Murky Precedent Meets Hazy Air: The Compact Clause and the Regional Greenhouse Gas Initiative

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MURKY PRECEDENT MEETS HAZY AIR: THE COMPACT CLAUSE AND THE REGIONAL GREENHOUSE GAS INITIATIVE

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Abstract: As it becomes clear that global warming is a reality, states are increasingly taking measures to regulate the emission of greenhouse gases such as carbon dioxide (CO₂). These efforts come largely in response to the federal government’s failure to regulate CO₂ emissions. Perhaps the most significant and novel example of states’ efforts to combat this problem is the Regional Greenhouse Gas Initiative (RGGI), a multi-state attempt to establish a regional cap-and-trade program targeting CO₂ emissions produced by fossil fuel-fired power plants. RGGI faces significant obstacles in its path to full implementation, including the possibility that it violates the Compact Clause of Article I of the United States Constitution. This Note argues that in its current iteration, RGGI likely does not conflict with the federal government’s Compact Clause power as delineated by the Supreme Court in U.S. Steel Corp. v. Multistate Tax Commission. If RGGI’s administrative body is ultimately vested with greater regulatory and enforcement powers, however, this Note concludes that the outcome under U.S. Steel could be much different.

INTRODUCTION

Global warming is a growing threat, one that humans have an interest in addressing promptly and effectively.¹ A major cause of the alarming rise in global temperatures is the emission of greenhouse gases, namely carbon dioxide (CO₂), which is emitted in frighteningly large quantities by fossil-fuel burning power plants.² In recent years, the second Bush Administration has avoided regulating greenhouse

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gas emissions.\textsuperscript{3} In 2001, the Administration rejected the Kyoto Protocol, which seeks to establish international standards for the reduction of greenhouse gases.\textsuperscript{4} The Environmental Protection Agency (EPA), meanwhile, has declined to list CO\textsubscript{2} as a criteria pollutant under the Clean Air Act (CAA).\textsuperscript{5} This determination contradicted the decisions of two prior EPA general counsels.\textsuperscript{6}

In response to this federal abandonment of the regulation of greenhouse gases, numerous states have taken the initiative in developing their own methods of regulating and reducing greenhouse gas emissions.\textsuperscript{7} One of the most promising of these plans is the Regional Greenhouse Gas Initiative (RGGI), a multi-state cooperative effort to establish a regional cap-and-trade program targeting CO\textsubscript{2} emissions produced by fossil fuel-fired power plants.\textsuperscript{8} RGGI is currently in its early stages, and while seven states have signed a Memorandum of Understanding (MOU) committing themselves to the program, the initiative will not become effective until 2009.\textsuperscript{9} Although this ambitious program is a promising sign that states are taking the threat of global warming seriously, RGGI is not without its potential problems. One of the possible roadblocks facing the initiative is the Compact Clause found in Article I of the U.S. Constitution.\textsuperscript{10}

An interstate compact is a legally binding agreement between states, created when states pass reciprocal statutes.\textsuperscript{11} As compacts have become increasingly common, their relationship to the Compact Clause


\textsuperscript{5} McKinstry, supra note 3, at 73–76.

\textsuperscript{6} Id. at 75.

\textsuperscript{7} Hodas, supra note 2, at 55 (“[A]s states have become frustrated with the failure of the Bush Administration [to deal with the threat of global warming, the] drumbeat from the states has become louder and more insistent.”); see McKinstry, supra note 3, at 26–54 (noting greenhouse gas initiatives in California, Massachusetts, Maine, New Hampshire, New Jersey, New York, Oregon, Wisconsin, and eastern Canada).


\textsuperscript{9} CLF, RGGI, supra note 8.

\textsuperscript{10} See U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . .”).

\textsuperscript{11} Paul T. Hardy, Interstate Compacts: The Ties That Bind 2 (1982).
has become the topic of significant debate.\textsuperscript{12} Although the plain language of the Compact Clause suggests that all interstate agreements and compacts require congressional consent, the Supreme Court has not interpreted it that way.\textsuperscript{13} The Court has provided scarce precedent with respect to the congressional consent requirement, but it has adopted a standard under which only interstate compacts that increase state power at the expense of federal supremacy require congressional consent.\textsuperscript{14} The Court decided the controlling case, \textit{U.S. Steel Corp. v. Multistate Tax Commission}, in 1978, and has rarely returned to this subject in the years since that decision.\textsuperscript{15}

The issue RGGI faces under \textit{U.S. Steel} is whether it increases the power of its member states against that of the federal government.\textsuperscript{16} In dicta, the Court seemed to suggest a three-part inquiry that would result in a compact’s falling outside the scope of the Compact Clause’s congressional consent requirement.\textsuperscript{17} Under this inquiry, an agreement will not require congressional consent if it: (1) does not authorize member states to exercise powers unavailable to them in the compact’s absence; (2) does not delegate sovereign power to the administrative body established by the compact; and (3) reserves in each state the power to withdraw from the compact at any time.\textsuperscript{18} These three characteristics do not seem to constitute a determinative test, however, as the opinion does not suggest that agreements not marked by these traits necessarily require congressional consent.\textsuperscript{19}

In its current iteration, RGGI is likely to satisfy this inquiry and thus avoid the Compact Clause’s congressional consent requirement.\textsuperscript{20} However, if the member states decide to vest regulatory and enforcement powers in RGGI’s administrative body, the outcome would likely be different.\textsuperscript{21} It is unclear how the Court would approach such an agreement in light of the Compact Clause.\textsuperscript{22}

\begin{footnotesize}
\textsuperscript{13} \textit{U.S. Steel}, 434 U.S. at 459, 471.
\textsuperscript{14} See id. at 471.
\textsuperscript{15} See Greve, \textit{ supra} note 12, at 287–88, 308.
\textsuperscript{16} See \textit{U.S. Steel}, 434 U.S. at 471.
\textsuperscript{17} See id. at 473.
\textsuperscript{18} Id.
\textsuperscript{19} See id. at 479.
\textsuperscript{20} See \textit{infra} Part IV.A.
\textsuperscript{21} See \textit{infra} Part IV.B.
\textsuperscript{22} See id.
\end{footnotesize}
Part I of this Note provides an overview of the Compact Clause and a brief history of interstate compacts. Part II details the Court’s holding in *U.S. Steel Corp.* Part III discusses the structure of RGGI and the reasons underlying its creation. Part IV explores RGGI’s likely status under *U.S. Steel*, both in its current form and in the likelihood of the initiative’s administrative agency being granted regulatory and enforcement powers. Part IV concludes that RGGI, in its current form, does not require congressional consent under *U.S. Steel*, but that an empowered administrative agency would likely change that conclusion.

I. **The Compact Clause and the History of Interstate Compacts**

A. **The Compact Clause**

The Compact Clause of Article I of the United States Constitution provides that “[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.”\(^{23}\) This language suggests a virtual ban on agreements or compacts between states.\(^{24}\) However, the true meaning and scope of the Compact Clause has been the subject of debate for quite some time.\(^{25}\) The “broad and unqualified” language of the clause has resulted in much ambiguity concerning its purpose and reach.\(^{26}\)

B. **An Overview of Interstate Compacts**

A compact is “basically an agreement between two or more states, entered into for the purpose of dealing with a problem that transcends state lines.”\(^{27}\) Functioning simultaneously as contracts and statutes, these legally binding agreements come into existence when two or more states enact highly similar, if not identical, statutes that “establish and define the compact and what it is to do.”\(^{28}\) These statutes also serve

\(^{23}\) U.S. Const. art. I, § 10, cl. 3. The Compact Clause is “the only provision of the U.S. Constitution that provides a mechanism for formal cooperation among states.” Hardy, *supra* note 11, at 2.

\(^{24}\) *U.S. Steel*, 434 U.S. at 459 (stating that, if read literally, the Compact Clause would require states to obtain congressional approval before entering into any agreement among themselves); see Greve, *supra* note 12, at 297–98.

