
THE COMPACT CLAUSE AND THE REGIONAL GREENHOUSE GAS INITIATIVE

The twentieth century witnessed an unprecedented amount of cooperation between states, much of it taking creative new forms.¹ Given that the language of the Constitution's Compact Clause prohibits any interstate "agreement or compact" without congressional consent,² these modern arrangements might have been expected to raise issues under that clause. The Supreme Court, however, has long been reluctant to give the Compact Clause a "literal" reading for fear of posing unnecessary, and perhaps insurmountable, barriers to beneficial state cooperation. Instead, the Court has used a functional test that permits interstate agreements without congressional consent so long as the agreements do not undermine the supremacy of the federal government. This functional test, however, has become untethered from the text of the Compact Clause itself, in the process stripping the clause of independent force.

An occasion may soon arise to reexamine the doctrine. The Regional Greenhouse Gas Initiative (RGGI), an effort by ten northeastern states to reduce carbon dioxide emissions from power plants in the region, is an interstate agreement that some have suggested may violate the Compact Clause.³ The RGGI states have neither requested congressional consent nor announced an intent to do so. If they were to request consent, it is difficult to predict whether Congress would grant it. The new Democratic Congress has shown interest in climate change regulation,⁴ but the politics of climate change at the national level could impede consent even in a sympathetic Congress.

This Note suggests that buried in the Court's Compact Clause cases are hints of an alternative to the problematic functional test. This alternative, a categorical test, would ask whether an interstate ar-

¹ See, e.g., JOSEPH F. ZIMMERMAN, INTERSTATE COOPERATION 164 (2002) (noting that states today cooperate on matters as diverse as environmental protection, criminal intelligence, mutual emergency assistance, and welfare fraud); David E. Engdahl, *Characterization of Interstate Arrangements: When is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 63-64 (1965) (stating that interstate compacts before the twentieth century were employed "only for the settlement of interstate boundaries and for similar purposes").

² The Interstate Compact Clause reads: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State." U.S. CONST. art. I, § 10, cl. 3.

³ See, e.g., Claire Carothers, Note, *United We Stand: The Interstate Compact as a Tool for Effecting Climate Change*, 41 GA. L. REV. 229, 249-54 (2006) (concluding that RGGI requires congressional consent); Letter from William L. Fang, Deputy Gen. Counsel, Edison Elec. Inst., to Franz Litz, Chair of the Reg'l Greenhouse Gas Initiative (Mar. 20, 2006), available at http://www.rggi.org/docs/rggi-eeimou_comments032006final.pdf (same).

⁴ See Felicity Barringer & Andrew C. Revkin, *Measures on Global Warming Move to Spotlight in the New Congress*, N.Y. TIMES, Jan. 18, 2007, at A24.

rangement possesses the necessary characteristics of a “compact or agreement” under the Compact Clause. This test is more closely based on the text of the Compact Clause and squares better with what little is known of the Framers’ purpose behind the clause than the functional test. Using RGGI as an example, this Note argues that the categorical test fulfills much of the purpose of the Court’s functional test by allowing many interstate arrangements to avoid a consent requirement. Although the result for RGGI would be the same under either test, an analysis of RGGI illustrates additional advantages of the alternative approach.

Part I explains the key features of RGGI. Part II sketches the development of the functional test and then applies that test to RGGI, concluding that the initiative does not present a Compact Clause problem under the functional test. Part III reviews some weaknesses of the functional test and suggests that a categorical test, which has been lurking in Supreme Court cases, is a better method for analyzing RGGI and other interstate arrangements. Part III then outlines the doctrinal underpinnings of the categorical test and applies it to RGGI, concluding that RGGI should not be considered a compact or agreement under the Compact Clause. Part IV considers the additional advantages of the categorical test. Part V concludes that the Court should substitute the categorical test for its functional test if a challenge to RGGI presents the opportunity.

I. THE REGIONAL GREENHOUSE GAS INITIATIVE

RGGI began in April 2003, when New York’s Governor George Pataki invited ten other northeast states to develop a regional cap-and-trade program for carbon dioxide emissions from power plants.⁵ Delaware, New Jersey, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine accepted Governor Pataki’s invitation and joined RGGI discussions as active participants; Maryland and Pennsylvania observed.⁶ Based on discussions between the states and negotiations with stakeholders, the governors of seven of the states

⁵ See Kirk Johnson, *10 States to Discuss Curbs On Power-Plant Emissions*, N.Y. TIMES, July 25, 2003, at B5. Under a cap-and-trade program, an emissions limit, or “cap,” is set for an entire geographic area. Emission sources within the area are given “allowances,” each of which permits the source to emit one ton of carbon dioxide. The number of allowances distributed is equal to the level of the cap. If a source does not possess enough allowances to cover its emissions, it can either reduce its emissions or buy extra allowances from another source. A trading system that covers a large geographic area provides more potential trading partners and consequently more opportunities for efficient trades. For a more detailed explanation of greenhouse gas cap-and-trade systems and other policy options, see Robert R. Nordhaus & Kyle W. Danish, *Assessing the Options for Designing a Mandatory U.S. Greenhouse Gas Reduction Program*, 32 B.C. ENVTL. AFF. L. REV. 97 (2005).

⁶ About RGGI, <http://www.rggi.org/about.htm> (last visited Apr. 7, 2007).

signed a Memorandum of Understanding (MOU) in December 2005,⁷ with Massachusetts and Rhode Island joining in 2007.⁸

The MOU states the basic principles and structure of RGGI. Each signatory state pledged to submit for legislative or regulatory approval a jointly agreed-upon model rule that would establish in the state a cap-and-trade program.⁹ Each state's emissions cap — its proportion of the regional emissions — is set out in the MOU.¹⁰ The distribution of emission allowances to sources is left to each state.¹¹ Allowances under the program are to be tradable between the entities in the participating states. The MOU also calls for the establishment of a regional organization to assist the states in implementing the program.¹²

The signatory states issued the Model Rule¹³ on August 15, 2006. The Model Rule, a document of 163 pages, translates the principles of the MOU into detailed legislative language. Each signatory state agreed to seek approval of the Model Rule no later than December 31, 2008, some through the legislative process and others through regulatory rulemaking.¹⁴

II. THE FUNCTIONAL COMPACT CLAUSE

Although the text of the Compact Clause might appear broad enough to require congressional consent for all interstate cooperation, no court has ever invalidated an interstate agreement for lack of such consent.¹⁵ The Supreme Court has long maintained that not every arrangement that might be considered an "agreement or compact" in the modern meaning of the terms requires congressional consent. This Part traces the development of the Court's functional Compact Clause test and then analyzes RGGI under that test.

⁷ REGIONAL GREENHOUSE GAS INITIATIVE MEMORANDUM OF UNDERSTANDING (2005) [hereinafter MOU], available at http://www.rggi.org/docs/mou_final_12_20_05.pdf.

