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STATE SUPREMACY IN THE FEDERAL REALM: THE INTERSTATE COMPACT

Marlissa S. Briggett

I. INTRODUCTION

On March 24, 1989, the largest oil spill in American history occurred.¹ The Exxon Valdez tanker ran aground in Prince William Sound, spewing 10.9 million gallons of oil for miles.² The resulting damage to fishing, marine life, and Alaskan tourism was devastating.³ The spill also devastated the peace of mind of the nation, particularly Alaskan citizens.⁴

The disaster raised the question of whether the spill could have been avoided by stronger preventative regulation.⁵ An alerted public began to scrutinize the regulatory system.⁶ Many found it unsatisfactory.⁷ Among the areas thought to need improvement are oil tanker design, operating requirements, and personnel standards.⁸

⁴ "A leather-faced fishermen from the town of Cordova, Mr. Brown finished his sentence while choking back tears. 'We had a pristine environment,' he said. 'What we've got now, well, it's a loss of innocence.'" Shabecoff, Valdez Townspeople Angered as Oil Slick Continues to Expand Off Alaska, N.Y. Times, Apr. 1, 1989, at 8, col. 1.
⁶ See id.
⁸ See ENVIRONMENTAL POLICY INSTITUTE, FRIENDS OF THE EARTH, OCEANIC SOCIETY,
In the past, the Pacific coastal states had tried to promulgate stricter regulations.\(^9\) Congress, however, has delegated authority to the Coast Guard to promulgate oil transportation regulations.\(^10\) From Alaska’s perspective, there are two reasons why this delegation of authority is unsatisfactory. First, Alaska and other coastal states that shoulder the burden of oil spills have no formal voice in articulating standards to prevent the occurrence of future spills. Second, the Coast Guard seems susceptible to the powerful interests of the oil tanker trade.\(^11\)

Alaska is in no position to change the unsatisfactory system now in place, however. The first proscription to unilateral action by Alaska lies in the supremacy clause, which preempts state action in an area where the federal government has acted.\(^12\) Even barring the

\[^9\] See, e.g., Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978). In Ray v. Atlantic Richfield Co., the Supreme Court held that, if a Washington state tanker law imposes stricter standards for design and construction of tankers than the national standards, that law is invalid under the supremacy clause. See id. at 168.


The Coast Guard routinely approved reductions in the number of sailors required on oil tankers, as well as reducing the level of experience for tanker operations. Pilotage standards for Prince William Sound were lowered to meet nationwide general standards. It appears that Coast Guard decision making is driven by industry initiative, rather than agency fact finding.

\[^12\] U.S. CONST. art. VI, § 1.

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

\[^12\] The Supreme Court generally finds state laws preempted where a federal regulatory scheme exists. See, e.g., Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947) (when a state asserts the right to act upon a matter regulated by the United States Warehouse Act, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than
preemption problem, Alaska's resources, financial and otherwise, are not equal to the task of regulating the oil-shipping trade. 13

An interstate compact is a binding agreement between two or more states 14 that may provide Alaska with a powerful tool to vindicate its interests. The interstate compact has been recognized as a valuable intermediate level of regulation between intrusive federal control and ineffective state control. 15 Regional control potentially offers more efficiency than federal control. 16 Because regions are more familiar than Washington with the particular circumstances of a regional problem, they are more sensitive to the type of regulations required. 17 Furthermore, because the states have a greater interest in the outcome of the regulations, it is in their best interests to regulate as effectively as possible. For instance, Alaska, Washington, and Oregon are very dependent upon Pacific coastal waters for their marine and ecological life, as well as for their fishing and tourism industries. 18 The states' common dependency should ensure adequacy of regulation.

If Alaska bands together with other states, it can create an interstate compact agency with authority to promulgate oil transportation regulations. This interstate compact would become federal law upon congressional approval. 19 Thus, as federal law, the interstate compact accomplishes what the states acting alone cannot accomplish. 20 The new interstate compact agency, therefore, would circumvent the current inadequate Coast Guard regulations. Furthermore, Alaska would be able to pool its resources, including personnel, equipment, financing, and expertise, with the other compacting states, and perhaps the federal government, thus eliminating the

that of the state). But see Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 444-46 (1960) (although federal statutes comprehensively regulate safety of ships and shipping in interstate commerce, local jurisdictions may enact shipping regulations to protect the health and welfare of citizens).

13 See Interstate Compact Report, supra note 11, at 8.
15 Comment, Using the Interstate Compact to Control Acid Deposition, 6 J. Energy L. & Pol'y 413, 446 (1985).
16 A compact can be highly responsive to community needs and values because citizens easily can access the compact representatives appointed by the governor. This responsiveness leads to decisions that are narrowly tailored to the needs of the region and are therefore more effective and efficient than generalized federal policy decisions. See Interstate Compact Report, supra note 11, at 7.
17 See id.
18 See id. at 16.
19 See infra notes 100-18 and accompanying text.
20 See infra notes 145-47 and accompanying text.
problem of Alaska’s lack of resources. Another source of revenue may come from the establishment of fees for crude oil shipped across members’ territory. The interstate compact, then, presents a powerful tool to regulate interstate oil transportation more effectively.