\(^{25}\) Note, *Charting No Man’s Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts*, 111 Harv. L. Rev. 1991, 1992 n.11 (1998) (“Courts and commentators differ over how the scope of the clause was intended to be, or should be, limited.”).

\(^{26}\) See Greve, *supra* note 12, at 297.

\(^{27}\) Hardy, *supra* note 11, at 2.

As elements of a contract: the enactment of the compact statute by one state is the offer, and the passage of the same or an equivalent statute by the other states comprises the acceptance. Accordingly, courts interpret compacts as both contracts and statutes, and they therefore must meet the legal requirements of both. They are binding on the signatory states to the same extent as contracts between individuals or corporations are on the parties involved. As such, “[a] transgressing state can be sued in federal court, with specific performance an available remedy.” In addition to being governed by contract law, compacts are also subject to the same legal principles that govern statutory interpretation.

The creation and design of interstate compacts has developed with little or no guidance from the federal or individual state constitutions, none of which contain procedural requirements that govern such agreements. Over time, however, the process for enacting contracts has remained mostly consistent. Generally speaking, the process “begins with some form of negotiation between the states considering creation of and membership in the compact.” Eventually, the negotiating states determine the purpose of the compact and the manner in which that purpose will be met. At the completion of the negotiation stage, the signatory states draft a document that lays out the ways and means by which the expectations established during the negotiations will be carried out. Then, each member state must ratify “the specific

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29 Hardy, supra note 11, at 2; see Hasday, supra note 28, at 2 (“More than mere statutes, compacts are contracts that are binding on the member states and their citizens.”).
31 Hardy, supra note 11, at 3. They are binding even to the extent that “a state may not withdraw from a compact on the ground that its highest court has found the agreement to be contrary to the state constitution.” See Hasday, supra note 28, at 3.
32 Hasday, supra note 28, at 3.
33 Hardy, supra note 11, at 3. Other terms of a compact would provide for “enactment and amendment, and procedures for termination or withdrawal.” Note, supra note 25, at 1993.
35 Hardy, supra note 11, at 6.
36 Id.
37 Id. The negotiation process varies, depending on the compact. See Zimmermann & Wendell, supra note 34, at 16–19.
38 Hardy, supra note 11, at 6.
document containing the provisions of the agreed-to compact.” 39 This ratification process requires passage in the state legislature and the signature of the governor. 40

The final step in the creation of some compacts—one that is only required in certain circumstances—is the obtainment of congressional consent. 41 Historically, Congress has been willing to consent to compacts “almost automatically.” 42 The Supreme Court has held that Congress may consent in advance to compacts, and will “imply consent from congressional action, making formation of a compact even easier.” 43 However, Congress has the power to amend or terminate compacts to which it has granted consent, giving it power markedly asymmetrical to that of the states. 44 Even more noteworthy, perhaps, is the fact that the Court has also imputed to Congress the right to grant conditional consent. 45 Thus, when Congress does invoke its authority under the Compact Clause, it yields immense power over the proposed compact. 46

C. The Historical Development of Interstate Compacts

For many years, interstate compacts were rare; only twenty-one became effective between 1789 and 1900. 47 These early interstate compacts were enacted almost exclusively for the purpose of defining state boundaries. 48 This trend eventually changed, though, as “states began to recognize in the compact clause a tool for the resolution of other, 49

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39 Id. “Although recent data is sketchy, writers frequently cite studies indicating that compacts take between four and nine years to enact and lament that the states and Congress have not been able to proceed more rapidly.” Hasday, supra note 28, at 19. Hasday argues, however, that the time-consuming nature of the compact negotiation process is not necessarily a flaw given compacts’ permanency. Id. at 20.

40 Hardy, supra note 11, at 6.

41 Note, supra note 25, at 1992–93. One commentator posits that the Compact Clause’s congressional consent requirement should be interpreted to apply to a far broader range of interstate agreements. See generally Greve, supra note 12.

42 Hasday, supra note 28, at 14.

43 Zimmermann & Wendell, supra note 34, at 21 (“Clearly, when a compact is brought before it for its consideration, Congress can indicate by a variety of means its legislative intent that consent is not necessary.”); Hasday, supra note 28, at 13 (noting, however, that although Congress can grant consent in advance, it rarely does so).

44 Hasday, supra note 28, at 12.


46 See Hasday, supra note 28, at 12.

47 Richard H. Leach & Redding S. Sugg, Jr., The Administration of Interstate Compacts 5 (1959); see Hasday, supra note 28, at 3–4.

48 Note, supra note 25, at 1992. In fact, “all but one of the thirty-six compacts enacted before 1921” were devoted to boundary disputes. Hasday, supra note 28, at 3–4.
more complex, problems." Rapid industrialization and the states’ increasing interdependency led to a heightened desire for “improvisation, experimentation, and cooperation,” and compacts provided what seemed to be the answer.50

A prime example of this developing recognition of the benefits of interstate compacts was the establishment in 1917 of the Port Authority of New Jersey and New York.51 The Port Authority was created to “administer efficiently a multitudinous array of issues that confronted the Port of New York,” and the federal government accordingly delegated to it the power to regulate one of the most important harbors in the United States.52 After eighty years of feuding between the two states, only an interstate compact proved successful at bringing the two sides into agreement.53 This ceding of the federal government’s power to regulate interstate commerce heralded a new approach to compacts.54

Inspired by the success of the Port Authority, other interstate compacts similarly unrelated to boundary disputes were enacted.55

This trend toward more frequent use of the Compact Clause to deal with increasingly complex interstate issues was accelerated by an influential article authored by Felix Frankfurter and James M. Landis in 1925.56 The authors wrote, “The imaginative adaptation of the compact idea should add considerably to resources available to statesmen in the solution of problems presented by the growing interdependence, social and economic, of groups of States forming distinct regions.”57 Using the issue of electric power as an example, the two authors strongly sug-

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51 See Greve, supra note 12, at 291–92.

52 Briggett, supra note 49, at 757.

53 Id.

54 Id.

55 Leach & Sugg, supra note 47, at 7.

56 See Briggett, supra note 49, at 758 (“The formation of the Port Authority of New York and New Jersey piqued interest in the interstate compact as an effective device for regulation.”); see also Note, supra note 25, at 1992.

57 See Leach & Sugg, supra note 47, at 7. For example, two subsequent—and successful—interstate compacts were the Interstate Sanitation Commission (1935), and the Palisades Interstate Park Commission (1937). Id.

58 See Briggett, supra note 49, at 758 (referring to the significance of the “landmark” Frankfurter and Landis article). See generally Frankfurter & Landis, supra note 34.

59 Frankfurter & Landis, supra note 34, at 729; see Leach & Sugg, supra note 47, at 8–9 (discussing the new light cast on interstate compacts by Frankfurter and Landis, and the subsequent shift in the prevailing wisdom regarding the scope and utility of compacts).
gested that compacts “furnish[] the answer” to such regional problems. 58

This new view of compacts—that they are useful tools applicable in a wide range of different situations—resulted in a sharp spike in the number of compacts in force. 59 From 1920 to 1940, the states adopted approximately twenty compacts. 60 This trend continued into the 1970s, with over 100 compacts created between 1940 and 1975. 61 There are currently approximately 200 interstate compacts in effect, varying greatly with respect to their subject matter. 62

Over time, compacts have evolved to serve three main functions. 63 As previously mentioned, the first of these functions is to resolve boundary disputes, an endeavor to which nearly all early compacts were committed. 64 The second function involves institutionalizing one-shot interstate projects, such as the allocation of water resources or the building of a bridge. 65 Finally, and of primary concern for this Note, “[some] compacts create ongoing administrative agencies with jurisdiction over such varied and important domains as resource management, public transportation, and economic development.” 66 The proposed RGGI discussed at length below is an example of this third category of interstate compacts. 67