⁸ Press Release, Executive Dep't, Commonwealth of Mass., Governor Patrick Signs Regional Pact to Reduce Greenhouse Gas Emissions (Jan. 18, 2007), available at http://www.mass.gov/?pageID=pressreleases&agId=Agov3&prModName=gov3pressrelease&prFile=reduce_greenhouse_gases011807.xml; Donald L. Carcieri, Governor of R.I., 2007 State of the State Address (Jan. 30, 2007), available at <http://www.governor.ri.gov/documents/statemessage07.pdf>. In addition, Maryland passed legislation in April 2006 announcing its intention to join RGGI. See Healthy Air Act, MD. CODE ANN., ENVIR. § 2-1002 (West Supp. 2006).

⁹ MOU, *supra* note 7, § 2(A).

¹⁰ See *id.* § 2(C).

¹¹ The signatory states did agree in the MOU to dedicate at least twenty-five percent of the allowances to a consumer benefit or strategic energy purpose. *Id.* § 2(G)(1).

¹² *Id.* § 4.

¹³ REGIONAL GREENHOUSE GAS INITIATIVE MODEL RULE (2007), available at http://www.rggi.org/docs/model_rule_corrected_1_5_07.pdf.

¹⁴ MOU, *supra* note 7, § 3(B).

¹⁵ See Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 289 & n.15 (2003).

A. Development of the Functional Test

For more than a hundred years after the adoption of the Constitution, no case required the Supreme Court to define the contours of the Compact Clause. In the first case to address the validity of an interstate agreement, *Virginia v. Tennessee*,¹⁶ the Court recognized in extended dicta that not all interstate arrangements require congressional consent.¹⁷ Virginia asked the Court to void for lack of congressional consent¹⁸ the boundary line both states had agreed upon and adopted by statute.¹⁹ Justice Field, writing for a unanimous Court, first asked whether the agreement between Virginia and Tennessee fell within the prohibition of the Compact Clause. Although he recognized that the terms could be all-encompassing, Justice Field stated that “[t]here are many matters upon which different States may agree that can in no respect concern the United States.”²⁰ For instance, in agreements between states acting as private property owners or as commercial entities, the consent of Congress could “hardly be deemed essential.”²¹ Similarly, in urgent situations calling for the agreement of multiple states, it would be the “height of absurdity” to require the states to obtain congressional consent before acting.²²

Finding it impossible for the terms of the Compact Clause to apply in the broadest possible sense, Justice Field turned to the “object of the constitutional provision” to discover the limitations of the clause.²³ Applying the principle of *noscitur a sociis* (a word takes its meaning from context) to the clause in which the interstate compact prohibition appears,²⁴ Justice Field stated: “[I]t is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.”²⁵ Thus, a compact or agreement needed congressional consent if it would lead to “the

¹⁶ 148 U.S. 503 (1893). Earlier, in *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823), the Court ruled on the validity of a 1789 compact between Virginia and Kentucky, formed before Kentucky became a state. *Id.* at 85–87.

¹⁷ See *Virginia v. Tennessee*, 148 U.S. at 517–21.

¹⁸ *Id.* at 517.

¹⁹ *Id.* at 514–15.

²⁰ *Id.* at 518.

²¹ *Id.*

²² *Id.* Justice Field suggested that an epidemic of disease would be such a situation.

²³ *Id.* at 519.

²⁴ The full clause reads:

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.

U.S. CONST. art. I, § 10, cl. 3.

²⁵ *Virginia v. Tennessee*, 148 U.S. at 519.

increase of the political power or influence of the States affected, and thus encroach . . . upon the full and free exercise of Federal authority."²⁶

The Court avoided deciding whether the particular boundary line in question increased the power of either state by finding that Congress had implicitly consented to the border agreement.²⁷ Subsequent boundary dispute cases repeated the federal supremacy dicta of *Virginia v. Tennessee*,²⁸ which the Court finally adopted as a holding in the 1976 boundary case *New Hampshire v. Maine*.²⁹

The Court considered its first modern complex interstate agreement in *United States Steel Corp. v. Multistate Tax Commission*.³⁰ The agreement at issue, the Multistate Tax Compact (MTC), was intended to reform state taxation of multistate businesses.³¹ At the core of the MTC was a set of rules for apportioning and allocating tax receipts from multistate taxpayers.³² The MTC also created the Multistate Tax Commission,³³ which was authorized to study state and local tax systems, adopt uniform advisory administrative regulations for the consideration of the states, and conduct audits upon the request of a member state.³⁴ A group of multistate companies challenged the MTC on the ground that it had never received the consent of Congress.³⁵ Analyzing the MTC under the *Virginia v. Tennessee* test, the Court found that it posed no threat to federal supremacy, largely because the MTC policies were ones that the states were free to adopt individually.³⁶

*B. Does RGGI Encroach Upon Federal Supremacy?:
The U.S. Steel Test*

1. *Federal Supremacy.* — Because the Court has never found an encroachment on federal supremacy, it is hard to say what such an agreement would look like,³⁷ but the MTC at least provides an example of an agreement that the Court does not believe threatens federal

²⁶ *Id.* at 520.

²⁷ *Id.* at 522.

²⁸ *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 459 & n.9 (1978).

²⁹ 426 U.S. 363, 369–70 (1976).

³⁰ 434 U.S. 452.

³¹ *Id.* at 456.

³² See MULTISTATE TAX COMPACT art. IV (1967) [hereinafter MTC], available at [http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT\(1\).pdf](http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf).

³³ *Id.* art. VI.

³⁴ *U.S. Steel*, 434 U.S. at 456–57.

³⁵ *Id.* at 458.

³⁶ See *id.* at 472–76.

³⁷ The *U.S. Steel* Court was careful to say that congressional approval of past compacts does not imply that those compacts required approval. *Id.* at 471.

supremacy. Comparing the alleged dangers of the MTC to those of RGGI suggests that the Court would not view RGGI as a threat to federal supremacy.

First, RGGI might be thought to encroach upon federal supremacy because of the federal government's undeniable interest in climate policy. In *U.S. Steel*, however, the Supreme Court was careful to distinguish the presence of federal interests from a threat to federal supremacy.³⁸ In the absence of federal action preempting state regulation, the states are free to pursue policies in an area that implicates federal interests. No federal statute regulates greenhouse gases as such³⁹ or expressly prohibits the states from acting in this area. In short, there is no supreme federal law for the RGGI states' actions to encroach upon. Even if RGGI were found to be in conflict with a federal climate policy, such a decision would not necessarily rest on Compact Clause grounds because climate change regulation by individual states would likely be preempted as well.

