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Reanimating the Foreign Compacts Clause

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REANIMATING THE FOREIGN COMPACTS CLAUSE

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INTRODUCTION

On October 23, 2019,[1] the United States Department of Justice ("DOJ") filed a complaint against the State of California "for unlawfully entering a cap and trade agreement with the Canadian Providence of Quebec."[2] In many ways, the complaint reflects a conventional disagreement between states and the federal government over the contours of federalism, but the complaint's second cause of action, alleging a violation of the "Compacts Clause," Article I, section 10(3) of the United States Constitution,[3] is unique. The body of law and scholarship surrounding the Compacts Clause is often guesswork at best, for jurists and scholars alike, because typically states' practice is not to seek congressional consent, and Congress's, to rarely consider granting or denying it. Further, Congress has only explicitly rejected one state-made compact in its history.[4]

Federal litigation challenges to agreements made by states are even more uncommon.[5] While still limited, the vast majority of litigation

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[1] Complaint for Declaratory and Injunctive Relief at 1, United States v. California, No. 2:19-cv-02142 (E.D. Cal. Oct. 23, 2019) [hereinafter Complaint].

[2] Press Release, Off. of Pub. Affs., U.S. Dep't of Just., *United States Files Lawsuit Against State of California for Unlawful Cap and Trade Agreement with the Canadian Province of Quebec* (Oct. 23, 2019), https://www.justice.gov/opa/pr/united-states-files-lawsuit-against-state-california-unlawful-cap-and-trade-agreement [https://perma.cc/5ZTV-UZ2S].

[3] U.S. CONST. art. I, § 10, cl. 3.

[4] *See* Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071, 1078 n.33 (2008) [hereinafter Hollis I] ("granting consent to a Great Lakes Basin Compact but limiting it to U.S. state participation and not including provisions authorizing recommendations to the federal governments on treaties and agreements").

[5] *See* MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY 284–85 (2016). The terms "compacts" and "agreements" will be used interchangeably throughout this writing. The courts have noted, accurately, that the drafters must have certainly intended some distinction between the terms

is initiated by private parties.[6] And when Congress does consider compacts made by states (also *de minimis*),[7] they usually concern agreements made between two or more states, referred to as "interstate" agreements.[8] A truly rarified species, though, is a direct federal legal challenge to an agreement under the second group in the Compacts Clause, concerning compacts made between states and foreign governments,[9] referred to as "foreign state agreements" ("FSAs").[10]

Article I, section 10 of the United States Constitution directs, "no State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or foreign Power."[11] While the body of law and scholarship concerning both interstate agreements and FSAs is limited,[12] authors have not unreasonably assumed that the test for interstate agreements, originating from *Virginia v. Tennessee*,[13] applies to FSAs as well, but the Supreme Court has never explicitly held so.[14]

While Article I, section 10 is parallel in construction for both types of agreements, the potential harm each type of agreement poses is actually quite different.[15] Therefore, the courts should see not one unitary

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"compacts" and "agreements" versus "treaties" because of the separate process for approval for compacts and agreements differing from that of treaties, but stated that "[w]hatever distinct meanings the Framers attributed to the terms in Art. I, § 10, those meanings were soon lost." U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460–64 (1978). However, this distinction between treaties and compacts must be explored and considered separately, because of the differing scope of executive powers in each area.

[6] *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION, 155–56 (2d ed. 1996).

[7] Hollis I, *supra* note 4, at 1083.

[8] GLENNON & SLOANE, *supra* note 5, at 281.

[9] HENKIN, *supra* note 6, at 155–56. "[O]rdinarily the state's judgment would not be reviewed unless some aggrieved private interest challenged the agreement."

[10] The origin of the term "FSA" appears to be Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 742 (2010) [hereinafter Hollis II].

The Supreme Court has only considered an FSA once: Holmes v. Jennison, 39 U.S. 540, 549–51, 569–70 (1840). *See* HENKIN, *supra* note 6, at 153. I have found no case in which the Executive Branch, until this complaint, has ever before directly challenged in court an FSA for lack of congressional consent.

[11] U.S. CONST. art I, § 10.

[12] Andrew A. Bruce, *The Compacts and Agreements of States with One Another and with Foreign Powers*, 2 MINN. L. REV. 500, 501 (1918) ("So far as the supreme court of the nation is concerned, we have but little more than dicta to guide us in the determination of these questions.") (discussing if congressional approval is required for FSAs).

[13] 148 U.S. 503, 525 (1893); GLENNON & SLOANE, *supra* note 5, at 282.

[14] GLENNON & SLOANE, *supra* note 5, at 289.

[15] Hollis II, *supra* note 10, at 769–70.

Compacts Clause, but two: the more developed interstate Compacts Clause and the less well-defined "Foreign" Compacts Clause.[16]

Positive or negative federal action under the Foreign Compacts Clause, either by Congress or the President, is so rare that most scholars accurately describe the Foreign Compacts Clause as having "fallen into desuetude."[17] Professor Sharmila Murthy, in her analysis of the suit, quickly dismisses the strength of DOJ's Compacts Clause argument, asserting that, under the single Compacts Clause theory, "[m]ost experts believe that the functional test developed for interstate compacts applies to cross-border agreements."[18] Murthy concludes that the President "does not have the constitutional authority to end the Cap-and-Trade Agreement with Quebec."[19] The District Court agreed on both counts, as argued by both the State of California, as well as *amici*,[20] Judge William Shubb, in his March 12, 2020, ruling, which adopted this commonly advanced view of a singular compacts clause, with the test from *Virginia* and its progeny controlling.[21] But before reaching that conclusion, Judge Shubb concluded that the "agreement" was not a compact, stating "'classic indicia' . . . from *Northeast Bancorp* are missing."[22] Later, in separate motions, Judge Shubb further dismissed the DOJ's arguments, finding the Cap-and-Trade Agreement did not violate Foreign Affairs Doctrine preemptions.[23] For the sake of the current matter, California's attempt to do *something* in the face of the disjointed, ineffective federal response to climate change, the result appears desirable, but I am skeptical that the current Supreme Court will take a similar view, or that the result is most favorable where unified national (not to mention international) action is required.