This Comment argues that an interstate compact can circumvent existing federal regulations. Section II addresses the importance of Alaska’s coastal waters to the state’s uniqueness and the inadequacy of present regulations to protect these waters. Section III deals with the basic development of the interstate compact, beginning with the origins of the interstate compact and describing the gradual expansion of the compact clause. Then, section III describes the interstate compact in operation. Section IV studies the constitutionality of an interstate compact that directly conflicts with prior federal law. Finally, section V presents the particular applicability of an interstate compact to Alaska’s situation.

II. THE THREAT OF AN OIL SPILL TO ALASKA’S UNIQUENESS

A. Oil Spill Effects on Alaska

From the Aleutian word meaning “great land,” Alaska reflects its name. Great in beauty, in size, and in natural resources, Alaska is America’s last frontier. The abundant natural resources within Alaska evoke reverence from environmentalists and developers alike. The Exxon Valdez spill brought to the forefront the tension between these two groups.

The oil spill affected many facets of Alaskan life. The fishing industry, which provides nearly 20,000 jobs and annual catches of over two billion dollars in wholesale value, is obviously affected by an oil spill. The danger from contaminated fish led state officials to cancel the years’ herring season, which would have brought in an estimated twelve million dollars in revenue. Furthermore, the spill also threatened the psyche of the fisherman. When Exxon compensated the fishermen for their loss in earnings due to the spill, the
money did not compensate the fishermen for the loss of the actual experience of fishing. 30

In the wake of the oil spill, concern focused also on the tourist industry. 31 Seven hundred thousand people, more than the entire Alaskan population, travel to Alaska annually to experience the unspoiled beauty for which Alaska is famous. 32 Alaska relies on its clean image to boost tourism. 33 With at least 2,500 square miles of ocean affected by the spill and 300 to 800 miles of stained shoreline, 34 Alaska’s image may be tarnished permanently in potential tourists’ minds.

Finally, the spill threatened Alaska’s priceless ecology. 35 Prince William Sound, in particular, is home to sensitive bird species and serves as a fundamental migratory path and playground for whales, seals, and otters. 36 A preliminary beach survey indicated an average of eighty oil-coated ducks and other birds per one hundred meters. 37 Bald eagles scavenging the contaminated birds were at risk. 38 Significant numbers of deer and otters were also harmed. 39

B. The Inadequacy of Present Regulations

The Exxon Valdez spill educated the nation about Alaska’s unique environment. 40 It also focused public attention on the present oil transportation regulatory system. 41 In particular, the public heavily scrutinized the Coast Guard’s role in oil transportation. 42

The Ports and Waterways Safety Act of 1972 gave the Coast Guard the authority to control vessel traffic and set the standards for oil tanker design, construction, maintenance, and operation. 43 Prior to this legislation, the primary mission of the Coast Guard was search and rescue operations. 44 The two responsibilities are not comple-

30 See id.
31 See Johnson, supra note 3, at 58.
32 See Lemonick, supra note 23, at 58.
33 Hamel & Schreiner, Selling Alaska’s Pride, AM. DEMOGRAPHICS, Apr. 1989, at 60.
34 Disturbing Numbers, supra note 23, at 14.
35 Curtis, supra note 5, at 5.
36 Id.
37 Lemonick, supra note 23, at 58.
38 Id.
39 Disturbing Numbers, supra note 3, at 14.
40 See Adler, supra note 25, at 50.
41 Curtis, supra note 5, at 7.
42 See, e.g., 135 CONG. REC. E1347 (daily ed. Apr. 25, 1989).
44 135 CONG. REC. E1349 (daily ed. Apr. 25, 1989) (reprinting Fradkin, The Valdez Connection, AUDUBON MAG. (1977)).
mentary, and the history of the Coast Guard's involvement in the regulatory scheme reveals some doubt as to whether the Coast Guard should be regulating the oil industry. 45

In 1973, before any regulations were proposed, Secretary of the Interior Roger C.B. Morton assured Congress that "[n]ewly constructed American flag vessels carrying oil from Port Valdez to United States ports will be required to have segregated ballast systems, incorporating double bottoms." 46 The Coast Guard formulated this position for the United States delegation to the Intergovernmental Maritime Consultative Organization (IMCO) conference in London in 1973. Yet the United States's position was defeated overwhelmingly at the conference. One participant blamed the Coast Guard's lack of forcefulness at the conference for the defeat. 47 Although the IMCO's position was not binding on the United States, the Coast Guard insisted that it could not impose stricter requirements than those of the conference. 48 The regulations that were proposed reflected the results of the conference, rather than the stronger regulations that the United States originally had presented at the conference. 49

The proposed regulations were greeted with criticism. Environmental organizations pointed out that the American Petroleum Institute organized the study group that developed the proposed regulations. 50 There was discord even within the administration. The Secretary of the Interior and the Environmental Protection Agency both expressed dissatisfaction with the regulations. 51

Complaints persist that the Coast Guard is too close to the regulated industry to regulate effectively. 52 Yet, because of the expertise and strong bonds between industry and the Coast Guard, it is diff-

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45 See id.
46 Id.
47 Id.
48 Id. Senator Magnuson wrote to the Transportation Secretary that he was concerned that:

[T]he rules were developed in a manner that relied too heavily on the input of special interests . . . the Coast Guard has accepted—on a political rather than a technical basis—the provisions of the 1973 IMCO conference as the basis of its regulatory actions. The Coast Guard strained to stay within the letter of a treaty which had not been sent to the Senate for advice and consent, which is not intended to be exclusive, and which does not cover completely the problem of accidental pollution from ships.