It might also be suggested that the RGGI states have impermissibly enlarged their political influence over matters of national climate change policy by acting in concert. The Court dismissed a similar concern in *U.S. Steel*. There, the dissent contended that the MTC increased the political influence of the member states by organizing a group of states to oppose federal action in the field.⁴⁰ The Court responded: "We may assume that there is strength in numbers and organization. But enhanced capacity to lobby within the federal legislative process falls far short of threatened 'encroach[ment] upon or interfer[ence] with the just supremacy of the United States.' Federal power in the relevant areas remains plenary"⁴¹ If the MTC — an explicit effort to avert federal legislation⁴² — was not worrisome in this regard, RGGI is even less so. The RGGI states are not attempting to prevent federal action on climate change (in fact, they would welcome it), and it is unclear what kind of political leverage vis-à-vis the federal government the RGGI states could obtain from membership.⁴³

³⁸ *Id.* at 479 n.33.

³⁹ The Supreme Court recently ruled that the EPA has authority under the Clean Air Act to regulate greenhouse gas emissions from motor vehicles. *Massachusetts v. EPA*, No. 05-1120, slip op. at 25-30 (Apr. 2, 2007). The EPA must now determine whether greenhouse gas emissions from vehicles meet the Clean Air Act's endangerment standard. *Id.* at 32.

⁴⁰ See *U.S. Steel*, 434 U.S. at 480 n.33.

⁴¹ *Id.* (alteration in original) (quoting *Virginia v. Tennessee*, 148 U.S. 504, 519 (1893)).

⁴² *Id.* at 487 (White, J., dissenting).

⁴³ RGGI might influence the course of an eventual federal program by serving as a model from which lessons can be drawn. States, of course, have long been serving as "laboratories" of democracy. The states also might obtain increased influence vis-à-vis the regulated industries, but the *U.S. Steel* Court made clear that "the test is whether the Compact enhances state power *quoad* the National Government." *Id.* at 473 (majority opinion).

In addition, RGGI might be thought to limit the policy options of the federal government regarding climate change. The Court in *U.S. Steel* emphasized that the MTC would not foreclose any path of action to the federal government.⁴⁴ Likewise, RGGI would not hinder the federal government's adoption of any domestic climate policy. The MOU indicates the RGGI states' intention to transition to a federal program should one arise.⁴⁵ Even without the states' cooperation, federal law could preempt further state action. At most, RGGI's history of regulation might complicate the emissions baseline used to calculate each regulated entity's required reductions in a federal program because entities regulated by RGGI would want credit for reductions they had already made under that program. RGGI reductions, however, would not be different in kind from other types of early reductions that the federal government would likely recognize.⁴⁶

Further, because of the implications of climate change for global politics, RGGI might be accused of interfering with the federal government's management of foreign affairs. State law is preempted when it clearly conflicts with an "express foreign policy of the National Government."⁴⁷ The United States has opted not to join the Kyoto Protocol,⁴⁸ but the RGGI states have not implemented the Kyoto Protocol on their own. Beyond opposition to the Kyoto Protocol, a foreign policy on climate change is difficult to discern.⁴⁹ Even if U.S. policy were understood as opposition to any binding national emission reductions, it does not necessarily follow that *state* reductions would be in clear conflict with that policy.

Even if RGGI is not in conflict with a current foreign policy, one could argue that RGGI might interfere with a future foreign policy. The federal government has asserted in a different context that domestic reductions of greenhouse gas emissions could weaken the bargaining position of the United States in international climate negotiations.⁵⁰

⁴⁴ *Id.* at 480 n.33.

⁴⁵ See MOU, *supra* note 7, § 6(C).

⁴⁶ The federal government in fact has a system in place for documenting voluntary reductions, run by the Energy Information Administration. See Energy Policy Act of 1992, Pub. L. No. 102-486, § 1605(b), 106 Stat. 2776, 3002-03 (codified at 42 U.S.C. § 13385(b) (2000)).

⁴⁷ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003).

⁴⁸ Press Release, President George W. Bush, President Bush Discusses Global Climate Change (June 11, 2001), <http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html>.

⁴⁹ For a discussion of conflicting indications of U.S. foreign policy on climate change, see Note, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877, 1884-89 (2006).

⁵⁰ The EPA denied a petition to regulate greenhouse gas emissions from motor vehicles partially on this ground. See Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,929 (Sept. 8, 2003). A coalition of automobile dealers has also suggested that California's attempt to limit greenhouse gas emissions from motor vehicles would "undercut the

The idea is that if states make emission reductions, developing nations might prefer to free-ride on those reductions rather than reduce their own emissions.⁵¹ However, the effect of unilateral U.S. reductions is far from clear,⁵² and it is difficult to square this argument with the Bush Administration's professed commitment to pursuing voluntary emission reductions.⁵³ Still, even if action taken by the RGGI states were found to impede federal policy at either the domestic or international level, the Compact Clause would not provide an independent ground for invalidating the regulation, since an individual state program would have the same potential for interference.

Finally, RGGI might be said to pose a threat to federal control over interstate commerce. RGGI does not currently threaten federal control over commerce, but a problem could arise if someday RGGI takes steps to prevent what is known as "leakage." Because neighboring states on the same electric grid are not adopting emissions caps, electricity in those states will not carry the cost of carbon reductions. If the price impact causes load-serving entities in the RGGI states to import more electricity from non-RGGI states, some of the emission reduction benefits of RGGI will be lost. The RGGI states recognize this problem and are studying possible solutions.⁵⁴ Almost any solution adopted, however, would necessarily restrict electricity imports, which could interfere with interstate commerce in violation of the dormant commerce clause.⁵⁵ But if leakage control measures were found to violate the dormant commerce clause, the Compact Clause would not be an independent ground for invalidating the measures. Again, any interference with federal supremacy would arise not from the interstate cooperation but from the effect of the regulation itself.

2. *Other Federal Structure Impacts.* — A court evaluating RGGI under the Compact Clause might consider two factors that are not strictly related to federal supremacy but may be understood as other impacts on the federal structure. The first of these is the effect of the agreement on other states. The *U.S. Steel* Court did not list this as a

Executive's ability to pursue [international] agreements." *Cent. Valley Chrysler-Jeep v. Witherpoon*, 456 F. Supp. 2d 1160, 1183 (E.D. Cal. 2006).

⁵¹ See *Cent. Valley Chrysler-Jeep*, 456 F. Supp. 2d at 1176–77.

⁵² See Note, *supra* note 49, at 1891.

⁵³ For instance, the EPA's Climate Leaders program encourages voluntary commitments to reduce emissions. See U.S. EPA, CLIMATE LEADERS FACT SHEET (2007), available at http://www.epa.gov/climateleaders/docs/partnership_fact_sheet.pdf. The United States has also joined an international statement of intent to take voluntary measures to reduce emissions. See THE GLENEAGLES COMMUNIQUÉ (2005), available at http://www.fco.gov.uk/Files/kfile/PostG8_Gleneagles_Communique.pdf.

