authority in 1921.[6] In their landmark 1925 article, Professors Frankfurter and Landis heralded the potential of the compact device for addressing complex, regional needs.[7] In the past seventy-five years, states have formed more than 150 compacts, addressing regional concerns in such wide-ranging areas as mental health, conservation, and law enforcement.[8]

States derive the power to enter into agreements or compacts with one another from the Compact Clause of Article I, which requires them to obtain the consent of Congress to do so.[9] Read literally, the clause would include virtually any agreement between states; however, the Supreme Court has interpreted the clause to require consent for only a subset of interstate agreements.[10] Although original intent is contested,[11] the current rule requires consent only when a compact "may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the

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[4] *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution — A Study in Interstate Adjustments*, 34 YALE L.J. 685, 696 (1925).

[5] *See* INFOPACK: INTERSTATE COMPACTS AND AGREEMENTS OVERVIEW 1997 (Council of State Governments ed., 1997) (on file with the Harvard Law School Library) [hereinafter INFOPACK] (providing a list of compacts "believed to be in force through 1997" including, among others, compacts regarding river management and supervision of parolees and probationers).

[6] *See* Emanuel Celler, *Congress, Compacts, and Interstate Authorities*, 26 LAW & CONTEMP. PROBS. 682, 688, 692–93 (1961). Compacts have long been used as a tool for water apportionment. *See, e.g.*, Colorado River Compact, NEV. REV. STAT. §§ 538.010, 538.041–251 (1995).

[7] *See* Frankfurter & Landis, *supra* note 4, at 707–09 (noting the potential for the compact device to address "regional problems calling for regional solutions" and citing electric power provision as an example). This Note uses the word "regional" to include both multistate metropolitan areas and regions made up of groups of states.

[8] *See* INFOPACK, *supra* note 5. 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." JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM 141–42 (1992). Zimmerman associates this decline with increased federal preemption of state regulation and increased complexity of interstate problems. *See id.* at 142.

[9] *See* U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . .").

[10] *See* United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 459–60 (1978).

[11] Courts and commentators differ over how the scope of the clause was intended to be, or should be, limited. Some explain the limits of the scope of the Compact Clause by differentiating between the terms "treaty" and "agreement or compact," both used in Article I, section 10. *See United States Steel Corp.*, 434 U.S. at 463–71; David E. Engdahl, *Characterization of Interstate Agreements: When is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 64–65, 75–81 (1965); Abraham C. Weinfeld, Comment, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?*, 3 U. CHI. L. REV. 453, 453 (1935).

United States or interfere with their rightful management of particular subjects placed under their entire control."[12]

To form an interstate compact, states must reach agreement on the terms of the compact and enact legislation entering into the compact, in addition to obtaining congressional consent. From colonial times until the 1930s, parties to a compact usually negotiated through joint commissions.[13] Since the 1930s, compacts have often been initiated and drafted in a somewhat less formal manner.[14] In this system, after 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.[15] Compacts function simultaneously as contracts and statutes; thus, they must meet the legal requirements for, and will be interpreted as, both.[16] In addition to their substantive terms, compact documents include provisions for enactment and amendment, and procedures for termination or withdrawal.[17]

Congress consents to compacts by a statute or a joint resolution, which usually includes the compact's terms.[18] Although the Compact Clause itself requires only the consent of Congress, "settled usage" has granted the President veto power over consent, consistent with both of

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[12] *United States Steel Corp.*, 434 U.S. at 467 (quoting Virginia v. Tennessee, 148 U.S. 503, 518 (1893)) (internal quotation marks omitted).

[13] *See* FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 16–17 (1976). Negotiation through joint commissions remains the practice for boundary and water allocation compacts "where there is a presumption of permanence approaching perpetuity." *Id.* at 17.

[14] *See* PAUL T. HARDY, INTERSTATE COMPACTS: THE TIES THAT BIND 7 (1982); ZIMMERMAN & WENDELL, *supra* note 13, at 17–19.

[15] *See* HARDY, *supra* note 14, at 11–12. To comply with the contract law requirement that "there must be an acceptance of what was offered," compact terms must be substantially similar in all compacting states. *Id.* at 11. However, the terms of the enabling portions of the statutes may differ to allow the compact to work within each state's existing governmental structure. *See id.*

[16] *See* Texas v. New Mexico, 482 U.S. 124, 128 (1987); HARDY, *supra* note 14, at 8. As contracts, interstate compacts are subject to the prohibition against state impairment of contract obligations under the Contract Clause of the Constitution. *See* Green v. Biddle, 21 U.S. (8 Wheat.) 1, 92–93 (1823).

[17] *See* HARDY, *supra* note 14, at 8–11. Usually, a compact will provide that it will take effect upon its enactment by a requisite number of states. *See* ZIMMERMANN & WENDELL, *supra* note 13, at 34–35. Compact terms may be varied by the same procedures used to enact the compact. *See* VINCENT V. THURSBY, INTERSTATE COOPERATION: A STUDY OF THE INTERSTATE COMPACT 13–14, 140 (1953). Furthermore, compacts may set a date or other precondition for review and consideration of revisions, and establish grounds for termination. *See* HARDY, *supra* note 14, at 10–11. Paul Hardy notes that for compacts formed to administer public works, provisions for disposition of property upon withdrawal or termination are particularly important. *See id.*

[18] *See* ZIMMERMANN & WENDELL, *supra* note 13, at 24; Michael H. McCabe, *Interstate Compacts*, *in* INFOPACK, *supra* note 5.

these types of legislative mechanisms.[19] Congressional consent may be express or implied, and may precede or follow state enactment of the compact.[20] "[C]onsent may also be conditional, limited, or temporary and is always subject to modification or repeal" by Congress.[21]

The federal structure of the United States allows for public provision of goods and services at both the national and state levels. However, because it is sometimes more economically efficient for an entity larger than a single state and smaller than the federal government to provide government services,[22] compacts that create interstate agencies to administer public works or to deal with a regional problem[23] can present unique advantages within our federal union.[24] Especially today, as politicians and commentators argue for devolution of governmental responsibilities from the national government to states, localities, and regions,[25] compacts may be formed both to capture efficiencies of regional solutions and to maintain proximity to the people they serve.

