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James F. Blumstein

Thomas J. Cheeseman

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STATE EMPOWERMENT AND THE COMPACT CLAUSE

James F. Blumstein* and Thomas J. Cheeseman**

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** Associate, Dechert, LLP; Vanderbilt Law School Class of 2016. The authors wish to thank Laura Dolbow, Vanderbilt Law School Class of 2017; and Alex Carver, Vanderbilt Law School Class of 2018, for their dedicated and conscientious research assistance. We also acknowledge with appreciation the assistance of Carolyn Floyd, Associate Director of Immersion Resources, Vanderbilt University; Douglas Ambrose, Carolyn C., and David Ellis '38 Distinguished Teacher Professor of History, Hamilton College; Robert L. Paquette, Charter Fellow, The Alexander Hamilton Institute For The Study of Western Civilization.

INTRODUCTION

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power . . . .
>
> —U.S. Const. art. I, § 10, cl. 3

In the United States, federal law is made through a process of bicameralism and presentment: legislation must be approved by both houses of Congress and signed by the President before becoming law.[1] Bicameralism and presentment are frequently treated as the exclusive means by which federal law may be created. As the Supreme Court put it in *INS v. Chadha*,[2] bicameralism and presentment constitute the "single, finely wrought and exhaustively considered, procedure" by which the legislative power of the federal government may be exercised.[3] For the Framers, it was "beyond doubt that lawmaking was a power to be shared by both Houses and the President."[4]

But despite such sweeping claims, it is clear that not all federal law is required to undergo the strictures of bicameralism and presentment. Constitutional amendments, for example, must be approved by Congress and ratified by three-quarters of the states but need not be presented to the President to take effect.[5]

This Article argues that the Constitution provides yet another mechanism for the creation of federal law without presentment. Under the Compact Clause,[6] Congress is authorized to consent to compacts among the states.[7] Further, congressional consent to state compacts in certain contexts transforms the compacts from state law into federal law.[8] Relying on the Constitution's text, structure, and history, as well as Supreme Court jurisprudence, this Article shows that presidential presentment is not necessary

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[1] U.S. CONST. art. I, § 7, cl. 2.

[2] 462 U.S. 919 (1983).

[3] *Id.* at 951.

[4] *Id.* at 947.

[5] *See* Hawke v. Smith, 253 U.S. 221, 229 (1920) ("At an early day this court settled that the submission of a constitutional amendment did not require the action of the President."); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 379, 382 (1798) (rejecting the argument that the Eleventh Amendment was invalid because it was never submitted to the President for his approval).

[6] U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

[7] *Id.*

[8] Cuyler v. Adams, 449 U.S. 433, 440 (1981) ("[W]here 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.").

for Congress to exercise its consent power under the Compact Clause. The result is an alternative mechanism for federal lawmaking that, in certain cases, precludes an approval role for the President.

At first glance, it might appear uncontroversial that no presidential approval is required for Congress to consent to state compacts under the Compact Clause. After all, the Clause speaks only of congressional consent and gives no indication that presidential approval might also be required.[9] Moreover, the first Supreme Court case to interpret the Compact Clause noted that "the constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law, and of right reason."[10] But other constitutional provisions complicate matters. The Presentment Clause[11] and the Order, Resolution, and Vote (ORV) Clause[12] seemingly require all congressional actions that require bicameral approval to be channeled through the traditional legislative process, which requires presentment to the President for approval or veto.[13] If that were the case, Congress could not consent to state compacts without also seeking presidential approval.

Compelling evidence, however, suggests that the scope of the Presentment and ORV Clauses is not so broad. Though we provide a fuller account of this evidence later in the Article,[14] we provide a brief sketch here.

Not all congressional actions that require bicameral approval—for example, the proposal of constitutional amendments pursuant to Article V[15]—are subject to the presentment requirement.[16] Further, the Supreme Court declared in *Arizona State Legislature v. Arizona Independent Redistricting Commission*[17] that *state* executives

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[9] 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 . . . ." (emphasis added)).

[10] Green v. Biddle, 21 U.S. (8 Wheat.) 1, 36 (1823).

[11] U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States . . . .").

[12] *Id.* art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States . . . .").

[13] *See id.* art. I, § 7, cl. 2–3.

[14] *See* discussion *infra* Sections II.F, G.

[15] U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . .").

[16] *See* Hawke v. Smith, 253 U.S. 221, 229 (1920) ("At an early day this court settled that the submission of a constitutional amendment did not require the action of the President."); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 379, 382 (1798) (rejecting the argument that the Eleventh Amendment was invalid because it was never submitted to the President for his approval). Early constitutional practice establishes the same point: the First Congress did not submit the proposed Bill of Rights to President Washington before sending the amendments to the state legislatures for ratification. RICHARD BERNSTEIN & JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 44 (1993).

[17] 135 S. Ct. 2652 (2015).

are precluded from playing any role when the Constitution assigns to a state legislature "a ratifying, electoral, or consenting function."[18] Though the Court's comments in *Arizona Independent Redistricting Commission* concerned the consenting function of a state legislature under Article IV, Section 3,[19] there is no material difference between the consent requirement imposed upon state legislatures by Article IV, Section 3 and the consent requirement imposed upon Congress by the Compact Clause.[20] In both cases, the Constitution vests the power to consent to a given action in a legislative body, to the exclusion of the executive.[21] The power to consent to interstate compacts belongs to Congress alone; it is not shared with the President.[22]

In addition to being constitutionally permissible,[23] federal lawmaking through the Compact Clause has a number of normatively attractive features. First, in the face of regional polarization that has often hampered Congress's ability to craft nationwide legislation addressing important issues, interstate compacts provide a means for states to partner with Congress to address those issues on a regional, rather than national, basis. In other words, interstate compacts promote federalism: they enable a form of decentralized decision-making that promotes "autonomy, democracy, and freedom" and "seeks to empower geographically-based minorities in a political manner."[24] Such an approach allows for a "sensitivity to geographically-based sub-national majorities" so that different interests can be accommodated without the need for a national resolution or consensus on important issues.[25] Some recent discussions about health reform reflect that approach, leaving for state-based flexibility some critical issues upon which a national consensus might not exist and for which subsidiarity (state or local autonomy) might be an appropriate mode of resolution or compromise.[26]

Second, interstate compacts can serve as an important vehicle for promoting state autonomy and experimentation.[27] The Compact Clause enables states to solve

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[18] *Id.* at 2667.

[19] *Id.* at 2668.

[20] *Compare* U.S. CONST. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, *without the Consent of the Legislatures of the States concerned* as well as of the Congress." (emphasis added)), *with id.* art. I, § 10, cl. 3 ("No State shall, *without the Consent of Congress*, . . . enter into any Agreement or Compact with another State . . . ." (emphasis added)).

[21] See *id.* art. I, § 10, cl. 3; *id.* art. IV, § 3, cl. 1.

[22] *Id.* art. I, § 10, cl. 3.

[23] *Id.*

[24] James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1252–53 (1994).

[25] *Id.* at 1259.

[26] Robert Jackel & Alex Green, *How Treaties Between States Could Keep Obamacare Alive*, ATLANTIC (Feb. 4, 2017), https://www.theatlantic.com/politics/archive/2017/02/interstate-compacts-save-obamacare/515604/ [https://perma.cc/v6AJ-SA2L].

[27] *See id. Cf.* Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 211 (1997) (asserting that "the Constitution

certain types of problems that involve other states, such as healthcare reform, even in the face of political gridlock between Congress and the President. Interstate compacts can also reinvigorate state policy by permitting states to experiment with alternative regulatory structures. By allowing states to tailor their systems to regional differences and experiment with different approaches to public policy, compacts can provide exploratory laboratories for innovation, allowing states to observe their peers' successes and failures and improve their own policies, and by affording states a "right-to-try."

This Article proceeds in two parts. Part I describes the scope of the Compact Clause, setting forth limitations on the types of compacts that are permitted under the Compact Clause.[28] Part II then argues that presidential approval is not necessary for Congress to exercise its consent power under the Compact Clause and briefly explores the implications of our argument, demonstrating that interstate compacts provide a socially desirable alternative to congressional legislation that enables states and Congress to address important societal problems without involving the President.[29]

I. THE SCOPE OF THE COMPACT CLAUSE

This Section will focus on the historical origins of the Compact Clause,[30] the legal development of the Compact Clause,[31] and examples of how the Compact Clause has furthered cooperative federalism.[32]

A. The Historical Origins of the Compact Clause

Little legislative history exists about the meaning and purpose of the Compact Clause.[33] Madison described Article 1, Section 10, Clause 3 as "within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark."[34] The scope and nature of the Compact Clause, however, may be discerned by an examination of the British Government's role in approving compacts during the colonial period,[35] Congress's role in approving compacts under

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does not express a preference for Congress to delegate federal power to states" in the name of federalism).

[28] *See* discussion *infra* Part I.

[29] *See* discussion *infra* Part II.

[30] *See* discussion *infra* Section I.A.

[31] *See* discussion *infra* Section I.B.

[32] *See* discussion *infra* Section I.B.2.

[33] *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460–61 (1978) ("The records of the Constitutional Convention, however, are barren of any clue as to the precise contours of the agreements and compacts governed by the Compact Clause."); *see also* Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 308–15 (2003).

[34] *U.S. Steel Corp.*, 434 U.S. at 461 n.11 (quoting THE FEDERALIST NO. 44, at 299, 302 (James Madison) (Jacob E. Cooke ed., 1961)).

[35] *See* discussion *infra* Section I.A.1.

the Articles of Confederation,[36] and the debates relating to Article 1, Section 10 during the Constitutional Convention.[37]

1. Compacts in the Colonial Period

As Felix Frankfurter and James M. Landis noted in their seminal paper examining the history and potential uses of the Compact Clause, the clause "has its roots deep in colonial history."[38] Most colonial charters were inevitably "vague and expansive" resulting in a number of boundary disputes.[39] To resolve a boundary dispute, colonies could avail themselves of one of two methods: negotiations through a joint commission that required the Crown's consent to go into effect or referring the dispute to a Royal Commission that would sort out the issue.[40]

Post-Revolution, however, a number of the boundary disputes remained unsettled.[41] Even though the Founding generation viewed states as independent sovereigns, the Articles of Confederation still reserved power for Congress to regulate relations between states and with outside sovereigns.[42] For example, two provisions precluded states: (i) from sending or receiving ambassadors from a foreign state,[43] and (ii) from entering into alliances with other states without Congress's consent.[44] Under the Articles of Confederation, Congress would be the final arbiter of state boundary disputes.[45] The purpose of congressional power in the area of foreign affairs was to promote stability and cohesion amongst competing political powers.[46]

2. Compacts Under the Articles of Confederation

Under the Articles of Confederation, four compacts were enacted: two addressing boundary disputes,[47] a boundary dispute and navigation agreement,[48] and a regulatory compact.[49] The regulatory compact was the Potomac River and Chesapeake Bay

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[36] *See* discussion *infra* Section I.A.2.

[37] *See* discussion *infra* Section I.A.3.

[38] Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 692 (1925).

[39] *Id.*

[40] *Id.* at 692–93.

[41] *See id.* at 693.

[42] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 24 (2005); *see also* ARTICLES OF CONFEDERATION of 1781, art. II, para. 1 ("Each State retains its Sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.").

[43] *See* ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1.

[44] *Id.* art. VI, para. 2.

[45] *See id.* art. IX, para. 2.

[46] *See* Frankfurter & Landis, *supra* note 38, at 693–94.

[47] *See id.* at 732–34.

[48] *See id.* at 734.

[49] *See id.*

Navigation and Trade Agreement, enacted by Maryland and Virginia to help cooperate in their management of shared waters.[50] Congress did not expressly approve this compact, yet its validity under Article VI of the Articles of Confederation was never publicly questioned.[51]

When Maryland ratified the compact, the Maryland legislature proposed that Delaware and Pennsylvania be invited to participate in further negotiations relating to "interstate commercial regulations."[52] In response, Virginia ratified the agreement and called upon all thirteen states to meet in Annapolis in 1786 to draft uniform commercial laws.[53] Nine states appointed representatives, although only five states participated.[54] In Annapolis, the delegates approved a resolution requesting that Congress assemble a convention in Philadelphia, to start in May 1787, to examine and propose amendments to the Articles of Confederation.[55] In response, Congress approved a resolution on February 21, 1787, calling for the proposed convention.[56] As we know, attendees elected to scrap the Articles of Confederation, reformulating the nature of the union among the states and empowering a national government to address the contemporary problems of the American states by creating an American republic.[57]

3. Debates at the Constitutional Convention

At the Philadelphia Convention, the Framers largely adopted the Articles of Confederation's ban on interstate and foreign compacts, paring back the requirements for describing the proposed compact.[58] Read broadly, this prohibition could prevent

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[50] JOSEPH F. ZIMMERMAN, INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS 6–7 (2d ed. 2012).

[51] U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 461 n.10 (1978) ("[T]he Virginia-Maryland Compact of 1785, which governed navigation and fishing rights in the Potomac River, the Pocomoke River, and the Chesapeake Bay, did not receive congressional approval, yet no question concerning its validity under Art. VI ever arose."). Professors Frankfurter and Landis suggested that Madison appears to have privately believed the Virginia-Maryland Compact infringed upon federal power, noting that "[i]n other cases the [federal] [authority] was violated by Treaties & wars . . . . by compacts [without] the consent of Congress as between [Pennsylvania] and [New] Jersey, and between [Virginia] and [Maryland]." Frankfurter & Landis, *supra* note 38, at 694 n.36. Yet, for reasons we shall see, Madison was more predisposed to find a violation of Federal prerogative and thus his views were unrepresentative of the general beliefs of the Framers and the population at large at the adoption of the United States Constitution.

[52] *See* ZIMMERMAN, *supra* note 50, at 7.

[53] *See id.*

[54] *See id.*

[55] *See id.*

[56] *See id.*

[57] For an examination of the creation of the American Republic, see AMAR, *supra* note 42, at 25–53.

[58] *Compare* U.S. CONST. art. I, § 10, cl. 3, *with* ARTICLES OF CONFEDERATION of 1781, art. VI, para. 2.

State A from selling property within State B to the government of State B, or it could prevent two states from agreeing to build a bridge over a river running between the two states. The Supreme Court has rejected such a broad interpretation of the Clause, believing that such an interpretation would unduly burden the states.[59]

Before we analyze how the Court has interpreted the Compact Clause, it is important to examine the debates surrounding the Compact Clause, and Article I, Section 10 more broadly, to better understand their role in our constitutional system.