The history of interstate compacts shows an evolution from fairly simple tools used to resolve interstate boundary disputes to complex agreements dealing with a wide range of issues. 68 Despite the promulgation of hundreds of these agreements over the last seventy-five

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58 Frankfurter & Landis, supra note 34, at 708.
59 See Hardy, supra note 11, at 5; Frankfurter & Landis, supra note 34, at 729; Hasday, supra note 28, at 4 n.18.
60 Hardy, supra note 11, at 5.
61 Id.
62 Greve, supra note 12, at 288; see also Hasday, supra note 28, at 4 n.18 (noting that the pace of compact creation dramatically quickened in the twentieth century, but began to slow in the 1970s). Hardy provides a list of areas for which compacts have been created, including, among others: fisheries conservation, land and water resources, mining practices, corrections, educational facilities, mental health, taxation, vehicle safety, nuclear energy, pest control, parks and recreation, regional planning and development, mass transit, and flood control. Hardy, supra note 11, at 5.
63 Hasday, supra note 28, at 3; see Leach & Sugg, supra note 47, at 5–6.
64 Hasday, supra note 28, at 3–4.
65 See id. at 4. Other examples of this type of compact are included in the Hasday article. Id. at 4 n.16.
66 Leach & Sugg, supra note 47, at 6; Hasday, supra note 28, at 4.
67 See infra Parts II.B, III.A–B; see also Hasday, supra note 28, at 4 n.17.
68 See Hardy, supra note 11, at 4–5; Greve, supra note 12, at 288; Hasday, supra note 28, at 3–4.
years, a major question mark still looms over this form of interstate problem-solving. Due largely to the fact that there is very little case law concerning interstate compacts, the issue of when congressional consent is required is the subject of much debate.

II. The Compact Clause, Congressional Consent, and the Court: Scant Attention and Scarce Precedent

A. Precursors to U.S. Steel Corp. v. Multistate Tax Commission

Very few Supreme Court cases have dealt directly with the Compact Clause, resulting in much uncertainty regarding the requirement that some interstate compacts be granted congressional consent before going into effect. A brief line of cases, culminating in U.S. Steel Corp. v. Multistate Tax Commission, is virtually all that exists of Court precedent regarding the congressional consent requirement. Some authors assert that this scarce precedent makes the Court’s Commerce Clause jurisprudence ambiguous and perhaps unreliable.

In Virginia v. Tennessee, an 1893 case involving a border dispute between the two states, the Court for the first time distinguished between interstate compacts that require congressional consent and those that do not. In dicta but writing for a unanimous Court, Justice Field declared that the Compact Clause cannot be read to apply to all agreements and compacts. Rather, he wrote:

> Looking at the clause in which the terms “compact” or “agreement” appear, it is evident that the [clause’s] prohibi-
tion is directed to the formation of any combination tending
to the increase of political power in the States, which may en-
croach upon or interfere with the just supremacy of the
United States.\footnote{76}

Thus, according to Justice Field, there are two categories of inter-
state compacts.\footnote{77} The first consists of compacts that increase the member states’ political power vis-à-vis the federal government, and therefore require congressional consent under the Compact Clause.\footnote{78} The second is comprised of those compacts that do not “encroach upon or interfere with the just supremacy of the United States,” and therefore do not require congressional approval.\footnote{79} Justice Field proposed that the proper inquiry is whether “the establishment of the [compact] may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority.”\footnote{80}

The next major case to deal directly with the congressional con-
sent requirement was \textit{New Hampshire v. Maine}, decided in 1976.\footnote{81} While that case’s subject matter is irrelevant to this discussion, the Court—in declaring that the agreement in question did not require congressional consent—utilized the language found in \textit{Virginia v. Tennessee} regarding the two categories of interstate compacts.\footnote{82} Justice Brennan, who authored the opinion for a six-member majority, first quoted directly from the “just supremacy of the United States” language of \textit{Virginia v. Tennessee}.\footnote{83} Then, again quoting from \textit{Virginia v. Tennessee}, he wrote that the outcome of Compact Clause cases depended upon whether the inter-
state agreement “may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority.”\footnote{84} This decision represented

\footnote{76}Id.
\footnote{77}See id.
\footnote{78}See id. at 518–19.
\footnote{79}See id.
\footnote{80}Id. at 520.
\footnote{81}See 426 U.S. 363, 370 (1976) (finding that a consent decree regarding a border dis-
pute between the two states was not an agreement or compact under the Compact Clause and thus did not require congressional consent).
\footnote{82}New Hampshire v. Maine, 426 U.S. at 369–70; see Virginia v. Tennessee, 148 U.S. at 519.
\footnote{83}New Hampshire v. Maine, 426 U.S. at 369 (“The application of the Compact Clause is limited to agreements that are ‘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.’” (quoting Virginia v. Tennessee, 148 U.S. at 519)).
\footnote{84}Id. at 369–70.
the first time that the Court had “occasion expressly to apply [Justice Fields’s language] in a holding [rather than in dicta].” Just two years later, the Court would deliver its most significant Compact Clause opinion to date.86

B. An Analysis of U.S. Steel Corp. v. Multistate Tax Commission

The last, and most important, of this line of Compact Clause congressional consent cases was U.S. Steel Corp. v. Multistate Tax Commission.87 Coming close on the heels of the Court’s opinion in New Hampshire v. Maine, U.S. Steel stands as the most recent and most significant Court ruling regarding the Compact Clause.88 In the twenty-eight years since the opinion was handed down, the Court has rarely revisited this area of law.89

At issue in U.S. Steel was the Multistate Tax Compact (Compact)—an agreement enacted by the legislatures of seven states—and the agency it created, known as the Multistate Tax Commission (Commission).90 In response to the difficulty member states encountered with respect to taxing multistate businesses, the Compact was formed to facilitate proper determination of the state and local tax liability of multistate taxpayers, promote uniformity and compatibility in state tax systems, facilitate taxpayer convenience and compliance in the filing of tax returns, and avoid duplicative taxation.91 The Commission, com-

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86 See generally id.
87 See id. at 454.
88 See Greve, supra note 12, at 308.
89 See id. The Court has subsequently dealt with the Compact Clause, but has not altered its holding in U.S. Steel regarding compacts that do not require congressional consent. Id. In fact, only two subsequent cases have dealt with U.S. Steel in any meaningful way. See, e.g., Cuyler v. Adams, 449 U.S. 433 (1981) (holding that an interstate agreement is federal law under the Compact Clause where Congress has authorized the states to enter into it and the subject matter of the agreement is an appropriate subject for congressional legislation); Northeast Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 472 U.S. 159 (1985) (holding that the agreement in question likely was not an interstate compact for purposes of the Compact Clause, and even if it were, it would not increase state power quo Vad the federal government). Northeast Bancorp is particularly pertinent to this Note because of the majority’s declaration that the agreement likely was not a compact to begin with, and even if it were, not all such agreements required congressional consent. See 472 U.S. at 175–76.
90 434 U.S. at 456. By the time the Court heard the case, twenty-one states had become members. Id. at 454.
91 Id. at 456.
posed of the tax administrators from all member states, was created for the purpose of achieving these four goals.92

The Commission was endowed with “regulatory authority to determine rules for the allocation and apportionment of business income among member states and other multistate tax issues.”93 This regulatory authority was subject to the member states participating in the proceedings in which the rules were determined, and to the states subsequently approving the regulations.94 Furthermore, the Commission had the executive authority to conduct its own tax audits either of its own volition or upon request by a member state.95 The powerful Commission also was granted “authority to adjudicate disputes, through compulsory arbitration, over the allocation of business income in disputes between taxpayers and member-states’ tax authorities.”96

In response to this multistate tax scheme, several business interests sued in state and federal court to challenge the Compact’s constitutionality under the Compact Clause.97 Before attacking the business interests’ substantive arguments, Justice Powell affirmed the Court’s prior holding in New Hampshire v. Maine establishing the test suggested in Virginia v. Tennessee.98 In dicta, he then offered what appears to be an informal three-part guide to determine whether a compact requires congressional consent:

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 cor-

92 Id.; see Greve, supra note 12, at 303.
93 Greve, supra note 12, at 303.
94 Id. The regulations were to have “no force in any member State until adopted by that State in accordance with its own law.” U.S. Steel, 434 U.S. at 457.
95 Greve, supra note 12, at 303.
96 See id.
97 Id. at 304.
98 U.S. Steel, 434 U.S. at 471. Justice Powell wrote:

In [New Hampshire v. Maine,] we specifically applied the [Virginia v. Tennessee] test. . . . We reaffirmed Mr. Justice Field’s view that the application of the Compact Clause is limited to agreements that are 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. This rule states the proper balance between federal and state power with respect to compacts and agreements among States.

