

HANDSHAKE DEALS: THE FUTURE OF INFORMAL STATE AGREEMENTS AND THE INTERSTATE COMPACTS CLAUSE

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I. INTRODUCTION

Federalism is making a comeback in the United States. The federal government is both unwilling and unable to solve many urgent social problems. State governments, unsurprisingly, are constantly looking for

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alternative solutions to interstate issues when Congress fails to act. Recently, several U.S. states, along with Mexican states and Canadian provinces, decided to act without federal approval to address the most pressing of all social issues—climate change. The Western Climate Initiative (WCI) was formed when the governors of five western states agreed, in a “memorandum of understanding,” to work together informally to address climate change in the face of congressional gridlock.¹ The WCI now consists of twenty-seven North American governments and includes almost one third of the North American economy.² The WCI is “a collaboration of independent jurisdictions working together to identify, evaluate, and implement policies to tackle climate change at a regional level.”³ By 2012, the WCI members will implement, through independent legislation in each member jurisdiction, a fully operational cap and trade program which will heavily regulate all sectors of the economy within the WCI member jurisdictions.⁴

All this newfound federalism must be tempered, however. When federal leadership is lacking it is often noble when states work together to solve social problems. It is not always constitutional, however. The Interstate Compacts Clause (ICC) creates a constitutional check on interactions between states. The ICC states that “[n]o State shall, without the consent of Congress, . . . enter into any agreement or compact with another State, or with a foreign power . . . unless actually invaded, or in such imminent danger as will not admit of delay.”⁵ Thus, coordinating state action like the WCI is not always constitutional.

Traditional ICC jurisprudence essentially asks three questions to determine whether state action is constitutional. First, is the coordinating action between the states a “compact”? Courts currently apply two tests—the classic indicia test and the contract test—to determine whether a compact exists. Second, if a compact exists, does the compact raise federal concerns and, thus, require congressional consent? Third, if the compact raises federal concerns, has Congress consented to the compact?

Informal state coordination like the WCI, however, requires a new test. The WCI was purposefully crafted to avoid the appearance that the

1. Christine O. Gregoire et al., *Western Regional Climate Action Initiative 1* (Feb. 26, 2007), <http://www.westernclimateinitiative.org/component/remository/func-startdown/11/>.

2. Ben Arnoldy, *Western States Propose Cap-And-Trade System for Greenhouse Gases*, CHRISTIAN SCI. MONITOR, July 24, 2008, at 1.

3. Western Climate Initiative, <http://www.westernclimateinitiative.org/index.php>.

4. *Design for the WCI Regional Program* (2010), <http://www.westernclimateinitiative.org/component/remository/general/program-design/Design-for-the-WCI-Regional-Program/> [hereinafter *Design Update*] (last visited Jan. 16, 2011).

5. U.S. CONST. art. 1, § 10, cl. 3.

members are working together. The traditional ICC analysis is not equipped to evaluate this type of covert state coordination. Thus, I propose applying the test from antitrust law used to find whether a “contract, combination, or conspiracy” exists between business entities, to determine whether coordinate state action creates a compact. This “conscious parallelism” test is useful for agreements like the WCI where individual states follow independent but parallel paths to regulation and take some additional steps toward an overt agreement. This new test will supplement the classic indicia and contract tests when a potentially covert agreement is present.

This Article evaluates the constitutional viability of the WCI as a valid interstate compact using the ICC framework and the newly incorporated conscious parallelism test. Other potential constitutional challenges to the WCI are not addressed.⁶ The WCI is evaluated because of its massive potential regulatory impact on businesses in major sectors of the North American economy including California. The WCI was selected instead of other regional climate change agreements because the presence of Canadian and Mexican entities makes the WCI more susceptible to constitutional challenge and because the WCI has developed sufficiently to allow details of the agreement to be carefully scrutinized.⁷

Climate change has not been a high priority in the Obama administration and no federal action is imminent.⁸ Thus, the constitutionality of the WCI is a live question. Even if federal action was forthcoming the WCI should still be analyzed for several reasons. First, the analysis will be useful as a guide in other interstate compact scenarios besides climate change. Second, even if climate change legislation is passed during the Obama administration, it would still take one or two congressional cycles (*i.e.*, several years) for climate change

6. For an overview of preemption and the commerce clause challenges to regional climate change agreements, see ENVIR., ENERGY & RESOURCES BOOK PUB. COMM., AM. BAR. ASS'N, GLOBAL CLIMATE CHANGE AND U.S. LAW 335-36 (Michael B. Gerrard, ed. 2007) [hereinafter GLOBAL CLIMATE CHANGE AND U.S. LAW].