Article I, Section 10 is composed of three clauses.[60] Whereas the first clause contains blanket prohibitions,[61] the latter two contain conditional bans.[62] As explained below, the conditional prohibitions are best understood as mechanisms to protect federal interests against possible state encroachment.[63]

One distinguished scholar, Professor Michael Greve, has proposed that the Compact Clause is a species of the "congressional negative" proposed by James Madison at the Constitutional Convention.[64] While remaining agnostic about whether the Compact Clause is best understood as a form of Madison's congressional negative, we note that modern Compact Clause doctrine has developed in a manner consonant with how Madison's peers at the Constitutional Convention responded to his proposed congressional negative. As we shall see, Madison's peers rejected one aspect of the congressional negative while embracing another,[65] and modern Compact Clause doctrine has done the same.[66]

Madison's proposed congressional negative was motivated by two distinct purposes: enabling the federal government to defend itself against state encroachment and reforming internal state policy.[67] The second purpose of Madison's proposed congressional negative can only be understood in light of his argument in *Federalist No. 10* about the nature of factions and extended republics.[68] Distilled to its essentials, Madison argued that the most significant threat to individual liberties was posed by "factions," his term for interest groups which promote laws that advantage the group and not the body politic as a whole.[69] Contrary to the then-popular consensus,[70] Madison argued that an 'extended republic,' covering a large territory, would better check factions primarily because the expanded geographic scope would make it more challenging to

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[59] *See* Virginia v. Tennessee, 148 U.S. 503, 518–22 (1893).

[60] U.S. CONST. art. I, § 10.

[61] *Id.* § 10, cl. 1 ("No State shall enter into any . . . .").

[62] *Id.* § 10, cl. 2–3 ("No State shall without the Consent of the Congress . . . .").

[63] *See infra* note 67 and accompanying text.

[64] *See* Greve, *supra* note 33, at 289.

[65] *See id.* at 312–13.

[66] *See id.* at 365–66.

[67] *See* Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 627–28 (1999).

[68] *Id.* at 629.

[69] *See* THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

[70] *See* Kramer, *supra* note 67, at 639 ("No one picked up or repeated Madison's points . . . . And . . . [he] lost every proposal he made based on it.").

coordinate actions.[71] Additionally, Madison believed corrupt politicians would wilt on a larger stage.[72] Thus, a large national government would better preserve liberty than the individual states, which might be captured by provincial interests. The implication of this reasoning is twofold—that a national government would better preserve liberty and that the individual states posed a threat to liberty.

While Madison's extended republic theory is widely taught,[73] political theorists often fail to appreciate the recentness of Madison's conclusions when he presented them to the Constitutional Convention and the negative reception they received from other attendees.[74] Madison likely did not fully develop his ideas about factions until he composed his "Vices of the Political System of the United States" memorandum in April 1787.[75] In light of his new insights, Madison no longer focused merely on the states' ability to enfeeble the national government, as under the Articles of Confederation,[76] but on the national government's ability to improve state governments.[77] Madison believed a congressional veto right over all state laws could serve the dual purpose of protecting federal prerogatives and dissipating the effects of factions in the states.[78] With respect to the second purpose of the congressional negative—improving internal state policy—Madison's peers overwhelmingly rejected his proposal and, importantly, his reasoning.[79] But the other purpose motivating Madison's congressional negative—protecting federal interests—was in fact vindicated in various constitutional provisions, such as the Compact and Supremacy Clauses.[80]

At the Convention, Edmund Randolph advocated that the Convention replace the Articles of Confederation with various congressional powers to defend federal interests, including Madison's congressional negative.[81] Multiple versions of the negative were proposed: a limited negative, only intended to protect federal supremacy; a broader negative, which satisfied Madison's twin goals; a negative lodged in the Senate alone; a negative lodged in both houses; and a limited negative that only invalidated laws that interfered with federal interests and required a two-thirds vote

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[71] *See* THE FEDERALIST NO. 10, *supra* note 69, at 83 (James Madison).

[72] *See id.* at 84 ("The influence of factious leaders may kindle a flame within their particular states but will be unable to spread . . . through the other states.").

[73] *See* Kramer, *supra* note 67, at 612–13.

[74] *See id.* at 612, 615.

[75] *See id.* at 628.

[76] *See, e.g.*, ARTICLES OF CONFEDERATION of 1781, art. VIII (requiring the national government to request money from the states rather than implementing a tax to pay its debts).

[77] *See* Kramer, *supra* note 67, at 628–29.

[78] *See id.* at 627–28.

[79] *See id.* at 648–52.

[80] *See* Greve, *supra* note 33, at 312, 365–66.

[81] Randolph spoke on behalf of the Virginia delegation. His proposal for powers necessary to the federal government included "the power to defend the nation from foreign invasion, the capacity to protect member states from one another and from internal rebellions, the ability to procure benefits that require collective action, the energy to defend itself from encroachments by the states, and the status of being supreme." Kramer, *supra* note 67, at 641.

from each house.[82] The convention-goers repeatedly rejected these proposals—they preferred to leave power to the states.[83] In rejecting Madison's congressional negative, however, it is evident that the convention-goers primarily rejected the second purpose of the negative—giving the federal government the power to improve internal state policy and curb factionalism.[84] Though the convention-goers did not adopt Madison's negative, they were far more receptive to its original purpose of protecting federal interests, as demonstrated by the adoption of the Supremacy Clause[85] (which gave Congress the power to preempt contrary state laws) and Article I, Section 10[86] (which limits the power of the states to engage in certain activities that pose a unique risk to federal interests).

Moreover, modern Compact Clause doctrine comports with the convention-goers' acceptance of the legitimacy of the federal government's power to protect its own interests and their corresponding rejection of a broader power to oversee the internal affairs of the states.[87] As explained below, the Court has interpreted the Compact Clause to require congressional consent only for compacts that threaten federal supremacy but not for other more routine compacts focused on solving state problems.[88]

In addition to evaluating the Compact Clause against the backdrop of Madison's congressional negative, we should also look at the structure of Article I, Section 10's three clauses to better understand the Compact Clause. The first clause mixes a number of blanket prohibitions relating to federal supremacy, such as the Treaty Clause, the ban on states coining money, and prohibitions designed to cultivate a national market, such as the Contracts Clause.[89] By contrast, clause two, a set of conditional bans, focuses instead on a states' ability to "lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws."[90] As originally interpreted, this clause prohibited the states from laying imposts or duties on either domestic or foreign imports or exports, leaving the United States as a national market whose import policies would be determined by the federal government.[91]

The third clause largely addresses what Professor Akhil Reed Amar has termed the country's geostrategic concerns.[92] The provisions, like the bulk of the early

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[82] ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 146–54 (2010). *See also* Kramer, *supra* note 67, at 648, 651–52.

[83] Kramer, *supra* note 67, at 648–52.

[84] *See id.* at 649–53.

[85] *See id.* at 652–53 n.180; *see also* U.S. CONST. art. VI, cl. 2.

[86] *See* Kramer, *supra* note 67, at 648; *see also* U.S. CONST. art. I, § 10.

[87] *See* Greve, *supra* note 33, at 365–66.

[88] *See* discussion *infra* Section I.B.1.

[89] U.S. CONST. art. I, § 10, cl. 1. For a discussion of the contract clause, see JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY (2016).

[90] U.S. CONST. art. I, § 10, cl. 2.

[91] *See* Brown v. Maryland, 25 U.S. 419, 421 (1827); *see also* AMAR, *supra* note 42, at 122–23.

[92] *See* AMAR, *supra* note 42, at 44.

Federalist Papers, focused on external threats that gave urgency to ratification, not internal reforms.[93] Uniting against potential foreign adversaries better secured the states' citizens' liberties. As the Founders recognized, "[w]hen England, Wales, and Scotland were separate kingdoms, military competition between them invited invasion and foreign intrigue, triggering a heightened domestic militarization that threatened liberty. The indivisible union of England and Scotland at the outset of the eighteenth century gave island residents more room to breathe free."[94] If the states did not ratify the Constitution, *Publius* and other leading voices believed that internal wars, reminiscent of Continental Europe, were inevitable.[95] Further, only as a unified front could the states exact trade concessions from Europe.[96]

This general geostrategic vision dictated that no state "keep Troops, or Ships of War in time of Peace . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay," without Congress's consent.[97] The United States would have one military and diplomatic strategy.[98] Further, the conditional prohibition of assessing duties of tonnage[99] restricted a state's ability to ban boats from entering ports by restricting a state's ability to tax instrumentalities of commerce (namely, boats).[100] Otherwise, prominent ports could tax foreign and interstate commerce. Note that each of these prohibitions deals with encroachment on the federal prerogative.

Similarly, the Compact Clause, also in the third clause of Article I, Section 10,[101] should be read as preventing the states from unilaterally interfering with federal interests. As we shall see, this is precisely how the Supreme Court has interpreted the Compact Clause and why the Court has treated the Foreign Compact Clause differently from the Interstate Compact Clause.[102]

B. The Legal Development of the Compact Clause

The Supreme Court's treatment of the Interstate Compact Clause and Foreign Compact Clause has diverged significantly, with the Court requiring congressional

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[93] *See id.* at 44–46.

[94] *Id.* at 45.

[95] *See id.* at 46.

[96] *See id.* at 47.

[97] *Id.* at 51; U.S. CONST. art I, § 10, cl. 3.

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

[99] *See id.*

[100] The prohibition allowed the United States to speak with a single voice. *See* Greve, *supra* note 33, at 296 ("For a federal republic . . . the prospect of separate, unsupervised agreements among its member-states and between a member-state and a foreign nation must constitute a cause for alarm.").

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

[102] *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472–73 (1978). Just as important, the limited number of restrictions and the existence of conditional prohibitions evidence a structure that respected a state's ability to settle internal affairs and to cooperate with Congress on compacts that could aid a particular group of states, and more generally, the federal system's opportunities for innovation.

consent for any agreement with a foreign nation, even a one-off, oral, gratuitous promise,[103] while only requiring congressional consent for those interstate agreements that interfere with federal interests.[104] As Chief Justice John Marshall recognized in *Barron v. Baltimore*,[105] the interstate and foreign prohibitions served different purposes: "If these compacts are with foreign nations, they interfere with the treaty making power which is conferred entirely on the general government, if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the constitution."[106] Whereas the first was entirely suspect because of the treaty-making power, the latter was suspect only to the extent the states united for political purposes to interfere with the constitutional allotment of power. We will first examine the Supreme Court's treatment of the Foreign Compact Clause,[107] and then apply those insights to understand the Supreme Court's Interstate Compact Clause jurisprudence.[108]

1. Congressional Consent Requirement

The Supreme Court first addressed when state agreements with foreign nations would require Congress's consent in *Holmes v. Jennison*.[109] The Court had to determine whether the Vermont Governor's decision to detain an alleged criminal and turn over custody of the individual to Canadian officials violated the Constitution for failure to receive congressional consent.[110] Recognizing the pervasive role the federal government has to establish "one-voice" in foreign affairs[111] and the explicit constitutional restrictions on the states' relations with foreign entities, a plurality of the Court, led by Chief Justice Taney, construed the congressional consent requirement broadly to prevent states from meddling with the federal government's foreign maneuverings.[112] Silence on a matter may not indicate apathy but instead may be

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[103] *See* Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 569–70 (1840).
[104] *See U.S. Steel Corp.*, 434 U.S. at 472–73.
[105] 32 U.S. (7 Pet.) 243 (1833).
[106] *See id.* at 249.
[107] *See* discussion *infra* Section I.B.1.
[108] *See* discussion *infra* Section I.B.1.
[109] 39 U.S. (14 Pet.) 540 (1840).
[110] *See id.* at 562.
[111] *See id.* at 570 (noting "Congress [has] the power to regulate commerce; to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; to declare war; to grant letters of marque and reprisal; to raise and support armies; to provide and maintain a navy. And the President is not only authorized, by and with the advice and consent of the Senate, to make treaties; but he also nominates, and by and with the advice and consent of the Senate appoints ambassadors and other public ministers, through whose agency negotiations are to be made, and treaties concluded. He also receives the ambassadors sent from foreign countries: and every thing that concerns our foreign relations, that may be used to preserve peace or to wage war, has been committed to the hands of the federal government").
[112] *See id.* at 561, 573–76.

considered ambivalence or coolness.[113] Although procedural disagreements prevented a majority opinion,[114] on remand, the Vermont Supreme Court treated Justice Taney's opinion as highly persuasive and freed the prisoner.[115] Subsequent courts, including the Supreme Court, have regarded Taney's opinion as definitive as well.[116]

By contrast, starting with *Virginia v. Tennessee*,[117] the Supreme Court has rejected such a capacious consent requirement for interstate compacts.[118] Courts have utilized the states' quasi-sovereign status vindicated in the Tenth Amendment, without citing the Tenth Amendment, to help interpret the Compact Clause in much the same way the Court subsequently invoked the Tenth Amendment to interpret the extent of Congress's Commerce Clause power to commandeer the states in *New York v. United States*.[119] Consistent with our historical analysis earlier, the Court has reinforced its more limited interpretation of the Compact Clause by citing Justice Story's observation that "the consent of Congress may be properly required, in order to check any infringement of the rights of the national government," but that a total prohibition on formalized state cooperation would create an unnecessary and textually unrequired mischief.[120]

Thus, there exists two types of compacts under the Interstate Compact Clause: (1) compacts that do not require congressional consent,[121] which we may term Common Law Compacts, and (2) compacts that do require congressional consent,[122] which we may term Constitutional Compacts. Accordingly, in all Compact Clause disputes, parties must address the threshold issue of what sort of compact they have placed before the Court to determine whether the compact is valid.

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[113] *See id.* at 574–75.

[114] *See Ex parte* Holmes, 12 Vt. 631, 642 (1840).

[115] *See id.*

[116] *See* United States v. Rauscher, 119 U.S. 407, 414 (1886) ("There is no necessity for the states to enter upon the relations with foreign nations which are necessarily implied in the extradition of fugitives from justice found within the limits of the state, as there is none why they should in their own name make demand upon foreign nations for the surrender of such fugitives."); People *ex rel*. Barlow v. Curtis, 50 N.Y. 321, 325 (1872).

[117] 148 U.S. 503 (1893).

[118] *See id.* at 517–22.

[119] 505 U.S. 144, 155–56 (1992) ("These questions can be viewed in either of two ways. In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." (internal citations omitted)).

[120] *Virginia*, 148 U.S. at 519–20.

[121] *See id.* at 517–22.

[122] *See* Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 573–76 (1840).

The Court finally formulated a test for determining whether consent to interstate compacts was required in *U.S. Steel Corp. v. Multistate Tax Commission*.[123] There, the Court had to determine whether a multistate agreement to divide taxable income from interstate commerce required congressional consent.[124] In marking the distinction between a Common Law Compact and a Constitutional Compact, the Court stated:

> On its face the Multistate Tax Compact contains no provisions that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States. There well may be some incremental increase in the bargaining power of the member States *quoad* the corporations subject to their respective taxing jurisdictions. Group action in itself may be more influential than independent actions by the States. But the test is whether the Compact enhances state power *quoad* the National Government.[125]

Thus, a "Compact [that] enhances state power *quoad* the National Government," is a Constitutional Compact and must receive consent, while a Compact that does not challenge federal supremacy is a Common Law Compact and does not require consent.[126]

As the Supreme Court has recognized, "the constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law, and of right reason."[127] Thus, in *Green v. Biddle*,[128] the Court inferred congressional consent to the compact between Virginia and Kentucky that allowed Kentucky to become a state by Congress's consent.[129] As the number of compacts has proliferated, Congress has developed a number of ways to consent to proposed state compacts, including ratifying compacts states have proposed, giving consent in advance to compacts containing certain essential elements, and granting consent for an indefinite period of time, or for a limited duration.[130]

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[123] 434 U.S. 452, 472–73 (1978).