Id.
49 Id.
50 Id.
51 Id.
52 Id. at E1347.
cult for other federal agencies, coastal states, and environmental groups to assert themselves in the oil tanker transportation field.53

III. The Development of the Interstate Compact into a Powerful Tool to Deal with Complex Regional Problems

A. Constitutional Roots of the Interstate Compact Device

Authority for interstate compacts emanates from the United States Constitution.54 The grant of power to the states to enter into agreements, known as the compact clause, is a significant one.55 Originally, however, the states perceived the compact clause primarily as a device to determine boundary disputes.56 Gradually, the states began to recognize in the compact clause a tool for the resolution of other, more complex, problems. For example, in 1917, the Port Authority of New York and New Jersey established an interstate commission to administer efficiently a multitudinous array of issues that confronted the Port of New York.57 The federal government, the repository of power over interstate commerce, ceded to the Port Authority the power to regulate a harbor of vital commercial importance to the entire country.58

Observation of the potential power of an interstate compact has led Congress to pay increased attention to interstate compacts.59 In certain areas, however, Congress has yielded its supervisory powers. In Virginia v. Tennessee,60 the Supreme Court distinguished

53 Id. at E1348-49.
54 U.S. CONST. art. I, § 10.
“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . .” Id.
55 See Frankfurter & Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 YALE L.J. 685, 691 n.25 (1925) [hereinafter Frankfurter & Landis]. The authors argue that the full potential of the compact clause has not yet been realized because, phrased as a negative limitation in the Constitution, the significance of the grant of power has been minimized.
56 See id. at 692-93.
57 Note, Congressional Supervision of Interstate Compacts, 75 YALE L.J. 1416 (1966). Originally granted powers to build, operate, and coordinate transportation facilities, the Port Authority, representing New York and New Jersey, has even greater power now. The Authority borrows and issues bonds to raise capital funds, budgets its revenue, enters into contracts without legislative approval, and issues subpoenas. In addition, it operates, rents, builds, and buys office buildings, railroad lines, and warehouse facilities. Id. at 1419. For text of the Port Authority Compact, see N.J. STAT. ANN. §§ 32:1-1 to 32:1-174 (West 1963).
58 See Frankfurter & Landis, supra note 55, at 697.
59 See Hines, Nor any Drop to Drink: Public Regulation of Water Quality, Part II: Interstate Arrangements for Pollution Control, 52 IOWA L. REV. 432, 443-44 (1966).
60 148 U.S. 503 (1893).
between compacts that do not encroach upon federal power and those that might interfere with federal power.\textsuperscript{61} The Court implied that compacts not encroaching upon federal power need not obtain congressional consent.\textsuperscript{62} Congress implicitly recognized the \textit{Virginia v. Tennessee} rule when a debate ensued on the floor over whether the Southern Regional Education Compact needed congressional consent even though it did not encroach upon federal power.\textsuperscript{63} The debate was never concluded, and the compact continued without express congressional ratification, implying that Congress ratified its operation.\textsuperscript{64}

The problem with the \textit{Virginia v. Tennessee} rule is its uncertainty of application. It does not resolve the question of whether an interstate compact should be submitted for congressional consent.\textsuperscript{65} To apply the test, courts look to the degree to which the compact conflicts with federal law or federal interests.\textsuperscript{66} If there is any danger of federal preemption, proponents often consider seeking congressional consent.\textsuperscript{67} If a compact clearly preempts or conflicts with federal law, then congressional consent is imperative.\textsuperscript{68}

\section*{B. The Expansion of the Compact Clause}

The formation of the Port Authority of New York and New Jersey piqued interest in the interstate compact as an effective device for regulation.\textsuperscript{69} In 1925, Felix Frankfurter and James M. Landis provided further encouragement for the formation of interstate compacts in their landmark study of the compact clause.\textsuperscript{70} Frankfurter and Landis argued that the rapid industrialization of the nation occasioned a need for creative alternatives to cope with diverse interstate interests.\textsuperscript{71} Industrialization created regional problems

\begin{thebibliography}{9}
\bibitem{note61} See id. at 519.
\bibitem{note63} F. ZIMMERMANN & M. WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 21 n.8 (1961).
\bibitem{note64} See id.
\bibitem{note65} Engdahl, \textit{Characterization of Interstate Arrangements: When Is a Compact Not a Compact?}, 64 MICH. L. REV. 63, 70–71 (1965).
\bibitem{note67} F. ZIMMERMANN & M. WENDELL, \textit{supra} note 63, at 23.
\bibitem{note68} Id.
\bibitem{note69} See \textit{supra} notes 57–58 and accompanying text.
\bibitem{note70} Frankfurter & Landis, \textit{supra} note 55, at 687–88.
\bibitem{note71} Id. at 688. Conservation of natural resources is an area particularly fertile for interstate
\end{thebibliography}
wholly unsuited to federal control.\textsuperscript{72} At the same time, these regional matters extended beyond state lines and therefore required a mechanism of control greater than that at the disposal of a single state.\textsuperscript{73} The interstate compact agency provided such a mechanism.