However, in addition to the logistical issues associated with forming compacts,[26] some commentators have cited the loss of state sover-

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[19] FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, THE INTERSTATE COMPACT SINCE 1925, at 94 (1951). Zimmermann and Wendell note that the threat of a presidential veto has occasionally been an obstacle to compact formation. *See* ZIMMERMANN & WENDELL, *supra* note 13, at 24.

[20] *See* Cuyler v. Adams, 449 U.S. 433, 441 (1981); Virginia v. West Virginia, 78 U.S. (11 Wall.) 39, 60–61 (1871) (inferring congressional consent to a compact settling a boundary dispute between Virginia and West Virginia from the statute admitting West Virginia to the Union).

[21] McCabe, *supra* note 18; *see* HARDY, *supra* note 14, at 18–19; Celler, *supra* note 6, at 685–86. *But see* Tobin v. United States, 306 F.2d 270, 272–73 (D.C. Cir. 1962) (stating that Congress can attach conditions to its consent to an interstate compact, provided the conditions are constitutional, but reaching no conclusion on whether Congress may constitutionally reserve the right "to alter, amend or repeal" a compact consent).

[22] *See* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 126 (1995); Frankfurter & Landis, *supra* note 4, at 697 ("From the point of view of geography, commerce, and engineering, the port of New York is an organic whole. Politically, the port is split between the law-making of two States, independent but futile in their respective spheres."). *But see* REGULATION, FEDERALISM, AND INTERSTATE COMMERCE 136–40 (A. Dan Tarlock ed., 1981) (suggesting potential inefficiencies of compacts, including cartelization).

[23] *See, e.g.*, An Act to Grant the Consent of Congress to the Kansas and Missouri Metropolitan Culture District Compact, Pub. L. No. 103-390, § 1, 108 Stat. 4085, 4085 (1994); Tri-State High Speed Rail Line Compact Act, 45 ILL. COMP. STAT. 75/0.01–75/3. (West 1990); Bi-State Metro. Dev. Dist. (Compact Between Missouri and Illinois), MO. REV. STAT. § 70.370 (1994).

[24] *See* Frankfurter & Landis, *supra* note 4, at 707–08; Carlton James Gausman, Comment, *The Interstate Compact as a Solution to Regional Problems: The Kansas City Metropolitan Culture District*, 45 U. KAN. L. REV. 897 *passim* (1997).

[25] *See* Mary O. Furner, *Downsizing Government: A Historical Perspective*, USA TODAY MAG., Nov. 1, 1997, at 56–57. Politicians and commentators differ over whether the devolution trend has begun to wane. *Compare id. with* Dana Milbank, *States Find Federal Powers Grow Despite GOP Gains*, WALL ST. J., Oct. 3, 1997, at A12.

[26] Critics have long argued that the stability provided by formal compacts also puts them at risk for becoming inflexible and easily outdated. *See* MARSHALL E. DIMOCK & GEORGE C.S. BENSON, CAN INTERSTATE COMPACTS SUCCEED? 16 (Public Policy Pamphlet No. 22, Harry D. Gideonse ed., 1937); HARDY, *supra* note 14, at 21; THURSBY, *supra* note 17, at 140–42. Including

eignty inherent in the device as a potential disadvantage of compacting.[27] Taking on interstate compact obligations "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."[28] Further, although compact agencies may be physically closer to the people affected by them than is the national government, they may allow less direct accountability. Compact statutes are voted upon initially by state and federal legislators and signed by state and federal executives. However, once enacted, compact agencies function just as other administrative agencies do; they are relatively insulated from the political process and only indirectly accountable to the electorate through their appointed officials. Indeed, these entities with inherently divided loyalties may be even less responsive than traditional agencies located within a single state.[29]

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within the compact documents procedures for review, amendment, and termination may somewhat lessen problems of rigidity. *See supra* note 17 and accompanying text. However, the creation of a compact itself presupposes that some inflexibility will remain, as stability and permanence are benefits of entering a compact. *See* HARDY, *supra* note 14, at 21; THURSBY, *supra* note 17, at 140. Critics have also noted that drafting formal agreements that will function within multiple state governmental systems is time-consuming, and thus compacts will not provide a rapid solution to pressing regional problems. *See* ZIMMERMAN, *supra* note 8, at 145 (noting that compact negotiations between California and Nevada concerning water rights took twelve years, "even though only two States were involved and there was only one issue to be resolved"). *But see* ZIMMERMANN & WENDELL, *supra* note 13, at 54–55 (explaining that negotiating water allocation compacts is exceptionally time-consuming and that other types of compacts can be negotiated more quickly). Because the compacts emphasized in this Note create interstate agencies to deal with major interstate problems, and often to administer large-scale public works, they may require even longer drafting and negotiation periods.

[27] *See* DIMOCK & BENSON, *supra* note 26, at 11. Dimock and Benson argue:

> In the usual representative government the man who opposes the general interest for the sake of political capital in his own constituency can easily be defeated by votes from other districts. But the rule in compact government . . . is that unanimous consent must be secured. Politicians from one state may upset the apple cart for all the states.

Id.; accord MARIAN E. RIDGEWAY, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM 297–99 (1971).