⁵⁴ See REGIONAL GREENHOUSE GAS INITIATIVE POST-MODEL RULE ACTION PLAN § 3(E) (2006), available at http://www.rggi.org/docs/model_rule_ap_8_8_06.pdf.

⁵⁵ See Heddy Bolster, Note, *The Commerce Clause Meets Environmental Protection*, 47 B.C. L. REV. 737 (2006) (discussing the dormant commerce clause threat to RGGI).

relevant factor, but it did consider and reject on the merits the appellants' argument that other states were unfairly affected by the MTC.⁵⁶ Justice White's dissent mentioned the possibility of disadvantage to other states as a reason for requiring congressional consent,⁵⁷ and a four-member dissent cited this language in a later case.⁵⁸ Therefore, it is reasonable to think that a court might consider the effect of the initiative on other states.

If a court were to look at the effect of RGGI on other states, it would find little cause for alarm. RGGI, unlike some environmental regulation, does not achieve its ends by imposing costs on other states. In fact, because any effect of reducing greenhouse gas emissions occurs globally, other states free-ride on any environmental benefits RGGI achieves. Potentially a nonmember state might complain if RGGI raised electricity prices in neighboring nonmember states on the same power grid. If such an effect were observed, it likely would not present a problem under the Compact Clause analysis. As the Court noted in *U.S. Steel*, individual state policies often exert economic pressure on other states, but "[u]nless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause of Art. IV, § 2, it is not clear how our federal structure is implicated."⁵⁹

Nor does RGGI exert coercive pressure on other states to join the initiative. It was alleged in *U.S. Steel* that the MTC exerted such force by eliminating the advantages other states could obtain by not taxing interstate businesses,⁶⁰ but the Court dismissed this as unproven.⁶¹ Regardless, it is not a problem that RGGI presents. RGGI, unlike the MTC, creates no competitive advantage for the member states. In fact, by subjecting its fossil fuel power plants to additional regulation, RGGI arguably puts in-state entities at a competitive disadvantage.⁶²

Nor does RGGI limit the policy options of nonmember states. Other states remain free to do nothing, to form regional alliances of their own, or to join RGGI. If a nonmember state decided to implement a cap, it could save development costs and take advantage of a larger carbon market by joining RGGI. Still, each state would be free

⁵⁶ *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 477–78 (1978).

⁵⁷ *Id.* at 485 (White, J., dissenting).

⁵⁸ *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 56 (1994) (O'Connor, J., dissenting).

⁵⁹ *U.S. Steel*, 434 U.S. at 478 (citation omitted).

⁶⁰ *Id.* at 477–78; *see also id.* at 495–96 (White, J., dissenting).

⁶¹ *Id.* at 477 (majority opinion).

⁶² Some proponents of RGGI suggest, however, that RGGI will provide overall economic benefits to the states by incentivizing energy efficiency and technology development. *See, e.g.*, RGGI's Economic Benefits, http://www.nrcm.org/economic_benefits_RGGI.asp (last visited Apr. 7, 2007). Regardless of whether RGGI economically benefits the member states, those benefits would not come at the expense of nonmember states.

to take advantage of these benefits by adopting terms similar to RGGI or to forego them by crafting its own policy.⁶³ The existence of RGGI makes other states no worse off if they do nothing, and it improves their options if they decide to enact climate regulation at a later point.

The second federal structure impact that a court might consider is whether RGGI's Regional Organization involves either a delegation of sovereign authority or the creation of an entity with greater powers than the sum of the member states acting individually. In *U.S. Steel*, the MTC was found not to involve a delegation of sovereign authority, as the individual member states were free to adopt or reject its rules and regulations.⁶⁴ Nor did the Commission's "enforcement powers" give it greater authority over interstate business than the sum of the states acting individually. The Commission had no power to penalize failures to comply with its auditing procedure; like any state-authorized auditing agent, it had to resort to the courts to enforce its requirements.⁶⁵ Compared to the MTC, the RGGI Regional Organization is even less of a threat to the federal structure. It possesses no regulatory or enforcement authority at all;⁶⁶ it will simply assist the states in administering their programs.⁶⁷

3. *No Federal Supremacy or Structure Problem.* — In sum, the RGGI MOU and Model Rule adopted in each state do not present a threat to federal supremacy or federal structure as those tests have been applied by the Supreme Court. To each possible objection, the answer should be the same as it was in *U.S. Steel*: the agreement "does not purport to authorize the member States to exercise any powers they could not exercise in its absence."⁶⁸ If any of those powers are problematic, this will be so not because of the Compact Clause but because of independent constitutional constraints on state action.

⁶³ In fact, other states and regions are taking independent action on climate. In September 2006, California passed legislation to cap the state's greenhouse gas emissions at 1990 levels by 2020. California Global Warming Solutions Act of 2006, 2006 Cal. Legis. Serv. 488 (West) (codified at CAL. HEALTH & SAFETY CODE §§ 38500–38599 (Deering Supp. 2006)). The governors of New York and California have discussed the possibility of linking the California and RGGI carbon markets. Press Release, Governor Arnold Schwarzenegger, California, New York Agree to Explore Linking Greenhouse Gas Emission Credit Trading Markets; Gov. Schwarzenegger Tours Carbon Trading Floor (Oct. 16, 2006), <http://gov.ca.gov/index.php?/press-release/4449>. In February 2007, the governors of Arizona, California, New Mexico, Oregon, and Washington announced the Western Regional Climate Action Initiative, under which the states will set a regional emissions target and adopt a cap-and-trade program to achieve that target. See Press Release, Governor Christine O. Gregoire et al., Five Western Governors Announce Regional Greenhouse Gas Reduction Agreement (Feb. 26, 2007), available at <http://www.pewclimate.org/docUploads/2007%2D02%2D26%20NGA%20greenhouse%20gas%20event%20release%20Epdf>.

⁶⁴ *U.S. Steel*, 434 U.S. at 473.

⁶⁵ *Id.* at 475–76.

⁶⁶ MOU, *supra* note 7, § 4(A)(5).

⁶⁷ The functions of the Regional Organization are discussed in more detail at *infra* pp. 17–18.

⁶⁸ *U.S. Steel*, 434 U.S. at 473.

III. AN ALTERNATIVE APPROACH

A. *Criticisms of the Functional Test*

Though the application of the functional test to RGGI would yield a result favorable to RGGI's supporters, the functional test itself is subject to several criticisms. At least with regard to federal supremacy concerns, if not necessarily to federal structure ones, the test appears to prohibit nothing that would not already be invalid under other constitutional doctrines. Several commentators have also noted that the Court's functionalist interpretation is difficult to reconcile with the text of the Compact Clause,⁶⁹ which neither mentions the purpose of requiring congressional consent nor qualifies that requirement.