Once a compact obtains congressional approval, administrators may possess the power to promulgate implementing rules and regulations.\textsuperscript{74} They may even go so far as to direct federal agencies. \textit{Seattle Master Builders Association v. Pacific Northwest Electric Power & Conservation Planning Council}\textsuperscript{75} involved the Bonneville Power Administration (BPA), an agency of the United States Department of Energy, and the Pacific Northwest Electric Power and Conservation Planning Council, an interstate compact agency.\textsuperscript{76} The Act\textsuperscript{77} creating the Council provided that certain BPA actions must be consistent with the Council's plan.\textsuperscript{78} The Act also directed that the Council can request and review certain actions of the federal agency.\textsuperscript{79} The Court of Appeals for the Ninth Circuit upheld the delegation of that power over a federal agency to an interstate agency.\textsuperscript{80}

Although not involving an interstate compact, the Court of Appeals for the Ninth Circuit in \textit{California v. Environmental Protec


\textsuperscript{72} Frankfurter & Landis, \textit{supra} note 55, at 707–08. “National action is either unavailable or excessive . . . and, in the practical tasks of government, wholly unsuited to Federal action even if constitutional power were obtained.” \textit{Id.}

\textsuperscript{73} \textit{Id.} at 707.

\textsuperscript{74} F. Zimmermann & M. Wendell, \textit{supra} note 63, at 5. Compact agencies also may request and review federal agency action. \textit{See Seattle Master Builders Ass’n v. Pacific Northwest Elec. Power}, 786 F.2d 1359, 1362 (9th Cir. 1986). Some compacts, however, form commissions primarily in a study and recommendatory capacity. These commissions investigate issues, make recommendations to the constituent states, and perhaps publicize their findings to persuade the proper officials to act. In theory, these compacts are the least powerful; in practice, however, they may wield tremendous influence and tend to be broader in scope than the operating ones. \textit{See R. Leach & R. Sugg, The Administration of Interstate Compacts} 18–19 (1959); \textit{see also F. Zimmermann & M. Wendell, \textit{supra} note 63, at 45; Leach, The Interstate Oil Compact: A Study of Success}, 10 \textit{Okla. L. Rev.} 274, 287–88 (1957).

\textsuperscript{75} 786 F.2d 1359, 1362 (9th Cir. 1986).

\textsuperscript{76} \textit{Id.}


\textsuperscript{78} 786 F.2d at 1362.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.} at 1364.
tion Agency recognized that Congress can delegate to a state powers otherwise reserved to the federal government. In this case, California and Washington challenged the Environmental Protection Agency Administrator's determination that exempted federal agencies from compliance with the states' proposed permit plans. The court of appeals examined the Federal Water Pollution Control Act Amendments of 1972 (FWPCAA) to determine whether the FWPCAA had waived exclusive federal jurisdiction to issue permits to federal agencies. Having found the claimed waiver in the FWPCAA, the court of appeals held that the waiver was proper because it was clear, unambiguous, and not unduly broad or irrevocable. The result required the federal agencies to comply with both substantive and procedural requirements of state pollution control permit programs.

C. Judicial Receptiveness to the Interstate Compact

The Supreme Court has encouraged the expanded use and increased powers of the interstate compact. In New York v. New Jersey New York brought suit to enjoin a New Jersey state agency from implementing a project that would have conveyed sewage from the Passaic Valley into part of New York Harbor. Although the Court ruled that the evidence presented was insufficient to grant injunctive relief, the Court suggested cooperative study and mutual concession by the states. By doing so,

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81 511 F.2d 963, 974-75 (9th Cir. 1975), rev'd on other grounds, 426 U.S. 200 (1976).
82 Id.
84 See 511 F.2d at 968.
85 Id. at 964-65.
86 Id. at 974-75.
87 E.g., State v. Sims, 341 U.S. 22, 27 (1951) (discussed infra notes 92-95 and accompanying text); New York v. New Jersey, 256 U.S. 296, 313 (1921) (discussed infra notes 88-90 and accompanying text); see also Frankfurter & Landis, supra note 55, at 696; Hirsch & Abramowitz, Clearing the Air: Some Legal Aspects of Interstate Air Pollution Problems, 18 Duq. L. Rev. 53, 102 (1979). Because cases considering interstate compact issues have been relatively few, however, there is a paucity of significant interstate compact law. Engdahl, Interstate Urban Areas and Interstate "Agreements" and "Compacts," Unclear Possibilities, 58 Geo. L.J. 799, 803 (1970).
88 256 U.S. 296 (1921).
89 Id. at 298.
90 Id. at 313.

We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented ... is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of
the Court advocated the formation of a type of interstate compact agency. 91

The Court has manifested its approval of interstate compacts in other decisions as well. In State v. Sims 92 the issue before the Court was whether the West Virginia legislature had the authority, under its state Constitution, to enter into a compact that delegated power to an interstate agency and appropriated funds for the administrative expenses of the agency. 93 The Court avoided a strict reading of the state Constitution in order to sustain the compact. 94 Because the Court went to such lengths to sustain the compact, the decision indicates that compacts will be sustained whenever possible.95

In United States Steel Corp. v. Multistate Tax Commission 96 the Supreme Court reviewed an interstate tax compact to determine whether the agreement, which lacked congressional consent, was valid under the compact clause. 97 The purpose of the compact was to facilitate the determination of tax liability for multistate taxpayers and to promote uniformity in state tax systems. 98 The Court concluded that congressional consent was unnecessary because the compact did not authorize states to exercise any powers that they could not have exercised in the absence of the compact. 99

Furthermore, the Supreme Court has invested congressionally sanctioned interstate compacts with additional weight by recognizing them as federal law. 100 The "law of the Union doctrine,"101 that is, representatives of the states so vitally interested in it than by proceedings in any court however constituted.