Id. (citations and internal quotations omitted).
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. This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover . . . each State is free to withdraw at any time. Despite this apparent compatibility of the Compact with the interpretation of the Clause established by our cases, appellants argue that the Compact’s effect is to threaten federal supremacy.  

Under this apparent test, an interstate agreement does not increase state power at the expense of federal power and thus does not require congressional consent if it: (1) “does not purport to authorize the member States to exercise any powers they could not exercise in its absence”; (2) does not delegate sovereign power to the administrative body created by the compact, allowing each state to retain “complete freedom to adopt or reject the rules and regulations of the Commission”; and (3) reserves in each state the power to withdraw from the Compact at any time. All of these factors contribute to a compact’s “apparent compatibility . . . with the interpretation of the [Compact] Clause established by [precedent].”  

After laying out this putative test in dicta, the Court proceeded to dismantle the specific challenges to the Compact’s legality. The first theory the appellants offered sought to limit the Virginia v. Tennessee rule to agreements that did not involve an independent administrative body. However, the Court rejected this argument. Writing for the majority, Justice Powell stated, “It is true that most multilateral compacts have been submitted for congressional approval. But this historical practice . . . is not controlling.” Justice Powell declared that the pertinent inquiry is one of potential, not actual, impact on

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99 Id. at 472–73.  
100 Id.; Greve, supra note 12, at 306–07.  
101 U.S. Steel, 434 U.S. at 473.  
102 See id.  
103 Id. at 471. The argument was based on the fact that the Court had never upheld a multilateral agreement involving such a body without congressional consent. Id.  
104 Id.  
105 Id.
federal supremacy. He noted that the number of parties to an agreement is irrelevant. Rather, all that matters is whether there is impermissible enhancement of state power vis-à-vis federal power.

After rejecting the business interest appellants’ contention that the rule established in Virginia v. Tennessee should be limited, the Court dispensed with the rest of their argument. The second theory behind the suit was that the Compact encroached upon the power of the federal government, and thus it required congressional approval. In making this argument, appellants offered three main contentions: (1) the Compact encroached upon federal supremacy with respect to interstate commerce; (2) the Compact encroached upon the power of the United States with respect to foreign relations; and (3) the Compact impaired the sovereign rights of nonmember states. All of the appellants’ arguments were dashed by the seven-Justice majority.

The first claim regarded the Compact’s purported interference with interstate commerce. The business interest appellants argued that the Compact affected interstate commerce in four ways. Two alleged effects on interstate commerce involved the risk of multiple taxation: first, a risk was allegedly created by the Commission’s auditing techniques, and second, by its apportionment of nonbusiness income. The third alleged effect on interstate commerce stemmed from the Compact’s requirement that multistate businesses under audit file data concerning affiliated corporations, and the fourth was that the Compact conferred upon the Commission enforcement powers that exceeded the power wielded by each state acting individually. The Court rejected each of these claims, making the particular point of rejecting the claim concerning enforcement power. Justice Powell wrote, “Appellees make no showing that increased effectiveness in the administration of state tax laws, promoted by [this reciprocal legislation], threatens federal supremacy.” In short, the Com-

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106 Id. at 472.
107 Id. at 472.
108 Id.; see Greve, supra note 12, at 304.
109 Id. at 473.
110 Id. at 473–78.
111 See id. at 479.
112 Id. at 473.
113 Id. at 473–76.
114 U.S. Steel, 434 U.S. at 473–75.
115 Id. at 475–76.
116 See id.
117 Id. at 476.
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The Compact did not encroach upon federal power simply by increasing states’ ability to strengthen their own laws by way of cooperating with one another.\textsuperscript{119}

The Court viewed the second argument with an equally critical eye.\textsuperscript{120} Appellants argued that the Commission “conducted multinational audits . . . [which conflicted] with federal policy concerning the taxation of foreign corporations.”\textsuperscript{121} In sternly rejecting this argument, Justice Powell wrote, “To the extent that [the auditing method in question] contravenes any foreign policy of the United States, the facial validity of the Compact is not implicated.”\textsuperscript{122}

The third and final Compact Clause argument offered by the business interests charged that the Compact impaired the sovereign rights of nonmember states.\textsuperscript{123} This contention was based on the belief that if the particular auditing methods employed by the Commission were to spread throughout the region, unfairness in taxation could only be avoided by way of a coordinating body.\textsuperscript{124} That coordinating body, argued appellants, would naturally be the Commission.\textsuperscript{125} Thus, they claimed, the Compact exerted “undue pressure to join upon nonmember States in violation of their ‘sovereign right’ to refuse.”\textsuperscript{126}

The Court unequivocally—and rather aggressively—rebuted and rejected this line of argument.\textsuperscript{127} Justice Powell first pointed out that each member state was free to adopt the auditing procedures it thought best—the same situation that would exist had the Compact never been enacted.\textsuperscript{128} Furthermore, even if the Compact did create economic pressure, it was not an affront to state sovereignty.\textsuperscript{129} Justice Powell wrote, “Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result.”\textsuperscript{130} As long as this pressure does not violate the Commerce Clause or the Privileges and Immunities Clause, he wrote,\textsuperscript{131}

\begin{itemize}
\item \textsuperscript{119} See \textit{id}. at 475–76.
\item \textsuperscript{120} \textit{Id}. at 476–77.
\item \textsuperscript{121} \textit{U.S. Steel}, 434 U.S. at 476.
\item \textsuperscript{122} \textit{Id}. at 477 (noting further that “[t]his contention was not presented to the court below and in any event lacks substance”).
\item \textsuperscript{123} \textit{Id}.; see Greve, supra note 12, at 305.
\item \textsuperscript{124} \textit{U.S. Steel}, 434 U.S. at 477.
\item \textsuperscript{125} \textit{Id}.
\item \textsuperscript{126} \textit{Id}.
\item \textsuperscript{127} See \textit{id}; Greve, supra note 12, at 306.
\item \textsuperscript{128} \textit{U.S. Steel}, 434 U.S. at 477–78.
\item \textsuperscript{129} \textit{Id}. at 478.
\item \textsuperscript{130} \textit{Id}.
\end{itemize}
“it is not clear how our federal structure is implicated.”131 In essence, a compact does not impair the sovereign rights of nonmember states, and thus encroach upon the just supremacy of the United States, merely by virtue of the fact that it places one state at a disadvantage to another.132

As it stands now, U.S. Steel is the controlling case regarding the congressional consent requirement of the Compact Clause.133 Despite this stature, some commentators suggest that its hold on the congressional consent requirement is tenuous.134 In light of the recent judicial shift in favor of state power, and the paucity of cases either supporting or questioning U.S. Steel since that opinion came down, “this body of law is likely to be revisited.”135 Until then, however, the congressional consent requirement is firmly under the sway of U.S. Steel.