In a recent article, Michael S. Greve argues that the Compact Clause is a remnant of James Madison's "congressional negative" — the proposition that all state laws be ineffective until granted congressional approval.⁷⁰ The Constitutional Convention rejected a broad application of Madison's negative but retained it for specific categories of state action, such as compacts.⁷¹ In those particular cases, the Framers made a judgment that it was too dangerous to allow certain classes of state laws, including compacts, to exist until Congress affirmatively acted to preempt them, given that a number of hurdles, such as supermajoritarian requirements, might prevent Congress from acting.⁷² The burden of overcoming those hurdles was instead placed on the proponents of a particular interstate agreement. Greve argues that the Framers chose not only the end, but also a specific means of achieving it.

If the Framers made a conscious choice to invert the constitutional default rule with respect to compacts, it is inconsistent with that directive for the Court to use a functional test that re-inverts it.⁷³ On this understanding, a formalist, categorical test — one that asks whether the arrangement in question is a compact or agreement between states, and if so, requires consent — would be more appropriate.

This does not necessarily mean that all interstate arrangements that can be understood in the modern sense of the phrase "compact or agreement" would be invalid without congressional consent, because there is reason to believe that the Framers understood "compact" and "agreement" to be terms of art, not catch-alls. There was no debate

⁶⁹ See, e.g., Engdahl, *supra* note 1, at 66–67; Greve, *supra* note 15.

⁷⁰ Greve, *supra* note 15, at 310–13.

⁷¹ *Id.* at 312–13.

⁷² *Id.* at 318–19.

⁷³ *Id.* at 289–90.

over the Compact Clause at the Constitutional Convention,⁷⁴ indicating that its terms and purposes were commonly understood at the time.⁷⁵ In fact, in the only (and indirect) reference to the Compact Clause in the Federalist Papers, Madison wrote: “The remaining particulars of this clause, fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark.”⁷⁶ But if the contours of the terms were clear to the Framers, they soon ceased to be so to subsequent interpreters.⁷⁷

Some judges and scholars examining the Compact Clause have suggested that the Framers may have been relying on the meanings attributed to the terms by a contemporary international law theorist, Emmerich de Vattel,⁷⁸ whose writings were known to the Framers.⁷⁹ Vattel’s works have been used primarily to shed light on the distinction between a “treaty, alliance, or confederation,” arrangements on which the Constitution places an absolute prohibition, and a “compact or agreement,” but they may also provide some insight into the compact category itself. As Professor David Engdahl describes, Vattel conceived of agreements or compacts as “arrangements which . . . make one final disposition of the parties’ claims or rights,” and consequently, “a right surrendered to another by ‘compact’ no longer belongs to the one who surrendered it and can never be reclaimed.”⁸⁰ Treaties, in contrast, “oblige a party to perform repeated acts as specified occasions arise.”⁸¹ Both categories involve states permanently altering their legal relationships to each other. Notably, neither of these definitions would cover a nonbinding agreement to adopt similar policy.

The evidence that the Framers understood “compact” and “agreement” to be terms of art, and that their understanding may have been informed by Vattel, leads to the conclusion that some interstate arrangements were likely intended to fall outside the Compact and Treaty Clauses altogether. Beyond what can be gleaned from Vattel,

⁷⁴ See *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 460–62 & n.11 (1978).

⁷⁵ *Id.* at 460–63; see also Engdahl, *supra* note 1, at 75 (calling the lack of detail in the historical record “less a disappointment than a clue”).

⁷⁶ THE FEDERALIST NO. 44, at 280 (James Madison) (Clinton Rossiter ed., 1961).

⁷⁷ See, e.g., 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1397 (Boston, Hillard, Gray, & Co. 1833).

⁷⁸ See, e.g., *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 572 (1840); Engdahl, *supra* note 1, at 75–79; Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?*, 3 U. CHI. L. REV. 453, 458 (1936).

⁷⁹ In 1775, Benjamin Franklin reported that copies of Vattel’s work had been “continually in the hands of the members of our Congress now sitting.” Weinfeld, *supra* note 78, at 458 (quoting 2 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 64 (Francis Wharton ed., 1889)).

⁸⁰ Engdahl, *supra* note 1, at 77.

⁸¹ *Id.* at 76.

the Court may not be able to decipher exactly what the Framers considered to be the limits of the compact category,⁸² but this provides a place to start in crafting a definition of the terms. In fact, the Court has been developing a categorical test, albeit less consistently than its functional test, since its early Compact Clause decisions. Because a formal, categorical test could lend more textual and historical legitimacy to the Court's results than the functional test, the remainder of this Part will trace the development of the categorical test and then apply it to RGGI.

B. *Development of a Categorical Test*

As described above, *Virginia v. Tennessee* is best known for its articulation of the functional test. But it was also the case in which the Court first implied a categorical restriction: arrangements between the states that do not involve the exchange of mutual consideration simply fall short of a compact or agreement under the clause. The definitional issue arose because the Court had to determine which of the various agreements between Virginia and Tennessee regarding their boundary counted as a "compact or agreement." According to Justice Field, neither the creation of a joint commission to mark the line nor the mere "legislative declaration" that the line was correct was a "compact or agreement."⁸³ A legislative declaration of the line could be "invoke[d] against the State as an admission" by those affected by it, "but not as a compact or agreement."⁸⁴ Rather, he wrote:

The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it, for example, as made upon a similar declaration of the border or contracting State. The mutual declarations may then be reasonably treated as made upon mutual considerations.⁸⁵

Virginia's statute, passed first, conditioned its effectiveness on the passage of a similar act by Tennessee, and hence constituted a "compact or agreement." Justice Field emphasized that "ratification was

⁸² One type of agreement that the Court can be fairly certain does fall within the compact category is that of boundary settlements. With several boundary lines unsettled in 1789, the Constitution had to allow a method for setting them. See Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution — A Study in Interstate Adjustments*, 34 YALE L.J. 685, 693 (1925). There is evidence that the Framers intended boundary agreements to be subject to the consent requirement. See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 14 (Adrienne Koch ed., 1966) (referring to the boundary agreements between Virginia and Maryland and between Pennsylvania and New Jersey, both executed without congressional consent, as violations of federal authority). Boundary agreements also provide an apt example of rights that once surrendered cannot be reclaimed.

⁸³ *Virginia v. Tennessee*, 148 U.S. 503, 520 (1893).

⁸⁴ *Id.*

⁸⁵ *Id.*

mutually made by each State in consideration of the ratification of the other.”⁸⁶ Thus, in its first extensive treatment of the Compact Clause, the Court recognized that some forms of interstate cooperation are not encompassed by the terms “compact or agreement.”