[124] *Id.* at 454.

[125] *Id.* at 472–73.

[126] *Id.*

[127] Green v. Biddle, 21 U.S. (8 Wheat.) 1, 85–86 (1823).

[128] 21 U.S. (8 Wheat.) 1 (1823).

[129] *See id.* at 86–87. The compact between Virginia and Kentucky was entered upon the condition that the federal government, by a certain date, "assent to the erection of the District of Kentucky into an independent State, and agree, that the proposed State should immediately, after a certain day, or at some convenient time future thereto, be admitted into the federal Union." *Id.* at 86. Because Congress passed an Act that "after referring to the compact, and the acceptance of it by Kentucky," declared Congress's consent "to the erecting of the said District into a separate and independent State, upon a certain day, and receiving her into the Union," the Court found that Congress had consented to the compact itself. *Id.* at 86–87.

[130] ZIMMERMAN, *supra* note 50, at 54–55.

2. Treatment as Federal Law

The effect of Congress's consent to an interstate compact is to, in certain circumstances, transform the state compact into federal law.[131] The Court first addressed this issue in a pair of cases involving a bridge over the Ohio River and a compact between Kentucky and Virginia created at Kentucky's entrance into the Union as a state.[132] As the Court noted, the Virginia-Kentucky compact provided that "the use and navigation of the River Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States."[133] The Court determined that the compact "by the sanction of Congress, has become a law of the Union."[134] The Court then found on this "statutory" basis that a public nuisance suit could be brought to prevent the reconstruction of the bridge after a storm and to stop the attendant effects of the bridge on the ease of navigation of taller ships.[135] In response to *Wheeling I*, the bridge company appealed to Congress to allow the reconstruction of the bridge.[136] Congress responded by passing a law in August 1852, eight months after the *Wheeling I* holding, legalizing the Wheeling Bridge and displacing the Court's ruling.[137] Pennsylvania subsequently challenged Congress's action, but the Court rejected Pennsylvania's argument that Congress could not repeal the compact, finding instead that it was like any other federal statute.[138]

In *Cuyler v. Adams*,[139] the Court noted that subsequent courts built off the "law of the Union" doctrine to hold that "the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question."[140] Then, buried in a footnote, the Court explained the evolution of the doctrine. The Court noted that:

> [T]he law-of-the-Union doctrine was questioned in *People v. Central R. Co.* and in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*," [but that] any doubts as to its continued vitality were put to rest in *Delaware River Joint Toll Bridge Comm'n v. Colburn*, where the Court stated . . . . that the construction of such a compact sanctioned by Congress by virtue of Article I,

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

132 *See* Pennsylvania v. Wheeling & Belmont Bridge Co. (*Wheeling II*), 59 U.S. (18 How.) 421 (1855); Pennsylvania v. Wheeling & Belmont Bridge Co. (*Wheeling I*), 54 U.S. (13 How.) 518, 557–58 (1851).

133 *Wheeling I*, 54 U.S. at 561.

134 *Id.* at 566.

135 *See id.* at 626–27.

136 *See Wheeling II*, 59 U.S. at 429.

137 *Id.*

138 *See id.* at 432.

139 449 U.S. 433 (1981).

140 *Id.* at 438.

> § 10, Clause 3 of the Constitution, involves a federal 'title, right, privilege or immunity'. . . .[141]

The Court asserted that the *Delaware River* holding "reaffirmed the law-of-the-Union doctrine and the underlying principle that congressional consent can transform interstate compacts into federal law."[142] The Court then established the modern two-part test, "But [1] where Congress has authorized the States to enter into a cooperative agreement, and [2] 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."[143] Thus, the threshold inquiry is whether the subject of the compact relates to one of the federal government's sources of power.[144] If a source of power can be found, such as the treaty-making power or the Commerce Clause, then congressional consent will transform the compact into federal law.[145]

The Court has subsequently reaffirmed the *Cuyler* test.[146] There does seem to be an appropriate symmetry at work. Consent is only required where the compact encroaches upon federal power,[147] such as in the case of the Dormant Commerce Clause,[148] foreign affairs,[149] or in the case of conflict or preemption.[150] These areas are appropriate for

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[141] *Id.* at 439 n.7 (citations omitted).

[142] *Id.*

[143] *Id.* at 440.

[144] *See id.*

[145] As a corollary, for a Constitutional Compact, a state's failure to obtain Congress's consent renders the agreement void. *See* Virginia v. Tennessee, 148 U.S. 503, 518–19. While the dissenters did not outright reject the majority's position, they questioned whether the previous cases had squarely held that consent transforms compacts into federal law and derided the lack of rationale put forward. *See Cuyler*, 449 U.S. at 450 (Rehnquist, J., dissenting).

[146] > Under the Compact Clause, two States may not conclude an agreement such as the Pecos River Compact without the consent of the United States Congress. However, once given, congressional consent transforms an interstate compact within this Clause into a law of the United States. One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.

Texas v. New Mexico, 462 U.S. 554, 564 (1983) (citations omitted) (quoting *Cuyler*, 449 U.S. at 438). *See also* New Jersey v. New York, 523 U.S. 767, 811 (1998) ("Indeed, congressional consent 'transforms an interstate compact within [the Compact] Clause into a law of the United States'. . . Just as if a court were addressing a federal statute, then, the 'first and last order of business' of a court addressing an approved interstate compact 'is interpreting the compact.'") (citations omitted) (first quoting *Cuyler*, 449 U.S. at 438; and then quoting *Texas*, 462 U.S. at 567–68).

[147] *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 473 (1978).

[148] *See* New York State Dairy Foods, Inc. v. Ne. Dairy Compact Com'n, 198 F.3d 1, 3, 8–9 (1st Cir. 1999).

[149] *See* Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 569 (1840).

[150] NYSA-ILA Vacation & Holiday Fund v. Waterfront Comm'n, 732 F.2d 202, 298 (2d Cir. 1984).

federal legislation and thus compacts in these areas are deemed to be federal in character.[151] Since *Cuyler*, in sum, a Constitutional Compact is (and should be) considered federal law.[152] The Court has recognized that Congress may put conditions upon its consent to compacts.[153] One such condition may be the ability to "alter, amend or repeal" the nature of the consent.[154] If such a compact is considered state (as distinct from federal) law, then that suggests that Congress can directly modify state law, much further than even Madison envisioned through his proposed congressional negative.

Instead, Constitutional Compacts should be regarded as contracts between two or more states and the federal government—a position the Supreme Court has recognized for years.[155] The contract is formed in one of two ways: either (1) the involved states each enact the law creating the compact and the federal government gives consent with certain conditions or (2) the federal government gives consent and the states enact laws in conformity with the federal requirements.[156]

If states enact laws to create a compact and Congress consents to the compact in a resolution with requirements inconsistent with the original state plan, the states are not bound to follow the conditions.[157] Rather, a compact has not been formed. In order to actually form the compact, each state would have to amend its previous law to conform to Congress's requirements.[158] Any other view of a compact's status would run into the anti-commandeering principle.

That a Constitutional Compact is a contract with the federal government, and thus a form of federal law, follows from the anti-commandeering principle.[159] Congress

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[151] *Id.*

[152] Some commentators have called into question *Cuyler*'s ruling. *See, e.g.*, L. Mark Eichorn, Note, Cuyler v. Adams *and the Characterization of Compact Law*, 77 VA. L. REV. 1387, 1404–10 (1991) (arguing that Congressional consent should not transform a compact into federal law because Congress is "regulating" the states, not the underlying activity). As the discussion in text indicates, we disagree with Mr. Eichorn's position on *Cuyler*.

[153] *See* James v. Dravo Contracting Co., 302 U.S. 134, 148 (1937) (noting that Congress may impose conditions upon its consent); *see also* Tobin v. United States, 306 F.2d 270, 271–76 (D.C. Cir. 1962) (finding that Congress validly reserved its right to "alter, amend or repeal" its consent to the compact creating the New York Port Authority). In particular, the Court found that Congress could validly use this provision to conduct oversight of the Authority's operations. The Court created a rule that:

> [I]f a particular compact happens to be operational in nature (as exemplified by the compact creating the Authority) as opposed to one static in nature (as exemplified by an agreement to settle a disputed boundary line, an *act* which necessarily dies at the moment of its birth), Congress is not without power to control the conduct of the former.

Id. at 273.

[154] *See Tobin*, 306 F.2d at 271.

[155] *See* Pennsylvania v. Wheeling & Belmont Bridge Co. (*Wheeling II*), 59 U.S. (18 How.) 421, 433 (1855).

[156] Cuyler v. Adams, 449 U.S. 433, 441 (1980).

[157] *See Dravo Contracting Co.*, 302 U.S. at 148–49.

[158] *See* New York v. United States, 505 U.S. 144, 188 (1992).

[159] The anti-commandeering principle was initially established in the Commerce Clause

does not have power "to issue orders directly to the States[;]" the anti-commandeering doctrine recognizes and protects a reserved, sovereign power of the states—not having Congress "issue direct orders to the governments of the States."[160] Since the agreement reflected by the compact is "in the nature of a contract,"[161] that could pose a problem when the federal government seeks to modify the compact unilaterally. If the compact were a state-law contract between states, then the federal government would be constrained in its ability to amend its consent pursuant to a reservation of power. Under the anti-commandeering principle, the federal government cannot commandeer either the state legislature into changing the law or the state executive into enforcing a new provision.[162] Further, the states would be entering into a contract without "clear notice" protection for changes to the relational contract, something prohibited in *National Federation of Independent Business v. Sebelius*.[163] If, however, Constitutional Compacts are seen as federal laws, knowingly and voluntarily entered into by the states, then states can fairly enter into compacts, protected by the anti-commandeering principle to protect their sovereignty as they cooperate with the federal government.[164]

II. SHOULD THE COMPACT CLAUSE BE SUBJECT TO PRESENTMENT?

The previous Part described how the Compact Clause could be used to create agreements between states as an avenue for major legislative initiatives, such as healthcare reform. Based on historical analysis and understanding,[165] such a compact would require congressional consent,[166] and upon congressional consent should be treated as federal law.[167] This Part argues that congressional consent in this context

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context. *See New York*, 505 U.S. at 161; *see also* Printz v. United States, 521 U.S. 898, 925, 935 (1997). It was subsequently applied, in a functional manner in the Spending Clause context. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 577–78 (2012); James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, CATO SUP. CT. REV., 67, 67 (2011–2012). Most recently, the anti-commandeering principle has been described in broad, generalized terms. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475 (2018) (noting that Congress does not have power "to issue orders directly to the States").

[160] *Murphy*, 138 S. Ct. 1461, 1475–76 (2018).

[161] *NFIB*, 567 U.S. at 577. *See also* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1984); Blumstein, *supra* note 159, at 71.

[162] *See New York*, 505 U.S. at 161; *see also Printz*, 521 U.S. at 935.

[163] *See NFIB*, 567 U.S. at 638 (Ginsburg, J., concurring in part). Justice Ginsburg specifically disagreed with the Chief Justice's argument that Congress must notify States of potential Medicaid changes years in advance.

[164] For a recent invocation and explanation of the anti-commandeering principle, see *Murphy*, 138 S. Ct. at 1476–77 (2018). Notably, the Court in *Murphy* did not suggest that the principle is limited to the Commerce Clause or the spending power, which are both previous areas of application.

[165] *See* discussion *supra* Section I.A.

[166] *See* discussion *supra* Section I.B.1.

[167] *See* discussion *supra* Section I.B.2.

would not require presentment—Congress could consent without involvement from the executive.[168]

A. The Constitution, State Legislatures, and Consent

Although no case has ever addressed whether the Constitution subjects congressional consent under the Compact Clause to presentment, the Supreme Court's jurisprudence on the role of state legislatures in our Constitutional order suggests that it does not.[169] We now examine the Supreme Court's "state legislature" jurisprudence and draw out the implications for congressional consent under the Compact Clause.[170]

The Court has addressed the validity of using the referendum process in the context of both congressional redistricting and ratification of a constitutional amendment.[171] For congressional redistricting, the Supreme Court has held that states can subject redistricting to the referendum process.[172] For ratification, however, the Court has held that subjecting the legislature's approval of a constitutional amendment to ratification by the people in a referendum was contrary to Article V.[173] Importantly, for our purposes, the Court discussed the nature of the legislative acts at issue, shedding light on the legislative nature of "consent."

In *State of Ohio ex rel. Davis v. Hildebrant*,[174] a citizen brought suit seeking to force state election officials to disregard a state referendum disapproving recently drawn congressional districts.[175] The Constitution empowers state legislatures to set the time, place, and manner by which representatives and senators are elected.[176] Under Ohio law, however, citizens could subject recently passed legislation to a referendum by convincing six percent of the voting population to sign a petition.[177] Prior to the referendum, the law would not be put into effect, and could only go into effect if approved by the people.[178] In this instance, after Ohio's legislature established new districting, which the Governor approved, the new scheme failed to receive a majority of votes cast in the referendum.[179] The plaintiff challenged the validity of

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[168] *See* discussion *infra* Part II.

[169] *See infra* notes 171–204 and accompanying text.

[170] *See infra* notes 171–204 and accompanying text.

[171] *See* Hawke v. Smith, 253 U.S. 221, 227 (1920) (addressing the use of a referendum for the ratification of a constitutional amendment); Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 566–67 (1916) (addressing the use of a referendum for congressional redistricting).

[172] *See Hildebrant*, 241 U.S. at 568.

[173] *See Hawke*, 253 U.S. at 227–31.

[174] 241 U.S. 565 (1916).

[175] *See id.* at 566–67.

[176] *See* U.S. CONST. art. I, § 4, cl. 2 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of [choosing] Senators.").

[177] *Hildebrant*, 241 U.S. at 566.