III. THE REGIONAL GREENHOUSE GAS INITIATIVE

A. Why the Need for a Regional Initiative?

The Regional Greenhouse Gas Initiative (RGGI) came about as a state response to inaction at the federal level regarding greenhouse gases, particularly CO2.136 Greenhouse gases, of which CO2 is the most prevalent, are so called because they trap the thermal radiation emanating from the surface of the earth, resulting in global temperature increases.137 CO2 concentrations have increased by approximately thirty-one percent since the pre-industrial age, with electricity generators serving as one of the most significant contributors to the increase

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131 Id.
132 See id. Justice Powell also explained:

Appellants do not argue that an individual State’s decision to apportion non-business income—or to define business income broadly, as the regulations of the Commission actually do—touches upon constitutional strictures. This being so, we are not persuaded that the same decision becomes a threat to the sovereignty of other States if a member State makes this decision upon the Commission’s recommendation.

Id.

133 See Greve, supra note 12, at 308; Hasday, supra note 28, at 11.
134 See Greve, supra note 12, at 308; Hasday, supra note 28, at 11.
135 See Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 178–79 (2004) (noting the Supreme Court’s recent shift towards a more restrictive view of the federal government’s commerce power and a more expansive view of state autonomy); Hasday, supra note 28, at 11.
136 See McKinstry, supra note 3, at 26 (“[M]any states, localities and private industry groups have taken action to fill the void left by the federal government.”).
137 Scott, supra note 1, at 58.
in recent times. Despite this alarming trend, the federal government has taken little action.

Shortly after taking office in 2001, the Bush Administration made headlines the world over by declaring that it would not support U.S. ratification of the Kyoto Protocol (Protocol). The Protocol was negotiated and signed by the parties to the United Nations Framework Convention on Climate Change (Framework Convention), which included the United States. Negotiated in 1998, the Protocol “defined the specific greenhouse gas emissions reductions required by the Framework Convention.” Though the Clinton Administration made the United States a signatory to the Protocol in 1998, it has never been ratified by the Senate, and the Bush Administration has made it clear that it does not support the measure.

In 2003, several states “petitioned the EPA to list carbon dioxide . . . as a criteria pollutant under the Clean Air Act.” EPA declined, stating that it lacked authority to regulate greenhouse gases under the CAA. This determination was contrary to that made by two prior EPA general counsels. Indeed, the question of whether EPA has implied authority under the CAA to regulate greenhouse gases is “the subject of vigorous debate.” The CAA requires electricity generators to monitor and report their CO₂ emissions, but does not directly control such greenhouse gas emissions or explicitly authorize such regulation.

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138 See Hodas, supra note 2, at 61 n.44; Nordhaus & Danish, supra note 2 (stating that electricity generators account for about one-third of U.S. greenhouse gas emissions).

139 See generally McKinstry, supra note 3.

140 See generally Global Warming, supra note 4.

141 McKinstry, supra note 3, at 17. The Framework Convention was the international community’s response to concerns about global climate change. Id. It was signed and ratified by the United States in 1992, becoming effective in 1994. Id. The Convention “establish[ed] the overall objective of stabilizing [greenhouse gases] at levels that will prevent” dangerous interference with the climate system and defined what such levels might be. Id.

142 Id.


144 Hodas, supra note 2, at 56.

145 McKinstry, supra note 3, at 75; Nordhaus & Danish, supra note 2, at 108 (“[T]he Clean Air Act . . . does not directly address control of [greenhouse gas] emissions, much less explicitly authorize [greenhouse gas] regulation.”).

146 McKinstry, supra note 3, at 75. Eleven states have challenged this action in federal court. Id.

147 Nordhaus & Danish, supra note 2, at 108.

148 Id.
It seems, then, that “in terms of ambient air quality . . . the federal government has abandoned the field to the states.” There is currently no federal statute directly regulating greenhouse gas emissions. To fill this perceived gap in federal regulation, numerous states have taken the initiative against greenhouse gas emissions. Massachusetts, for example, has implemented mandatory CO₂ emissions regulations. These state initiatives, coupled with regional ones like RGGI, are attempts to make up for the federal government’s failure to ratify the Kyoto protocol or enact other meaningful CO₂ restrictions.

B. The Initiative Itself

RGGI is an interstate agreement created for the purpose of reducing emissions of CO₂ from fossil fuel-fired power plants located within RGGI’s member states. Following on the heels of 2001’s Climate Change Action Plan—a groundbreaking (nonbinding) agreement between the governors of the New England states and the premiers of the provinces of Eastern Canada—RGGI is the first regional program of its kind. It is expected to result in notable decreases in CO₂ emissions from power plants in the region.

Currently, seven states have signed the Memorandum of Understanding (MOU) committing them to implementing RGGI. Those signatory states are Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, and Vermont. Two more states—Massachusetts and Rhode Island—were afforded the option of signing the MOU in the near future, while Maryland, the District of Columbia, Pennsyl-
vania, and the eastern Canadian provinces are considered “observers” in the process.\textsuperscript{159}

The MOU obliges states to “propose for legislative and/or regulatory approval a CO$_2$ Budget Trading Program . . . aimed at stabilizing and then reducing CO$_2$ emissions within the Signatory States.”\textsuperscript{160} Then, the states must “implement[] a regional CO$_2$ emissions budget and allowance trading program that will regulate CO$_2$ emissions from fossil fuel-fired electricity generating units” with a rated capacity not less than twenty-five megawatts.\textsuperscript{161} Stated plainly, RGGI’s purpose is to design a regional cap-and-trade program to reduce CO$_2$ emissions in the signatory states.\textsuperscript{162} The seven states presently committed to the initiative plan to freeze power plant emissions at current levels and then reduce them by ten percent within ten years of the implementation of the initiative.\textsuperscript{163} This ambitious plan is a groundbreaking attempt at using regional cooperation to take serious action against greenhouse gases.\textsuperscript{164}

RGGI’s most significant goal is to “set up a market-driven system to control emissions of carbon dioxide, the main greenhouse gas, from more than 600 electric generators in the [seven] states.”\textsuperscript{165} It is to take effect in 2009, and aims to achieve its goal of a ten-percent reduction in CO$_2$ emissions by 2019.\textsuperscript{166} When the plan goes into force, it will be “the first mandatory cap-and-trade program in the United States to reduce emissions of the gases that cause global warming.”\textsuperscript{167} Currently, the initiative is still in the development stage.\textsuperscript{168}

To provide guidance in achieving its goals, RGGI mandates the creation of a regional organization (RO) to “facilitate the ongoing administration of the Program.”\textsuperscript{169} The RO, with its headquarters in

\textsuperscript{159}See id. at 8; CLF, RGGI, supra note 8.

\textsuperscript{160}RGGI, MOU, supra note 157, at 2.

\textsuperscript{161}Id.


\textsuperscript{164}See CLF, Background, supra note 8.

\textsuperscript{165}DePalma, supra note 163, at A1.

\textsuperscript{166}CLF, RGGI, supra note 8.


\textsuperscript{168}See DePalma, supra note 163. On March 22, 2006, a draft model rule was circulated among the member states. Regional Greenhouse Gas Initiative, Draft Model Rule, http://www.rggi.org/modelrule.htm (last visited Feb. 26, 2007). The comment period closed on May 22, 2006, after at least two stakeholder meetings had been held. Id.