[28] RIDGEWAY, *supra* note 27, at 298. At least one commentator has further "charged that the inflexible character of compacts places pressure on the federal government to accept unsatisfactory compact provisions rather than require re-enactment by the states." ZIMMERMANN & WENDELL, *supra* note 13, at 55 (citing WALLACE R. VAWTER, INTERSTATE COMPACTS — THE FEDERAL INTEREST 7 (Library of Congress 1954)).

[29] *See* RIDGEWAY, *supra* note 27, at 300; Celler, *supra* note 6, at 695; Ross D. Netherton, *Area-Development Authorities — A New Form of Government by Proclamation*, 8 VAND. L. REV. 678, 691–92 (1955).

If the drawbacks of compacting outweigh its advantages, other mechanisms can be used to achieve similar results — informal agreements, enactment of uniform state laws, and state administration of federal programs using federal grants-in-aid. *See* THURSBY, *supra* note 17, at 142–43; Jonathan Varat, *Economic Integration in the United States Federal System*, *in* COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA 29–30 (Mark Tushnet ed., 1990). Resolution can also be sought under the original jurisdiction of the Supreme Court, as an alternative to a negotiated compact solution. *See* U.S. CONST. art. III, § 2. However, in several such cases, the Court has specifically recommended negotiation and use of an interstate com-

Even if these structural and political complications are resolved, there remains an issue more fundamental to interstate compacts: if interstate compact agencies cannot be defined as either state or federal entities, how are they to fit into a doctrinal reality based on a federalist conception of dual — but no more than dual — sovereignty? Legal doctrines establishing the spheres of the federal and state governments often seek to define an entity as either one or the other. Interstate compact agencies, by definition, frustrate such categorical treatment. The remainder of this Note explores and evaluates how courts attempt to resolve this problem in federal jurisdiction and vertical choice of law doctrines.

III. Federal Jurisdiction and Vertical Choice of Law

When a dispute develops regarding the interpretation or application of an interstate compact, issues arise regarding which court should hear the dispute and which law should be applied to resolve it. By definition, more than one state creates a compact and the federal government consents to it. Therefore, a dispute might be brought in either federal or state court, and often in more than one state court. In the course of resolution by a state or federal court, at least three bodies of law might be consulted to construe an interstate compact — federal law and the law of at least two compacting states. In some situations, all bodies of law will concur on the disputed point. However, when bodies of law disagree, courts may struggle to show respect for each state and the federal government, as well as to find an appropriate and equitable rule of decision. This Part considers Supreme Court doctrine, which has resolved these issues by permitting federal jurisdiction over interstate compact disputes and requiring federal law to govern their interpretation and enforcement.

A. Supreme Court Appellate Jurisdiction

The Supreme Court first explicitly confronted the question whether cases requiring construction of interstate compacts fall within its certiorari jurisdiction in *Delaware River Joint Toll Bridge Commission v. Colburn*,[30] which arose from a 1935 compact between New Jersey and Pennsylvania to construct bridges across the Delaware River.[31] The

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pact as an alternative to seeking a judicial resolution of interstate conflicts. *See* New York v. New Jersey, 256 U.S. 296, 313 (1921); Frankfurter & Landis, *supra* note 4, at 706 (noting the Supreme Court's advice to states to use compact negotiation in lieu of litigation in two boundary dispute cases). Litigation may be more expensive than negotiation and also will not be available in all conflicts. For example, litigation may be effective in settling a boundary dispute, but it cannot create an agency to regulate an interstate public work.

[30] 310 U.S. 419 (1940).

[31] *See id.* at 425–26. Landowners who claimed that a highway built by the Commission interfered with their property rights brought a mandamus action in New Jersey state court to compel

Court held "that the construction of [an interstate] compact sanctioned by Congress . . . involves a federal 'title, right, privilege or immunity' which when 'specially set up and claimed' in a state court may be reviewed here on certiorari."[32]

The question of certiorari jurisdiction over a case regarding the enforceability of a compact arose in *West Virginia ex rel. Dyer v. Sims*.[33] The case involved the Ohio River Valley Water Sanitation Compact, entered into by eight states that agreed to cooperate in efforts to control pollution in the river.[34] The commissioners brought a writ of mandamus against the West Virginia state auditor, who had refused to pay an appropriation for the compact even though the legislature had authorized funds.[35] The West Virginia Supreme Court of Appeals denied the writ on the grounds that the compact impermissibly delegated the state's police power to sister states and to the federal government, and that the compact violated the West Virginia Constitution by binding future legislatures to appropriations for the Commission.[36] The United States Supreme Court defended its jurisdiction over the controversy on the ground that West Virginia could not be permitted to be the judge in its own case against a sister state.[37] While noting that deference to state courts in this area was appropriate, particularly when issues of local law were at stake, Justice Frankfurter explained that the Supreme Court was "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."[38]

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compensation proceedings. *See id.* at 426. The court found that the landowners were not entitled to recover without statutory authorization, but construed an existing statute in conjunction with the compact to require compensation. *See id.* at 426–27.

[32] *Id.* at 427 (quoting section 237(b) of the Judicial Code, 28 U.S.C. § 344). Its jurisdiction thus established, the Court concluded that the statute relied upon by the New Jersey court was inapplicable to the Commission and that authorization for damages was thus lacking. *See id.* at 428–34. The current statutory grant of certiorari jurisdiction contains language identical to that quoted in *Colburn*. *See* 28 U.S.C. § 1257 (1994). This language may be contrasted with that of § 1331, which grants district courts original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.* § 1331.

[33] 341 U.S. 22 (1951).

[34] *See id.* at 24 (citing 54 Stat. 752). The compact created the Ohio River Valley Water Sanitation Commission to oversee the endeavor. *See id.* The Commission was authorized to issue orders for compliance with the compact's water treatment requirements; the orders were enforceable in both state and federal courts. *See id.* at 25.