91 See id.
92 341 U.S. 22 (1951).
93 Id. at 30.
94 Although article X, § 4 of the West Virginia Constitution forbids the use of debt except in certain enumerated situations, the Court read the constitution broadly to find that provisions in the Compact regarding debt were sufficient to avoid conflict with article X, § 4. Id. at 32. These provisions included the requirement of the governor's approval of the budget and the pledging of credit only by and with the authority of the state legislature. Id.
97 Id. at 454.
98 Id. at 456.
99 Id. at 473.
101 Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 566 (1852); see also Cuyler, 449 U.S. at 442 (Interstate Agreement on Detainers was a congressionally
interstate compact as federal law, originated in *Pennsylvania v. Wheeling & Belmont Bridge Co.*\(^\text{102}\) In this case, a bridge construction company unsuccessfully argued that state legislative authorization shielded it from a nuisance suit.\(^\text{103}\) The company reasoned that until a specific congressional act prohibited obstructions on the Ohio River, the state had a right to exercise its own discretion.\(^\text{104}\) The Court, however, found that a clause in the congressionally sanctioned Virginia-Kentucky Compact of 1789, providing for free and common use and navigation of the Ohio River, was controlling because the compact became a law of the Union by congressional sanction.\(^\text{105}\)

The Court has not always followed the law of the Union doctrine. In *New York v. Central Railroad*,\(^\text{106}\) New York State made a claim against the railroad based upon the construction of a compact between New York and New Jersey.\(^\text{107}\) When the state courts ruled in favor of the railroad, New York attempted to bring the case before the Supreme Court by securing a writ of error.\(^\text{108}\) A unanimous Court dismissed the writ because the question arose under the agreement and not under any act of Congress.\(^\text{109}\) In contrast to *Wheeling*, the Court determined that congressional assent did not transform the act into federal law.\(^\text{110}\)

Although *Central Railroad* never addressed the law of the Union doctrine espoused by *Wheeling*, one subsequent Supreme Court decision cited *Central Railroad* as a repudiation of the doctrine.\(^\text{111}\) In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*\(^\text{112}\), the Court declined jurisdiction over a compact apportioning water rights of an interstate stream.\(^\text{113}\) The Court relied on *Central Railroad* to find that the compact was not a treaty or statute of the United

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\(^\text{102}\) 54 U.S. (13 How.) 518, 566 (1852).
\(^\text{103}\) See id.
\(^\text{104}\) See id. at 565.
\(^\text{105}\) See id. at 566.
\(^\text{106}\) 79 U.S. (12 Wall.) 455 (1870).
\(^\text{107}\) Id. at 456.
\(^\text{108}\) Id.; see also Engdahl, *supra* note 100, at 993.
\(^\text{110}\) Id.
\(^\text{111}\) *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).
\(^\text{112}\) Id.
\(^\text{113}\) See id. at 109–10.
Significantly, the Court never addressed the conflicting doctrine of *Wheeling* in *Hinderlider*. Ultimately, the Court reaffirmed the law of the Union doctrine. In *Delaware River Joint Toll Bridge Commission v. Colburn*, the Court addressed the discrepancies between *Wheeling* and *Central Railroad*. The Court overturned the decision in *Central Railroad*, concluding that a compact sanctioned by Congress involved a federal law and was therefore reviewable by the Court. By reaffirming the law of the Union doctrine, the Court validated the underlying principle that congressional consent can transform interstate compacts into federal law. Thus, the law of the Union doctrine remains controlling, and interstate compacts are given the force and effect of federal law.

### D. Cooperative Federalism: The Federal Government's Participation in Compacts

Federal cooperation in interstate compacts offers significant advantages over pure interstate compacts without such federal participation. For instance, an interstate-federal compact offers greater financial resources. The federal financing of projects and contribution to the regional compact agency, however, does not necessitate federal control over the agency. Rather, the financial resources are considered a form of state aid that is not necessarily conditional upon advance adherence to federal policies. Therefore, the interstate compact retains its independence in substantive matters while satisfying its need for federal resources.

The federal government offers other non-financial resources as well. Some compacts designate federal agencies as primary research agencies to gather information. Politically, too, federal participation proves advantageous. Federal involvement in the drafting of a compact may enhance the likelihood of obtaining congressional con-

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114 *Id.* at 109.
115 310 U.S. 419 (1940).
116 See *id.* at 427.
117 *Id.*
120 *Id.* at 839.
121 *Id.* at 837.
sent. Also, when interstate agreements can affect federal interests, a federal representative provides the interstate agency with an advocate at the federal level who understands the situation. Furthermore, the federal representative facilitates effective relations with an array of many-tiered federal agencies.

The Delaware River Basin Compact presents an example of a federal-interstate compact. The Compact created a regional agency with territorial jurisdiction over the Delaware River Basin for the development of water resources through its regulatory and administrative powers. Five members compose the commission: four represent the compacting states, and one represents the federal government. A majority is necessary for any agency action. Because the state representatives have a voice equal to the federal representative, there is no danger that the federal government will usurp control of the interstate compact.

In addition, the Constitution implicitly contains proscriptions as to how far Congress may interfere with the formation of an interstate compact. While playing an important role in the development of interstate arrangements, Congress may not establish the essential elements of an interstate compact, as this is uniquely within the states' responsibility.