7. Three main regional initiatives currently exist in the United States: The Regional Greenhouse Gas Initiative (RGGI), the Midwest Greenhouse Gas Reduction Accord, and the WCI. RGGI is the oldest mandatory regional agreement on climate change in the United States. RGGI is an agreement between ten northeastern states to create a mandatory cap-and-trade program to reduce carbon dioxide emissions. It is similar to the WCI but much smaller in scale. *Overview of RGGI CO₂ Budget Trading Program*, http://rggi.org/docs/program_sum. The Midwest Greenhouse Gas Reduction Accord is a fledgling regional agreement involving Midwestern states and Canadian provinces with similar goals to the WCI and RGGI which has been endorsed by 6 states or provinces. *Midwestern Greenhouse Gas Accord* (Nov. 15, 2007), <http://www.midwesterngovernors.org/energysummit.htm> (follow “Midwestern Greenhouse Gas Reduction Accord” hyperlink).

8. *Learning from State Action on Climate Change* (May 2008), http://www.pewclimate.org/policy_center/policy_reports_and_analysis/state (follow “Update May 2008” hyperlink).

legislation to be passed and implemented. Third, even if federal action were imminent, the constitutionality of the WCI is still important because with regional agreements as viable alternatives, the WCI members' bargaining position with the federal government on climate change legislation will strengthen. Fourth, most environmental laws grew out of state "policy laboratory" experiments like the WCI, and a finding that the WCI is constitutional will allow important environmental policy developments to continue.⁹

The rest of the Article is organized in the following manner. Part II discusses the background of the interstate compacts clause, interstate compacts, and the WCI. Part III develops the three steps of an interstate compact analysis, incorporates the conscious parallelism test, and applies the analysis to the WCI. Part IV briefly concludes.

II. BACKGROUND

A. *What is the Interstate Compacts Clause?*

The ICC is an elegant compliment to the U.S. federal system. The United States has a federal government with one national government and multiple semi-autonomous state governments. Federalism creates efficiencies not possible in a unitary or decentralized system. First, federalism allows state governments to create geographically diverse programs in order to better serve the "needs of a heterogeneous society."¹⁰ Second, federalism also allows states to "serve as a laboratory; and try new social and economic experiments without risk to the rest of the country."¹¹ Third, federalism is a check on tyranny because it "secures to citizens the liberties that derive from the diffusion of sovereign power."¹² Fourth, federalism creates political community by "facilitat[ing] a kind or degree of political participation by citizens that does not occur at the national level."¹³

However, a federal system also has deficiencies. Many times the national government fails to address national problems, such as climate change, for lack of political will, interest, or constitutional authority.¹⁴

9. *Climate Change 101: Understanding and Responding to Global Climate Change* (Jan. 2011), http://www.pewclimate.org/global-warming-basics/climate_change_101 (follow "Download a pdf of the complete series hyperlink).

10. Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 2 SUP. CT. REV. 71, 78 (1998).

11. *Id.* at 78-79.

12. *Id.* at 79.

13. *Id.* at 81.

14. Congress's lack of attention to the future effects of deficit spending is a prime example of this phenomenon.

States in a federal system may not be able to effectively solve national problems alone, either.¹⁵ The actions of a single state will not solve a national problem like climate change for at least two reasons. First, states have jurisdictional limits on their regulatory power. Simply put, states cannot regulate greenhouse gas (GHG) emitters outside of their jurisdictions. Second, states have little incentive to enact costly legislation to remedy national problems because of the presence of free riders. When a state passes climate change legislation, other states have more incentive not to act and to simply enjoy the fruits of the enacting state's labor. Thus, in a federal system, individual states are confined within their borders when the federal government fails to act. The framers did not completely disarm the states from addressing national issues, however. Rather, they reserved for the states a limited right to work together by forming interstate compacts when the national government fails to act.

The ICC prohibits states from entering interstate compacts without congressional consent "unless actually invaded, or in such imminent danger as will not admit of delay."¹⁶ The ICC, along with the state treaty prohibition¹⁷ and judicial opinion, defines the type of coordinating actions states can take. Basically, states may never enter treaties, states may enter agreements or compacts which impact the federal system after receiving congressional consent, and states need no consent for agreements or compacts which do not impact the federal system and for other, lesser levels of cooperation.