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[16] *Id.* at 769.
[17] GLENNON & SLOANE, *supra* note 5, at 289.
[18] Sharmila Murthy, *California's Cap-and-Trade Agreement with Quebec: Surviving Constitutional Scrutiny*, HARV. L. SCH.: ENV'T & ENERGY L. PROGRAM (Nov. 4, 2019), https://eelp.law.harvard.edu/2019/11/californias-cap-and-trade-agreement-with-quebec-surviving-constitutional-scrutiny/ [https://perma.cc/LUY9-SARM].
[19] *Id.*
[20] Brief of Amici Curiae Professors of Foreign Relations Law at 1–2, United States v. California, No. 2:19-cv-02142 (E.D. Cal. May 26, 2020).
[21] Memorandum and Order Re: Cross-Motions for Summary Judgment at 18, 22, 33, United States v. California, No. 2:19-cv-02142 (E.D. Cal. Mar. 12, 2020) [hereinafter March 12th Ruling].
[22] *Id.* at 28.
[23] Memorandum and Order Re: Second Cross-Motions for Summary Judgment at 29–30, United States v. California, No. 2:19-cv-02142 (E.D. Cal. July 17, 2020).

While likely apocryphally attributed to the eminently quotable Yogi Berra, it remains true that "it's tough to make predictions, especially about the future."[24] However, if the current litigation reaches the Supreme Court, it seems likely that the Court will reanimate the disused requirement of congressional consent and find the current agreement between California and Quebec to be violative of the *Foreign* Compacts Clause. Strong textual arguments will be appealing to the current Court. Likewise attractive is the expansive view of the President's power in foreign affairs, possible federal preemption in the form of environmental protection legislation,[25] and the distinguishability of precedent for interstate agreements from FSAs. The current Court is unlikely to adopt a rule that is so clearly the opposite of the words in the Constitution. The upcoming presidential election will affect whether the federal government appeals. For now, the DOJ is "considering [their] next steps."[26]

If appealed, the current litigation should force answers to a number of important questions the Supreme Court has left unresolved: 1) Has federal inaction led the Foreign Compacts Clause to lose all (or almost all) of its meaning?; 2) Is there a separate standard for interstate agreements versus FSAs?; and, 3) If there is a separate standard, what should it be?

While certainly in overwhelming disuse, both congressional powers to approve or disapprove compacts made by states, and the executive's ability to challenge agreements that encroach on presidential powers, are available to both Congress and the President. Congress clearly retains the power to disapprove agreements.[27] But the President should be able to successfully challenge agreements that encroach upon plenary powers of the President, as well as agreements that infringe on authorities delegated to the executive by Congress. Delegation by Congress should function as disapproval of the agreement and be viewed as a form of federal preemption.[28] Finally, California most likely has the ability to moot the current litigation by executing a new "understanding" with Quebec that

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[24] *The Perils of Prediction*, ECONOMIST, June 2, 2007.

[25] The application of federal preemption issues will be beyond the scope of this writing, however, as I will discuss below, congressional legislation delegating discretion to the executive should act as an effective disapproval of an FSA.

[26] Rachel Frazin, *Judge Rejects Trump Administration Challenge to California Cap-and-Trade Program*, HILL (July 17, 2020), https://thehill.com/policy/energy-environment/507887-judge-rejects-trump-administration-challenge-to-california-cap-and [https://perma.cc/G4AD-5GWT].

[27] STEVEN BLEVINS, COUNCIL STATE GOV'TS, CONGRESSIONAL CONSENT AND THE PERMISSION FOR STATES TO ENTER INTO INTERSTATE COMPACTS 2 (2011).

[28] *See* HENKIN, *supra* note 6, at 156–58 (discussing federal preemption).

would be without any legal effect, a mere political commitment that would neither purport to constrain the parties nor infringe on federal powers and thereby not implicate the Compacts Clause while still meeting California's intent, namely reducing carbon emissions in both California and Quebec.

I. WHY NOT INFER CONSENT FROM CONGRESSIONAL INACTION?

It is understandable and logical, due to inaction by Congress, that jurists and scholars have concluded that congressional consent, or more typically, lack thereof, under the Foreign or singular Compacts Clause has become meaningless.[29] In over 232 years of operation under the Constitution, Congress has only disapproved of an FSA once and has "only consented to a mere handful."[30] By most estimates, there are currently hundreds of FSAs, and all of the FSAs that Congress has consented to fall into "four narrowly defined categories: (a) bridges; (b) firefighting; (c) highways; and (d) emergency management."[31] Mexico and Canada and their collective border states and providences are the foreign party to most of these FSAs.[32] Amusingly, or perhaps intentionally provocatively, California boasts having at least 69 bilateral agreements, with 16 different nations, related just to climate issues.[33]

"The states have concluded more than two hundred FSAs in the last ten years alone. And these numbers certainly undercount the actual practice, since no formal mechanisms exist for collecting or monitoring FSAs."[34] As Glennon and Sloane correctly describe, "the textual 'default rule' . . . has changed by 180 degrees—from one that treats FSAs as presumptively invalid absent congressional approval to one that regards them as presumptively valid absent congressional disapproval."[35] If the Court adopts this approach, consent, under the plain language of the Compacts Clause, has become a rule without application, because the courts have generally inferred implied consent to congressional silence.

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[29] GLENNON & SLOANE, *supra* note 5, at 283.
[30] Hollis I, *supra* note 4, at 1075.
[31] *Id.* at 1076.
[32] Hollis II, *supra* note 10, at 751.
[33] *Climate Change Partnerships*, CAL. ENERGY COMM'N, https://www.energy.ca.gov/about/campaigns/international-cooperation/climate-change-partnerships [https://perma.cc/8MA4-VUTW] (last visited Nov. 2, 2020).
[34] Hollis II, *supra* note 10, at 744.
[35] GLENNON & SLOANE, *supra* note 5, at 283.

But what to make of congressional silence? While tempting, it is a leap to simply argue that the predominant practice of nearly complete congressional inaction indicates that Congress has forfeited the power of requiring its consent to FSAs. Even under the framing laid out by Glennon and Sloane, FSAs not approved or disapproved by Congress would only be presumptively valid.[36] This framing neither negates Congress's ability to specifically disapprove at any later time, nor the possibility that an unapproved (or possibly even an approved) FSA encroaching on another branch's power should be invalid.

Like many other areas of actual practice, the source of confusion is really a story of congressional neglect. However, there are a number of reasons that could explain Congress's inaction: 1) lack of knowledge; 2) intentional implied approval; 3) lack of congressional interest—which is really a subspecies of implied approval; 4) the proliferation of FSAs is more than Congress can currently handle; or 5) the topics of "classic" FSAs are truly local issues that are not within Congress's power to approve or deny.