[35] *See id.*

[36] *See id.* at 25–26.

[37] *See id.* at 28.

[38] *Id.* The Court determined that the Compact did not conflict with the West Virginia Constitution, and reversed the judgment of the West Virginia court. *See id.* at 32.

B. *Federal Law as the Rule of Decision and Federal Question Jurisdiction*

In assessing other questions, *Colburn*, *Dyer*, and *Pennsylvania v. Wheeling and Belmont Bridge Co.*[39] suggested that compacts would be governed by federal law. In *Wheeling*, the Court considered an original suit by Pennsylvania seeking an injunction against the construction over the Ohio River of a bridge that allegedly would obstruct navigation.[40] In deciding whether it could properly require the bridge to be abated as a public nuisance, the Supreme Court stated: "This compact, by the sanction of Congress, *has become a law of the Union.* What further legislation can be desired for judicial action?"[41] The "law of the Union" doctrine, which emerged from this statement, arguably requires that interstate compacts, as federal legislation, be construed as federal law.[42]

Petty v. Tennessee-Missouri Bridge Commission[43] explicitly held what the Court had only suggested in *Wheeling* — that federal law governs the interpretation of interstate compacts.[44] The terms of the compact in *Petty* allowed the Commission "to sue and be sued in its own name,"[45] and Congress consented to the compact, including a reservation "[t]hat nothing herein contained shall be construed *to affect, impair, or diminish any right, power, or jurisdiction* of the United States or *of any court*, department, board, bureau, officer, or official *of the United States.*"[46] The courts below had construed the sue-and-be-

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[39] 54 U.S. (13 How.) 518 (1851).

[40] *See id.* at 557–59. The bridge was being constructed by a Virginia corporation, under the authority of a Virginia statute. *See id.* at 557. However, Virginia had previously entered into a compact with Kentucky, to which the United States had consented upon Kentucky's admission to the Union. *See id.* at 560–61. The terms of the compact required that "the use and navigation of the River Ohio . . . shall be free and common to the citizens of the United States." *Id.* at 561.

[41] *Id.* at 566 (emphasis added). The Court then ruled that the bridge created an obstruction and ordered that the obstruction be diminished to a reasonable point. *See id.*

[42] *See* Cuyler v. Adams, 449 U.S. 433, 438 n.7 (1981). *But see* People v. Central R.R., 79 U.S. (12 Wall.) 455, 456 (1872) ("The assent of Congress [to the compact] did not make the act giving it a statute of the United States, in the sense of the [statutory grant of certiorari jurisdiction]."). The understanding of certiorari jurisdiction enunciated in *Central R.R.* was expressly disclaimed in *Colburn*. *See* Delaware River Joint Toll Bridge Comm'n v. Colburn, 310 U.S. 419, 427–28 (1940). *See generally* David E. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987, 991–1012 (1965) (explaining the conflict between *Wheeling* and *Central R.R.* and suggesting an alternative resolution).

[43] 359 U.S. 275 (1959).

[44] *See id.* at 278. *Petty* involved a Jones Act claim by the widow of a ferry employee who died on a sinking ferry owned by the Tennessee-Missouri Bridge Commission, an interstate compact entity. The Commission claimed immunity from suit under the Eleventh Amendment. *See id.*

[45] *Id.* at 277 (quoting art. I, § 3 of the Tennessee-Missouri Bridge Commission Compact, MO. REV. STAT. § 234.360) (internal quotation marks omitted).

[46] *Id.* at 277 (quoting An Act Granting the Consent of Congress to a Compact or Agreement Between the State of Tennessee and the State of Missouri, Concerning a Tennessee-Missouri Bridge Commission, and for Other Purposes, Pub. L. No. 81-411, ch. 758, 63 Stat. 930, 930 (1949) (emphasis added)) (internal quotation marks omitted).

sued clause of the compact in accordance with both Missouri and Tennessee law, holding that neither would interpret the clause as a waiver of Eleventh Amendment immunity by the Commission.[47] The Supreme Court reversed, explaining that the construction of "the terms of a consensual agreement, the meaning of which, because made by different States acting under the Constitution and with congressional approval, is a question of federal law."[48] Thus, *Petty* stands for the proposition that federal law governs the construction of interstate compacts, even if the laws of the compacting states are consistent with one another and jointly conflict with federal law. The majority's absolutist position illustrates the attempt to force interstate compact agencies into traditional federal or state categories.

However, the absolutist position was not universally accepted.[49] Although Justice Frankfurter agreed that construction of a compact consented to by Congress raised a federal question, he penned a strong dissent arguing 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."[50] Rather, Justice Frankfurter viewed the compact as a contract, to which the Court should assign the meaning intended by the parties — the compacting states.[51]

Despite Justice Frankfurter's earlier admonition, the Court extended the *Petty* holding in *Cuyler v. Adams*.[52] *Cuyler* involved the Interstate Agreement on Detainers (IAD), a compact among forty-eight states, the District of Columbia, and the United States, which allowed for temporary relocation of prisoners to the custody of another compact member to face criminal charges in that jurisdiction.[53] The Third Circuit vacated and remanded a district court decision permitting the transfer of a prisoner from Pennsylvania to another compacting state, finding that the IAD required that he be afforded a pre-transfer hearing.[54] During the appeal, a Pennsylvania state court ruled that Penn-

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47 *See id.* at 279–80.

48 *Id.* at 279. The Court noted that the compact obtained congressional approval at a time when immunity for corporations performing federal governmental functions was disfavored, and also relied upon the reservation clause in the congressional consent act. *See id.* at 280–81 (citing Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381 (1939)).