Furthermore, there is some judicial reluctance to allow congressional involvement in interstate agreements to go too far. In *Tobin v. United States*, the Judiciary Committee initiated an informal

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124 Id.
126 Grad, *supra* note 119, at 825.
127 Id. at 827.
128 Id.
129 See Heron, *supra* note 122, at 22-23.
130 Id. at 24-25. A revealing statement of the federal attitude toward interstate compacts with federal participation is illustrated in a note from the Director of the United States Bureau of the Budget to President Truman: “Several steps can be taken to insure this consideration [of federal interests]. . . . Such steps to protect Federal interests, of course, should not interfere in any way with the orderly process of negotiations by the States . . . .” T. Witmer, *Documents on the Use and Control of the Waters of Interstate and International Streams*, H.R. Doc. No. 319, 90th Cong., 2d Sess. 371-72 (1968). The statement suggests the independence of the states' interests. But see Hassett, *Enforcement Problems in the Air Quality Field: Some Intergovernmental Structural Aspects*, 4 Ecology L.Q. 63, 84 (1974) (the record suggests that federal agencies will want a supervisory role when there is federal participation in an interstate compact).
132 Id.
investigation into the New York Port Authority. The Authority refused to disclose certain documents relating exclusively to its internal administration. The purpose of the subcommittee investigation was to decide whether Congress should alter, amend, or repeal its consent to the interstate compact. The appellant, Executive Director of the Port Authority, argued that Congress did not have the power under the Constitution to transform its consent in such a way. The Court sidestepped the constitutional issue by holding that Congress adequately could protect federal concerns by acting pursuant to its usual plenary powers.

The Court recognized Congress’s power to override provisions of an interstate compact by subsequent legislation enacted within its plenary powers. Perhaps more significant was the Court’s hesitancy to hold that Congress has an implied power to alter, amend, or repeal its consent to an interstate compact. The Court’s hesitancy was based on the fear that such a holding would stir up uncertainty in the compacts that already existed at the time.

Thus, the interstate compact has expanded from a device primarily determining boundary disputes between states into a device for more complex problems. Judicial encouragement of interstate compacts furthers their expansion. Federal cooperation in compacts also increases potential abilities of interstate compacts.

IV. Expansion of the Compact Clause to Circumvent Prior, Inadequate Federal Regulation

A. Significance of an Interstate Compact

The most significant aspect of an interstate compact is that congressional consent transforms the compact into federal law. Upon congressional consent, the interstate compact provides a vehicle for the states to exercise power that is otherwise barred by

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133 See id. at 271.
134 See id.
135 Id. at 272.
136 Id.
137 See id. at 273.
138 Id.
139 Id.
140 Id.
141 See supra notes 54–86 and accompanying text.
142 See supra notes 87–118 and accompanying text.
143 See supra notes 119–24 and accompanying text.
144 See supra notes 100–118 and accompanying text.
federal preemption. In *United States Steel Corporation v. Multistate Tax Commission*, the Court concluded that congressional consent was unnecessary because the compact did not authorize states to exercise powers they could not have exercised in its absence. The corollary is that consent is necessary when the compact does authorize states to exercise powers they could not have exercised otherwise. This conclusion implies that with congressional consent, the states' sphere of power is increased.

Yet, the states have never used an interstate compact explicitly to circumvent existing federal regulations. There does not seem to be any obstacle, however, to using the interstate compact in this manner. When the compact becomes federal law upon congressional consent, the new federal law supersedes prior federal law just as any other new federal law would.

Unfortunately, subsequent congressional legislation similarly can preempt the interstate compact. There is arguably no check on Congress's ability to render the regulations of a regional compact agency void. The threat of subsequent legislation may represent a disincentive to the states involved in an interstate agreement to commit money, time, and resources to a regional agency whose authority is so completely dependent on Congress.

Federal participation in an interstate compact, may provide a safeguard for important state interests, however. With federal participation and representation in the regional agency, Congress might believe that the federal interests are served adequately so as to allow Congress to adopt a more cooperative approach to the compact.

147 Id. at 473.
148 See Riverside Irrigation Dist. v. Andrews, 568 F. Supp. 583, 589–90 (D. Colo. 1983) (congressional approval of interstate compact relating to certain navigable waterways did not limit congressional authority thereafter to enact the Clean Water Act, even though the Act was inconsistent with the compact).
149 One writer presents the theory that Congress is bound by principles of quasi-contract, supported by dicta in early cases. See White, The Emerging Relationship Between Environmental Regulations and Colorado Water Law, 53 U. Colo. L. Rev. 597, 630 (1982). The generally accepted view, however, is that "[i]t would arguably be inconsistent with the intent of the Framers of the Constitution if congressional approval were construed as limiting, rather than preserving, federal powers." Id. at 631.
150 See supra notes 119–40 and accompanying text.
151 See Hassett, supra note 130, at 82.
B. Benefits of an Interstate Compact

Beyond enlarging a state's sphere of power, there are other benefits to an interstate compact with federal approval. Removed from the state interests, both physically and politically, the federal government is apt to de-emphasize regional concerns. An interstate compact combats federal insensitivity toward important state interests.152 Similarly, an interstate compact excludes peripheral interests that can hamper effective regulatory action.153 With an interstate compact, negotiation is limited to the states involved, thus excluding unproductive forces that may exist on a large-scale national level.154 Furthermore, negotiation limited to the states directly involved is more likely to result in efficient regulation that is tailored to specific community needs and values.155

A compact also increases an individual state's representational power within a given context.156 For instance, unlike Alaska's voice of 3 of 535 votes in the United States Congress,157 Alaska could have one voice of only four in a Pacific states compact.158 This proportionately larger voice allows those states that have special concerns about an issue to play a larger role than they would have if the issue were left to national control.