[178] *Id.*

[179] *Id.*

appending a referendum to the process.[180] The Court deferred to the state, finding that appending the referendum was not contrary to Article I, Section 4 or Article 4, Section 4's Republican Guarantee clause.[181]

By contrast, the Court struck down a state's use of the referendum process in the ratification of the eventual Eighteenth Amendment.[182] In *Hawke v. Smith*,[183] the Ohio legislature had adopted a resolution ratifying the proposed amendment and "ordered that certified copies of the joint resolution of ratification be forwarded by the Governor to the Secretary of State at Washington and to the presiding officer of each house of Congress."[184] But Ohio's constitution provided that the state legislature's ratification of a proposed amendment to the U.S. Constitution be subject to a referendum by the people of Ohio.[185] The Supreme Court, in reviewing the use of a referendum to ratify a proposed constitutional amendment, held that Article V's requirement that constitutional amendments be ratified by the "legislatures" of three-fourths of the states precluded Ohio's use of a referendum in the ratification process.[186] The Court distinguished *Hildebrant* on the ground that while the Elections Clause[187] "plainly gives authority to the State to legislate" in the area of elections (and thus the ability to establish a referendum procedure for approving congressional districts), Article V neither authorizes nor requires the state to take "legislative action" when considering a constitutional amendment; it merely authorizes a state legislature to express "assent or dissent to a proposed amendment to the Constitution."[188] Indeed, the Court went so far as to describe the argument that the Constitution required ratification by the state's then-current mode of legislation as "fallacious" and that "ratification . . . is not an act of legislation within the proper sense of the word."[189] Further, the Court recognized that state legislatures derive their power from the people of the state, who may prescribe the manner in which those legislatures act.[190] The ratification power, however, emanates from the federal Constitution, which prescribes a particular manner of exercising that power.[191]

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[180] *See id.* at 569.

[181] *Id.* at 569–70. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion . . . .").

[182] *See* Hawke v. Smith, 253 U.S. 221, 229 (1920).

[183] 253 U.S. 221 (1919).

[184] *Id.* at 225. Note that here, the legislature did not seek the Governor's signature, but instead instructed him to conduct a ministerial function.

[185] *Id.*

[186] *Id.* at 225–26, 230–31.

[187] U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .").

[188] *Hawke*, 253 U.S. at 230–31.

[189] *Id.* at 229.

[190] *Id.* at 230.

[191] *See id.*

The distinction between traditional modes of legislation and alternative pathways to legislative actions (such as ratification) was further utilized in challenges before the Court regarding the state executive's role in redistricting and ratification.[192]

In *Smiley v. Holm*,[193] the Minnesota legislature completed a new redistricting scheme and transmitted it to the Governor, who then returned the scheme without his approval.[194] In response, rather than attempting to pass the scheme over the Governor's alleged veto, the legislature submitted the same scheme to the Minnesota Secretary of State.[195] Defenders of the legislature's choice argued that much like in *Hawke*, Article I, Section 4 clearly granted the power to regulate elections solely to the legislature, not the legislature and executive.[196] The Court disagreed, however, noting that "[t]he question here is not with respect to the 'body' as thus described but as to the function to be performed. The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function."[197] The Court determined that because the legislature's rules regarding "times, places, and manner" would compose a comprehensive code and would need to be enforced with punishments for transgressing the rules, the legislative act involved "lawmaking in its essential features and most important aspect."[198] Such a state of affairs diverged from ratification in that in the "expression of assent or dissent . . . no legislative action is authorized or required."[199]

The Supreme Court recently addressed a variety of legislative actions in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[200] Although that case centered on whether the people of Arizona, through a referendum rather than the state legislature, could create a commission to draw new congressional districts, the Court first summarized existing law regarding appropriate state decision-makers for

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[192] *See, e.g.*, Smiley v. Holm, 285 U.S. 355, 374–75 (1932) (remanding a case where Minnesota's legislature tried to redistrict the State's Congressional elections and bypass "at large" voting).

[193] 285 U.S. 355 (1932).

[194] *Id.* at 361.

[195] *Id.*

[196] *Id.* at 362–63.

[197] *Id.*

[198] *Id.* at 366.

[199] *Id.* at 372. Similarly, when a state consents to the formation of a new state from the existing state's current territory, no legislative action is authorized or required, as the existing state has no further actions to take. *See* U.S. CONST. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, *without the Consent of the Legislatures of the States concerned* as well as of the Congress." (emphasis added)). *Cf.* Coleman v. Miller, 307 U.S. 433, 446–47 (1939) (involving a dispute whether executive participation in the constitutional ratification process was permissible, not required).

[200] 135 S. Ct. 2652 (2015).

redistricting purposes.[201] The Court reaffirmed that redistricting involved the essential components of lawmaking and, therefore, must be subject to the state's legislative process.[202] By contrast, "the Governor could play no part when the Constitution assigned to 'the Legislature' a ratifying, electoral, or consenting function."[203] That is, *Arizona Independent Redistricting Commission*'s reasoning supports the proposition that the legislature need not (and may not) include the executive when performing a consenting function, at least with respect to consenting functions assigned to the legislature by the Constitution.[204]

In short, the Supreme Court's state legislature jurisprudence supports the conclusion that when the Constitution assigns a legislature a consenting or ratification function, the executive has no role to play. In the case of the Compact Clause, this means that Congress may consent to state compacts without seeking Presidential approval.

B. The Presentment Clauses

Thus, the Supreme Court has stated that the Constitution empowers legislatures to consent without presentment, at least at the state level.[205] There is no textual reason to distinguish between *state* legislatures' consent power (for example under Article IV, Section 3, Clause 1) and *Congress's* consent power under the Compact Clause.[206] This Section will analyze the Supreme Court's treatment of the Presentment Clause, which directly addresses presentment at the federal level.[207]

"The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws."[208] In traditional lawmaking, bills, however styled, must be presented to the President and be signed or repassed over a presidential veto to take effect.[209] The Constitution enshrines the presentment requirement in Article I, Section 7, Clause 2.[210] Further, under the ORV Clause, every order, resolution, or vote by both houses similarly must be presented to the President for his approval.[211]

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[201] *See id.* at 2658, 2666–68.

[202] *Id.* at 2668.

[203] *Id.* at 2667.

[204] An example is allowing a new state to be formed from the current territory of an existing state. *See id.*

[205] *See id.* There is no role for the Governor in "instances in which the Constitution calls upon State Legislatures to exercise a function other than lawmaking."

[206] *See id.* at 2667.

[207] *See* discussion *infra* Section II.B.

[208] INS v. Chadha, 462 U.S. 919, 951 (1983).

[209] *See id.* at 951–52.

[210] U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate shall, before it become a Law, be presented to the President of the United States . . . .").

[211] *Id.* art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary [except on a question of Adjournment] shall be presented to the President of the United States; and before the Same shall take Effect,

Madison stated that the ORV Clause "was introduced in order to ensure 'that Congress could not circumvent the presentment requirement' already placed in Article I, Section 7, Clause 2 'by calling proposed legislation' something 'other than a bill.'"[212] In his Commentaries on the Constitution, Justice Story similarly noted the end-run rationale for the ORV Clause.[213] Relatedly, in *Chadha*, the Supreme Court recognized that the ORV Clause was added to prevent Congress from circumventing presentment and aggrandizing its own power.[214] While some scholars have suggested that the ORV Clause serves a further function, at a minimum, the clause serves to prevent Congress from remaining unchecked.[215]

Yet Congress can act without executive approval in some situations.[216] For example, *Hollingsworth v. Virginia*[217] ruled that Article V's grant of power to Congress to propose constitutional amendments is not subject to presentment.[218] Historians have found that "[o]n the day of [Hollingsworth's] oral argument, Justice Chase stated: 'There can, surely, be no necessity to answer [Petitioners'] argument. The negative of the president applies *only to the ordinary cases of legislation*: he has nothing to do with the proposition or adoption of amendments to the constitution.'"[219] In a terse opinion, the *Hollingsworth* Court recognized that the amendment had not been submitted to the President as seemingly required by the ORV Clause, since the Constitution required the concurrence of both Houses to propose amendments.[220] In addition, the Court noted that simply because the required proportion of each House necessary to propose an amendment was equal to the proportion necessary to override a veto did not answer whether the ORV Clause applied.[221] After all, the President may still veto a bill that received "veto-proof" support, in hopes of persuading the legislature that the bill is ill-conceived and should not be repassed.[222] Nonetheless, the Court held that

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shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.").

[212] Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *Was Rightly Decided, and Why* INS v. Chadha *Was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1311 (2005).

[213] *Id.* at 1352.

[214] *See* INS v. Chadha, 462 U.S. 919, 947–48 (1983).

[215] *See* Tillman, *supra* note 212, at 1321–67 (discussing various interpretations of the ORV Clause by legal scholars); *see also* Gary Lawson, Comment, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEX. L. REV. 1373, 1373–76 (2005) (analyzing Seth Tillman's interpretation of the ORV Clause).

[216] *See, e.g.*, Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

[217] 3 U.S. (3 Dall.) 378.

[218] *See id.* at 382.

[219] Tillman, *supra* note 212, at 1275 (emphasis added) (citing *Hollingsworth*, 3 U.S. (3 Dall.) at 381, n.36).

[220] *Hollingsworth*, 3 U.S. at 379.

[221] *Id.*

[222] *See id.*

Congress had acted consistently with the Constitution and that the Eleventh Amendment had not been birthed stillborn.[223] Thus, as early as 1798, the Supreme Court found at least one example of a bicameral congressional action that operated outside the confines of presentment.[224]

The *Hollingsworth* Court's decision implicitly draws upon the Framer's understanding of the President's relationship to Congress and the nature of the President's participation in the traditional legislative power. Sections II.C and II.D shall examine the development of the English conception of executive power[225] and how such ideas refracted through the Revolutionary Period.[226] The distinctly American conception of the Executive helps explain the *Hollingsworth* Court's decision and justifies the extension of that precedent to Congress's consent powers under Article I, Section 10, Clauses 2 and 3. It further bolsters the argument that the Constitution supports the reinvigoration of the legislature and the states.

In addition to *Hollingsworth*'s recognition that the ORV Clause is not as all-encompassing as one might assume, the Supreme Court has acknowledged that there are some alternative pathways for passing binding rules.[227] While traditional legislation must be passed through bicameralism and presentment, *Chadha* recognized that the Treaty Power (wherein only the Senate can act) reflected one such alternative pathway.[228] Indeed, the Constitution distinguishes between the treaty-making process and the law-making process,[229] and the Supreme Court, in furtherance of the distinction, has drawn still another distinction between self-executing treaties, which take effect upon ratification, and non-self-executing treaties, which must be codified through traditional legislation before taking effect.[230]

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[223] *Id.* at 382.

[224] *See id.*

[225] *See* discussion *infra* Section II.C.

[226] *See* discussion *infra* Section II.D.

[227] *See* INS v. Chadha, 462 U.S. 919, 951 (1983).

[228] *See id.*

[229] The Constitution's distinction between legislation and treaties mirrors the medieval English distinction between "*jurisdictio* and *gubernaculum*: the authority of a judge or custodian of the law, and the authority of a guide, a 'helmsman' or a 'pilot'," and the attendant requirement for the King to act with Parliament in exercising his domestic *jurisdictio* powers. MICHAEL OAKESHOTT, LECTURES IN THE HISTORY OF POLITICAL THOUGHT 320 (2006).

[230] *See* Medellín v. Texas, 552 U.S. 491, 504–05 (2008) ("This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law. The distinction was well explained in Chief Justice Marshall's opinion in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), which held that a treaty is 'equivalent to an act of the legislature,' and hence self-executing, when it 'operates of itself without the aid of any legislative provision.' When, in contrast, '[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.' In sum, while treaties 'may compromise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be "self-executing" and is ratified on these terms.'" (citations omitted)).

If we accept that the legislative power may occasionally be utilized without bicameralism, as is textually allowed under the Treaty Power, where the Senate exercises its unilateral consenting powers,[231] then perhaps, based on the structure of the Constitution and the nature of the power utilized, there are other legislative powers latent in the Constitution that may be utilized without presentment. In Sections II.F, II.G, and II.H, we shall examine three such potential provisions—Article V's "Constitutive Power,"[232] Article I, Section 10, Clause 2's Import-Export Power,[233] and Article I, Section 10, Clause 3's Compact Power.[234]

C. English Executive Precedent and Its Meta-Theory

As Edward Campbell Mason recognized in his magisterial work, *The Veto Power*:

> Since the time of the Teutonic tribes a change has gradually been taking place, and now in the United States two authorities are interested in the making of laws: Congress, which, like its early prototype, can either accept or reject proposed legislation; and the President, who is entirely separate from Congress, but has a qualified power of rejection which is similar to the negative power of Congress.[235]

Originally, upon the conquest of England, the Teutonic tribes maintained their pre-existing governmental traditions—the 'people' were sovereign, but slowly the King began to acquire greater authority.[236] The King's growing power can most clearly be seen in his national council, the *Witenagemot*.[237] Eventually, as Mason noted, "the legislative power which had been exercised formerly by the whole people came to be exercised by a comparatively small number of men [the *Witenagemot*] who were summoned and practically controlled by the King."[238] The English King's legislative power, particularly after the Norman Conquest, can be broken into three primary categories, excluding the veto: "the power of creating substantive law by royal proclamation, the power of suspension, and the power of dispensation."[239]

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[231] U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

[232] *See* discussion *infra* Section II.F.

[233] *See* discussion *infra* Section II.G.

[234] *See* discussion *infra* Section II.H.

[235] EDWARD CAMPBELL MASON, THE VETO POWER: ITS ORIGIN, DEVELOPMENT AND FUNCTION IN THE GOVERNMENT OF THE UNITED STATES 11 (Albert Bushnell Hart ed., 1890).

[236] *Id.* at 12.

[237] *Id.*

[238] *Id.*

[239] *See id.* at 12–13.