49 *See id.* at 283 (Frankfurter, J., dissenting). Justice Frankfurter was the author of *Dyer*, upon which the *Petty* Court relied. *See* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 24 (1950). Justices Harlan and Whittaker joined the *Petty* dissent. *See Petty*, 359 U.S. at 285 (Frankfurter, J., dissenting).

50 *Petty*, 359 U.S. at 285 (Frankfurter, J., dissenting).

51 *See id.* Justice Frankfurter also disputed the majority's reading of the congressional condition, whether read alone or in tandem with the compact's sue-and-be-sued clause. *See id.* at 285–88. Justice Frankfurter noted that the same or substantively indistinguishable conditions were used in many early compacts both with and without sue-and-be-sued clauses and argued that these terms did not indicate a requirement of waiver of immunity. *See id.* at 286–88.

52 449 U.S. 433 (1981).

53 *See id.* at 435 n. 1.

54 *See id.* at 437.

sylvania transferees under the IAD had no right to a pre-transfer hearing.[55] The Third Circuit held that it was not bound by the state court's decision because the IAD was an interstate compact. As such, the compact was to be construed under federal, and not state, law.[56]

The Supreme Court affirmed the Third Circuit.[57] Citing *Petty*, as well as *Dyer* and *Colburn*, the Supreme Court first reiterated that "congressional consent transforms an interstate compact within this clause into a law of the United States, thus presenting a federal question."[58] The Court then explained that congressional consent was at the core of the Compact Clause, allowing states to seek regional solutions while empowering the federal government to guard against interference with federal sovereignty or with the rights of noncompacting states.[59] Next, noting that not all compacts come within the clause,[60] the Court explained that "where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause."[61] Finding its requirements satisfied in the case before it,[62] the Court concluded that federal law governed.[63]

Following *Cuyler*, courts broadly expanded the idea that congressional consent "transforms" compacts into federal law. For example, the Fourth Circuit held not only that the Washington Metropolitan Area Transit Authority (WMATA) Compact was federal law "for purposes of interpretation,"[64] but also that it served to delegate federal powers to the compact agency at issue.[65] In another instance of significant expansion, the Second Circuit held that a compact's employee-

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[55] *See id.* at 438.

[56] *See id.*

[57] *See id.* at 436, 450.

[58] *Id.* at 438. An accompanying footnote described the history of the "law of the Union" doctrine dating back to *Wheeling*. *See id.* at 438 n.7.

[59] *See id.* at 439–40.

[60] *See id.* at 440 (citing United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 468 (1978) (quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893))).

[61] *Id.*

[62] *See id.* at 440–42.

[63] *See id.* at 442. The Court then investigated whether the IAD provided a pre-transfer hearing, held that it did, and affirmed the decision of the court of appeals. *See id.* at 447–50.

Then-Justice Rehnquist's dissent, which was joined by Chief Justice Burger and Justice Stewart, argued that the IAD was not a compact within the meaning of the Clause and that unnecessary congressional consent alone surely should not transform state law into federal law. *See id.* at 450–55 (Rehnquist, J., dissenting). The dissenters particularly feared the potential scope of the majority opinion, stating that "the Court's opinion threatens to become a judicial Midas meandering through the state statute books, turning everything it touches into federal law." *Id.* at 454.

[64] Washington Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312, 1318 (4th Cir. 1983).

[65] *See id.* at 1319–21.

benefit program was not preempted by the Employee Retirement Income Security Act (ERISA) because the compact was federal law under *Cuyler*.[66] The court construed ERISA's preemption of "all State laws" related to employee benefits as inapplicable to the compact benefit program.[67] Despite such expansive readings of *Cuyler*, courts have maintained that compacts remain governed by state law in cases in which an interstate compact fails to meet the *Cuyler* consent and subject matter requirements.[68]

Based on *Cuyler*, it seems clear not only that the Supreme Court has certiorari jurisdiction over cases involving compact interpretation and enforcement,[69] but also that federal district courts can entertain compact actions under federal question jurisdiction.[70] The grant of jurisdiction under § 1331 to district courts over "all civil actions arising under the Constitution, laws, or treaties of the United States" should provide sufficient jurisdictional grounding for virtually any compact interpretation case if a compact consented to by Congress is considered to be federal law.[71]

IV. EVALUATING FEDERAL JURISDICTION AND THE USE OF FEDERAL LAW TO CONSTRUE COMPACTS

Although the cases establish that disputes over interpretation and enforcement of interstate compacts will be heard by the Supreme Court on certiorari and by lower federal courts under § 1331, not all

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66 *See* NYSA-ILA Vacation and Holiday Fund v. Waterfront Comm'n, 732 F.2d 292, 297–98 (2d Cir. 1984).

67 *Id.* at 296. The court noted that although ERISA's provisions supersede "all State laws insofar as they may now or hereafter relate to any employee benefit plan," the statute does not "alter, amend, modify, invalidate, impair, or supersede any law of the United States." *Id.* at 296 & n.8 (quoting 29 U.S.C. § 1144(a)) (internal quotation marks omitted).

68 *See, e.g.*, Stewart v. McManus, 924 F.2d 138, 142 (8th Cir. 1991). *Stewart* held that the Interstate Corrections Compact was neither approved by Congress nor an appropriate subject for congressional legislation and thus had not been transformed into federal law that could provide the basis for a prisoner's § 1983 claim. *See id.*

69 *See supra* pp. 1996–97.

70 *See* Cuyler v. Adams, 449 U.S. 433, 438 (1981) ("[T]he construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question."); *see also* League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency, 507 F.2d 517, 519–22 (9th Cir. 1974) (holding, prior to the decision in *Cuyler*, that cases involving the interpretation of interstate compacts would present federal questions and noting that this issue was one of first impression). *But see, e.g.*, Rivoli Trucking Corp. v. American Export Lines, Inc., 167 F. Supp. 937, 939 (E.D.N.Y. 1958) (holding, in a case predating *Cuyler*, that a compact case was not cognizable under federal question jurisdiction).