Historically, the ICC served two basic functions: dispute resolution and control of interstate alliances. The ICC codified the national government's traditional role in resolving disputes between states. Under English rule, the colonies had to present disputes between colonies to the Crown for resolution.¹⁸ States were not allowed to work together for practical and philosophical reasons.¹⁹ The Articles of Confederation and, subsequently, the Constitution mirrored this arrangement by prohibiting agreements between states without congressional approval.²⁰ For example, interstate compacts with

15. See *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 363 (2000) (noting that state Acts may be preempted expressly or impliedly).

16. U.S. CONST. art. 1, § 10, cl. 3.

17. U.S. CONST. art. 1, § 10, cl. 1.

18. CAROLINE N. BROUN ET AL., *THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS* 3 (2006).

19. *Id.*

20. Christi Davis & Douglas M. Branson, *Interstate Compacts in Commerce and Industry: A Proposal For "Common Markets Among States,"* 23 VT. L. REV. 133, 136 (1998). See Articles of Confederation art. IX ("The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever

congressional consent were regularly used to resolve early boundary disputes between the states.²¹

Additionally, the ICC discouraged alliances between states.²² States have an incentive to create alliances in order to gain power over other actors in the federal system, including the federal government.²³ The ICC protects the federal government by limiting state combinations. Given the state's historically broad police powers and the small size of the pre-administrative state federal government, the ICC was more likely viewed originally as a limitation on state power than an invitation for creative state level solutions to regional and national issues.²⁴

B. *What are Interstate Compacts?*

Interstate compacts are the agreements that states enter into pursuant to the ICC. Fundamentally, interstate compacts are agreements between states that become binding after Congress consents to the agreement. "Historically, the interstate compact has received relatively little use."²⁵ Until the twentieth century, interstate compacts were used almost exclusively to resolve boundary disputes.²⁶ However, the New York Port Authority compact of 1921 and the Colorado River compact of 1922 revolutionized the use of interstate compacts early in the twentieth century. The Colorado River Compact was the first compact to address a regional problem—irrigation rights to water from the Colorado River.²⁷ It was also the first compact to be truly multilateral rather than restricted to two or three states.²⁸ The New York Port Authority

...").

21. Davis & Branson, *supra* note 20, at 136.

22. BROUN ET AL., *supra* note 18, at 5.

23. *Id.*

24. This notion of a weak federal government that needs protection from the states is consistent with Herbert Wechsler's argument in *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543, 544 (1954) and Larry D. Kramer's argument in *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 216 (2000). Kramer notes that the Supreme Court's only significant role in federalism has been protecting the federal government from the states, by maintaining "national supremacy against nullification or usurpation by the individual states." *Id.* at 228.

25. FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, *THE INTERSTATE COMPACT SINCE 1925*, at 3 (Council of State Governments 1951). Throughout the eighteenth and nineteenth centuries, expanding population, new states, and migration under the program of manifest destiny exacerbated boundary problems between states creating the need for interstate compacts to resolve boundary disputes. In contrast, the need for interstate compacts to take regulatory action was not as significant given the states' historically broad police powers and relative weakness of the pre-administrative state federal government.

26. *Id.* *But see id.* n.10 (noting that exceptions include the Virginia/West Virginia partition agreement and the Chesapeake and Ohio Company compact of 1825).

27. *Id.* at 5.

28. *Id.*

compact was the first compact to create an interstate administrative agency to deal with an ongoing problem—transit into New York.²⁹ The growth of multilateral interstate compacts administered by interstate agencies to address regional problems has continued.³⁰ Additionally, the overall number and subject matter of interstate compacts has expanded considerably.³¹ Specifically, use of environmental compacts expanded in the 1960s and 1970s in conjunction with the growth of the environmental movement.³²

Interstate compacts are an increasingly popular form of state action because they create unique benefits. First, interstate compacts balance competing local and national interests.³³ State control generally generates more efficient regulation.³⁴ As the Supreme Court noted in *New York v. New Jersey*:

the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court however constituted.³⁵

Simultaneously, an interstate compact preserves federal control through the congressional consent requirement. This “ensures that federal concerns are at the forefront of compact design and construction” and allows the Congress to veto improvident compacts.³⁶

Second, interstate compacts effectively address regional problems by “breaking down fences.”³⁷ State boundaries are often arbitrary lines that do not neatly encompass the scope of real life problems.³⁸ “[A]n interstate compact provides the opportunity to make decisions across state boundaries without resorting to federalization”³⁹

Third, interstate compacts are a stable and predictable way of

29. *Id.*

30. BROWN ET AL., *supra* note 18, at 177-79.

31. *Id.* at 178-80 (“[C]ompacts govern a wide array of areas ranging from health, education, taxation, and transportation to corrections, child welfare, energy, and the environment . . .”).