Inevitably though, Parliament and the King clashed over their concurrent legislative powers.[240] In 1610, James I's use of the proclamation power spurred a feud with Parliament, resulting in a judicial decision against the use of proclamations.[241] Although the beheading of Charles I stymied his use of proclamations, the Commons did not prohibit proclamations as a constitutional matter until 1766.[242] The Glorious Revolution marked the end of the suspension and dispensing powers.[243] All that remained of the King's 'legislative' power was his ability to veto legislation.[244] Not long afterwards, even the Executive's approval became naught more than a formalistic ritual; as an English constitutional commentator provocatively put it, "the Queen 'must sign her own death-warrant if the two Houses send it to her.'"[245] Mason noted that:

> Bills have been defeated by the announcement that the Sovereign would consider its promoters unfriendly; they have been defeated by royal influence or royal bribes, but never since 1708 has the signature of the Sovereign been refused to a measure which has obtained a majority of both Houses of Parliament.[246]

The King's participation in legislation historically had significance for the legitimacy of law that is lost on modern minds. By searching for antecedents to the Constitution's separation of powers, a historian of ideas would miss the essential concepts of Mixed Constitutionalism and the Ruler-Ruled distinction. As Professor Gordon Wood recognized, the conflict between the King's "prerogatives" and the people's liberties animated the eighteenth-century's political conflicts.[247] Contrary to the modern liberal conception of politics, these historical actors viewed politics on a spectrum from absolute power, in one person's hands, to absolute liberty of the people; both states portended disaster.[248] Different still, participants understood politics through the prism of the "three estates of the realm" rather than a contest for control between various interest groups.[249]

Prevailing wisdom held that the three forms of rule—monarchy, aristocracy, and democracy—were all unstable forms of governance; the best constitution sought to blend the three forms to synthesize a stable regime.[250] As such, legislation needed

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[240] *Id.* at 13.
[241] *Id.*
[242] *See id.*
[243] *Id.* at 14 ("[T]he powers were taken away from the Crown in the first year after the Revolution of 1688.").
[244] *Id.* at 15.
[245] *Id.* at 16–17.
[246] *Id.* at 17.
[247] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787 19 (1969).
[248] *See id.*
[249] *Id.* at 20.
[250] *Id.* at 198.

to involve the many, through the House of Commons; the few, through the House of Lords; and the one, through the King.[251] In that sense, the King truly participated in legislation, as to exclude the King would be to ignore the dictates of Mixed Constitutionalism.[252] This was the King in Parliament in the parlance of the day.[253] The potential for the King's veto charged all of the Parliament's legislation with a magisterial element.[254] Yet, this was decidedly not the character of American executive power.[255]

D. America's Conceptual Revolution

The Framers built a republican form of government with a strong suspicion towards the Executive, demonstrating that no executive power or participation should be assumed.[256] The transition to a republican form of government sparked the Framers to radically reconceive the functions of the separate branches of government.[257] Rather than creating a Roman Senate or House of Lords premised on aristocracy, the Revolutionary-era politicians justified the American Senate through its ability to better represent the will of the people and to protect individual liberty.[258] Similarly, the American executive was stripped of the regal trappings of the English executive.[259]

The colonists were very concerned about tyranny and valued the importance of leaving the power to govern with the people.[260] Our radical Whig ancestors believed leaving power in the hands of the people was essential to maintaining a peaceful society.[261] Though they originally thought the King and Parliament represented the people, eighteenth-century practice undermined this theory.[262] The people increased participation in the House of Commons, which tended to blur the distinction between the rulers and the ruled, which lay at the heart of the Whig theory of politics.[263] It would be this blurring of the distinction that would force the Founders to develop an intellectual edifice to appraise and remedy the divisions in the emerging political

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[251] *See id.*

[252] *See id.*

[253] *See* OAKESHOTT, *supra* note 229, at 320–21.

[254] *See* WOOD, *supra* note 247, at 587.

[255] *See* discussion *infra* Section II.D.

[256] *See infra* notes 253–98 and accompanying text.

[257] *See* WOOD, *supra* note 247, at 553–62 (discussing the various proposals for designing the Separation of Powers).

[258] *See id.*

[259] *See id.*

[260] *See id.* at 46–124, 257–343. As Burke rightly said of the colonists, "They augur misgovernment at a distance and snuff the approach of tyranny in every tainted breeze." *Id.* at 5.

[261] *See id.* at 23–24. Following the words of Algernon Sidney, the would-be revolutionaries believed that "[p]eace is seldom made, and never kept . . . unless the subject retain such a power in his hands as may oblige the prince to stand to what is agreed." *Id.* at 24 (internal quotation marks omitted).

[262] *See id.* at 25–26.

[263] *Id.* at 26.

environment. Soon the Founders would discover the potential for a tyranny by the people, a theoretical impossibility in Whig ideology.[264]

Convinced that oppression inevitably emanated from the executive, the revolutionaries turned their gimlet eyes toward the "kingly" branch.[265] The Colonists rent asunder the executive department in their new state constitutions, convinced that such actions would forever rid America of tyranny.[266] In large part, Americans believed that, as a moral people, they could restrain their passions internally and serve as a beacon for men who aspire toward freedom.[267] America was to be a republic—a republic sustained by the innate virtue of the American people.[268]

These were decidedly not the type of men who would suggest that "[a]mbition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government."[269] Madison's 1787 proposals were a reaction to, not a fulfillment of, the aspirations and beliefs of 1776.[270] Accordingly, the Framers' expansion of the executive branch must be understood against the backdrop of anti-executive sentiment. Therefore, the colonists' attitude of extreme suspicion towards the executive shows that executive participation should not be assumed in the American constitutional structure.

In determining the role of presentment in our constitutional system, the issue can be posed in one of two ways: (1) what sort of bills or congressional resolutions must be sent to the President? or (2) what sort of issues must the President be able to veto based on our constitutional structure? By asking the latter question, we can examine the purposes of the veto and, correlatively, the scope of the Presentment and ORV Clauses.

The Framers believed that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[271] Once rendered diminutive and impotent, the Framers now saw virtue in a strong executive, capable of checking the "impetuous vortex" that is the legislative branch.[272] Indeed, Madison went so far as to claim that "it is against the enterprising ambition of this department [the legislature] that the people ought to indulge all their jealousy and exhaust all their precautions."[273]

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[264] *Id.* at 62.

[265] *See id.* at 135–36.

[266] *See id.* at 136 ("The Americans . . . made . . . the [Executive] . . . a pale reflection . . . of his regal ancestor.").

[267] *See id.* at 91–107.

[268] *Id.* at 101.

[269] THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

[270] *See* WOOD, *supra* note 247, at 472.

[271] THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

[272] THE FEDERALIST NO. 48, at 308–09 (James Madison) (Clinton Rossiter ed., 1961).

[273] *Id.* at 309.

Inspired by this fear, the Framers structured our Constitution such that ambition and self-interest would prevent Congress from overreaching, as the state legislatures had. Yet, how best could the branches be structured in relation to each other to prevent the legislature from usurping executive power? The solution was twofold: bicameralism and the veto.[274] Madison noted, "[a]s the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified."[275] Indeed, as Hamilton noted, "[t]he primary inducement to conferring the power in question upon the executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design."[276]

Hamilton recognized that while the essence of the legislative branch lies in the enactment of laws, the essence of the executive branch lies in the execution of laws and the command of the military forces.[277] To prevent Congress's usurpation of the executive function, the Framers believed they must endow the President with either an absolute or qualified negative upon the acts of the legislative branch.[278] Without the one or the other, Congress would likely aggrandize itself and strip the Executive of all of his powers.[279]

What then may we conclude about the nature of the President's participation in lawmaking? Unlike the English kings, the President's veto did not represent a distinct estate—in a republican form of government, there is only the people.[280] Madison recognized that under the Constitution, all laws or resolutions required the concurrence of the people—through the House, and the states—through the Senate.[281] With those two entities already represented in the federal government, there was no need for the President's imprimatur for democratic legitimacy. As Professor Gordon Wood has recognized, "[t]he limited negative did not grant, as critics were charging, legislative power to the executive, thus violating the doctrine of separation of powers."[282]

The veto has no greater social significance, then, but is "only a check on the legislature—a device to maintain the proper separation of powers. Such a description of the executive veto was a perversion of the ancestral English Crown's role in legislation, and of the traditional theory of mixed government."[283] The Framers empowered the President to veto legislation to prevent Congress from harvesting the President's power for itself and instituting a tyranny.[284] Empowering the President would prove

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[274] THE FEDERALIST NO. 51, *supra* note 269, at 322–23.
[275] *Id.*
[276] THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
[277] *See* THE FEDERALIST NO. 75, at 450 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
[278] *See* THE FEDERALIST NO. 73, *supra* note 276, at 441–42.
[279] *See id.* at 441.
[280] *See* WOOD, *supra* note 247, at 607.
[281] *See* THE FEDERALIST NO. 62, at 376 (James Madison) (Clinton Rossiter ed., 1961).
[282] *See* WOOD, *supra* note 247, at 553.
[283] *Id.*
[284] *See id.* at 605.

less dangerous, our Framers thought, because the President could not write laws, only enforce them, and would be checked by independent judges and juries.[285] The Framers enabled the President in recognition that the Constitution would empower Congress to dictate national policy.[286]

The Framers's limited executive simply had no vested interest in any specific legislation and was given his veto to protect his institutional prerogative. At most, some have argued that the President may refuse to enforce laws he deems unconstitutional.[287] Although the President may "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient[,]"[288] the Constitution in no way requires Congress to act upon, let alone seriously consider, the proposal. Contrast that with Article V, where "[t]he Congress . . . on the Application of the Legislatures of two thirds of the several States, *shall* call a Convention for proposing Amendments."[289] While Congress must comply with state actions toward amending our fundamental charter,[290] the Congress, if it so desires, may summarily dismiss any proposition by the President. Congress's decision to grant consideration to the Executive's desires is merely gratuitous and based on respect for his judgment. In contrast to the magisterial prerogative of proclamation, where the King could fashion the weapons he sought to wield,[291] the President at most can assert a narrow field of what we may term his Executory Interest.[292] In defining the Executory Interest, the substance of the law is irrelevant, but the relationship of the law to the President's duty to "take Care that the Laws be faithfully executed"[293] is of supreme importance. The American people understood Congress to be our legislative body, fully empowered to legislate to further the tranquility of the land utilizing its delegated powers, as this Article argues.

Indeed, even the Commander-in-Chief Clause merely provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;"[294] the President will only have an army if Congress exercises its powers under Article I, Section 8, Clause 12,[295] and the President can only lead the militia if Congress calls forth the militia under Article I, Section 8, Clause 15.[296] Based on the textual grants

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[285] *See* AMAR, *supra* note 42, at 63.
[286] *See id.* at 64–67.
[287] *See id.* at 179.
[288] U.S. CONST. art. II, § 3.
[289] *Id.* art. V (emphasis added).
[290] *Id.*
[291] *See* MASON, *supra* note 235, at 12.
[292] U.S. CONST. art. II, § 3.
[293] *Id.*
[294] *Id.* art. II, § 2, cl. 1.
[295] *Id.* art. I, § 8, cl. 12 ("To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;").
[296] *Id.* art. I, § 8, cl. 15 ("To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . .").

to the President and Congress, the Court has set forth a jurisprudence that at its core aims to protect the President's Executory Interest (faithful execution of the law)[297] without allowing the President to usurp legislative power.[298]

E. Modern Separation of Powers Precedent

Modern separation of powers jurisprudence focuses on concerns about "encroachment" and "aggrandizement."[299] This approach rightfully focuses the inquiry on whether one branch has either usurped the powers of another branch or interfered with the due functioning of its coordinate branch.[300] Within this sphere, we find (i) cases that deal with questions of whether the President has usurped legislative power by the use of his discretion,[301] further refined by Justice Jackson's three categories from his *Youngstown Sheet and Tube Co. v. Sawyer* concurrence;[302] (ii) cases that address whether Congress has established either a process,[303] institution,[304] officer,[305] or law[306] that unduly infringes upon the President's Executory Interest; or (iii) cases that consider whether Congress has usurped the Court's inherent judicial powers.[307] Moreover, other procedural and jurisdictional matters, such as standing, may in large part be seen as part of our separation of powers jurisprudence as well.[308] When the Court confronts a separation-of-powers challenge alleging congressional encroachment upon the executive's prerogative or aggrandizement at the executive's expense, the Court's

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[297] *See* INS v. Chadha, 462 U.S. 919, 954–56 (1983); *see also* Bowsher v. Synar, 478 U.S. 714, 722–23 (1986) ("The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts. The President appoints 'Officers of the United States' with the 'Advice and Consent of the Senate . . . .' Once the appointment has been made and confirmed, however, the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate. An impeachment by the House and trial by the Senate can rest only on 'Treason, Bribery or other high Crimes and Misdemeanors.' A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers.") (citations omitted).

[298] *See* Clinton v. City of New York, 524 U.S. 417, 436–40, 448–49 (1998).

[299] Mistretta v. United States, 488 U.S. 361, 382 (1989).

[300] *See id.*

[301] *See* Dames & Moore v. Regan, 453 U.S. 654, 668–69 (1981); *see also Clinton*, 524 U.S. at 436–40, 448–49.

[302] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952).

[303] *See* INS v. Chadha, 462 U.S. 919, 947–48 (1983).

[304] *See* Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 277 (1991).

[305] *See* Bowsher v. Synar, 478 U.S. 714, 726 (1986).

[306] *See* Zivotofsky *ex rel*. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2087 (2015).

[307] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 234 (1995).

[308] *See* Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983).

inquiry "focuses on the extent to which [the Act] prevents the Executive Branch from accomplishing its constitutionally assigned functions."[309]

The *Chadha* Court directly confronted Congress's attempt to usurp executive power through a congressional veto.[310] In reaction to "the clumsy, time-consuming private bill procedure" previously used to suspend deportation, Congress delegated the authority to the Attorney General, but sought to retain a veto outside of the constitutionally prescribed manner of enacting federal legislation—bicameralism and presentment.[311] Absent the statutory reservation of power, Congress could not reverse the Attorney General's decision.[312] It was Congress's institutional innovation that allowed it to effectively control executive discretion outside of the constitutionally prescribed checks on the Executive; indeed, the purpose of the congressional veto was to encroach upon the President's Executory Interest.[313] The Executive had no vested interest in being granted the statutory discretion, but the Court found that Congress could not grant the authority with conditions that accreted power to Congress through the encroachment upon the President's Executory Interest.[314] If the Court allowed Congress to maintain the power over the executive's discretion, then Congress would be arrogating legislative and executive power for itself, which "may justly be pronounced the very definition of tyranny."[315]

Congress similarly sought to infringe upon the President's Executory Interest by attempting to maintain control over the Comptroller General in the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman-Hollings Act.[316] Under the law, only Congress could remove the Comptroller General, an executive officer, through a joint resolution or impeachment.[317] As such, the Court believed that threats from Congress might influence the Comptroller General to execute laws in accordance with Congress's—and not the President's—desires.[318] As the Court declared, "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."[319] The Court derived its observation from the "Decision of 1789," the debate in the First Congress where "James Madison urged rejection of a congressional role in the removal of Executive Branch officers, other than by impeachment . . . ."[320] Congressional

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[309] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).
[310] *See* INS v. Chadha, 462 U.S. 919, 954 (1983).
[311] *Id.* at 954–55.
[312] *Id.* at 952–53.
[313] *See id.* at 952.
[314] *See id.* at 954–56.
[315] THE FEDERALIST NO. 47, *supra* note 271, at 301.
[316] *See* Bowsher v. Synar, 478 U.S. 714, 717 (1986).
[317] *See id.* at 720.
[318] *See id.* at 726 ("To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto.").
[319] *Id.* at 722.
[320] *Id.* at 723.

legislation restricting the President's ability to discipline his inferiors to guarantee that he takes care to faithfully execute the laws unduly encroaches upon the President's Executory Interest.[321] There have been a few notable exceptions to this general rule, but at most those cases stand for the proposition that Congress must not encroach upon the Executory Interest in a way that aggrandizes its own power.[322]

The Court has prevented Congress from circumventing separation of powers concerns by cooperating with the states through a Constitutional Compact.[323] In *Metro Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*,[324] Congress had granted its approval to a Constitutional Compact to deal with an infrastructure investment issue.[325] Congress had enacted the compact to guarantee financing through tax-exempt bonds to guarantee the continued "excellent management" of the local airports.[326] Congress, to assuage certain Representatives' fears about ceding federal control, placed a provision in the consent that required that the Compact be supervised by a board of review, composed of nine congressmen, that could veto the compact commission's actions, including the promulgation of regulations and adoption of a budget.[327] The Court concluded that:

> We thus confront an entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is

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[321] *See, e.g.*, *id.* at 726.