71 28 U.S.C. § 1331 (1994). The issue of compact interpretation or enforcement must be apparent on the face of a well-pleaded complaint. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 153–54 (1908). Additional cases involving compact terms or agencies might come under the original jurisdiction of the federal district courts as hybrid cases of jurisdiction, in which federal question jurisdiction lies because "vindication of a right under state law necessarily turn[s] on some construction of federal law." Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1982).

scholars agree with the Supreme Court's interpretation of the Compact Clause. Writing before *Cuyler*, but assuming that the Court would follow the "law of the Union" doctrine and treat congressional consent to a compact as transforming a compact into federal law, Professor Engdahl argued that consent should not be equated with legislation, but rather should be analogized to Congress's consent either to a state's constitution upon entry into the Union or to state regulation.[72] A state constitution remains state law, not an act of Congress, and is "subject to alteration and amendment by the State after admission."[73] Thus, under Engdahl's analogy, classification of compact consent acts as federal legislation would not alone be sufficient to justify certiorari review in the Supreme Court.[74] This could be argued even more strongly with respect to the more limited federal question jurisdiction in lower federal courts.

However, theories other than "transformation" also support federal jurisdiction over compact cases. An independent justification for federal jurisdiction is that federal courts provide a more neutral forum than state courts.[75] This argument also underlies the constitutional grant of the Supreme Court's original jurisdiction over disputes between states.[76] Of course, if one compacting state brings a suit against another, it may invoke the grant of federal jurisdiction over litigation between states. However, even when the parties are not states, state interests may nevertheless conflict, and trying the case in one state may be prejudicial to another.

Furthermore, whether or not compacts are federal law, the federal government may still have an interest in settling compact disputes.

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[72] *See* Engdahl, *supra* note 42, at 1015–16 (citing Coyle v. Smith, 221 U.S. 559, 568 (1911)). Professor Engdahl also noted that equating consent with legislation is inappropriate because consent by implication would be a suspect vehicle for legislation; because consent preceding compact drafting might be an unconstitutional delegation of legislative authority; and because Congress lacks the authority to legislate on many of the subjects of compacts to which it consents. *See id.* at 1016–19.

[73] *Id.* at 1016 (quoting *Coyle*, 221 U.S. at 568) (internal quotation marks omitted).

[74] *See id.* at 1017.

[75] Concerns for state sovereignty and accurate outcomes on state law issues, which militate against federal jurisdiction in many cases, are less powerful in the compact context. First, the courts of one of the compacting states might favor the position of their own state over those of other compact members. Second, if the choice of law rule suggested below is applied, *see infra* p. 2005, a state court might consciously or unconsciously harmonize the law of the other compacting states with its own law in order to apply that law to decide the case.

The "neutrality" rationale for federal jurisdiction would be partially satisfied by preserving the certiorari jurisdiction of the Supreme Court. Even Engdahl agrees that there are arguments other than "transformation" to support the retention of certiorari review over compact cases. *See* Engdahl, *supra* note 42, at 1026–40. However, given the limited capacity of the Supreme Court docket, the Court would be capable of providing a forum for only a small number of compact disputes. *See The Supreme Court, 1996 Term — The Statistics*, 111 HARV. L. REV. 431, 435 tbl.2 (1997) (noting that the Court granted only 3.2% of all petitions for appellate review).

[76] *See* U.S. CONST. art. III, § 2, cl. 1; THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The constitutional requirement of congressional consent has been interpreted as a means to preserve the balance between federal and state sovereignty and protect the interests of noncompacting states.[77] However, according to the interpretive principle of *expressio unius*,[78] the requirement of congressional consent can also be interpreted as a reason to reject federal court jurisdiction. Granting federal jurisdiction over compact cases arguably contravenes an implied state sovereignty over interstate compacts that is limited only by the requirement of congressional consent.

Courts face similar issues concerning state sovereignty and forum neutrality when considering the rule of decision in compact cases. Because compacts are to be construed with reference to federal law,[79] courts may look first to statutes[80] and then, if there are none, to federal common law[81] to interpret and enforce them.[82] Courts do not always specifically assert that they are using federal common law to interpret the compacts they consider, but when federal courts interpret or enforce the terms of a compact without resort to statutes or other sources of positive law, they make federal common law.[83]

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77 *See* United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472, 477 (1978).

78 "'[E]xpressio [or inclusio] unius est exclusio alterius' means 'inclusion of one thing indicates exclusion of the other.'" WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 638 (2d ed. 1995).

79 *See* Cuyler v. Adams, 449 U.S. 433, 442 (1981).

80 *See, e.g.*, Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 281 (1959) (using the language of a consent act's provision reserving federal jurisdiction to support a holding of nonimmunity under the Eleventh Amendment).

81 *See, e.g., id.* at 280–81 (citing Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 375 (1939), as supporting a federal common law presumption against immunity for agencies performing federal governmental functions); Pievsky v. Ridge, 98 F.3d 730, 733–39 (3d Cir. 1996) (using federal decisions to interpret the language of an interstate compact concerning the removal of compact officers). In some cases, courts may look to both statutory and common law sources in interpreting interstate compacts. *See Petty*, 359 U.S. at 280–82.

82 *See* Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) ("In [the] absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."). The ambiguous legal status of congressional consent acts, as both statutes and codifications of contracts, further complicates the choice of law question. *See* Texas v. New Mexico, 482 U.S. 124, 128 (1987) (explaining that although a compact is a statute, it is also a contract, and "remains a legal document that must be construed and applied in accordance with its terms").