Other cases have reached a similar conclusion, but with less clear reasoning. For instance, in *Bode v. Barrett*,⁸⁷ the Court considered an Illinois law that subjected nonresidents to a highway use tax unless the states of their residence exempted Illinois residents from similar taxes.⁸⁸ Illinois’s law is an example of reciprocal legislation, in which one state grants certain privileges to any other state that grants it the same privileges. The Court, upholding the law, stated merely that this “kind of reciprocal arrangement between states has never been thought to violate the Compact Clause of Art. I, § 10 of the Constitution.”⁸⁹

In similar fashion, the Court in *New York v. O’Neill*⁹⁰ addressed a reciprocal Florida statute that provided a process for compelling witnesses to travel to and testify in proceedings in other states that had adopted a similar law.⁹¹ Addressing an argument that it was unconstitutional for one state to pass legislation with the goal of benefiting another state, Justice Frankfurter glowingly described the role of reciprocal state legislation: “The Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships. . . . Far from being divisive, this legislation is a catalyst of cohesion. It is within the unrestricted area of action left to the States by the Constitution.”⁹² He saw these as “extra-constitutional arrangements”⁹³ that were “neither contemplated nor specifically provided for by the Constitution.”⁹⁴

On one hand, Justice Frankfurter’s praise of these state arrangements (and his avowal that they do no harm) is reminiscent of the functional test. On the other, his assertion that these arrangements are not contemplated by the Constitution sounds like a categorical exclu-

⁸⁶ *Id.* at 521. Even if ratification by one state had not been expressly contingent upon ratification by the other, the effectiveness of the boundary line still would be contingent on its ratification by both states. Without mutual agreement, there is no enforceable boundary line until one is decided by a court.

⁸⁷ 344 U.S. 583 (1953).

⁸⁸ *Id.* at 586.

⁸⁹ *Id.*

⁹⁰ 359 U.S. 1 (1959).

⁹¹ *Id.* at 4–5.

⁹² *Id.* at 6.

⁹³ *Id.* at 9.

⁹⁴ *Id.* at 10 (quoting Frankfurter & Landis, *supra* note 82, at 691) (internal quotation marks omitted).

sion. In the end, Justice Frankfurter saw no need to analyze the legislation under the Compact Clause at all.⁹⁵

If *Bode* and *O'Neill* suggested that the Court viewed some interstate arrangements as outside the scope of the Compact Clause altogether, neither opinion shed any light on what criteria might be used to rule an arrangement in or out of the compact category. Though clarification was to come, in a case called *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*,⁹⁶ the Court first threw into doubt the existence of a categorical test. In *U.S. Steel*, the Court approvingly cited *Bode* and *O'Neill*, which it said "support the soundness of the *Virginia v. Tennessee* rule," but it then declined to exclude all reciprocal legislation from the Compact Clause.⁹⁷ Instead, it stated that "the mere form of the interstate agreement cannot be dispositive. Agreements effected through reciprocal legislation may present opportunities for enhancement of state power at the expense of the federal supremacy similar to the threats inherent in a more formalized 'compact.'"⁹⁸ It concluded that "[t]he Clause reaches both 'agreements' and 'compacts,' the formal as well as the informal. The relevant inquiry must be one of impact on our federal structure."⁹⁹

U.S. Steel might have been the end for the categorical analysis were it not for *Northeast Bancorp*, the Court's most recent Compact Clause case.¹⁰⁰ In *Northeast Bancorp*, the Court not only recognized that there could be a relevant inquiry prior to the federal supremacy test, but also gave a detailed list of indicators of a compact within the meaning of the Compact Clause. Analyzing reciprocal statutes in Massachusetts and Connecticut that provide for the acquisition of in-state banks by out-of-state banks,¹⁰¹ the Court stated:

We have some doubt as to whether there is an agreement amounting to a compact. The two statutes are similar in that they both require reciprocity . . . , both legislatures favor the establishment of regional banking in New England, and there is evidence of cooperation among legislators, officials, bankers, and others in the two States in studying the idea and lobbying for the statutes. But several of the classic indicia of a compact are missing. No joint organization or body has been established to regulate regional banking or for any other purpose. Neither statute is conditioned on action by the other State, and each State is free to modify or repeal its

⁹⁵ Justice Frankfurter's only reference in the case to the Compact Clause appears in a citation to his own article on the clause. See *id.* at 10 (citing Frankfurter & Landis, *supra* note 82).

⁹⁶ 472 U.S. 159 (1985).

⁹⁷ *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 469-70 (1978).

⁹⁸ *Id.* at 470 (footnote omitted).

⁹⁹ *Id.* at 470-71 (footnote omitted).

¹⁰⁰ The Court discussed the Compact Clause in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 35 (1994), but that case did not turn on the interpretation of the clause.

¹⁰¹ *Northeast Bancorp*, 472 U.S. at 164.

law unilaterally. Most importantly, neither statute requires a reciprocation of the regional limitation.¹⁰²

Thus, the Court established five indicia of a compact or agreement: reciprocity, actual cooperation, a joint or regional organization, conditional statutes, and restriction on unilateral repeal or modification. The Court avoided deciding whether the statutes in question were compacts, concluding that even if they were, they posed no threat to the federal structure.¹⁰³

Northeast Bancorp and *U.S. Steel* may at first appear irreconcilable on the question of whether the Compact Clause analysis permits categorical exclusions, but in fact the two cases drive at different points. The Court in *U.S. Steel* signaled an unwillingness to rule any state agreements out of the Compact Clause based on form, such as the formality or informality of the agreement. In contrast, the *Northeast Bancorp* Court was concerned with evaluating the substance of the agreements, for example, whether mutual consideration or other indicia were present. The form of an interstate agreement does not necessarily predict whether the *Northeast Bancorp* indicia will be present.

Notably, the Court chose indicia similar to the characteristics Vattel used to define a compact or agreement. In particular, the last two characteristics — conditionality and restriction of unilateral repeal — parallel the Vattelian requirements. The question of whether a joint organization has been formed likewise gets at the distinction between compacts, which allow states to achieve a goal not attainable alone, and other agreed-upon actions that the states are empowered to take individually.

C. Is RGGI a Compact or Agreement Within the Meaning of the Compact Clause?: The Northeast Bancorp Indicia

Analyzing the RGGI MOU or the RGGI Model Rule under *Northeast Bancorp* suggests that RGGI does not possess enough “indicia” to be a compact. The *Northeast Bancorp* Court did not specify how many of the indicators of a compact an interstate arrangement must possess before it falls within the meaning of the term “compact or agreement,” nor did it identify the relative weight of the indicators it listed. The agreement at issue in that case possessed two indicators of a compact (reciprocity and actual collaboration), but those were insufficient to convince the Court that the agreement fell within the terms of the Compact Clause.

¹⁰² *Id.* at 175.

¹⁰³ *Id.* at 175–76.