\textsuperscript{169}RGGI, MOU, supra note 157, at 7.
New York City, will act as a forum for the signatory states, develop, implement and maintain an emissions and allowance tracking system, provide technical support to the signatory states for the development of new offset standards, and provide technical assistance to the states in reviewing and assessing applications for offset projects.\textsuperscript{170} The RO will “have no regulatory or enforcement authority with respect the [RGGI],” as the signatory states retain such authority.\textsuperscript{171} An executive board, consisting of two representatives from each signatory state, will be tasked with overseeing the RO’s operations.\textsuperscript{172} To properly complete its tasks, the RO “may employ staff and acquire and dispose of assets in order to perform its functions.”\textsuperscript{173}

Once RGGI is in place, its founders hope that it will serve as a model for the rest of the nation.\textsuperscript{174} Already, the governors of California, Oregon, and Washington have come together to explore the creation of a similar cap-and-trade program for the reduction of greenhouse gas emissions, including perhaps those produced by motor vehicles.\textsuperscript{175} It is expected that if RGGI is successful, other such initiatives will follow.\textsuperscript{176}

As details of RGGI are being finalized, one major consideration is its effect on energy prices and, accordingly, on consumers.\textsuperscript{177} While there is the possibility that the initiative will result in higher energy prices, officials hope those increases “can be offset by subsidies and support for the development of new technology.”\textsuperscript{178} The allowances and technology, it is anticipated, will be developed with funds raised from the sale of emissions allowances to the utility companies being regulated.\textsuperscript{179}

\textsuperscript{170} Id. at 7–8.  
\textsuperscript{171} Id. at 7.  
\textsuperscript{172} Id.  
\textsuperscript{173} Id.  
\textsuperscript{174} See DePalma, supra note 163, at A1.  
\textsuperscript{175} See West Coast Governors’ Global Warming Initiative, http://www.ef.org/west-coastclimate (last visited Feb. 26, 2007). One of the options the governors have agreed to explore is the adoption of “a market-based carbon allowance program.” Id.  
\textsuperscript{176} See DePalma, supra note 163, at A1.  
\textsuperscript{177} Id.  
\textsuperscript{179} DePalma, supra note 163, at A1.
IV. THE INTERSECTION OF RGGI AND THE COMPACT CLAUSE

A. Does RGGI Require Congressional Approval Under U.S. Steel?

Under *U.S. Steel Corp. v. Multistate Tax Commission*, the Compact Clause’s congressional consent requirement applies only to interstate agreements that are “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.”180 According to the Supreme Court, this rule “states the proper balance between federal and state power with respect to compacts and agreements among States.”181 Thus, the proper inquiry in determining whether RGGI requires congressional approval revolves around an analysis of its impact on federal power.182 A look at the federal government’s hands-off approach to CO₂ emissions and a close reading of *U.S. Steel* suggest that congressional consent is not required for RGGI.183

To begin this analysis, it is important to emphasize the federal government’s obvious and intentional avoidance of the issue of regulating greenhouse gases, particularly CO₂.184 In 2001, the Bush Administration declared that it would not support U.S. ratification of the Kyoto Protocol, a measure targeted at the control of greenhouse gas emission.185 The rejection came despite the fact that President Clinton had signed the Protocol in 1998.186 This decision stands as evidence that the federal government is not interested in exercising its power to regulate the greenhouse emissions targeted by RGGI.187

The federal government’s decision not to list CO₂ as a CAA criteria pollutant further suggests a lack of interest in exercising regulatory

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180 434 U.S. 452, 471 (1978) (internal quotations omitted).
181 Id.
182 See id.
183 Aside from a direct application of *U.S. Steel*, there are other potential constitutional roadblocks to RGGI, including the Commerce Clause and federal preemption. See Greve, infra note 12, at 288. This Note, however, will deal solely with an application of RGGI to the facts and holdings of *U.S. Steel*.
184 See McKinstry, infra note 3, at 26 (noting the “federal failure to implement the Framework Convention through ratification of the Kyoto Protocol and meaningful regulatory or fiscal policy”).
187 See McKinstry, infra note 3, at 26.
power over this field.\textsuperscript{188} In declining to list CO\textsubscript{2}, EPA stated that it lacked the authority to do so under the CAA.\textsuperscript{189} While the CAA requires electricity generators to monitor and report their CO\textsubscript{2} emissions, EPA’s decision not to list CO\textsubscript{2} as a criteria pollutant suggests that the CAA does not currently control greenhouse gas emissions or authorize their regulation.\textsuperscript{190} This federal denial of authority to regulate CO\textsubscript{2} emissions suggests that the current federal government is neither interested in, nor, in its view, capable of exercising power in this area.\textsuperscript{191} In short, “the federal government has abandoned the field to the states.”\textsuperscript{192} This abandonment is significant to RGGI’s likely treatment under \textit{U.S. Steel}.\textsuperscript{193}

Under \textit{U.S. Steel}, the test for determining whether an interstate compact requires congressional approval revolves around whether or not it increases the states’ political power vis-à-vis the federal government.\textsuperscript{194} In its current form, RGGI devotes itself exclusively to dealing with the problem of CO\textsubscript{2} emissions generated by fossil fuel-fired electric plants.\textsuperscript{195} As such, it deals with an issue over which the federal government has expressly avoided exercising power.\textsuperscript{196} This suggests that the compact does not “tend[] to the increase of political power in the States” in such a way as to “encroach upon or interfere with the just supremacy of the United States.”\textsuperscript{197}

The likelihood that congressional consent would not be required for RGGI is further supported by the text of the Court’s opinion in \textit{U.S. Steel}.\textsuperscript{198} In dicta, the Court noted that the compact at issue “[did] not purport to authorize the member States to exercise any powers they could not exercise in its absence.”\textsuperscript{199} Next, the Court explained that there was no delegation of sovereign power to the commission created by the compact, as each state retained “complete freedom to adopt or reject the rules and regulations” of the commission.\textsuperscript{200} Lastly, it pointed out that each state had the power to withdraw from the

\begin{footnotesize}
\begin{enumerate}
  \item See Hodas, \textit{supra} note 2, at 56.
  \item McKinstry, \textit{supra} note 3, at 75.
  \item See Hodas, \textit{supra} note 2, at 74. See generally Nordhaus & Danish, \textit{supra} note 2.
  \item See Hodas, \textit{supra} note 2, at 74.
  \item \textit{Id}.
  \item See generally 434 U.S. 452 (1978).
  \item \textit{Id} at 471.
  \item RGGI, MOU, \textit{supra} note 157, at 1.
  \item See Hodas, \textit{supra} note 2, at 74.
  \item See \textit{U.S. Steel}, 434 U.S. at 471.
  \item See generally id.
  \item \textit{Id} at 473.
  \item \textit{Id}.
\end{enumerate}
\end{footnotesize}
compact at any time.\textsuperscript{201} The Court intimated that all of these factors led to the compact’s “apparent compatibility . . . with the interpretation of the [Compact] Clause established by [precedent].”\textsuperscript{202} In light of the Court’s informal three-part inquiry into which interstate agreements by definition do not require congressional consent, it seems even more likely that RGGI will not fall under the auspices of the Compact Clause’s congressional consent requirement.\textsuperscript{203}

First, RGGI does not authorize the member states to exercise any powers they could not exercise in its absence.\textsuperscript{204} Due to the lack of clarity regarding CAA’s authority over electricity plant-generated CO\textsubscript{2} emissions, the states may be free to regulate these emissions as they wish.\textsuperscript{205} \textit{U.S. Steel} suggests that the adoption of uniform standards “in accord with the wishes of the member States” does not amount to a violation of federal supremacy.\textsuperscript{206} Rather, adopting uniform regulations would lead to “increased effectiveness in the administration of” state CO\textsubscript{2} emission regulations that would likely exist in the member states regardless of the existence of RGGI.\textsuperscript{207} Such “[r]eciprocal legislation” would merely serve “as a method to accomplish fruitful and unprohibited ends.”\textsuperscript{208}

One such example is Massachusetts’s independent enactment of its own binding CO\textsubscript{2} emissions regulations.\textsuperscript{209} These regulations mandate that “any person who owns, leases, operates or controls an affected facility shall demonstrate that emissions of carbon dioxide from the

\textsuperscript{201} Id.
\textsuperscript{202} Id. As the Court’s opinion is vague, and subsequent case law and scholarship are thin, it is impossible to determine precisely how significant this three-part inquiry is. It does not appear to be outcome determinative, because it does not suggest that any compact that fails to satisfy the three prongs necessarily requires congressional consent. \textit{See id.} It does, however, imply that if a compact satisfies the three prong test, it is presumed to fall outside the scope of the congressional consent requirement. \textit{See id.} At least one constitutional law textbook makes only a passing reference to \textit{U.S. Steel} and the Compact Clause, indicating the lack of attention received by this area of the Court’s jurisprudence. \textit{See} \textsc{sullivan \\& gunther}, \textit{supra} note 135, at 341–42 (devoting just one paragraph to a discussion of \textit{U.S. Steel} and the Commerce Clause).