32. *Id.*

33. BROWN ET AL., *supra* note 18, at 28.

34. *Id.* at 27.

35. *New York v. New Jersey*, 256 U.S. 296, 313 (1921).

36. BROWN ET AL., *supra* note 18, at 28.

37. Davis & Branson, *supra* note 20, at 144.

38. BROWN ET AL., *supra* note 18, at 28.

39. *Id.*

creating policy.⁴⁰ Interstate compacts, once created, are not voluntary.⁴¹ Rather, they are binding and thus are “one of the few instruments that can adequately provide for regional stability and uniformity in decision making.”⁴² Interstate compacts are binding for several reasons. First, when Congress consents to an interstate compact it becomes binding federal law.⁴³ Second, interstate compacts probably have legal force over federal agencies.⁴⁴ Third, even if not consented to by Congress, interstate compacts are legally enforceable contracts between the compacting states.⁴⁵ Finally, interstate compacts carry a moral force stemming from their formality.⁴⁶

Fourth, interstate compacts allow for a dynamic response to regional problems. Most interstate compacts today create interstate agencies to administer the compact’s terms.⁴⁷ These interstate agencies can quickly change strategies given new information or circumstances.⁴⁸

C. *What is the Western Climate Initiative?*

The WCI is a regional agreement that creates an administrative agency and uses economic controls to combat climate change. It was enacted through individual legislation in each member jurisdiction.⁴⁹ The WCI developed in 2007 out of climate change efforts in individual states and two regional agreements, the West Coast Global Warming Initiative and the Southwest Climate Change Initiative, and it was composed originally of only five U.S. states.⁵⁰ Current WCI members include the U.S. states of Arizona, California, Montana, New Mexico, Oregon, Utah, and Washington; and the Canadian provinces of British Columbia, Manitoba, Ontario, and Quebec.⁵¹ WCI observers include the

40. *Id.*

41. Jessica A. Bielecki, *Managing Resources With Interstate Compacts: A Perspective From the Great Lakes*, 14 BUFF. ENVTL. L.J. 173, 196 (2007).

42. *Id.* at 198.

43. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 566 (1855) (holding that interstate compacts are the “law of the union” enforceable on the federal government).

44. *See Seattle Master Builders Ass’n v. Nw. Power Planning Council*, 786 F.2d 1359, 1362 (9th Cir. 1986).

45. *See* BROUN ET AL., *supra* note 18, at 17.

46. ZIMMERMAN & WENDELL, *supra* note 25, at 105 (comparing the moral function of contracts).

47. *Id.* at 5.

48. BROUN ET AL., *supra* note 18, at 27.

49. Gregoire et al., *supra* note 1, at 1-3.

50. *Five Western Governors Announce Regional Greenhouse Gas Reduction Agreement 1* (2007), <http://www.westernclimateinitiative.org/component/remository/func-startdown/1/> (last visited Jan. 16, 2011).

51. *WCI Partners and Observers*, <http://www.westernclimateinitiative.org/wci-partners-and-observers-map> (last visited Jan. 16, 2011).

U.S. states of Alaska, Colorado, Idaho, Kansas, Nevada, and Wyoming; the Canadian provinces of Saskatchewan, Yukon, New Brunswick, and Nova Scotia; and the Mexican states of Baja California, Chihuahua, Coahuila, Nuevo Leon, Sonora, and Tamulipas.⁵² “The WCI is a collaboration of independent jurisdictions working together to identify, evaluate, and implement policies to tackle climate change at a regional level.”⁵³ WCI member jurisdictions encompass one-fifth of the U.S. economy and the majority of Canada’s.⁵⁴

The original WCI members agreed, in a memorandum of understanding negotiated by their governors at the winter 2007 meeting of the Western Governors’ Association, to collaborate to accomplish three tasks through independent legislation: to set an overall regional goal for reduction in GHGs; to create a multi-state registry to track GHG emissions; and to develop a regional market-based system, such as a cap and trade program, to achieve the regional goal.⁵⁵