1. *Reciprocity.* — The first *Northeast Bancorp* indicator, whether the statutes require reciprocity, is inapplicable to RGGI. Under reciprocal legislation, one state agrees to confer a benefit on any state that confers the same benefit on it. In contrast, the focus of RGGI is regulating emissions sources in state, not granting a benefit to other states that the RGGI state would like to receive in return. The closest analogy in RGGI is the tradable allowance scheme, in which each state accepts for compliance purposes allowance credits purchased from entities in other member states. This, however, is not a reciprocity agreement, as no state's acceptance of out-of-state emission allowances is expressly contingent on other states' acceptance of its allowances.¹⁰⁴ Similarly, the fact that RGGI states accept allowances only from other member states is not a reciprocity problem vis-à-vis nonmember states, because emission allowances simply do not exist in states that have not imposed an emissions cap.¹⁰⁵

2. *Actual Cooperation.* — It is unquestionable that the RGGI states engaged in actual cooperation in designing the program, which is a consideration under *Northeast Bancorp*. As described above, RGGI began as an initiative of the governors of the northeast states. Staff representatives from the states met regularly to craft details of the program design.¹⁰⁶ RGGI also involved an intensive stakeholder participation process.¹⁰⁷ But *Northeast Bancorp* indicates that evidence of actual cooperation is not itself sufficient to bring an interstate arrangement under the Compact Clause.

3. *Regional Organization.* — Another indication of a compact under *Northeast Bancorp*, one that overlaps with part of the federal structure test, is the establishment of an organization or body to “regulate [the activity in question] or for any other purpose.”¹⁰⁸ As discussed above, the RGGI MOU does call for the establishment of a Regional Organization,¹⁰⁹ but the Regional Organization envisioned by the MOU differs from the traditional “compact agency.” These agencies are often endowed with powers normally exercised by the states or with powers that an individual state could not exercise alone.¹¹⁰ In

¹⁰⁴ Indeed, a reciprocity requirement is unnecessary because accepting out-of-state allowances is as much a benefit to the regulated sources in state as it is to the sources in another state.

¹⁰⁵ As mentioned in *supra* note 63, five western states may be adopting a regional cap soon.

¹⁰⁶ See About RGGI, <http://www.rggi.org/about.htm> (last visited Apr. 7, 2007).

¹⁰⁷ See Stakeholder Process, <http://www.rggi.org/stakeholder.htm> (last visited Apr. 7, 2007).

¹⁰⁸ *Northeast Bancorp*, 472 U.S. at 175.

¹⁰⁹ The Regional Organization will be incorporated as a nonprofit organization in New York; its executive board will be composed of two representatives from each signatory state. MOU, *supra* note 7, § 4.

¹¹⁰ See, e.g., Port of New York Authority Compact, ch. 77, 42 Stat. 174, 176–78 (1921) (creating the Port of New York Authority, with broad regulatory power); Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688, 691–95 (1961) (creating commission with power to allocate waters in the Delaware River Basin); Atlantic Salmon Compact, Pub. L. No. 98-138, 97 Stat. 866,

contrast, the RGGI states have not delegated any regulatory or enforcement authority to the Regional Organization.¹¹¹

The states envision the Regional Organization as a deliberative forum for the signatory states to use as they implement the program.¹¹² The Regional Organization is also tasked with developing, implementing, and maintaining a system to track emissions data and allowance trading.¹¹³ In addition, the Regional Organization will provide technical help to the states.¹¹⁴ Although having a Regional Organization will be immensely helpful to the RGGI states in implementing the cap-and-trade program, the Regional Organization does not enable the states to accomplish anything that they could not have accomplished — albeit less conveniently — individually. For instance, in developing and operating a system to track emissions and allowances, and in providing technical assistance, the Regional Organization is performing work that might otherwise be done by a third-party contractor.¹¹⁵ And in providing a forum for the states to discuss their approaches to issues that might arise during the implementation of the Model Rule in each state, the Regional Organization is playing a role similar to that of other policy forums attended by representatives of multiple states, which have never been challenged on Compact Clause grounds.

4. *Conditional Statutes.* — The next indication of a compact — that the execution of one state's statute is conditioned on action by another state — is also not present in RGGI, since no state's adoption of the Model Rule depends on any other state's adoption. Although the coordinated effort is called the "Regional" Greenhouse Gas Initiative, the Model Rule is fully operative and self-contained in every state that adopts it. As in other pollution control regimes the states might operate, each state is instituting its own emissions cap, setting the terms of compliance, and enforcing the law itself. If only one state, or half the MOU states, were to adopt the Model Rule, the cap-and-trade program in theory could operate in the same manner as it would if all states adopted it; there would just be fewer opportunities to trade emission allowances.¹¹⁶

866–69 (1983) (creating commission with power to regulate Atlantic salmon fishing in the Connecticut River Basin).

¹¹¹ See MOU, *supra* note 7, § 4(A)(5).

¹¹² *Id.* § 4(A)(1).

¹¹³ *Id.* § 4(A)(2).

¹¹⁴ *Id.* § 4(A)(3)–(4).

¹¹⁵ States are increasingly relying on third-party contractors for assistance in implementing environmental regulations. See, e.g., Miriam Seifter, Comment, *Rent-a-Regulator: Design and Innovation in Privatized Governmental Decisionmaking*, 33 *ECOLOGICAL L.Q.* 1091, 1095–96 (2007).

¹¹⁶ In contrast, achieving the desired benefits of the MTC (whose status as a compact the Court did not question) required the participation of several states; indeed, that compact required the participation of seven states before going into effect. MTC, *supra* note 32, art. X.

5. *Unilateral Repeal or Modification.* — The last indication of a compact under *Northeast Bancorp* is whether each state can modify or repeal its law unilaterally. The RGGI MOU expressly permits states to withdraw without consequence.¹¹⁷ And because operation of the Model Rule within a state does not depend on action by other states, it is not affected by the withdrawal of other states. If RGGI were binding on the states, it would be hard to escape calling RGGI a compact,¹¹⁸ but its voluntary nature strongly suggests that it should fall outside the scope of the Compact Clause.

IV. THE TWO TESTS

A. *Merits of the Categorical Test Standing Alone*

As outlined in section III.B above, the Court's use of the categorical test has been inconsistent. In most cases, the Court has not explicitly applied a categorical test. In *Bode* and *O'Neill*, the Court assumed without analysis that the interstate arrangements at issue were not within the Compact Clause; in other cases, it proceeded on the assumption that the interstate agreement in question was a compact or agreement and analyzed it under the functional supremacy test. To the extent that the Court has employed a type of categorical test, such as in *Virginia v. Tennessee* and *Northeast Bancorp*, it has used the categorical test as a threshold to be passed before the functional test, but not as a substitute for the functional test.

Nevertheless, the Court could conceivably adopt the categorical test as a substitute for the functional test. In many cases, the results of the two tests, each standing alone, would be the same. Interstate arrangements that do not fit within the definition of compact or agreement are unlikely to pose the dangers for which the functional test screens. Conversely, any arrangements that would fail the functional analysis and thus require consent are sure to be clear cases of compacts that would also require consent under a categorical test.