Finally, an interstate compact allows states to pool their resources and those of the federal government.159 These pooled resources may represent financial resources as well as personnel, equipment, and information. The resources may enable the compact agency to perform functions it otherwise could not perform.

C. The Applicability of an Interstate Compact to Oil Tanker Regulation in Alaska and the Pacific Region

Alaska's situation is ripe for creative application of the compact clause. The burden of an oil spill of the Exxon Valdez magnitude

152 Bader, supra note 11, at 6.
153 Id. at 8.
154 Id.
155 Id. at 7.
156 Id. at 6–7.
158 Interstate Compact Report, supra note 11, at 7.
159 See supra notes 21–22, 119–21 and accompanying text.
falls disproportionately on Alaska and other coastal states in a number of areas. For example, oil spills threaten the anadromous fisheries upon which an extensive aboriginal population depends. The fishing industries of Alaska, Washington, and Oregon are dependent upon the harvest in Alaskan coastal waters. Furthermore, the unspoiled coastlines of the Pacific represent a unique ecological setting too valuable to destroy.

Despite the particular sensitivity of Alaska and the other coastal states to an oil spill, however, these states are powerless alone to try to prevent spills through regulation. Because of the doctrine of federal preemption, they must remain passive even if the existing regulations are inadequate. An interstate compact, however, provides a way to overcome the problem of federal preemption.

The State of Alaska is considering a variety of possible applications for a compact agency. For example, a compact agency may regulate industry spill prevention and response capability that could supersede the fractured planning for spills that is now in place. Other options include establishing a regional comprehensive plan that creates regulations for tanker design, crew size and qualifications, and mandatory response and navigation equipment. The compact would allow review of Coast Guard and other federal agency actions to determine whether their conduct is consistent with the plan. The formation of an interstate compact to achieve any of these goals should allow the Pacific states to assume a more active role in regulating oil tanker transportation.

D. Forming a Pacific States Compact

After drafting a compact, Alaska must pass the hurdle of obtaining congressional assent because formation of a compact to regulate oil transportation will affect interstate commerce substantially. Given

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160 Interstate Compact Report, supra note 11, at 16.
161 Id.
162 Id.
163 See supra note 12 and accompanying text.
164 See supra notes 144-49 and accompanying text.
165 See Interstate Compact Report, supra note 11, at 19-21.
166 Id. at 20.
167 Id. at 21.
168 Id.
169 See Intake Water Co. v. Yellowstone River Compact Comm'n, 590 F. Supp. 293, 297 (D. Mont. 1983). The Constitution does not specifically require a certain form of consent, so congressional consent may be given in several ways. For example, Congress may consent to a compact by formal act, by resolution, or by implied consent. Consent may be given in
the particulars of Alaska's situation, there is a strong case for congressional consent. The heightened public attention following the Exxon Valdez spill may compel Congress to consent to an alternative regulatory scheme that is stricter than the existing one. Furthermore, there are indications that Congress may be willing to relinquish federal power to the states in the context of oil transportation regulations. The tension between federal and state interests over oil transportation was illustrated in an amendment to the Oil Pollution Liability and Compensation Act offered by Representative Miller of California. The amendment preserved for the states the right to impose requirements and obligations in addition to the Act. Representative Studds supported the amendment, stressing deference to state interests. He emphasized the long history of protecting states' rights in environmental protection. In response to the argument that allowing states to legislate independently would lead to a serious lack of uniformity, Studds countered that it is not "our task to make life simple for the oil industry. It is our job to ensure that spills do not happen." In the ensuing vote, advance of a compact's formation, at the time of formation, or even after years of inaction. Prochaska, Low-Level Radioactive Waste Disposal Compacts, 5 VA. J. NAT. RESOURCES L. 383, 389–90 (1986).

These particulars include: Alaska's great interest in safe oil transportation, its belief in the inadequacy of present regulations, the suspicious relationship between the Coast Guard and the oil tanker trade, and Alaska's disproportionate burden should another spill occur. See supra notes 23–53 and accompanying text.

Congress has withheld consent for compacts in very few cases. F. ZIMMERMANN & M. WENDELL, supra note 63, at 24. Furthermore, one commentator has noted that compacts that include the following characteristics are routinely ratified by Congress: federal representation; broad standard-setting, monitoring, and enforcement powers for the agency; and one vote for every state. See Hassett, supra note 130, at 71.

Curtis, supra note 5, at 7.


Id. at H8128–29.

Id. at H8129. Congressman Studds stated:

Mr. Chairman, in the consideration of the oil spill liability bill, we have come to a crucial point where we are going to have to make a decision about whether we are going to have tough [sic] laws against oil spills and whether or not we are going to protect the rights of the States to devise systems and to impose penalties and to extend liabilities to those who would spill oils in the waters off of their States.

Id.