\textsuperscript{203} \textit{See supra} text accompanying notes 99–101.
\textsuperscript{204} \textit{See U.S. Steel}, 434 U.S. at 473.
\textsuperscript{205} \textit{See Hodos}, \textit{supra} note 2, at 74. Significantly, the MOU also states that when the federal government proposes a program comparable to that established by RGGI, the signatory states will transition into that federal program. RGGI, MOU, \textit{supra} note 157, at 10.
\textsuperscript{206} \textit{See U.S. Steel}, 434 U.S. at 474.
\textsuperscript{207} \textit{See id.} at 476.
\textsuperscript{208} \textit{See id.} (internal quotations omitted). In \textit{U.S. Steel}, the Court used this language when explaining that the signatory states to the Multistate Tax Commission had done no more than cooperatively exercise power that they could have exercised individually. \textit{Id.} at 473.
affected facility in the previous calendar year . . . did not exceed historical actual emissions.” If Massachusetts becomes a signatory to RGGI, it will result in “increased effectiveness in the administration of” such preexisting regulations rather than an increase in its power vis-à-vis the federal government. In short, RGGI would play the role of helping Massachusetts achieve “fruitful and unprohibited ends” that it would seek to achieve even in the absence of the agreement.

Second, RGGI does not delegate sovereign power to the regional organization (RO). The MOU signed by the seven member states explicitly says that the organization “shall have no regulatory or enforcement authority with respect to the [RGGI], and such authority is reserved to each Signatory State for the implementation of its rule.” Thus, while the RO is an important body in terms of its role in coordinating the efforts of the signatory states, it in no way usurps their sovereign power. Each state clearly “retains complete freedom to adopt or reject the rules and regulations” of the RO and thus RGGI as a whole. This preservation of the signatory states’ individual sovereignty suggests that the initiative does not increase their power in relation to the federal government under U.S. Steel. In short, the states are not collectively exercising any more power than they would be able to exercise individually.

Finally, each signatory state has the power to withdraw from RGGI. According to the MOU, “[a] Signatory State may . . . withdraw its agreement . . . and become a Non-Signatory State.” In U.S. Steel, the Court suggested that such ability to withdraw was a factor in determining whether an interstate agreement requires congressional consent. It is likely that this element of U.S. Steel’s apparent test for which interstate compacts do not require congressional consent is satisfied.

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210 Id.
211 See U.S. Steel, 434 U.S. at 476.
212 See id.
213 RGGI, MOU, supra note 157, at 8.
214 Id.
215 See U.S. Steel, 434 U.S. at 473; RGGI, MOU, supra note 157, at 8.
216 See 434 U.S. at 473.
217 See id.
218 RGGI, MOU, supra note 157, at 9.
219 Id.
220 434 U.S. at 473 (emphasizing that “each State is free to withdraw at any time”).
221 See id.
Thus, it is likely that under *U.S. Steel*, RGGI would not require congressional approval.\(^{223}\) The agreement merely facilitates the effective administration of state regulations that would be legitimate in the absence of this agreement.\(^{224}\) Additionally, the states are not surrendering sovereign power to RGGI, because they reserve the right to adopt or reject the rules or regulations of the initiative.\(^{225}\) Furthermore, each signatory state has the right to withdraw from the compact.\(^{226}\) As such, it does not appear to “tend[] to the increase of political power in the States” in a way that interferes with the just supremacy of the United States.\(^{227}\) Cumulatively, these factors suggest that RGGI will not require congressional approval if analyzed under the Court’s holding in *U.S. Steel*.\(^{228}\)

B. What If the RO Is Given Regulatory and Enforcement Authority?

As the application of *U.S. Steel* to RGGI’s current iteration suggests, the agreement is not one that requires congressional consent.\(^{229}\) Significant issues could arise, however, if steps are taken to make the agreement more binding on the signatory states.\(^{230}\) Specifically, if the RO were given actual authority over the member states, the agreement would be more likely to require congressional approval.\(^{231}\)

Currently, the RO is destined to be a purely advisory body.\(^{232}\) It is tasked with four major duties, the first of which is to “[a]ct as the forum for collective deliberation and action among the Signatory States in implementing the Program.”\(^{233}\) Second, it must “[a]ct on behalf of each of the Signatory States in developing, implementing and maintaining the system to receive and store reported emissions data.”\(^{234}\)

\(^{223}\) See id.

\(^{224}\) See id. at 476.

\(^{225}\) See id. at 473.

\(^{226}\) See id.; RGGI MOU, supra note 157, at 9.

\(^{227}\) See *U.S. Steel*, 434 U.S. at 471.

\(^{228}\) See id. at 473.

\(^{229}\) See supra Part III.A.

\(^{230}\) See Zimmermann & Wendell, supra note 34, at 23 (“[C]onsideration should be given to seeking specific federal consent in the instances of any compact which brings state action into a field of federal-state sensitivity.”); see also *U.S. Steel*, 434 U.S. at 473.

\(^{231}\) See Zimmermann & Wendell, supra note 34, at 23 (listing commerce-related, compact-created interstate agencies as likely requiring congressional consent); Hasday, supra note 28, at 9 (noting that compacts establishing administrative agencies “with jurisdiction over important aspects of economic or social life” have become increasingly common).

\(^{232}\) RGGI, MOU, supra note 157, at 8.

\(^{233}\) Id. at 7.

\(^{234}\) Id.
Third, it must “[p]rovide technical support to the States for the development of new offset standards to be added to state rules.”\textsuperscript{235} Finally, it is mandated to “[p]rovide technical assistance to the States in reviewing and assessing applications for offsets projects.”\textsuperscript{236} The advisory nature of these tasks, coupled with the MOU’s explicit declaration that the RO “shall have no regulatory or enforcement authority,” render the RO toothless.\textsuperscript{237}

Should the signatory states find a need for a more aggressive and binding regulatory scheme, there exists the potential that the RO will be granted at least some form of regulatory and enforcement authority.\textsuperscript{238} The MOU provides that the cap-and-trade program established by RGGI must be implemented in the signatory states under the force of statutory or regulatory law, but there is no guarantee that the states will act fairly and in good faith.\textsuperscript{239} Without an oversight agency vested with binding regulatory authority, it is easy to envision a change in a state’s leadership or economic circumstances leading to a drastically decreased effort in implementing and enforcing RGGI.\textsuperscript{240} Thus, for reasons of stability and utility, it is possible that the signatory states will take this step at some point in the future to make RGGI more effective.\textsuperscript{241}

If RGGI’s member states decide to create a more binding agreement in which the RO would have regulatory and enforcement authority over the member states, RGGI’s potential status under\textsuperscript{242} \textit{U.S. Steel} may be greatly affected. Such a change would entail a power shift from the states to a multistate agency, an element that was not present with

\textsuperscript{235} Id.

\textsuperscript{236} Id.

\textsuperscript{237} See id. at 7–8.

\textsuperscript{238} See Hasday, supra note 28, at 41 (“[C]reating compact agencies with so little authority that they are unescapably [sic] ineffectual is worse than pointless; it is a reckless use of a potentially dangerous institution.”).

\textsuperscript{239} See Nordhaus & Danish, supra note 2, at 103–04 (noting the ineffectiveness of emissions-reduction programs that lack rigorous reporting standards and verification requirements); RGGI, MOU, supra note 157, at 6–7.