83 Commentators' definitions of federal common law differ widely. *See, e.g.*, Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890–91 (1986) (defining federal common law as "any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments") (emphasis omitted) (citation omitted); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 267 (1992) (defining federal common law as "any rule articulated by a court that is not easily found on the face of an applicable statute"); Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 328 (1992) (dividing federal common law into categories of interpretation of enacted law and "judicial prerogative," wherein courts "create rules of decision based solely on a claim of inherent authority").

There would be many benefits to fashioning federal common law to govern interstate compacts. It would provide uniformity, serve as an unbiased source of law for resolving conflicts in which the compacting states are opposed, and protect federal interests intended to be safeguarded by the consent requirement. These benefits, however, will not accrue in some compact cases. Moreover, national uniformity often may not be important in compact cases, or may be obtained only at significant cost. Finally, many cases will not involve a conflict between compacting states, and federal interests may often be fully protected by the consent mechanism. Thus, even if there are advantages to hearing compact disputes in federal court, these advantages do not depend on the application of federal rules of decision.[84]

In cases like *Petty*, in which the law of the compacting states concurred on an issue, but the court nevertheless applied conflicting federal law, the requirement of following a federal rule of decision is unduly harsh. Indeed, this requirement expands the ways in which the federal government may control interstate compacts. First, the federal government exercises control at the stage of congressional approval, during which Congress may either deny consent entirely, or, threatening such denial, may attach conditions to the compact. Second, it exercises control during litigation by hearing the case in federal court. Third, also during litigation, it exercises control through the application of federal law in matters of interpretation, even when the laws of the compacting states are consistent with each other and not detrimental to noncompacting states.

Consider a case in which the federal common law chosen to govern a compact suit conflicts with all of the compacting states' laws on the subject at issue. If a court applies a conflicting federal rule of decision, there may be uniformity of law governing compacts across the different states, but there will be a divergence between the law governing the compact's actions and the law governing other entities within the compacting states. In the case of a compact created to administer an interstate public work or to serve a confined geographical area, consistency with the law governing other actors that interact with the compact agency may be more important than consistency with the law governing a similar compact in another region of the country.[85]

Another potential problem with using federal common law to govern construction of compacts is that common law is fashioned on a

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[84] *See, e.g.*, *Petty*, 359 U.S. at 285 (Frankfurter, J., dissenting); Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (requiring federal courts sitting in diversity cases to apply state substantive law, rather than "general" federal common law). Even cases espousing the rule that federal law governs compact interpretation note that deference should be paid to state law in this area. *See Petty*, 359 U.S. at 278 n.4.

[85] *Cf.* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728–29 (1979) (noting that in deciding whether to absorb a state rule as federal law, the court "must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law").

case-by-case basis.[86] If state law were to govern, compact agencies and those individuals or entities who interact with them would have a more established body of law to guide their interpretations of compact documents and the actions taken pursuant to them. When federal common law governs, in order to determine the rule that will be enforced, compacting parties must wait for judges to resolve each type of issue that may arise. Of course, federal common law would likely be chosen from a limited number of rules and would grow as more compact cases were decided; but this would only lessen, not eradicate, the unpredictability problem.

Because the benefits of using federal common law rather than state law do not always outweigh the costs, it would be preferable to institute a functional choice of law rule that provides circumstances in which federal courts should adopt state law as the federal rule of decision. Such a rule would retain many of the benefits of using federal common law, while reducing some of the attendant costs by providing stability and predictability, thus easing transaction costs for compact agencies. This rule would presume that the compacting states' law should be adopted when the compacting states' laws are consistent, uniformity is not a paramount concern, and the state law rule will not frustrate federal interests. Although federal courts determine federal common law, they may, and often do, draw upon and adopt state law as federal common law.[87] Compact cases are ripe for absorption of state law into federal common law, which "can only arise in an area which is sufficiently close to a national operation to establish competence in the federal courts to choose the governing law, and yet not so close as clearly to require the application of a single nationwide rule of substance."[88]

Several Supreme Court decisions have considered when federal courts should adopt state law as the rule of decision.[89] Criteria set forth in these cases can be used in determining whether to absorb state law in a compact case. First, the Court has held that a state rule shall not be absorbed as a federal rule of decision if it is adverse to federal

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[86] *See* Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 804–05 (1957). State common law is, of course, created incrementally as well; however, it is likely that state contract law and other areas of private law will be more fully developed than federal law on these topics.

[87] *See, e.g.*, De Sylva v. Ballentine, 351 U.S. 570, 580–81 (1956). *See generally* Mishkin, *supra* note 86, at 810–14 (discussing the factors that courts should consider in deciding whether to absorb state law as the rule of federal common law).

[88] Mishkin, *supra* note 86, at 805. Many compact cases specifically state that courts should show deference to state law in this context despite the fact that state law is not binding. *See, e.g.*, *Petty*, 359 U.S. at 278 n.4; West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 28 (1951).

[89] *See, e.g.*, *Kimbell Foods*, 440 U.S. at 728 (1979) ("[W]hen there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision.").

policy goals, programs, or other interests.[90] Second, state law shall not be absorbed as the rule of decision when national uniformity is necessary.[91] Third, judges determining whether to adopt state law should take into account "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law."[92] Finally, even in situations in which absorption would generally be appropriate, federal courts need not absorb state law that is anomalous compared to the laws of most states.[93] When compact cases meet these requirements, adopting state law would be less harsh than the rule that federal law controls compact interpretation and enforcement, but would protect the federalism values upon which vertical choice of law doctrine is grounded.