The WCI’s regional goal is set at a 15% aggregate reduction in GHG emissions below 2005 levels by 2020.⁵⁶ The regional goal “does not replace the partners’ existing [individual] goals” and can incrementally change based on new entrants to the WCI and updates to existing data.⁵⁷ To achieve the regional goal, WCI members should use “comprehensive and economy-wide” “emissions reduction activities.”⁵⁸ Emissions reduction activities should be market based, include all sectors of the economy, and include all GHGs covered by the United Nations Framework Convention on Climate Change.⁵⁹ Finally, each WCI member “will update the other WCI partners . . . every two years to ensure that actions are underway at levels consistent with full achievement of the 2020 goal.”⁶⁰

All WCI members have joined The Climate Registry (TCR), a multi-state GHG registry which tracks GHG emissions. TCR “is a nonprofit organization that provides meaningful information to reduce greenhouse gas emissions.”⁶¹ “[TCR] establishes consistent, transparent standards

52. *Western Climate Initiative: WCI Partners and Observers*, <http://www.westernclimateinitiative.org/wci-partners-and-observers-map> (last visited Jan. 16, 2011).

53. Western Climate Initiative, <http://www.westernclimateinitiative.org> (last visited Jan. 16, 2011).

54. Arnoldy, *supra* note 2, at 1.

55. Gregoire et al., *supra* note 1, at 2.

56. WESTERN CLIMATE INITIATIVE STATEMENT OF REGIONAL GOAL 1 (2007), <http://www.westernclimateinitiative.org/component/remository/func-startdown/91/> (last visited Jan. 16, 2011).

57. *Id.*

58. *Id.* at 2.

59. *Id.*

60. *Id.*

61. The Climate Registry, <http://www.theclimateregistry.org/about/> (last visited Jan. 16,

throughout North America for businesses and governments to calculate, verify and publicly report their carbon footprints in a single unified registry.”⁶² Entities that emit carbon dioxide report their emissions to TCR and TCR turns the raw data into useful figures for calculating the WCI’s progress toward the overall regional goal.⁶³ TCR is not solely the repository of WCI emission data. Rather, it is “an emerging effort by numerous states, provinces, and tribes to develop and manage a common GHG reporting system” that encompasses “a large portion of North America.”⁶⁴

Finally, the WCI is creating a cap and trade program. A cap and trade program controls GHG emissions by forcing businesses to internalize the cost of pollution. Entities that emit GHGs must obtain a permit. Only a limited number of permits are issued or sold, effectively capping the amount of GHGs that may be emitted. However, the permits may be traded between emitters. Thus, an emitter has an incentive to reduce its emission of pollution so it can trade its excess permits for other forms of capital. A cap and trade system is more effective than traditional command and control regulation because the emitter that can most cost effectively reduce its emissions will do so and emitters that cannot reduce their emissions cost effectively have the option to purchase additional permits instead of being regulated out of the market.

The cap and trade program’s design parameters were released on March 13, 2009, in the *Design Recommendations for the WCI Regional Cap-and-Trade Program* (Design Recommendations).⁶⁵ The Design Recommendations were updated on July 27, 2010, in the *Design for the WCI Regional Program* (Design Update).⁶⁶ The Design Recommendations and Design Update outline a cap and trade scheme, comparable to proposed federal cap and trade programs, which will begin on January 1, 2012.⁶⁷ The scope of the plan is economy wide⁶⁸ and includes both upstream and downstream regulation.⁶⁹ Entities that

2011).

62. *Id.*

63. *Id.*

64. Symposium, *Like a Nation State*, 55 UCLA L. REV. 1621, 1637 (2008).

65. DESIGN RECOMMENDATIONS FOR THE WCI REGIONAL CAP-AND-TRADE PROGRAM (2009), <http://www.westernclimateinitiative.org/component/remository/general/design-recommendations/Design-Recommendations-for-the-WCI-Regional-Cap-and-Trade-Program/> (last visited Jan. 16, 2011) [hereinafter DESIGN RECOMMENDATIONS].