There is not currently any reporting requirement or formal mechanism for states to forward FSAs or interstate compacts to Congress.[37] Unless a state affirmatively sends an FSA to Congress, there would be no initiating event causing Congress to act. States would be unlikely, without required prompting, to forward such agreements *sua sponte,* and thereby diminish their political power to make such agreements. Congressional inaction might mean some limited implied consent to the practice, but due to this lack of a formal protocol, all that can be truly inferred is that Congress is likely unaware of a majority of agreements.[38] While presuming congressional ignorance of the *general* practice would be naïve, attributing implied consent without evidence of congressional knowledge of any individual FSA is another leap of logic altogether. Thus, lack of *specific* knowledge of the vast majority of FSAs seems the most likely reason for much of congressional inaction.

Perhaps, as the Court assumed implied consent in *Virginia* regarding an interstate agreement,[39] such consent is just as plausible a conclusion for FSAs: perhaps unacted upon FSAs are simply agreements that Congress does not object to. Until the present litigation, no court has

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[36] *Id.*
[37] Hollis II, *supra* note 10, at 744.
[38] *Id.* at 796. While a proposal for the shape and nature of future congressional processes supervising FSAs is beyond the scope of this in writing, I agree with Professor Hollis, that Congress can and should enact a process for review.
[39] Virginia v. Tennessee, 148 U.S. 503, 506 (1893).

ever held that the *Virginia* test applied to FSAs.[40] And counter to what Chief Justice Taney believed the founders' feared,[41] many of the FSAs have not run contrary to United States foreign policy, but congruent with it. For example, so-called "Sister City/State" agreements make up many of the FSAs and were specifically encouraged by the Eisenhower Administration.[42] Plus, the fact that Congress has denied consent only once (in 1968, to the Great Lakes Basin Compact) demonstrates that when Congress sees an FSA that it objects to, it can act.[43]

Then why ever approve an FSA, if congressional silence already indicates approval? Congress has affirmatively approved a series of emergency management FSAs, as recently as 2007, 1998, and 1996, respectively.[44] While not dispositive, these recent approvals at least demonstrate Congress's belief that approval or denial has some effect.

Another possible logical conclusion is congressional indifference to the substance of most FSAs. While really a subspecies of implied approval, and logically cutting toward using a test similar to the functional test in *Virginia*, many FSAs concern matters that are rather pedestrian: sister cities, bridges, traffic schemes, and firefighting—matters that would frequently be considered local issues,[45] not the high foreign statecraft the framers may have feared. Based on these agreements, the inference that could be taken is not that Congress is indifferent to FSAs, but that Congress is indifferent to the *substance* of most FSAs.

However, the purpose of many FSAs goes beyond simple local issues. As Hollis describes, "FSAs do far more than deal with bridges, highways, firefighting, and emergency management."[46] They are used "(a) to establish a common policy or position; (b) to organize or effectuate a specific plan or project; (c) to establish an ongoing relationship; or (d) to impose a regulatory regime."[47] Still, implying consent through a lack of interest and allowing Congress to forfeit such a clear textual responsibility seems an unappealing argument, especially to the current Supreme Court, particularly against presidential challenge.

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[40] GLENNON & SLOANE, *supra* note 5, at 282.
[41] Holmes v. Jennison, 39 U.S. 540, 573–74 (1840).
[42] Hollis I, *supra* note 4, at 1039.
[43] *Id.* at 1078.
[44] *See id.* at 1077–78. In 2007, the International Emergency Management Assistance Memorandum of Understanding; 1998, the Pacific Northwest Emergency Management Arrangement; and 1996, the Emergency Management Assistance Compact.
[45] *See* Hollis II, *supra* note 10, at 754–59.
[46] *Id.* at 754.
[47] *Id.* at 756.

In recent decades, there has been a dramatic increase in FSAs.[48] While unlikely, it would certainly be neater to have a mechanism requiring states to submit agreements to Congress, much like the Case-Zablocki Act.[49] Then, at least Congress would have knowledge and could perhaps grant blanket consent to types, subject, or forms of FSAs, or even grant default consent if an FSA is not acted upon within a given time frame.[50]

With the proliferation of FSAs in recent decades, having a treaty-like approval process for every FSA[51] would be time consuming. "Earl Fry has argued that the current swath of agreement making by subnational entities lies beyond the ability of the national government to 'control, supervise, or even monitor.'"[52] If Congress truly wished to be consulted for *every* agreement, it would be an incredible logistical burden, but it need not be an all or nothing process. While I suspect the Court will decide that some zone of FSAs require consent, Congress ultimately has the legislative power to scope this zone.[53] The increase in FSAs may be a reason to finally act, but the burden of acting cannot justify the current approach—to imply consent. It is possible that there are certain subject matters that are beyond congressional approval or disapproval.[54] The Tenth Amendment of the Constitution gives powers not delegated to the United States to the states, or the people.[55] The Court found differentiation between the "truly national" and the "truly local" in *United States v. Lopez*.[56] Justice Scalia wrote in *Printz v. United States,* a case concerning firearm background checks, that "it is incontestable that the Constitution established a system of 'dual sovereignty' . . . although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'"[57] The functional test in *Virginia* seems to get at the same question: perhaps there is a zone for truly local (i.e., state) issues, either not requiring or perhaps beyond review of Congress?[58] But if a matter is truly local, then the remedy would also seem to be local as well. Yet, the

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[48] *See id.* at 744.
[49] *See* 1 U.S.C. § 112(b) (2004). *See also* Hollis II, *supra* note 10, at 800–01.
[50] *See* Hollis II, *supra* note 10, at 800–01.
[51] *See id.* at 800.
[52] *Id.* (citing EARL H. FRY, THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS 128 (1998)).
[53] *See id.* at 795.
[54] *See* GLENNON & SLOANE, *supra* note 5, at 287–88.
[55] *See* U.S. CONST. amend. X.
[56] *See* United States v. Lopez, 514 U.S. 549, 567–68 (1995).
[57] Printz v. United States, 521 U.S. 898, 918–19 (citing Gregory v. Ashcroft, 501 U.S. 452, 457 (1991); Tafflin v. Levitt, 493 U.S. 455, 458 (1990); THE FEDERALIST NO. 39 (James Madison)).
[58] *See* Virginia v. Tennessee, 148 U.S. 503, 518 (1893).