Of course, turning to state law will not always be an appropriate solution. There will be times when national uniformity is important. For example, in cases in which similar compacts in different regions will interact substantially with federal programs or agencies, adopting the applicable state laws for each compact would hinder national administration. In such cases, concerns about national uniformity are more salient, and a single rule of federal common law may be necessary. Similar concerns exist when compacts encompass or have the potential to encompass a large or geographically diverse group of states. In such circumstances, it is less likely that all states' rules would be consistent or that they would remain so after other states join the compact. There will also surely be cases in which the different compacting states' laws will conflict.[94] Finally, in some cases it may be

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[90] *See* United States v. Little Lake Misere Land Co., 412 U.S. 580, 597 (1973) (noting that to adopt state law on the issue in conflict would "deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act"); Board of Comm'rs v. United States, 308 U.S. 343, 351–52 (1939) (explaining that state law is absorbed when "recognition of state interests was not deemed inconsistent with federal policy").

[91] *Compare* United States v. Yazell, 382 U.S. 341, 354–58 (1966) (holding that uniformity was unnecessary in a case involving the federal government's desire to proceed against the separate property of the wife of a debtor who defaulted on a Small Business Association loan when state law did not allow such recovery, and that therefore state law should govern), *with* Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (holding that state law would not be absorbed because of the need for uniformity in laws governing United States commercial paper).

[92] *Kimbell Foods*, 440 U.S. at 728–29.

[93] For example, in *De Sylva v. Ballentine*, 351 U.S. 570 (1956), the Court explained that although state definitions of "child" would be used to determine who would be a child under the Copyright Act when the Act provided no guidance, a state would not be "entitled to use the word 'children' in a way entirely strange to those familiar with its ordinary usage." *Id.* at 581.

[94] This problem might be resolved by allowing the federal court to create a horizontal choice of law rule to enable it to choose from among the states' laws. *See* Mishkin, *supra* note 86, at 806–08. However, such a solution would most often have the same result as a rule allowing the federal court to adopt as federal common law whichever law it preferred, regardless of the possibilities presented by the laws of the compacting states. Thus, creating a choice of law rule would seem to add an unwarranted complication.

difficult for the federal court to determine the content of a state's law and thus it would be difficult to adopt it.[95]

In all other interstate compact suits requiring application of federal common law, federal courts should presume to adopt state law as federal common law. By adopting state law in such cases, federal courts would protect the constitutional value of state sovereignty that motivates federal jurisdiction and vertical choice of law doctrines. In addition, this functional methodology would ease compact agencies' transactions in commercial settings, and ensure national uniformity when it is necessary.

This functional, policy-driven approach need not be limited to jurisdictional and choice of law questions. Indeed, this approach was taken by the Supreme Court in *Hess v. Port Authority Trans-Hudson Corp.*,[96] when it looked to the Eleventh Amendment's "twin reasons for being" to determine whether Eleventh Amendment immunity should apply to an interstate compact agency.[97] Finding those reasons to be the protection of the dignity of the states and the protection of their treasuries, the Court examined whether the Port Authority's amenability to suit in federal court threatened the dignity and treasuries of New York and New Jersey.[98] Because the states were required to join with the federal government to create the Port Authority, and their treasuries could not be tapped by it, the Court found that Eleventh Amendment immunity did not apply.[99] Rather than trying to fit the compact agency into an established category, this inquiry recognized the agency's unusual character and used the concerns motivating Eleventh Amendment immunity doctrine to determine whether it should apply.

VI. CONCLUSION

Interstate compact agencies occupy a unique position in American federalism, existing in the gap between the ordinary concepts of state and federal. They are created by states, consented to by the federal government, and generally operated by state-appointed officials. The unusual position of interstate compacts and the sparse mention of them in the Constitution suggest no framework for dealing with compact agencies within traditional jurisdictional and choice of law doctrine. Therefore, courts should address these questions in the compact context by looking in each case to the rationales behind the doctrines that they seek to apply, as well as to policy considerations.

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95 *See id.* at 808–10.
96 513 U.S. 30 (1994).
97 *See id.* at 32.
98 *See id.* at 41–51.
99 *See id.* at 52–53.

Federal jurisdiction over compact interpretation and enforcement disputes is necessary to provide a single, unbiased forum.[100] Deciding which law to apply is a more complex question. It may be useful to treat compacts as federal in nature — in the sense of applying federal law to construe and enforce them — because such a treatment would direct courts to a single federal rule, instead of to consideration of the law of two or more states. This is less true when the federal law to be applied is federal common law, in which case the substance of the federal law may be uncertain, but the rule chosen would become a uniform federal rule of law to govern current and future cases.

However, when the laws of the compacting states do not conflict and the courts will have to use federal common law to decide an issue of compact construction or interpretation, the argument for adopting state law as the federal rule of decision is quite strong, particularly if the content of the federal law differs from that of all of the compacting states. Federal courts are part of the limited federal government, and in issues of vertical choice of law, concern for state autonomy and sovereignty is central. Further, compact agencies must act within the commercial arena controlled by state law. To subject these entities to different law than that which governs other commercial actors may unnecessarily raise their transaction costs. A choice of law rule requiring federal courts to adopt state law as the governing rule of federal common law in an interstate compact dispute when the law of the compacting states is uniform allows courts to maintain the proper respect for state law in a federal government. Yet it captures the advantages federal law offers in situations in which the laws of the compacting states differ.

To attempt to force interstate compact agencies into a strictly state or federal mold would strip them of the very qualities that make them flexible and effective tools with which to attack regional problems. Rather than trying to pigeonhole compacts into a "state" or "federal" category, courts should use federalism-related doctrines' "reasons for being"[101] to determine how to apply those doctrines to Compact Clause entities.

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[100] Of course, this argument might be pushed further to require exclusive federal jurisdiction over compact disputes. However, concurrent jurisdiction would be more appropriate because it would serve the interests of maintaining state involvement in compact adjudication and retaining some state authority over compacts.

[101] *Hess*, 513 U.S. at 47.