[322] *See* Morrison v. Olson, 487 U.S. 654, 694 (1988) ("Unlike some of our previous cases, most recently *Bowsher v. Synar*, this case simply does not pose a 'dange[r] of congressional usurpation of Executive Branch functions.'" (quoting Bowsher v. Synar, 478 U.S. 714, 727 (1986))); *see also* Wiener v. United States, 357 U.S. 349, 353 (1958) ("Humphrey's case was a [*cause célèbre*]—and not least in the halls of Congress. And what is the essence of the decision in Humphrey's case? It drew a sharp line of cleavage between officials who were part of the executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government,' as to whom a power of removal exists only if Congress may fairly be said to have conferred it. This sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference. 'For it is quite evident,' again to quote *Humphrey's Executor*, 'that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.'") (citations omitted).

[323] *See* Metro Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 266 (1991) ("Petitioners lay great stress on the fact that the Board of Review was established by the bylaws of MWAA, which was created by legislation enacted by the Commonwealth of Virginia and the District of Columbia. Putting aside the unsettled question whether the District of Columbia acts as a State or as an agent of the Federal Government for separation-of-powers purposes, we believe the fact that the Board of Review was created by state enactments is not enough to immunize it from separation-of-powers review.").

[324] 501 U.S. 252 (1991).

[325] *See id.* at 257.

[326] *Id.*

[327] *Id.* at 259–60.

> to protect an acknowledged federal interest, and membership in which is restricted to congressional officials. Such an entity necessarily exercises sufficient federal power as an agent of Congress to mandate separation-of-powers scrutiny.[328]

The ability of Congress to effectively control the execution of the Constitutional Compact, through the threat of vetoing the Compact Commission's budget and regulations, arrogated executive powers to Congress, a violation of the separation of powers.[329]

To the extent that the federal government maintains executive power, that executive power must be exercised by the Executive.[330] Left unanswered, of course, is the question whether without presentment Congress could have validly enacted the Constitutional Compact without the control provision. Yet, it seems suspect that such an arrangement would run afoul of the Constitution. In such a scenario, Congress would not be reserving executive power for itself, and would not be impinging upon the Executory Interest of the President; it simply would not have created a scheme that requires Presidential execution.

We shall further inquire into this issue after first examining how the concept of an Executory Interest helps to illuminate *Hollingsworth v. Virginia*.[331]

F. Article V and Presentment: The Constitutive Power

In *Hollingsworth v. Virginia*, the Court confronted a challenge to the validity of the Eleventh Amendment.[332] Prior to the Eleventh Amendment, the Court had ruled that citizens from different states could bring suit against a State government in federal court.[333] In response to the Court's decision, both Houses of Congress voted to send to the States what would become the Eleventh Amendment.[334]

In *Hollingsworth*, the Court recognized that if the amendment were validly enacted and properly enforceable, the Court would lack jurisdiction to hear Hollingsworth's suit against the State of Virginia.[335] Hollingsworth "challenged the procedure by which the Amendment had been adopted," arguing that its lack of a presidential signature—i.e., the lack of presentment—made it invalid under the ORV Clause.[336] This assertion was particularly consequential, as Congress had not presented the Bill of Rights to the President either.[337]

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[328] *Id.* at 269.
[329] *See id.* at 275.
[330] *See id.* at 277.
[331] *See infra* notes 332–46 and accompanying text.
[332] *See* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 378–79 (1798).
[333] *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 467–68 (1793).
[334] *See* BERNSTEIN & AGEL, *supra* note 16, at 49.
[335] *See Hollingsworth*, 3 U.S. (3 Dall.) at 382.
[336] *See* BERNSTEIN & AGEL, *supra* note 16, at 57.
[337] *See id.*

Hollingsworth was decided by pronouncement. At oral argument, Justice Chase summarily declared that "[t]here can, [s]urely, be no nece[ss]ity to an[s]wer that argument," namely the lack of presentment.[338] "The negative of the president applies only to the ordinary cases of legislation: He has nothing to do with the proposition or adoption of amendments to the constitution."[339] Subsequent Supreme Court decisions have relied on this statement to require that the amendment process strictly follow the text of Article V.[340]

As commentators pithily have observed, "[t]he [*Hollingsworth*] Court solved the [presentment] problem by declaring it solved."[341] The rationale underlying Justice Chase's statement in *Hollingsworth* may be illuminated by reference to his earlier statement at the Maryland ratifying convention that, "[t]he people's power . . . 'is like the light of the sun, native, original, inherent, and unlimited by human authority. Power in the rulers or governors of the people is like the reflected light of the moon, and is only borrowed, delegated and limited by the grant of the people.'"[342]

Properly understood, this means that Congress does not possess the Constitutive Power but rather serves to check the states in allowing the people to act.[343] Congress's ability to submit proposed amendments to state legislatures or Conventions should be seen as analogous to the President's ability to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient."[344] Congress can determine to which body its proposed amendment will go—a state legislature or a state convention; but, whereas Congress controls the decision-maker regarding constitutional amendments (a state legislature or a state convention), the decision to amend the Constitution lies with the people, who possess the Constitutive Power.[345]

To understand fully Congress's relationship to the Constitutive Power, we must first inquire into the American conception of constitutions.[346]

1. The Higher Law: The American Conception of Popular Sovereignty

As with nearly any important concept from the American founding, we must trace the antecedents in English law and examine how Americans came to reconceive the concepts through resistance to the British Empire, the fighting of the Revolution, and the reflection upon the instabilities in post-Revolutionary America.

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338 *Hollingsworth*, 3 U.S. (3 Dall.) at 382 n.2.

339 Hawke v. Smith, 253 U.S. 221, 230 (1920).

340 *See, e.g.*, *id.* at 230–31.

341 BERNSTEIN & AGEL, *supra* note 16, at 57. *See also* Tillman, *supra* note 212, at 1275 ("Like the [Hollingsworth] Court's 'opinion' Chase's statement is more of a conclusion than a reasoned argument.").

342 WOOD, *supra* note 247, at 371.

343 *See* BERNSTEIN & AGEL, *supra* note 16, at 18–19.

344 U.S. CONST. art. II, § 3.

345 *Id.* art. V.

346 *See* discussion *infra* Section II.F.1.

A striking feature of the discontented colonists in the 1760s is their insistence that the "letter and spirit of the British constitution" justified their actions.[347] The colonists' reliance upon the British Constitution as a bulwark against their imperial oppressors struck an antiquated cord.[348] As Professor Gordon Wood has noted, "by the last quarter of the eighteenth century it seemed clearer than ever before to most Englishmen that all such moral and natural law limitations on the Parliament were strictly theoretical, without legal meaning, and relevant only in so far as they impinged on the minds of the lawmakers."[349] Rejection of a higher law imposed upon Parliament coincided with the intellectual shift to the idea of Parliamentary Supremacy.[350]

Expositors on the British Constitution in the eighteenth century, such as Blackstone, drew no distinction between the British Constitution and the laws Parliament enacted.[351] With the collapse of the King's veto discussed earlier,[352] it was Parliament, not as a court, but as a legislative body, that could create whatever legal regime it desired.[353] Colonial lawyers, like James Otis, nominally accepted Parliamentary Supremacy while still suggesting that the British Constitution restrained the Parliament, based on a medieval presumption that what was not just was not law.[354]

Otis believed that all laws against "natural equity" should be declared void.[355] Yet, many American revolutionaries came to see that the validity of laws lay not in their correspondence with natural equity, but that they had been promulgated by the Sovereign.[356] Thus, our Founders came to believe that to protect the people's rights embedded in the common law from despots and usurpers that "somehow these principles and rights must be protected and guaranteed by lifting them out of government."[357]

Past written declarations of the English people's rights, such as the Magna Carta and the English Bill of Rights of 1689, may have been "undoubtedly of a nature more sacred than those which established a turnpike . . .[,]" but nonetheless could be repealed by a subsequent act of Parliament.[358] Yet, the rebelling colonists saw the combination of written documents with the distinction between fundamental and statutory law permeating the American consciousness as a means to restrain the government.[359] Indeed, Americans had regularly cited their charters to repel imperial intrusions.[360]

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[347] WOOD, *supra* note 247, at 12.
[348] *See id.* at 12–13.
[349] *See id.* at 260.
[350] *See infra* notes 351–57 and accompanying text.
[351] *See id.* at 261.
[352] *See* discussion *supra* Section II.C.
[353] *See* WOOD, *supra* note 247, at 261.
[354] *Id.* at 263.
[355] *Id.* at 264.
[356] *See id.* at 265.
[357] *Id.* at 266.
[358] *Id.*
[359] *See id.* at 268, 275.
[360] *See id.* at 268.

As Wood saw, "[t]he problem for Americans in the 1780's then was to refine and to make effective the distinction between fundamental and statutory law that all in 1776 had at least paid lip service to, and this essentially involved making clear the precise nature of a constitution."[361] In clarifying the distinction, the American people came to believe that "[o]nly the people by either 'persons *legally authorized* by them or themselves' could create or alter a constitution."[362]

In English history, the charters of the people's liberties memorialized agreements between the "King of England, and our predecessors," recognizing—not creating—the people's liberties.[363] This may have been fitting for a nation that still conceived of itself in terms of three distinct estates, but for a republican government, there was no entity above the people with whom the people had to contract. In response, Americans exalted a new contractual analogy—the Lockean social contract.[364] Precisely because a constitution was a contract between the people, only the people could alter the contract.[365] Further, to allow a legislature to amend the constitution (the people's fundamental charter) would be to reintroduce the ruler-ruled distinction by allowing those in government to dictate to the people the nature of the social contract; such an arrangement could not be countenanced by a republican people.[366] Yet, to make the constitution unamendable by the legislature, the legislature could not be allowed to draw up the contract in the first place.[367] The Founders, drawing on British history and recent experiences, would find that the proper place for this Constitutive Power was in conventions.[368]

The concept of a convention has a rather complicated past in English history and the colonial resistance.[369] As Wood has recognized:

> Convention was an ancient term in English history, dating back at least to early medieval times. Literally a convention was a meeting, an act of coming together, used to refer to all sorts of assemblies, especially formal assemblies, convened for deliberation on important matters, whether ecclesiastical, political, or social. Meetings of the clergy or of the barons, or of both, together with spokesmen for the people, outside of the established Crown institutions, were commonly called conventions. It was just such an assembly of the barons, prelates, and people—a convention of the estates of

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[361] *Id.* at 275.
[362] *Id.* at 276–77.
[363] *See id.* at 269 (internal quotation marks omitted).
[364] *See id.* at 283.
[365] *See id.* at 284.
[366] *See id.* at 283–84.
[367] *See id.* at 306.
[368] *See id.* at 309.
[369] *See id.* at 306–43.

> the realm—that accepted Edward II's abdication in 1327, and a similar convention of estates participated in a more ambiguous manner in the accession of Henry IV in 1399. Throughout the medieval period such conventions of the estates of the realm were regarded as quite distinct from the Parliament and in fact were thought to embody the nation more completely than Parliament did, since Parliament was more the King's instrument for receiving taxes and petitions and for governing the realm than it was a full representation or spokesman of the society.[370]

While conventions featured prominently in this early period of the English state, by the fifteenth century, the English people began to identify the meeting of the three estates with Parliament, making Parliament representative of the whole country.[371]

The concept of a convention lay dormant for over two centuries only to be revisited in the turbulent seventeenth century.[372] During this period:

> [W]hen the Commons and Lords were forced to convene without the King, Englishmen struggled with the proper terms to describe the meetings, with convention being commonly used by those who considered the bodies legally irregular. When Charles II was restored to the throne in 1660 by such a body, men were hard pressed to answer "whether anything done by this convention can be obliging to the nation, seeing they have not the right constitution of a parliament, according to the fundamental laws of the Kingdom?" In 1688 the body of Lords and Commons likewise called itself a convention until it had conferred the Crown on William and Mary at which time it became a Parliament.[373]

Thus, two of the most significant acts in England's seventeenth century, the restoration of the throne and the Glorious Revolution, were carried out by a body distinguished by the absence of the executive department.[374]

Americans similarly became acquainted with conventions throughout the eighteenth century, using the term to denote similarly momentous plans, such as the proposed continental union of 1754.[375] In response to the vagaries of administration during the colonial period, where the governor or council would become absent,

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[370] *Id.* at 310.
[371] *See id.*
[372] *See id.* at 311.
[373] *Id.*
[374] *See id.*
[375] *See id.* at 312.

colonial legislatures had to develop theoretical justifications to continue to operate.[376] Indeed, by 1773, the provincial bodies at all levels of government established themselves as permanent bodies, removing the governor's ability to prorogue the assemblies.[377] When governors attempted to prorogue the bodies, the bodies would continue on, claiming the status of conventions.[378] In response to the attack on the legitimacy of the conventions, prominent colonists and future framers such as James Wilson[379] responded "'that the objections of our adversaries cannot be urged against us' without denying the legality of the proceedings of the Revolution of 1688."[380] By the 1780s, the people believed that conventions, rather than being deficient, were superior to normal legislatures because of the people's approval.[381] Yet what was the constitutional status of these conventions, and how did they relate to the concept of sovereignty?

Americans explained conventions outside of the traditional governmental process by moving the very concept of sovereignty outside of the duly constituted governments.[382] In England, first, the meeting of the estates in Parliament, and then Parliament in its own right, were sovereign.[383] As we discussed in Sections II.B and II.C, Americans had rejected this "estates-view" of society in favor of a uniform, republican vision.[384] Accordingly, sovereignty remained indivisibly vested in the people rather than with unified estates.[385]

Indeed, the people no longer were "in government" as the people of England were through their representation in the Commons. The people remained outside the government, appraising their agents' actions with a gimlet eye.[386] Although inchoate at the time, it was upon this conceptual distinction that the people of North Carolina could inform their delegates to the North Carolina Convention of 1776 that "[p]olitical power . . . is of two kinds, one principal and superior, the other derived and inferior. . . . The principal supreme power is possessed by the people at large, the derived and inferior power by the servants which they employ."[387] Upon this basis, the American people could justify their durable restrictions placed on the government itself—the people always retained the Constitutive Power.[388]

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[376] *See id.*

[377] *See id.* at 313.

[378] *See id.* at 313–14.

[379] For discussion of the ratification and the role James Wilson played, see PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 97–124 (2010).

[380] WOOD, *supra* note 247, at 316.

[381] *Id.* at 338.

[382] *See id.* at 309, 364–65.

[383] *See id.* at 347.

[384] *See* discussion *supra* Sections II.B, C.

[385] *See* WOOD, *supra* note 247, at 364–65.