Constitution clearly requires congressional consent for all agreements.[59] By their very nature, FSAs are meant to have effects external to a state, not solely within. To say that Congress would have no ability to legislate a matter that affected a state and a foreign nation is improbable. Perhaps, as discussed in Part III, when there is congressional silence, a truly local issue test may be helpful in determining which FSAs could be presumptively valid. But a power so clearly given to Congress in Article I cannot be taken away by the Tenth Amendment.

While any congressional action on both interstate agreements and FSAs is the extreme exception, congressional disapproval of an FSA would direct a clear result: the agreement would be invalid. Conversely, Congressional approval, over matters solely within its plenary congressional powers, again would direct a clear result: the agreement would be valid. But that is a large caveat, for it also seems obvious that Congress could not approve of an FSA that infringes upon a plenary power of another branch. The reality is that many of the limited agreements to which Congress has consented have not infringed on presidential power, but deferred to it.[60] While previously discussed, the framers' differentiation between treaties and compacts has been lost to time.[61] If a state were to execute an agreement that could be characterized as a treaty or that encroaches on the executive's powers,[62] the President should be able to successfully challenge such an FSA.[63] The courts have shown little interest in distinguishing the difference between treaties and agreements or compacts.[64] But congressional consent should neither save a compact, nor should consent be implied by congressional inaction if there is true infringement upon presidential power. If Congress acts unconstitutionally, such an act is invalid. An "implicitly" approved FSA should be treated no differently.

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[59] *See* U.S. CONST. art. I, § 10.

[60] *See* Hollis II, *supra* note 10, at 801–02 ("Congress thus conditioned its approval of transboundary bridges and emergency coordination FSAs on the states obtaining the additional consent of the State Department.").

[61] *See supra* note 5 and accompanying text.

[62] The Complaint is careful not to invoke a "sole-voice" or "sole organ" of foreign affairs claim, but claims "the Constitution . . . vest[s] authority over foreign affairs in the President to prohibit actions by the states that lie outside their traditional and localized areas of responsibility and instead interfere with the federal government's foreign policy." Complaint, *supra* note 1, ¶ 31.

[63] *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 41, 45 (Clarendon Press 2d ed. 1996). Henkin and others have criticized the term "sole organ" as not "aspir[ing] to legal precision" but there certainly are plenary presidential powers within foreign affairs that congress or a state could infringe upon.

[64] *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 462–63 (1978).

Unrealistically, if California decided to execute a mutual defense agreement with Quebec (or another matter that would likely be considered a treaty), that was then, even more unrealistically, approved by Congress, that FSA should be seen as a treaty and should be invalid as an infringement upon the treaty powers of the President.[65] Likewise, even consent implied by congressional silence on an FSA that infringes on presidential plenary powers should likewise be invalid, and judged so, when challenged by the President. What is unique in the current litigation is not that a state executed an FSA that Congress has not approved, but that the President has challenged it as an encroachment of his powers.[66] All past unapproved FSAs are more like the proverbial tree falling in the forest, with no one around to hear it. Unchallenged FSAs cannot support that the current practice is valid, only that validity is irrelevant without challenge.

In truth, absolute congressional silence is somewhat rarer than we are led to believe, as Congress also speaks through legislation. While the likelihood of both congressional approval of an FSA and legislation on a connected issue is exceedingly unlikely, considering Congress has only approved a "handful" of FSAs,[67] that situation should be resolved through an application of the "last in time" doctrine.[68] What is likely, though, and is the case in the current litigation, is that Congress passes legislation addressing the general subject of an unapproved FSA.[69] Then, the federal legislation should still preempt the FSA.[70] Contrary to Murthy's assertion that the President "must primarily rely on his own independent constitutional powers, which do not plausibly include emissions trading,"[71] when the President challenges an agreement, he brings with him all of the office's plenary powers, as well as all powers delegated to the President by Congress—Jackson's first category.[72]

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[65] *See* U.S. CONST. art II, § 2.
[66] *See* Hollis I, *supra* note 4, at 1091.
[67] *See* Hollis II, *supra* note 10, at 801.
[68] MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 233–34 (Princeton Univ. Press 1990).
[69] *See* GLENNON & SLOANE, *supra* note 5, at 278 (discussing legislative preemption of an FSA).
[70] *See* Complaint, *supra* note 1, at 2, 4–5. The complaint makes out in its fourth cause of action a Foreign Commerce Clause claim. *Id.* Whether federal law has preempted state action under both the "Foreign Commerce Clause" as well as other federal environmental protection legislation might ultimately be highly relevant to the outcome of the litigation, however the issues of federal preemption are outside the scope of this Article. Nevertheless, if there is legislation deemed to have appropriately given the President discretion of carbon environmental policy, it would be appropriate for the President to challenge the current FSA using these delegated powers as well. *Id.*
[71] Murthy, *supra* note 18.
[72] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).

II. THERE SHOULD BE A DIFFERENT TEST FOR FSAS AND INTERSTATE AGREEMENTS

As discussed, the reason for congressional inaction is likely a combination of lack of knowledge, simple disinterest, and the fact that many FSAs are rather inoffensive. Glennon and Sloane, accurately writing well before the current litigation, saw the "problem of states endangering the national interest by making foreign compacts or agreements [as] more theoretical than real."[73] It is certainly a matter of perspective whether California's FSA advances or endangers the "national interest,"[74] but now with direct presidential challenge alleging as much, it is unlikely the Court will be as willing to embrace such a counter-textualist view as the functional test, especially when *Holmes* has never been overruled, and *Virginia* is easily distinguishable. This is the type of agreement that the framers sought to require congressional approval,[75] and it is exactly what the complaint alleges in its second and third causes of action.[76] Congressional silence, while probative, is not dispositive of approval when coupled with a colorable allegation of infringement on presidential powers. Appeals to federalism, and cries of "state's rights" seem to have swung wildly along the political spectrum in the last four years, but there was a fundamental logic of the framers desiring the several States not to independently pursue each their own foreign policy. The Court should not find that the functional test from *Virginia* applies to FSAs as well.

"The Supreme Court has only had one occasion to examine the Constitution's conditional prohibition of compacts involving foreign powers."[77] In *Holmes*, from 1840, Holmes, a prisoner in Vermont, that Canada requested extradition of, asked the Court to consider whether the Governor of Vermont had entered into an unconstitutional agreement with Canada over his extradition.[78] Chief Justice Taney, writing for an evenly divided court, found that the founders "manifestly believed that any intercourse between a state and a foreign nation was dangerous to the Union."[79] In *Holmes* there was not a written agreement or even clear evidence as to what that agreement was.[80] Advancing a standard more stringent than

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[73] GLENNON & SLOANE, *supra* note 5, at 289.
[74] *Id.*
[75] Holmes v. Jennison, 39 U.S. 540, 572 (1840).
[76] Complaint, *supra* note 1, at 1–2.
[77] Hollis II, *supra* note 10, at 779.
[78] *Holmes*, 39 U.S. at 541, 545.
[79] *Id.* at 573–74.
[80] *Id.* at 541.