Studds noted that federal preemption heavily favors the industry: "Are the potential victims lobbying for preemption? Have you had fishermen calling you every night to ask you to preempt States rights? Is it because the average American wants preemption that the only newspaper in America on record against the amendment is the Wall Street Journal?" Id. at H8130.

Id. at H8133.
the House of Representatives supported the amendment with 279 voting for the amendment and 143 voting against the amendment. 178

Assuming that a Pacific States compact obtains consent, it may have to ward off industry arguments for its invalidation. These arguments likely will emphasize the shift in the political balance as too significant an encroachment by the states within the federal sphere. 179 One commentator argues that an interstate compact substantially altering the balance of power between the states and federal government is a treaty that is absolutely prohibited and that cannot be validated, even by Congress. 180 If such an arrangement actually encroached upon federal authority, the commentator reasons, it might well be invalidated judicially. 181

The courts, however, have demonstrated a reluctance to intervene in interstate compacts. 182 Furthermore, particularly in the context of environmental regulation, the Court has been slow to find preemption where not explicitly intended by Congress. 183 By granting consent, Congress would authorize the compact agency specifically and obviously would not intend preemption by federal regulation. Therefore, unless Congress conditions consent on conforming to certain aspects of existing regulations, the present regulations would not limit the scope of a new regional agency.

E. Support for a Pacific States Compact

The case law repudiates the argument that the states are encroaching too far within the federal sphere when they enter into interstate compacts with congressional consent. Since Virginia v. Tennessee, 184 case law has distinguished between those compacts that encroach within the federal sphere and those that do not encroach within the federal sphere. 185 This distinction creates an implied assumption that interstate compacts may encroach within the federal sphere, so long as Congress grants consent. The operative

179 See, e.g., Engdahl, supra note 65, at 67–69.
180 See id.
181 Id. at 67.
184 448 U.S. 503 (1893).
standard for states in determining whether consent is needed is the degree to which the compact may conflict with federal law or the doctrine of preemption.\textsuperscript{186} The circumvention of existing regulations is a logical extension of this operative standard.

Frankfurter and Landis, who advocate the use of a compact so long as there is no existing congressional legislation, implicitly lend support to the theory of using the interstate compact to circumvent pre-existing, inadequate federal regulations. One of their underlying premises is that federal control is used when state control proves inferior.\textsuperscript{187} Another premise is that practical considerations based on the concrete circumstances should dominate the decision on whether the state action should reign.\textsuperscript{188} If the first premise is false and federal control is insufficient or unfair, then resorting to the test of the concrete circumstances should ensure fair and adequate regulation. In Alaska's case, consideration of the circumstances should lead to the conclusion that regional control would prove superior to national control.\textsuperscript{189}

Furthermore, the requirement of congressional approval provides the check to the states assuming too much power. Another check comes from Congress's ability to act subsequently in the subject matter of the compact and thereby supersede the compact.\textsuperscript{190} Although a compact agency would not want Congress to exercise its right to legislate subsequently, the fact that the right exists lends support to the argument that an interstate compact is constitutionally valid because there is no danger of unfettered state power.

Finally, a Pacific states compact regulating oil transportation would not conflict with federal policy. The purpose of either federal regulations or a regional agency's regulation is the same: to prevent oil spillage and to facilitate cleanup.\textsuperscript{191} Because the ultimate goals of both the federal and state governments are the same, an interstate

\begin{footnotes}
\footnote{See United States Steel Corp., 434 U.S. at 471 ("[t]he relevant inquiry must be one of impact on our federal structure").}
\footnote{Frankfurter & Landis, supra note 55, at 724.}
\footnote{Frequently, it appears that, while a State may deal with a subject that is part of interstate commerce, it has in fact dealt with it unfairly or imposed an unreasonable burden upon commerce beyond the State line. Again, conditions change and the inadequacy of State regulation provokes exercise of the Federal power. Id. at 723–24.}
\footnote{See id. at 724–27.}
\footnote{See supra notes 22–39 and accompanying text.}
\footnote{Dutton, Compacts and Trade Barrier Controversies, 16 IND. L.J. 204, 211 (1940).}
\footnote{For example, the statement of policy of the Ports and Waterways Safety Program declares that navigation and vessel safety and protection of the environment are matters of major national importance. 33 U.S.C. § 1221(a) (1988).}
\end{footnotes}
compact to regulate oil transportation should not disrupt national interests and policies. Rather, it may be the most effective way to realize these interests and policies.

V. CONCLUSION

Great concern over the failure of the regulatory system in preventing the Exxon Valdez spill makes it imperative to formulate a more stringent and effective system to prevent future tragedies. Dissatisfied with the Coast Guard's present regulations, the State of Alaska would like to participate more fully in promulgating regulations regarding oil transportation. Because of the supremacy clause, however, Alaska is barred from action within this sphere. Even without this bar, Alaska's resources probably are not adequate to ensure complete and effective regulation and supervision.

An interstate compact will prevent problems of preemption and lack of resources. Assuming a compact obtains congressional assent, preemption will not be a problem because the congressional assent would make it federal law. Combining the resources of the states and the federal government upon the formation of the compact will prevent the problem of lack of resources.

Once an interstate compact is in place, a commission formed under the compact could promulgate rules and regulations concerning oil transportation. Given the important state interests involved, it is likely that the compact commission would promulgate efficient and effective regulations. With such a system in place, the states most at risk will have the ability to see to it that the Exxon Valdez spill becomes an unrepeated memory.