In some cases, however, results under the two tests could differ. The categorical test would be a stricter test in that any interstate arrangement found to be a "compact or agreement" would require consent. The types of arrangements that would be considered compacts under the categorical test involve aims that the states could not pursue on their own, such as enforceable contracts on boundaries or water allocation, or the establishment of extensive regional organizations that exercise power greater than one state's agency could exercise. These

¹¹⁷ MOU, *supra* note 7, § 5(B).

¹¹⁸ See Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54, 74 (2005).

are compacts with the potential to pose risks that individual state action does not pose. Certainly not every interstate arrangement that is a compact or agreement within the meaning of the Compact Clause is a threat to federal supremacy or the federal structure, but the text of the Compact Clause appears to mandate that even those agreements obtain consent.¹¹⁹

Still, the categorical test is not functionally problematic. It avoids — but in a more justifiable manner — some of the harms the Court feared would result from a “literal” interpretation of the Compact Clause. The categorical test would exclude many harmless interstate arrangements, like RGGI, from a requirement of congressional consent. Those few arrangements that meet the criteria for a compact or agreement would need to obtain the approval of Congress, as the clause requires.

Alternatively, though less preferably, the Court could explicitly adopt the categorical test as a threshold to clear before reaching the functional test. In terms of requiring congressional consent, this two-step test would yield the same results as the functional test standing alone. Anything that is found to be a compact and that therefore reaches the functional test will come out the same way as if it were put through the functional test alone, whether or not the result requires consent. Furthermore, it is unlikely that anything excluded from the definition of a compact under the threshold test would have failed the functional test because agreements that do not meet the categorical test are not generally more dangerous than states acting alone. Even if the results achieved under a two-part test are always the same as those under the functional test alone, at least some of those results would be achieved in a manner more consistent with the text and history of the clause if the categorical test were used.

B. Enforceability: An Additional Strength of the Categorical Test

Aside from its justification on historical and textual grounds, a categorical test such as that presented in *Northeast Bancorp* has one additional strength over the functional test: it deems as “compacts or agreements” only those interstate arrangements that could be meaningfully invalidated by the judiciary. If the Court someday were to adopt a broader view of federal supremacy threats and proclaim invalid an agreement that did not meet the criteria of the categorical test, such as RGGI, such a decision would be difficult to enforce. Because the only

¹¹⁹ Michael S. Greve argues that the drafters of the Compact Clause preferred the small number of false positives — harmless interstate agreements subjected to the consent requirement — to the costs of letting dangerous interstate agreements exist until Congress mustered the will to preempt them. See Greve, *supra* note 15, at 316–17.

thing to strike down would be legislation that the states were entitled to enact independently, the states might well be able to skirt a court's decision.

The example of RGGI demonstrates the potential enforcement difficulty. The RGGI MOU is the only "agreement" between the member states,¹²⁰ but the MOU on its own has no power to force action. If no state adopted the Model Rule, the MOU would be meaningless, but once states adopt the Model Rule as state law, it operates independently of the MOU. Consequently, it is not clear what holding the MOU invalid would accomplish. Perhaps a court could instead attempt to prohibit the states from doing what they agreed to do in the MOU — most significantly, implementing the Model Rule. But if the statute or regulation would otherwise be valid, that is, if the only impediment to the state enacting that very statute or regulation again would be a "fruit of the poisonous tree" logic, then there is no ascertainable line between what is permissible and what is not. Suppose a former RGGI state, committed to reducing greenhouse gas emissions and believing a cap-and-trade system to be the best means of achieving that goal, enacted a new cap-and-trade statute. How is a court to know whether it is too close to the Model Rule? Surely an improper interstate agreement does not preclude the involved states from ever regulating in that field.

Once this much is granted, the states could tinker with their versions of the Model Rule in ways that would contradict the MOU,¹²¹ so that they were not fulfilling their MOU commitments, and still arrive at a set of rules that would permit easy trading of allowances between them.¹²² They might still end up with a system that looks very much like RGGI — a little less convenient and efficient, but enough like RGGI to ask what all the trouble was for.

In contrast, when an agreement possesses a number of the *North-east Bancorp* indicia, effectively enforcing a decision that such an agreement is invalid is much easier. For instance, a court could simply strike down the reciprocity provisions of a reciprocal statute that had enough of the other compact indicia. When actions of two or more states depend on each other, a court could enjoin the joint action, or it could refuse to recognize the mutual consideration, as in a border set-

¹²⁰ The acceptance of emission allowances generated in other states is not an agreement between states but rather a decision by one state to accept for compliance purposes allowances that come from other states. The trading of allowances takes place between regulated entities, not between the states.

¹²¹ For instance, a state could adjust its MOU cap up or down, alter the compliance periods, or devote less than twenty-five percent of its allowances to a consumer benefit or strategic energy purpose.

¹²² Because all tons of carbon emission reductions deliver the same climate benefit, trading can still be effective between sources regulated under different caps or on different terms.

tlement case. If a court found a regional organization endowed with too much sovereign authority, it could refuse to enforce the organization's orders.

In short, when two states have agreed to do something that requires action on both their parts, it is much easier to prohibit execution of that action than it is to prohibit a state from enacting legislation that it is otherwise entitled to enact and that does not depend on any other state's action. Once there has been a discussion between states resulting in a decision to take similar action, little can be done to prevent them from doing so. If all the Compact Clause required for an "agreement or compact" was such a decision, the Compact Clause might in many cases be unenforceable, since it is nearly impossible to prevent the initial discussion from occurring. The categorical test in *Northeast Bancorp* has the benefit of excluding from the terms of the Compact Clause agreements that would be difficult to invalidate.

V. CONCLUSION

While it may be "pure fantasy," as Justice White said with regard to the MTC,¹²³ to imagine that the nine RGGI states would have come up with nearly identical rules acting on their own, what RGGI amounts to in the end is similar policy enacted in multiple states. As such, neither the functional test nor the categorical test would result in a finding of a Compact Clause violation for RGGI.

Still, there are reasons to prefer reaching a conclusion about RGGI and other cases through the categorical test. For one, the categorical test is easier to reconcile with the scarce evidence of the Framers' intent than is the functional test. In addition, it respects the text of the clause by requiring congressional consent for any interstate agreement that meets its requirements. In doing so, the categorical test gives the Compact Clause the independent force that it lacks under current doctrine. To those who find historical and textual justifications unconvincing, the categorical test delivers many of the functional test's benefits in allowing many interstate arrangements to survive without obtaining consent, but it also has an advantage in enforceability. If RGGI is challenged on Compact Clause grounds, the Court should take the opportunity to firmly establish the categorical test.

¹²³ U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 491 (1978) (White, J., dissenting).