I advance today, "Taney found the constitutionality could not turn on the 'mere form of the agreement' but rather on the presence or absence of a 'mutual[] underst[anding].'"[81]

Relying on Hollis, "even though [Taney's] opinion did not garner a majority, it has long been regarded as authoritative."[82] Vermont's Supreme Court followed the opinion, releasing Holmes.[83] In 1841, the "U.S. Attorney General . . . issued an opinion that treated Taney's opinion 'as law.'"[84] *United States v. Rauscher* concurred with Taney's views.[85] Again, in 1909, the U.S. Attorney General "similarly invoked *Holmes* to suggest that the Constitution 'prohibits a State from making any kind of an agreement with a foreign power' without the consent of Congress."[86] The Supreme Court has never overruled *Holmes;* instead, the Court has typically sought to "reconcile *Holmes*"[87] with rulings on interstate agreements.

What is the test for interstate agreements? *Virginia v. Tennessee* is the seminal case for interstate agreements and,[88] in dicta, begins the "functional test" for agreements under the Compacts Clause,[89] prohibiting not all state-made agreements, but only "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."[90] The test from *Virginia* was further affirmed in *New Hampshire v. Maine*.[91]

Northeast Bancorp Inc. v. Board of Governors of the Federal Reserve System, a dispute over reciprocal banking legislation, laid out the new "classic indicia of a compact."[92] Citing a lack of these indicia in *Northeast Bancorp,* "[n]o joint organization or body has been established to regulate regional banking or for any other purpose. Neither statute is conditioned on action by the other State, and each State is free to modify or repeal its law unilaterally." The Court noted that "[m]ost importantly, neither statute requires a reciprocation of the regional limitation."[93] "The Court did not however, indicate whether each of these criteria needs to exist to

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[81] Hollis II, *supra* note 10, at 781 (brackets in original) (citing *Holmes*, 39 U.S. at 573).
[82] *Id.*
[83] *Ex parte* Holmes, 12 Vt. 631, 642 (1840); Hollis II, *supra* note 10, at 781.
[84] Hollis II, *supra* note 10, at 781 (citing 3 Op. Att'y Gen. 661, 661 (1841)).
[85] *See* United States v. Rauscher, 119 U.S. 407, 412–14 (1886).
[86] Hollis II, *supra* note 10, at 782 (citing 27 Op. Att'y Gen. 327, 332 (1909)).
[87] *Id.* at 782.
[88] *See generally* Virginia v. Tennessee, 148 U.S. 503, 509–10 (1893).
[89] GLENNON & SLOANE, *supra* note 5, at 281.
[90] *Virginia*, 148 U.S. at 519.
[91] New Hampshire v. Maine, 426 U.S. 363, 369 (1976).
[92] Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 472 U.S. 156, 175 (1985).
[93] *Id.* at 175.

qualify an arrangement as a compact, or if one or more of them alone would suffice."[94] The current test for interstate compacts is to look for the "classic indicia" of a compact or agreement, and then, if found, "evaluate the need for congressional consent in terms of the effect on federal supremacy."[95] This is the precise logic the district court applied to the California-Quebec arrangement in the current litigation, finding the "agreement" is no agreement at all, and even if it is, it would not "encroach upon or interfere[] with the just supremacy of the United States."[96]

The harm targeted in *Virginia* and affirmed in its progeny confront a similar but distinguishable harm than that posed by FSAs.[97] The potential harm of interstate agreements is that collections of states could increase their own power *vis a vis* the federal government. One could imagine an amalgamation of states that could collectively exert undue influence on the whole Union, greater than the power of the states individually. The Confederacy during the Civil War presents an obvious, yet extreme example.[98]

The colonial history and practice under the Articles of Confederation apparently demonstrated the purpose of the Compacts Clause to be so clear that Madison wrote in Federalist 44, the "reasonings [are] either so obvious, or have been so fully developed, that they may be passed over without remark."[99] Certainly not all interstate agreements functionally interfere with federal power, as the courts have never found one that has.[100] The same is not true for FSAs.[101] While federal power has never been absolutely exclusive over the matters that most interstate agreements cover,[102] foreign affairs is an area where the courts have been much more deferential to at least near-exclusivity.[103]

I am skeptical of the potential harm alleged under the third cause of action in the DOJ's complaint, that the Agreement could have the effect of undermining or complicating the United States' relations with Canada if a dispute were to arise between California and Quebec.[104] Nevertheless,

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[94] Hollis I, *supra* note 4, at 1088.
[95] Hollis II, *supra* note 10, at 767.
[96] United States v. California, 444 F. Supp. 3d 1181, 1195 (E.D. Cal. 2020).
[97] GLENNON & SLOANE, *supra* note 5, at 282; Hollis II, *supra* note 10, at 786.
[98] Hollis II, *supra* note 10, at 782.
[99] THE FEDERALIST NO. 44 (James Madison).
[100] GLENNON & SLOANE, *supra* note 5, at 281.
[101] *Id.* (*Holmes* is the only case ever overruling a state made agreement under the Compacts Clause).
[102] HENKIN, *supra* note 6, at 165–67.
[103] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003).
[104] Complaint, *supra* note 1.

the notion that FSAs, by their nature, have a far greater likelihood of infringing upon federal foreign affairs power is clear, as well as the possibility of foreign powers using states as a vehicle for their own intercourse with the Unites States.[105] The "secret" agreement between Cuba and Kansas easily demonstrates this point.[106] Further, "it seems highly likely that having ten of fifty U.S. states joining ICAP changed how . . . foreign government[s] . . . interacted with [the] Bush Administration."[107]

While I would not advocate for a position that the states have no role to play in foreign affairs, the courts have certainly been highly suspect and held states to a more stringent standard in every other area of state involvement in foreign affairs.[108] *Holmes* remains the only case directly addressing FSAs and "suggests that when it comes to FSAs, the Court has acknowledged a stricter adherence to the constitutional text than it has held to be required in the interstate context."[109] From *Holmes*:

> The framers of the Constitution manifestly believed that any intercourse between a state and a foreign nation was dangerous to the Union; that it would open a door of which foreign powers would avail themselves to obtain influence in separate states. Provisions were therefore introduced to cut off all negotiations and intercourse between the state authorities and foreign nations.[110]

Since the harms targeted by the framers between the "Domestic" and "Foreign" Compacts Clause are different, they deserve different standards. "From the standpoint of policy there is obviously a vast difference between interstate compacts and compacts between individual states and foreign powers."[111] While a functional test might be logical for interstate

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[105] Hollis II, *supra* note 10, at 786.
[106] *Id.* at 741 ("On December 9, 2003, Kansas Governor Kathleen Sebelius quietly concluded an agreement on behalf of her state with Cuba's food trade agency, Alimport. Kansas never released the actual text—it came to light via Cuban state radio—but Cuba apparently committed to buy $10 million in Kansas agricultural products and in return, Kansas would encourage the repeal of federal trade and travel sanctions against Cuba. Kansas Lieutenant Governor John Moore publicly came out in support of a bill introduced in the United States House of Representatives by a Kansas congressman that would have (if enacted) done just that.").
[107] *Id.* at 759 (ICAP is the International Carbon Action Partnership).
[108] *See Garamendi*, 539 U.S. at 416–17, 420.
[109] Hollis II, *supra* note 10, at 782.
[110] Holmes v. Jennison, 39 U.S. 540, 573–74 (1840).
[111] *The Power of the States to Make Compacts*, 31 YALE L.J. 635, 638 (1922).

agreements, a more stringent one is more appropriate for FSAs and will certainly be more appealing to the textualists, originalists, and those with expansive views of presidential power, currently on the Court.[112]

III. WHAT SHOULD THE TEST BE UNDER THE FOREIGN COMPACTS CLAUSE?

The best and neatest solution would be for Congress to act directly. This could take a number of forms, all of which would be an improvement on current practice.[113] The practice the framers likely presumed would be for Congress to require states to submit all FSAs to Congress, which would then have to actually approve or disapprove each submission—a burdensome proposition.[114] Another alternative would be to require notice of all FSAs, coupled with legislation granting consent to certain domains of agreements, or default consent in certain time frames, if unacted upon. Again, Congress will always retain the ability to affirmatively deny consent to any agreement, on any matter. None of the forgoing is likely to happen in the near term, and the courts will likely be left to themselves to determine the constitutional application of the Foreign Compacts Clause.

Regardless of future congressional action on the issues, FSAs do provide a valuable tool for border states to resolve what would classically be considered as local issues if the other party were another state, which would be upheld as interstate agreements under *Virginia*: cross-border bridges, traffic schemas, firefighting coordination, etc. *Holmes* is possibly distinguishable in that "extradition, historically [is] a subject of national policy."[115] Absent federal objection or preemption, these truly local agreements should be allowed to continue with Congress always retaining the ability to disapprove.

For FSAs, courts should look to encroachments upon federal powers, but in a much stricter application than they currently do for interstate agreements. The courts should allow FSAs, within the traditional local states' zones of authority, differentiating what is appropriately within the federal conduct of foreign affairs. This test, while dramatically limiting the current scope of FSAs, would still allow states to function in the

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[112] Hollis II, *supra* note 10, at 785 ("Even if both Compact Clauses perform the same function—i.e., protecting federal supremacy—they do so in distinct ways.").
[113] *See supra* discussion in Part I; *see also* Hollis II, *supra* note 10, at 800.
[114] *See Holmes*, 39 U.S. at 573–74.
[115] HENKIN, *supra* note 6, at 154.

face of congressional silence and at least make a colorable argument of implied consent based on prior congressionally approved FSAs.

Many FSAs, such as the Manitoba-Missouri watershed agreement and the Great Lakes agreements,[116] might seem, based on subject matter, to be the type of truly local issues that could be presumed valid, but as soon as multiple states are involved, such as with agreements involving precious resources like the water sheds of large rivers, these logically should fall within the federal domain.[117] When a common issue affects multiple states and a foreign government, that should be considered a federal foreign affairs issue, which the President and Congress are constitutionally empowered to control in order to avoid the divergent foreign policies that framers meant to prevent,[118] potentially causing states to enter a bidding war with a foreign government. This application would function not as a wholesale cessation of current FSAs, but limit them in a manner much closer to the text of the Constitution. Rather than being functional, this would look to the subject matter of the FSA, looking to traditional canons of federal and state power.

This test would allow the type of cross-border FSAs that are less likely to offend federal powers and are necessary for smooth operation and good governance in border communities. However, it would be highly suspect of agreements made by multiple states, non-border states, or with nations or subdivisions of nations that do not border—such as the California-Quebec agreement, and topics that are outside more limited, truly local issues—like climate change. Congress would always retain the power to disapprove, or preempt with legislation, and the executive should be able to challenge those that infringe on executive powers: plenary, concurrent, and powers delegated to the executive by Congress. This Foreign Compacts Clause test would limit agreements that encroach on federal powers, be far closer to a textual reading of the Constitution, and allow the executive to selectively challenge offensive FSAs.

Hollis advocates for an even stricter reading of the Foreign Compacts Clause to apply across the entire spectrum of possible agreements made by states, from the binding treaty-like documents to mere political

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[116] Hollis II, *supra* note 10, at 759, 742 n. 12; Pub. L. No. 90-419, 82 Stat. 414 (1968).
[117] Herbert H. Naujoks, *Compacts and Agreements between States and between States and a Foreign Power*, 36 MARQ. L. REV. 219 230 (1952) ("[A]lmost any compact of importance is bound to affect the power balance between the states and the Federal Government and hence could be considered political in nature, the states contemplating the making of a compact would be wise to include a provision for Congressional consent.").
[118] Hollis II, *supra* note 10, at 770.

commitments.[119] The *Holmes* court appears to go as far.[120] However, I would not advocate this new application to political commitments, "memorandums of understanding," or concurrent statements of intentions that do not purport to confirm legal binding terms or obligations on either party, that do not include "shall"-like terms, and do not have withdrawal time frames or notification of withdrawal provisions. While the courts have certainly held the federal government's powers in the foreign domain to be extensive, the courts have never gone so far as to say that the federal government's power is exclusive, especially in instances of federal silence.[121]

The test I recommend for FSAs is as follows: 1) is there an agreement? Applying a more expansive view of compacts than the current "classic indicia" from *Northeast Bancorp*,[122] for interstate agreements, but not as restrictive as *Holmes*,[123] looking to the language of the agreement, but not including mere concurrent political commitments. Then, 2) is the matter truly a local issue of the type that Congress has previously approved, or does it involve multiple states or a matter normally outside border state concerns and therefore encroaches on federal powers? And then, even if the matter is truly local 3) has there been a legitimate federal objection? This final prong should be present, because the plain language of the Constitution clearly gives Congress the power to consent, and even when there is congressional silence, foreign affairs are more appropriately the providence of the President than the states.[124] As discussed, when Congress affirmatively denies consent, the matter would be easily decided against the FSA. The executive's objection, however, would need to demonstrate that the subject of the FSA infringes on a presidential power. For litigation over FSAs that are truly local, when initiated by private parties, federal preemption would need to be demonstrated—the federal government is a "victim" of unapproved FSAs, not private parties.