[386] *Id.* at 388.

[387] *Id.* at 364.

[388] *See id.* at 364–65.

2. The American Experience with the Constitutive Power

In discussing sovereignty and the Constitutive Power in the American context, we must directly confront a set of linguistic and technical issues.[389] On the one hand, distinguished scholars maintain that during the Articles of Confederation, the states were independent sovereigns.[390] Yet at the same time, states like Massachusetts and New Hampshire struggled through the exercise of the Constitutive Power and the people's assertion of their sovereignty.[391] Thus, we must recognize the states as sovereigns while at the same time recognizing that each state was a mere instrumentality for the sovereign people. This linguistic confusion was further exacerbated once the Constitution was ratified and the federal government came into being and has persisted to the present day. Consider, for instance, Justice Souter's declaration in his *Alden v. Maine*[392] dissent that "[t]he National Constitution formally and finally repudiated the received political wisdom that a system of multiple sovereignties constituted the 'great solecism of an *imperium in imperio*.'"[393] This statement is erroneous—sovereignty remained undivided in the people.[394] As James Wilson declared at the Pennsylvania ratifying convention, "sovereignty resided not in any set of governmental institutions but in the people, who 'only dispensed such portions of power as were conceived necessary for the public welfare.'"[395] Pursuant to this authority, the people delegated different powers to the state and federal government.[396] Yet, the states qua states still played an essential role.[397] As Professor Pauline Maier has noted:

> The people formed [our federal republic]—not the people as a single body but "the people as composing thirteen sovereignties" since the people of each state chose representatives who met in convention to decide on ratification and no state was bound until its people gave their consent. Even so, the Constitution was dramatically different from the Articles of Confederation, whose authority came from the state legislatures. The Constitution rested on "the superior power of the people." Members of the House of Representatives would be chosen by the people, senators by the state legislatures.[398]

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[389] *See* discussion *infra* Section II.F.2.

[390] *See* AMAR, *supra* note 42, at 24.

[391] *See* WOOD, *supra* note 247, at 340–42.

[392] 527 U.S. 706 (1999).

[393] *Id.* at 799 (Souter, J., dissenting) (quoting BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 224–25 (1992)).

[394] *See* MAIER, *supra* note 379, at 109–10.

[395] *Id.* at 109.

[396] *See id.* at 109–10.

[397] *See id.* at 269–70.

[398] *Id.*

Properly speaking, neither the states nor the federal government possess the Constitutive Power but are rather part of a process of channeling the people's sovereign power in an orderly manner; without an orderly process for the people to express their will, the states had experienced violent outbursts of "the people out-of-doors," as Gordon Wood has termed it.[399] What is clear, however, is that unlike Congress's legislative power or the President's executive power,[400] both of which are derived from the people's Constitutive Power, no one may assert that an established entity possesses the Constitutive Power without contradicting the fundamental postulates of the American Republic. No entity other than the people possesses the Constitutive Power, thus our sovereignty.

Nonetheless, Americans commonly refer to state and federal governments as sovereign units, defined jurisdictionally and geographically. This notion of governments as sovereign derives from the authority of the people in their sovereign capacity to delegate powers to the federal and state governments.[401]

Conceiving of the state and federal governments as "sovereign entities," though ultimately not sovereign, helps to explain the form of Article V. In addressing the Constitutive Power early in the convention, George Mason supported a resolution declaring that:

> The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust chance and violence. It would be improper to require the consent of the [National] Legislature because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendm[en]t.[402]

The original committee draft of Article V only allowed the states to propose amendments.[403] Note, then, that originally the Framers assigned to Congress a ministerial role in Article V.[404] Completely without discretion, the Convention's exclusion of the executive seems sensible.

Alexander Hamilton objected to the proposed form of Article V, believing that states would only seek to aggrandize themselves, while Congress would be in a

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399 *See* WOOD, *supra* note 247, at 319–28.
400 *See* U.S. CONST. art. I; *id.* art. II.
401 *See* MAIER, *supra* note 379, at 269–70.
402 BERNSTEIN & AGEL, *supra* note 16, at 17.
403 *Id.* at 18.
404 *See id.* at 18–19.

position to readily ascertain necessary amendments—"[t]here could be no danger in giving this power, as the people would finally decide in the case."[405]

Eventually, the Convention would largely adopt Hamilton's proposal.[406] Only by the consent of the sovereign entity (the state), however, could a state be denied its equal suffrage in the Senate, showing the elevated status of states in the Constitution.[407] States may demand a Constitutional Convention to restrict federal power, but Congress may designate a convention, not a state legislature, as the proper forum for ratification, if Congress believes the states will act contrary to the will of the people.[408] In this way, state governments cannot manipulate the people's Constitutive Power in making amendments to the constitution.

Further, the federal legislature can propose amendments and have them ratified in state conventions, preventing the state governments from stymieing the people from amending the constitution for the general welfare.[409] Similarly, the federal legislature cannot stymie states from restraining the federal government; if a sufficient number of states apply to Congress for a convention, Congress must act.[410] Textually and structurally, Congress can check the states and the states can check Congress.[411] This process empowers both Congress and the States, and it may facilitate cooperation.

Motivated both by a commitment to the voters who placed him in Congress and a desire to prevent a second constitutional convention, Madison began his determined effort to amend the Constitution.[412] "Washington made only one substantive recommendation to the First Congress"—amend the Constitution to preserve its strengths and address its opponents' fears.[413]

Ultimately Congress formally proposed twelve amendments.[414] Notably, the proposed amendments were not presented to the President for his approval before they were sent to the states, indicating that the constitutional presentment mandate was not as all-encompassing as the language of the ORV Clause itself might suggest.[415]

Thus, we may return to Justice Chase's statement in the oral arguments of *Hollingsworth* that "[t]here can, surely, be no necessity to answer [Petitioners'] argument. The negative of the president applies only to the ordinary cases of legislation: he has nothing to do with the proposition or adoption of amendments to the constitution."[416]

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[405] *Id.*
[406] *See id.* at 19–21.
[407] *See* U.S. CONST. art. V.
[408] *See id.*
[409] *See id.*
[410] *See id.*
[411] *See id.*
[412] *See* BERNSTEIN & AGEL, *supra* note 16, at 36–39.
[413] *See id.* at 37–38.
[414] *Id.* at 44.
[415] *See id.*
[416] Tillman, *supra* note 212, at 1275 (quoting Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 381 (1798)).

The Framers endowed the President with the veto for two reasons: to defend his executory interest and to prevent hasty legislation.[417] The President does not have a vested interest in any particular piece of legislation, only in his Executory Interest.[418] In the case of a proposed amendment, there simply is nothing for the President to execute.

Further, Article V provides a sufficient check to the relevant parties to obviate the need for presidential participation.[419] The Constitution obligates Congress to call a convention if a sufficient number of states petition.[420] Thus, the federal government cannot prevent the states from restraining federal overreach. On the other hand, to prevent state governments from undermining the federal government, Congress can choose state conventions rather than state legislatures for ratification.[421] Similarly, if the federal government seeks additional powers to better promote the welfare of the people, but at the expense of state governments, Congress can send such a proposal to state conventions rather than to the interested state governments.[422] Thus, the constitutional amendment process is safeguarded by two entities that check each other apart from Congress—the States and conventions.

Where the President has no executory interest and where there are sufficient checks built into the constitutional process, there is simply no reason to infer presidential participation. Later in his career, Madison demonstrated his constitutional scruples in vetoing an internal improvements bill he had recommended because he believed it exceeded federal power.[423] Accordingly, it seems likely that Madison's decision not to submit the proposed constitutional amendments to Washington was driven by a principled belief that the President had no role in the constitutive power—i.e., no role in proposing amendments to the Constitution. In sum, those provisions in the Constitution that: (i) solely require congressional action or congressional consent, and that (ii) neither involve the Executory Interest, (iii) nor lack a check upon Congress, should not be construed to involve the President.

G. Article I, Section 10, Clause 2 and Presentment: The Interstitial Import-Export Power

Having established one exception to the ORV Clause, involving the Constitutive Power in amending the Constitution,[424] we will now turn to two further exceptions to presentment, both of which explicitly empower Congress and the States to cooperate and innovate without presidential involvement.[425]

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[417] THE FEDERALIST NO. 73, *supra* note 276, at 443.
[418] *See* discussion *supra* Sections II.C, D.
[419] *See* U.S. CONST. art. V.
[420] *See id.*
[421] *See id.*
[422] *See id.*
[423] *See* MASON, *supra* note 235, at 94–95.
[424] *See* discussion *supra* Section II.F.2.
[425] U.S. CONST. art. I, § 10, cl. 2–3.

Both Article I, Section 10, Clause 2's Interstitial Import-Export Power and Article I, Section 10, Clause 3's Interstitial Regulatory Power can be used to revitalize our federal system. In each case, states are prohibited from either "lay[ing] any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing [its] inspection Laws[,]"[426] or "enter[ing] into any Agreement or Compact with another State, or with a Foreign power"[427] without congressional consent. We shall observe two reasons these clauses fall outside the ambit of the ORV Clause. First, based on the meaning of the text, the history of the provisions, and the separation-of-powers principles established earlier, neither clause establishes a federal Executory Interest, obviating the need for presidential participation. Further, the two Article I, Section 10 powers implicate powers that provisions in Article I, Section 9 prohibit Congress from utilizing in the traditional lawmaking process.[428] Precisely because Congress cannot pass these provisions on its own initiative, but only in coordination with state governments, relying on the states to execute the provisions,[429] we should not assume presidential participation.

1. Text, Context, and Separation of Powers

Article I, Section 10, Clause 2 prohibits states from laying duties on imports or exports without Congress's consent.[430] Much like Article V, the text implies that states solely need Congress's consent, not traditional legal approval involving a presidential signature.[431] We think that the Import-Export Clause should be treated in the same way that *Hollingsworth* treated the Article V amendment provision—i.e., without the need for presentment. It provides another example where the ORV Clause has narrower application than one might think.

The federal and state governments are not entirely distinct entities. The Constitution provides for an extensive amount of state participation in the federal government.[432] Madison recognized that "[t]he State governments may be regarded as constituent

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[426] *Id.* art. I, § 10, cl. 2.

[427] *Id.* art. I, § 10, cl. 3.

[428] *Compare* U.S. CONST. art. I, § 10, cl. 2–3, *with* U.S. CONST. art. I, § 9.

[429] *See* U.S. CONST. art. I, § 9.

[430] *Id.* art. I, § 10, cl. 2.

[431] *Compare* U.S. CONST. art. I, § 10, cl. 2, *with* U.S. CONST. art. V.

[432] U.S. CONST. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."); *id.* art. I, § 3, cl. 1. ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote."); *id.* art. I, § 3, cl. 2 ("[A]nd if Vacancies [in the Senate] happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies."). *See also* the provisions in Article I, Section 10 which Congress cannot act upon unilaterally. *Id.* art. I, § 10.

and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former."[433] Importantly:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[434]

In contrast to intragovernmental decision-making tempered by separation of powers, intergovernmental actions merely need one entity to check the other.[435] With regards to the Import-Export Clause, Madison noted that:

> The restraint on the power of the States over imports and exports is enforced by all the arguments which prove the necessity of submitting the regulation of trade *to the federal councils*. It is needless, therefore, to remark further on this head, than that the manner in which the restraint is qualified seems well calculated at once to secure to the States a reasonable discretion in providing for the conveniency of their imports and exports, and to the United States a reasonable check against the abuse of this discretion.[436]

Madison seemed to believe that a state solely needed to receive consent from Congress. Madison's understanding seems comparable to his desired congressional negative.[437] As we noted, the three clauses in Article I, Section 10 were discussed in the context of the Madisonian negative.[438] While Madison's peers rejected the negative's goal of reforming the internal police power of the states, they embraced its second purpose—protecting federal interests—by prohibiting states from taking certain actions without congressional consent, actions that posed special threats to federal interests (i.e. laying duties on imports or exports and entering into agreements with other states).[439] Thus, the form of congressional consent under Madison's proposed congressional negative should inform our understanding of how congressional consent operates under the Import-Export and Compact Clauses.

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[433] THE FEDERALIST NO. 45, at 291 (James Madison) (Clinton Rossiter eds., 1961).

[434] THE FEDERALIST NO. 51, *supra* note 269, at 323.

[435] *See id.*

[436] THE FEDERALIST NO. 44, at 283 (James Madison) (Clinton Rossiter eds., 1961) (emphasis added).

[437] *See* discussion *supra* Section I.A.3.

[438] *See* discussion *supra* Section I.A.3.

[439] *See* discussion *supra* Section I.A.3.

Under one version of Madison's proposed negative, he envisioned that the Senate alone would exercise the negative.[440] Thus, bicameralism was not an essential element of Madison's congressional negative,[441] and the Senate-only negative certainly would not have implicated the ORV Clause. As a last-step measure, after the Convention had already agreed upon equal representation in the Senate, Madison expanded the negative power to both houses of Congress.[442] In this way, "[n]o law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the States."[443]

Congress cannot commandeer the states to fill the federal coffers—the state must choose to act, and Congress must give its consent.[444] Just as importantly, if Congress does grant approval to an import or export duty, Congress neither aggrandizes itself at the expense of the President nor encroaches upon the President's Executory Interest.[445] Thus, according to the Framers's conception of separation of powers (as reflected in the proper understanding of the ORV Clause presented in our analysis of Article V above),[446] we should not infer presidential participation in the Interstitial Import-Export Power. Congressional consent stands on its own without the need for presentment.[447]

2. Structural Incompatibility

Supporting the textual analysis is a structural analysis. There is a structural incompatibility between the two constitutional provisions regarding exports—the limitation on Congress's taxing power under Article I, Section 9's Export Clause and the provisions of Article I, Section 10's Import-Export Clause.[448] The Section 10 Import-Export Clause allows states to "lay . . . Imposts or Duties on Imports or Exports"[449] with congressional consent; in contrast, Section 9's Export Clause declares a flat-out ban: "[n]o Tax or Duty shall be laid on Articles exported from any State."[450] We shall show that the absence of presidential participation in the consent process harmonizes these seemingly contradictory approaches.[451]

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[440] LACROIX, *supra* note 82, at 150.
[441] *See id.*
[442] *See* Kramer, *supra* note 67, at 652–53.
[443] THE FEDERALIST NO. 62, *supra* note 281, at 378.
[444] *See supra* notes 159–64 and accompanying text.
[445] *See* discussion *supra* Section II.E.
[446] *See* discussion *supra* Section II.F.
[447] *See* discussion *supra* Sections II.A, B.
[448] *See infra* notes 449–50 and accompanying text.
[449] U.S. CONST. art. I, § 10, cl. 2.
[450] *Id.* art. I, § 9, cl. 5.
[451] *See infra* notes 452–71 and accompanying text.