\textsuperscript{240} See Hasday, supra note 28, at 10 (“[T]he finality—and enforceability—of [compacts creating interstate agencies] might also seem particularly appealing to states hoping to avoid a ‘race to the bottom,’ in which interstate cooperation would improve the situation of each state only if no state reneges.”). To understand such a possibility better, one need only look to the disparity between the Bush Administration’s approach to the Kyoto Protocol and that of its predecessor. See supra notes 138–41 and accompanying text.

\textsuperscript{241} See Nordhaus & Danish, supra note 2, at 105–04. Leach and Sugg wrote an excellent, albeit somewhat outdated, book explaining the costs and benefits of establishing interstate agencies by way of interstate compacts. See generally \textit{Leach} & \textit{Sugg}, supra note 47.

\textsuperscript{242} See \textit{U.S. Steel Corp. v. Multistate Tax Comm'n}, 454 U.S. 452, 476 (1978); \textit{Zimmermann} & \textit{Wendell}, supra note 34, at 23.
respect to the compact at issue in *U.S. Steel*. This move would thus distinguish RGGI from the compact featured in *U.S. Steel*, increasing the likelihood of the Court requiring RGGI to seek congressional consent.

First, the granting of regulatory and enforcement powers to the RO would seem to “authorize the member States to exercise . . . powers they could not exercise in its absence.” For example, under such a scheme the signatory states could act together in using the RO as a mechanism for applying pressure to another member state. If a signatory state were to provide lax enforcement and administration of RGGI, for instance, the other member states could conceivably compel the RO to take action against the transgressor. This process would clearly be an example of states exercising powers they could not exercise in the absence of a compact, allowing them to use legal leverage that would not otherwise be available to them. It is difficult to envision one state, acting on its own, being able to wield such power over another. As this example makes clear, the RO’s potential possession of such enforcement power would involve far more than a group of states merely adopting reciprocal legislation to “accomplish fruitful and unprohibited ends.” Essentially, any time the signatory states’ representatives to the RO’s executive board initiated regulatory or enforcement action, they would be exercising power that would be unavailable to them in the absence of the compact.

Second, and perhaps more important, vesting regulatory and enforcement authority in the RO would, by definition, involve a “delegation of sovereign power” to that entity. By granting the RO the power to enforce the cap-and-trade program by way of its own binding regula-

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243 See 434 U.S. at 473.
244 See id. Clearly, the structure and subject matter of RGGI are distinguishable from those of the tax-related compact featured in *U.S. Steel* in many ways, but they are comparable in that they satisfy the Court’s three-part inquiry. *See id.* If the RO were given binding authority, however, that comparison would be considerably more difficult to make.
245 See *id*.
246 See RGGI, MOU, supra note 157, at 7. The potential for such arm-twisting is foreshadowed by the MOU’s provision stating that the RO will be run by an executive board comprised of two representatives from each state. *See id.* This structure suggests that states with majority views could pressure those in the minority. *See id.*
247 See *id*.
248 See *U.S. Steel*, 434 U.S. at 473.
249 See *Hardy*, supra note 11, at 21 (noting the loss of state sovereignty inherent in a state’s involvement with interstate compacts).
250 See *U.S. Steel*, 434 U.S. at 476.
251 See *id*.
252 See *id*. at 473.
tions, the states would be acceding to a significant diminution of their sovereignty with respect to the regulation of CO₂ emissions. This diminution of sovereignty would include “reduction in the state’s ability to act independently [in this area], a diversion of state funds and energies to interstate purposes, . . . and a reduction in administrative autonomy and authority.” Thus, the states no longer would “retain[] complete freedom to adopt or reject the rules and regulations,” as did the signatories to the compact at issue in *U.S. Steel*. Rather, they would be required to accept numerous binding rules and regulations to which they would not have acceded in the absence of the compact. This requirement would clearly constitute a loss of sovereignty.

The third part of the ad hoc test laid out in dicta in *U.S. Steel*, involving member states’ ability to withdraw from the compact at any time, is more difficult to assess. Granting regulatory and enforcement powers to the RO would not necessarily diminish the states’ ability to withdraw from the agreement. The MOU makes clear that any state can withdraw from the agreement, but it is conceivable—if not likely—that if RGGI were to take the next step and grant significant power to the RO, it would also take steps to make the signatory states’ involvement in RGGI more binding by way of a conventional contractual compact. In the absence of such steps to restrict member states’ ability to withdraw from the agreement, however, the argument could still be made that the empowered RO would diminish their freedom to withdraw. If a signatory state had been involved with RGGI for such a period of time that regulations promulgated by the RO had become entrenched in that state’s common practice, it would be considerably more difficult for the signatory state to disentangle itself from RGGI.

If, as this analysis suggests, vesting regulatory and enforcement powers in the RO would lead to a considerable change in RGGI’s status under *U.S. Steel*, the question of its impact on federal supremacy remains unclear. The Court’s holding in that case was vague in

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253 See *Hardy*, supra note 11, at 21.
254 Id. at 21.
255 See 434 U.S. at 473.
256 See *Hardy*, supra note 11, at 21.
257 See *U.S. Steel*, 434 U.S. at 473; *Hardy*, supra note 11, at 21.
258 See 434 U.S. at 473.
259 See id.
260 See RGGI, MOU, supra note 157, at 7–8, 9.
261 See *U.S. Steel*, 434 U.S. at 473.
262 See id.
263 See id. at 473.
terms of addressing exactly what sort of agreements would increase state power versus federal power, thus requiring congressional consent; all it provides is, in dicta, the ad hoc test mentioned above. It is not clear whether a compact’s running afoul of those three factors necessarily means that, as a rule, it would increase state power vis-à-vis the federal government. The Court made no mention of whether a compact that is not characterized by those three factors would necessarily require congressional consent. If the RO were granted regulatory and enforcement power, RGGI would no longer be comparable to the compact in U.S. Steel, and it could be in a precarious position if challenged in court.

**Conclusion**

The Supreme Court has interpreted the Compact Clause in Article I of the U.S. Constitution to only require congressional consent for compacts that increase state power at the expense of federal supremacy. Compacts have evolved over time from typically dealing with interstate boundary disputes to involving much more expansive interstate agreements, sometimes including the creation of an administrative body with regulatory and enforcement authority. The relatively recent increase in the number of compacts has not, however, resulted in a corresponding increase in judicial rulings on this subject. Currently, the controlling case is *U.S. Steel Corp. v. Multistate Tax Commission*, which was decided in 1978. This area of the law has rarely been addressed by the Supreme Court since *U.S. Steel*.

RGGI is an interstate agreement among seven—and potentially more—northeastern states to establish a regional cap-and-trade program regulating the emission of CO₂ from fossil fuel-fired power plants. Formed in response to the lack of federal CO₂ emissions regulations under the Bush Administration, RGGI has the potential to implicate the Court’s holding in *U.S. Steel* and the Compact Clause’s congressional consent requirement.

In its current iteration, it is likely that RGGI will not require congressional consent under a direct application of *U.S. Steel*. It does not appear likely that, when the initiative is fully implemented in 2009, it

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264 See id. This vagueness is the root of at least one commentator’s belief that *U.S. Steel*’s precedential value is questionable. See Hasday, supra note 28, at 11.

265 See U.S. Steel, 434 U.S. at 473.

266 See id.; Hasday, supra note 28, at 39 (“[S]tates are frequently unable to determine whether an agreement requires congressional consent . . . .”).

267 See U.S. Steel, 434 U.S. at 473.
will tend to increase state power versus that of the federal government. However, if RGGI vests regulatory and enforcement authority in its administrative body, the outcome could be quite different. Existing Compact Clause precedent allows for no more than venturing a guess as to how such a compact would fare. It does seem likely, however, that the empowering of the regional organization (RO) would cast RGGI outside the scope of the three-part inquiry suggested in *U.S. Steel*, leaving the initiative to drift into the relatively uncharted waters of the Court’s congressional consent requirement jurisprudence.