The current Court should find this approach more appealing when dealing with FSAs than the *Virginia* and *Northeast Bancorp* test for interstate agreements.[125] While most provisions of the Constitution are never as clear as lay readers of the text might infer, strict "textualism"

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[119] *Id.* at 791–93.
[120] Holmes v. Jennison, 39 U.S. 540, 573–74 (1840).
[121] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 418–20 (2003).
[122] March 12th Ruling, *supra* note 21, at 28.
[123] *Holmes*, 39 U.S. at 572.
[124] *Garamendi*, 539 U.S. at 418–20.
[125] March 12th Ruling, *supra* note 21, at 28.

or even "originalism" seem the providence of a political ideology that is more inclined to look backwards than toward a progressing, functioning democracy. This proposed test would move away from the "180 degree"[126] opposite application currently assumed to apply, toward one that conforms with a plainer reading, while still retaining a carve-out for states to act in a very limited local zone, while also allowing the current federal practice—overwhelming disinterest. Absolute congressional control over all FSAs would remain, as well as a voice for the executive when presidential powers are encroached.

IV. SUBSTANTIVE DISAGREEMENTS WITH THE MAJORITY VIEW OF A SINGLE COMPACTS CLAUSE

Professor Murthy (writing before the district court virtually concurred in totality with her analysis)[127] is highly suspect of the viability of the government's complaint,[128] stating, "the Constitution does not expressly prohibit states from engaging in activities that could impact foreign affairs."[129] I agree, technically; however, as discussed, the Constitution does expressly prohibit "without the consent of Congress" a state from "enter[ing] into any Agreement or Compact . . . with a foreign power."[130] Further, Murthy is correct when she continues, "states like California have long engaged in cross-border activity."[131] While true, the practice has heretofore never been contested, and the question is much more in doubt if the Supreme Court, particularly the current Court, will approve of a practice that so clearly functions in opposition to the plain text of the Constitution and the intent of the framers, no matter how long or how often states have been making FSAs without congressional consent.

The history of federal inaction "has created the 'grey zone' of foreign affairs federalism into which states like California have stepped."[132] But to whom does unused congressional foreign affairs powers flow? While informative, longstanding practices cannot overcome such an obvious textual disconnection, particularly when there is colorable federal objection. It seems that the President's concurrent powers are more likely

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[126] GLENNON & SLOANE, *supra* note 5, at 283.
[127] *See* March 12th Ruling, *supra* note 21, at 2, 33.
[128] *See* Murthy, *supra* note 18, at 1, 3, 5.
[129] *Id.* at 1.
[130] U.S. CONST. art. I, § 10.
[131] Murthy, *supra* note 18, at 1.
[132] *Id.*

encroached by state action in the face of congressional silence in foreign affairs.[133] Murthy relies on the commonly assumed application of the *Virginia* functional test for interstate agreements applying to FSAs as well.[134] If true, as the district court held,[135] her analysis is sound. However, while a bulk of scholars make this assumption,[136] the few that have seriously considered the matter, question the *certainty* of this assumption.[137]

Murthy goes on, posing, "The California-Quebec Cap-and-Trade Agreement is largely consistent with prior acts of Congress. As a result, President Trump must rely on his own independent constitutional powers, which do not plausibly include emissions trading."[138] The President can always rely on his "independent constitutional powers,"[139] and the complaint does "engage[] in a sleight of hand" attempting to "re-cast[] the Cap-and-Trade Agreement as a national security issue."[140] But Congress created the Clean Air Act,[141] as well as other environmental legislation that Congress delegated at least some authorities to the President and the EPA Administrator.[142] Despite the debate concerning presidential authority over independent executive agencies, the President also brings delegated powers as well as plenary powers. While the Clean Air Act does preserve states' ability "to implement stricter air pollution standards,"[143] the fact that the method California chose was an FSA with Quebec likely puts it outside the permissible action under the Act and unconstitutionally encroaches on federal powers. "The Supreme Court has found that a federal regulation barred even identical, consistent, or supplementary state regulations because the federal government 'occupied the field.'"[144]

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[133] GLENNON, *supra* note 68, at 15–16.
[134] Murthy, *supra* note 18, at 1–2, 4–5.
[135] March 12th Ruling, *supra* note 21, at 28, 33.
[136] GLENNON & SLOANE, *supra* note 5, at 282.
[137] *See id.* at 281–82; *see generally* Hollis I, *supra* note 4, at 1086; and Hollis II, *supra* note 10, at 762–63.
[138] Murthy, *supra* note 18, at 1.
[139] *Id.* at 2.
[140] *Id.* at 1.
[141] 42 U.S.C. § 7401 (1990).
[142] There is significant debate surrounding what authorities the President has over independent executive agencies. *See* Christopher D. Ahlers, *Presidential Authority Over EPA Rulemaking Under the Clean Air Act*, 44 ENV'T L. 31–32, 34–35, 46 (2014). This debate at least exposes that there is the possibility of some powers delegated to the president.
[143] Murthy, *supra* note 18.
[144] California v. ARC American Corp, 490 U.S. 93, 100 (1989); HENKIN, *supra* note 6, at 157 ("In such cases, the Court avoids finding that the state action violates some implied substantive provision: it finds instead a purpose in the federal regulation to exclude the

Finally, contrary to Murthy's argument, if the court were to rule against California, it would not create a "domino effect."[145] The practice of states and the federal government would likely not change dramatically. First, it is unlikely that the executive would begin challenging the hundreds of current FSAs, just as Congress has shown no interest in actually reviewing the hundreds of current FSAs. Further, if the test I advocate is adopted, many, if not most, FSAs would not be determined to be compacts requiring congressional consent absent federal challenge. Finally, truly local FSAs that directly impact the functioning of border states (i.e., roads, bridges, emergency services) would still be permissible under a limited zone of truly local state authority.