The Convention debates show that the Framers regarded the Section 9 Export Clause as an important provision, not an afterthought.[452] Since the southern states were the main exporters of goods, it is unsurprising that the South strongly supported the clause in an effort to prevent the North from harming the South by taxing its exports.[453] Further, the Export Clause imposes a total ban on taxing state exports.[454] The Convention debates show that when a delegate sought to allow export taxation for regulatory purposes rather than revenue-raising purposes, his peers rejected his proposal—this was to be an absolute prohibition.[455] Although the Court has struggled to operationalize the Export Clause in a consistent manner, no one can doubt that a levy of "one cent per pound of flour exported" violates the clause.[456]

As Justice Story recognized, the Export Clause and the Port Preference Clause[457] worked together to prevent the federal government from utilizing its power either to harm one state or favor another.[458] The power to tax exports or to direct merchants to enter certain ports could be used to harm certain states.[459] The Constitution was designed to protect the republic and allow its people to flourish.[460] It was designed to allow Congress to cooperate with the States, not punish them. Thus, for taxation/regulation intended to have a localized impact, the Framers disapproved of unilateral federal action. But the federal government would still need a check on state import and export policies that would infringe upon the Framers's vision of a uniform market and a united front in the face of foreign foes.

The Supreme Court's application of the Import-Export Clause changed radically after the Civil War.[461] During the antebellum period, the Court prohibited states from imposing duties on imports or exports to or from sister states and foreign countries.[462] The post-War Court, on the other hand, restricted the Clause's application to foreign commerce.[463]

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[452] Erik Jensen, *The Export Clause*, 6 FLA. TAX REV. 1, 6 (2003).

[453] *See id.* at 8–9.

[454] U.S. CONST. art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State.").

[455] *See* Jensen, *supra* note 452, at 6–15.

[456] *Id.* at 16. *See also* United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 873 (1996).

[457] U.S. CONST. art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.").

[458] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 469–71 (1833).

[459] *See id.* at 470.

[460] *See id.* at 471.

[461] *See infra* notes 462–76 and accompanying text.

[462] *See infra* notes 464–66 and accompanying text.

[463] Brannon P. Denning, *Justice Thomas, The Import-Export Clause, And* Camps Newfound/Owatonna v. Harrison, 70 U. COLO. L. REV. 155, 159–67 (1999). As the Court developed

Litigants first invoked the Import-Export Clause in *Brown v. Maryland*.[464] In *Brown*, although only dealing with foreign commerce, Marshall opined that "[i]t may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister State."[465] "If the tax was laid on the gold or silver exported," Justice Taney subsequently wrote, "every one would see that it was repugnant to [the Import-Export Clause]."[466]

In 1869, the Court changed tact, looking to the contemporary understanding of the word 'impost.'[467] In *Woodruff v. Parham*,[468] where the Supreme Court reversed its interpretation of the Import-Export Clause, Justice Miller asserted "that the 'imposts' Congress was empowered to lay in Article I, Section 8 of the Constitution are 'limited to duties on foreign imports.'"[469] "If the Import-Export Clause was 'intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State into another,'" Justice Miller concluded:

> [T]he power conferred is curiously rendered nugatory by [the Export Clause of Article I, Section 9] which declares that no tax shall be laid on articles from any State, for no article can be imported from one State into another which is not, at the same time, exported from the former.[470]

By limiting the clause's application to foreign commerce, Justice Miller claimed to resolve the paradox. But is there a paradox?[471]

The federal government has power under Article I, Section 8 to lay "imposts."[472] States may lay "imposts" under Article I, Section 10, but only with Congressional consent.[473] *Woodruff* held that the "imposts" in Article I, Section 8 could only refer to foreign levies;[474] otherwise there would be a paradox. A federal power to tax under Article I, Section 8 would be inconsistent with a prohibition to tax under

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and applied the so-called Dormant Commerce Clause, the narrowing of the Import-Export Clause had very little effect. *See id.* at 164.

[464] *See id.* at 160–61.

[465] *Id.* at 161 (internal quotation marks omitted).

[466] *Id.* at 162 (internal quotation marks omitted).

[467] *Id.* at 163.

[468] 75 U.S. (8 Wall.) 123 (1869).

[469] Denning, *supra* note 463, at 183 (quoting Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 132 (1869)).

[470] *Id.* (quoting *Woodruff*, 75 U.S. at 132).

[471] Evidently, Justice Miller did not consider that the provision was designed to allow cooperation between Congress and the states. *Id.* at 183–84.

[472] U.S. CONST. art. I, § 8, cl. 1.

[473] *Id.* art. I, § 10, cl. 2.

[474] *See* Denning, *supra* note 463, at 183.

Article I, Section 9.[475] So, the resolution in *Woodruff* was to limit the power to tax "imposts" to foreign levies.[476]

Does that analysis suggest that states' power to impose "imposts" is limited to taxing foreign commerce? If the federal "consent" power conferred in Article I, Section 10 suggests a federal legislative power akin to the federal taxing power in Article I, Section 8, then the same conundrum described in *Woodruff* might exist. The term "imposts" perhaps should be interpreted similarly if they both apply to the federal government acting in its legislative capacity.

But that is not the case. The federal "consent" power applies to imposts levied by states[477] and is a federal "checking" power on states. The federal power to "consent," as in the Compact Clause context, is not a legislative power in the traditional sense, triggering presidential participation. Congress's "checking" or "consent" power under Article I, Section 10 differs from Congress's legislative power to tax under Article I, Section 8.[478] The "consent" power does not allow Congress to initiate action, as in a legislative context, only to ratify state action or provide a framework in which states can act voluntarily, on their own and without federal command.[479]

This structural analysis reinforces the textual analysis and strongly supports the insight that Congress's power to "consent" to state taxation under Article I, Section 10 is not legislative in character and does not need to adhere to the mandates of presentment. In this regard, this constitutional structural pathway is like the analogous structural pathway of the Compact Clause, in which Congress acts in a manner other than its legislative capacity; and the safeguards of presentment are inoperative (as they are in the context of amending the Constitution).[480] In sum, there is no violation of separation of powers, as there is no aggrandizement of the power of Congress nor is there encroachment on the President's Executory Interest.

H. Article I, Section 10, Clause 3 and Presentment: The Interstitial Regulatory Power

In the last Section, we examined two rationales that support the proposition that congressional consent under the Import-Export Clause is not subject to presentment and drew an analogy to Congress's consent power under the Compact Clause.[481] Our conclusion has been that Congress is allowed to exercise its "consent" power under

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[475] *Compare* U.S. CONST. art. I, § 8, cl. 1, *with* U.S. CONST. art. I, § 9, cl. 5.
[476] *See* Denning, *supra* note 463, at 183.
[477] U.S. CONST. art. I, § 10, cl. 2.
[478] *Compare* U.S. CONST. art. I, § 10, *with* U.S. CONST. art. I, § 8.
[479] U.S. CONST. art. I, § 10.
[480] *Id.* art. I, § 10, cl. 3.
[481] *See* discussion *supra* Section II.G.

the Compact Clause—what we term the Interstitial Regulatory Power—without presentment.

We have described and justified Congress's ability to transform state law into federal law through Congress's "consent" power under the Compact Clause.[482] This is a form of "unpreemption," with state law being transformed by Congressional consent into federal law in cooperation with states.[483] This may seem novel but is constitutionally justified.[484]

The President solely has a claim to his Executory Interest on behalf of the federal government, but does not have a vested right to an expansive regulatory state.[485] There are situations, like *Metro Washington*, where Congress consents to a compact, but maintains more than the right of congressional oversight, instead creating a federal Executory Interest.[486] In that situation, as the Court rightly ruled, Congress may not accrete executive power to itself.[487] Yet, for compacts that do not create any Federal Executory Interest, no separation of powers problem exists.

A further justification for exempting the Interstitial Regulatory Power from presentment is the structural incompatibility between the Port Preference Clause and the Compact Clause.[488] The Port Preference Clause states, "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another."[489] The Port Preference Clause (and the Export Clause) were designed to prevent the federal legislature from purposefully harming one or several states.[490] The Port Preference Clause prohibits the federal government from giving an explicit preference to one state over another. It does not prohibit a consequence of an otherwise valid federal action being that commerce is channeled towards one state rather than another.[491] In *Wheeling II*, the Court recognized Congress may not compel merchants to enter preferred ports nor grant a special privilege to vessels to enter one state rather than another.[492]

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[482] *See* discussion *supra* Section I.B.2.

[483] *See* discussion *supra* Section I.B.2.

[484] *See* discussion *supra* Section I.B.2.

[485] *See* discussion *supra* Section II.E.

[486] *See* Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 259–60 (1991).

[487] *See id.* at 277.

[488] *See infra* notes 489–503 and accompanying text.

[489] U.S. CONST. art. I, § 9, cl. 6.

[490] STORY, *supra* note 458, at 469–71.

[491] *See* Pennsylvania v. Wheeling & Belmont Bridge Co. (*Wheeling II*), 59 U.S. (18 How.) 421, 433–34 (1855).

[492] *Id.* at 434. The Court further recognized that the Maryland delegation had introduced the provision out of fear that Congress would force trade ships in the Chesapeake to dock in Virginia, harming Baltimore. *Id.*

Unless Congress explicitly regulates in a manner that discriminates in favor of one state rather than another, the Court will not invoke the Port Preference Clause to strike down a federal law.[493] Subsequent Courts have affirmed this interpretation of the Clause holding that "the prohibition of such a preference does not extend to acts which may directly benefit the ports of one State and only incidentally injuriously affect those of another, such as the improvement of rivers and harbors, the erection of light-houses, and other facilities of commerce."[494] More recently, a court noted:

> The Port Preference clause has been narrowly construed by the Supreme Court, so as only to prohibit "positive legislation" intended to produce "a direct privilege or preference of the ports of any particular State over those of another" and not "incidental advantages that might possibly result from the legislation of congress upon other subjects connected with commerce . . . ."[495]

Yet, a Constitutional Compact singles out particular states to allow those states to cooperate in some way that interferes with a federal interest,[496] which may include interfering with the national market. There is no content restriction on compacts, as they essentially allow a combination of federal powers and state powers. Indeed, as we saw in Part I, the sole purpose of congressional consent is to protect federal interests from state encroachment.[497] Congressional consent merely provides a shield for state law to operate. Thus, the constitutional prohibition on forcing vessels entering the state to pay a duty would not be violated by an interstate compact that favors certain states over others, as the federal government is not acting in its legislative capacity.

Take for instance the *Northeastern Dairy Compact* case.[498] In an attempt to increase prices paid to northeastern dairymen, the Compact Commission essentially established a tariff that disfavored outside milk producers.[499] It was only by direct congressional action that the Commission could avoid a Dormant Commerce Clause challenge.[500] If the compacts were treated as part of the traditional federal legislative power, this would very likely have violated the Port Preference Clause, as it would purposefully

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[493] *See infra* notes 494–96 and accompanying text.

[494] South Carolina v. Georgia, 93 U.S. (3 Otto.) 4, 13 (1876).

[495] Augusta Towing Co., Inc. v. United States, 5 Cl. Ct. 160, 165–66 (1984) (citation omitted).

[496] *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472–73 (1978).

[497] *See* discussion *supra* Section I.B.1.

[498] New York State Dairy Foods, Inc. v. Ne. Dairy Compact Comm'n, 26 F. Supp. 2d 249 (D. Mass. 1998).

[499] *See id.* at 252.

[500] *See, e.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).

select certain states for preferential regulatory treatment. Precisely because a Constitutional Compact is a two-tiered legal structure, the constitutional prohibition on certain federal legislation favoring specific ports is not implicated. Congress is not acting in an unconstitutional, legislative manner, but merely exercising its "consent" power—empowering states to act in a way they may not without consent. Congress and the states coordinate, checking each other, to establish the federal shell, which allows the states to operate the underlying regime.[501] Such an interpretation is consistent with the Supreme Court's jurisprudence on the state consenting function.[502] This result is textually and structurally permissible,[503] and (depending on the merits of the particular compact and its operational provisions) socially desirable.

CONCLUSION

Until now, federal legislation has seemed to be the last word on an issue, preventing further state experimentation and innovation. In the future, if states feel that current federal law poorly addresses their localized needs and preferences, then they may petition Congress for the 'right to try' an alternative regulatory structure that will both permit regional cooperation and provide new experiments and experiences from which new lessons may be learned and new laws may be crafted. In the case of healthcare reform, for example, with the many competing visions and values, the use of the Compact Clause can enable the states to try these different regimes. The compact

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[501] Similarly, the rest of the provisions in Article I, Section 10, Clause 3 are balanced in the same manner. Allowing only a specific state to impose a 'duty of tonnage' on ships entering the state would also likely run afoul of the Port Preference Clause's prohibition on legislation that requires "[v]essels bound to, or from, one State, be obliged to enter, clear, or pay duties in another." U.S. CONST. art. I, § 9, cl. 6. The final conditional prohibitions on keeping troops, ships of war during peace time, or ships to engage in war (unless invaded or facing an imminent threat) all fall within the general 'Geostrategic vision' discussed above. *See* AMAR, *supra* note 42, at 44–46. Congress could put forth rules regulating such forces under Article I, Section 8, Clause 14, 15, and 16; however, either the state executives or the President would be commanding the forces, as recognized in Article I, Section 8, Clause 16 and Article II, Section 2. U.S. CONST. art I, § 8, cl. 16; *id.* art. II, § 2. Thus, once again, we find a provision that allows state executives to take care to faithfully execute federal laws. Yet here, Congress must present the regulation to the President, as it will impact the manner in which a President could make war if such forces were nationalized. Yet, precisely because the President will be able to obtain control over the force by virtue of his status as commander-in-chief, there is no need for Congress to present their consent to the President. For if Congress gives consent to a state to make war, the state executive will operate in the shadows of the President, knowing that he is subservient to the will of America's commander-in-chief. As such, there is no need for presentment. *See also* Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 4 (2009).

[502] *See* discussion *supra* Section II.A.

[503] *See* discussion *supra* Section II.G.

on allowing for telemedicine, overcoming state-by-state licensing requirements, is a constructive illustration.

This approach is justified based on the text of the Constitution, early Congressional practice, and existing case law. Courts have treated Constitutional Compacts as federal law.[504] Article V's 'constitutive power' (amending the Constitution), with language analogous to the Compact Clause, has historically not involved presidential participation via Presentment, and the Supreme Court in *Hollingsworth* has so found.[505] More recently, the Supreme Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission* stated that the state legislature's consent power is not subject to state-based presentment, in contrast to a state legislature's district line-drawing, which is subject to state-based presentment.[506] Based on these legal principles and precedents, congressional approval of Constitutional Compacts should similarly not be subjected to presentment. A result would be further support for state-based experimentation, re-empowering the people and their elected legislative representatives, both at the federal and state level, to pursue the general welfare in certain measured ways free from federal executive control.

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

[505] Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 379 (1798).

[506] *See* Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2667 (2015); Smiley v. Holm, 285 U.S. 355, 361, 366 (1932).