V. CALIFORNIA CAN MOOT THE LITIGATION BY EXECUTING A NON-BINDING POLITICAL COMMITMENT

Ultimately, the current administration's opposition to addressing climate change, specifically carbon emissions, is unfortunate, and California's attempts to engage on the issue are morally laudable; however, it does not seem that the Supreme Court will be as permissive. Assuming that the Court would not adopt the strictest standard, advocated by Hollis,[146] requiring congressional approval of all FSAs, including mere political commitments, California should be able to moot the current litigation by executing a new "agreement" with Quebec that would escape scrutiny under the Compacts Clause altogether as a non-binding political commitment.[147]

In 2009, California and Quebec executed a prior agreement that was much more binding in nature than the current 2017 agreement.[148] According to the 2017 agreement, the parties were replacing a 2013 agreement.[149] The drafting history explaining the differences between the 2009 agreement and the 2017 agreement are unknown. More binding

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state, and places the onus for invalidating state law on the federal political branches.") (citing Hines v. Davidowitiz, 312 U.S. 52 (1940)).

[145] Murthy, *supra* note 18.

[146] Hollis II, *supra* note 10, at 796.

[147] GLENNON & SLOANE, *supra* note 5, at 287.

[148] *See generally* Attachment B of Complaint, United States v. State of California et al., No. 2:19-cv-02142 (E.D. Cal. Oct. 23, 2019) [hereinafter 2017 Agreement].

[149] *See generally* CAL. AIR RES. BD., AGREEMENT BETWEEN THE CALIFORNIA AIR RESOURCES BOARD AND THE GOUVERNMENT DU QUÉBEC CONCERNING THE HARMONIZATION AND INTEGRATION OF CAP-AND-TRADE PROGRAMS FOR REDUCING GREENHOUSE GAS EMISSIONS, https://ww2.arb.ca.gov/sites/default/files/classic//cc/capandtrade/linkage/ca_quebec_linking_agreement_english.pdf [https://perma.cc/GY33-TGRN] [hereinafter 2009 Agreement].

language, like "shall," is used less than in the 2009 agreement, but still present.[150] While the 2017 agreement's withdrawal clause drops the 2009 agreement's 12-month waiting period and seems to indicate either party may unilaterally withdraw, it confusingly maintains the original's "unanimous consent of the Parties" to terminate the agreement.[151] While not dispositive, this unanimous termination requirement, coupled with the multiple uses of the term "shall," indicates that the parties did intend something more binding than a political commitment.[152]

Without conducting a line-by-line recommendation for a new agreement, it seems the parties could execute an entirely non-binding political commitment, at a minimum, changing the name from "agreement" to "understanding." While a name alone will not be dispositive ("a rose [b]y any other name. . . ."),[153] calling the document an "agreement" certainly undercuts arguments that it is not an "agreement." Likewise, changing "shall" to "intend" or other synonymous terms, with lesser connotations of commitment, and allowing unilateral withdrawal and termination with an "endeavor" or "efforts" to provide 12-months' notice will shift the tone toward a non-binding understanding.[154] With these changes, while still likely to offend the Trump administration, such a document would likely be non-violative of all but the strictest possible readings of the Compacts Clause and be consistent with the Court's current practice of allowing states some *limited* space to speak in foreign affairs.

Another option would be to throw out the agreement altogether and for California to simply act unilaterally, setting a floor for regulatory standards, with a reciprocity requirement much like the structure found in *Northeast Bancorp*,[155] in which any foreign or domestic jurisdiction's, including Quebec's, carbon credits matching California's regulatory minimums, where California credits could also be bought as an offset, could reciprocally be purchased as an offset to California emissions. From a Compacts Clause perspective, how could there be a violation if there is not an even an agreement for Congress not to consent to?[156]

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[150] 2017 Agreement, *supra* note 148.
[151] *Id.*
[152] *Id.*
[153] WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2, l. 43–44 (1597).
[154] David Sloss, *California's Climate Diplomacy and Dormant Preemption*, 56 WASHBURN L.J. 507, 527 (2017).
[155] Northeast Bancorp Inc. v. Board of Governors of Fed. Rsrv. Sys., 472 U.S. 159, 164–78 (1985).
[156] Holmes v. Jennison, 39 U.S. 540, 573–74 (1840) (The court Holmes might still find such a structure violative of the Compacts Clause.).

CONCLUSION

The current administration's hostility to the realities of climate change are unfortunate and Congress's inaction is unsurprising. The majority of states' practices in both interstate agreements and FSAs has essentially gone unregulated for most of the history of the United States. Having never found an interstate agreement violative of the Compacts Clause, the Supreme Court has implied congressional consent when there has been none. Due to the parallel construction of the Compacts Clause, most scholars have understandably assumed that the functional test coming from *Virginia* applies to FSAs as well, but the Court has never held so.

I find it exceedingly unlikely that the current Court will be as willing to assume implied congressional consent from congressional silence to California's cap and trade agreement with Quebec, in the face of the clear text of the Compacts Clause. First, lack of knowledge to most FSAs is more likely than consent, and I encourage Congress to enact some review process.

Further, interstate agreements are distinguishable from FSAs in a number of ways. First, the harm the framers intended to prevent for FSAs is different than that of interstate agreements. Second, the subjects of FSAs are more likely to infringe on the generally recognized, near-exclusivity of the federal government. Finally, the history of unchallenged FSAs only demonstrates that they were unchallenged, not that they are presumptively valid.

The Kansas-Cuba agreement demonstrates the danger of states executing their own separate foreign policies: the potential to damage a fundamental idea of the Constitution, that we are better acting collectively than separately, especially in foreign affairs. Even efforts to achieve a "correct" objective could still have unforeseen consequences.[157]

There is only one time that an FSA has been challenged, and the Court invalidated that agreement because of lack of congressional consent.[158] Therefore, to provide clarity and limit future confusion surrounding FSAs, I encourage the Court to clearly establish a separate test under the Foreign Compacts Clause, one that is in closer keeping with text of the Constitution, while allowing a zone for truly local action.

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[157] *See* Hollis II, *supra* note 10.

[158] *Holmes*, 39 U.S. at 570 ("According to the express words of the Constitution, [treaty negotiation] is one of the powers that states are forbidden to exercise without the consent of Congress.").