66. Design Update, *supra* note 4.

67. *Id.*

68. DESIGN RECOMMENDATIONS, *supra* note 65, at 13.

69. *Id.* Upstream regulation refers to regulating GHG emissions at the distributor or importer level in order to avoid the difficulty of regulating individual consumers. The distributor or importer then passes on the cost of the regulation to consumer through higher prices.

emit over 25,000 metric tons of carbon dioxide equivalents must have a permit called an emission allowance in order to emit GHGs into the atmosphere.⁷⁰ Entities emitting over 10,000 metric tons of carbon dioxide equivalents have to report their emissions to TCR.⁷¹ The number of permits is capped by the total of all the WCI member's individual GHG allowance budgets.⁷² Permits are fungible across jurisdictions to enable efficient trading.⁷³ A minimum of 10% of permits must be auctioned with the remainder given away based on prior pollution levels.⁷⁴ Offsets are encouraged and must comply with the requirements of the Kyoto Protocol.⁷⁵ WCI members enforce the cap and trade program within their borders.⁷⁶ While "each jurisdiction's rule language may vary from the material included [in the cap and trade program]," the WCI's goal is uniformity "so that the integrity of the regional effort is assured."⁷⁷ The program is also designed to be integrated with other cap and trade programs throughout the world.⁷⁸ Finally, the Design Recommendations require the creation of a regional administrative organization to coordinate auctions and the adoption of rules, serve as a forum for WCI members, and monitor the cap and trade program.⁷⁹

In sum, the WCI is a multi-state solution to climate change which utilizes cap and trade as its main regulatory device. The WCI was negotiated by state governors as a "memorandum of understanding" and will be enacted through individual legislation in each Member State.⁸⁰ While it is similar to previous interstate compacts like the Port Authority of New York compact or Colorado River compact, it is broader in geographic and political scope.

The constitutionality of the WCI under the ICC is examined next.

Upstream regulation usually is necessary in the electricity generation and motor vehicle fuel sectors to adequately cover all emissions. Downstream regulation refers to regulating the entity that actually emits. *Id.*

70. *Id.* at 3.

71. *Id.* at 12.

72. *Id.* at 4.

73. *Id.* at 6.

74. *Id.* at 8.

75. *Id.* at 11. Offsets are emission credits given for activities which reduce GHGs. Examples include carbon sequestration and tree farms. *Id.*

76. *Id.* at 12.

77. Design Update, *supra* note 4, at 5.

78. *Id.* at 23-25.

79. *Id.* at 17.

80. Gregoire et al., *supra* note 1, at 2.

III. ANALYSIS

A. Overview

The interstate compact is a powerful tool for state action, one of the oldest and most formal types.⁸¹ While the purposes and complexity of interstate compacts have changed, the constitutional rules have remained relatively undeveloped since *Virginia v. Tennessee* was decided by the Supreme Court in 1893.⁸²

It is necessary to ask three questions to determine if the WCI is a constitutional interstate compact or unconstitutional state action. First, is the WCI an agreement between states or is it independent legislation enacted by separate states? Second, if the WCI is an agreement between states, does it require congressional consent or is it merely a ministerial agreement? Third, if the WCI is a compact to which congressional consent is necessary, has consent been given?

B. Is the WCI a Compact?

1. Introduction

The first step in determining whether the WCI is constitutional is to determine if there is in fact an interstate compact between states. State action is not governed by the ICC unless an “agreement or compact” between states exists.⁸³ Agreements and compacts have been interpreted to have functionally the same meaning, though the term “compact is generally used with reference to more formal and serious engagements.”⁸⁴ A broad range of state action may count as a compact for purposes of the ICC because “[t]he terms “agreement” or “compact” taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects”⁸⁵

State action to create an ongoing administrative body is a compact. In *Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey v. Colburn*, New Jersey and Pennsylvania created a “Bridge

81. ZIMMERMAN & WENDELL, *supra* note 25, at 102 (contrasting reciprocal laws, uniform laws, grants-in-aid, tax credits, administrative agreements, comity, and judicial settlement of interstate disputes to interstate compacts).

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

83. *Id.*

84. *Id.* (internal quotation marks omitted); *but see* *Holmes v. Jennison*, 39 U.S. 540, 571-72 (1840) (noting that “the words ‘agreement’ and ‘compact’ cannot be construed as synonymous with one another” rather, agreements are single, temporary acts while compacts are acts that last in “perpetuity, or for a considerable time”).

85. *Virginia*, 148 U.S. at 517-18.

Commission” to build bridges across the Delaware River that had the power to purchase property and exercise eminent domain.⁸⁶ The compact was negotiated by the states, adopted by the legislatures, and consented to by Congress.⁸⁷

The negotiation of settlements to avoid trial by state Attorneys General is a compact. In *New Hampshire v. Maine*, the two states disputed the location of the “lateral marine boundary separating the States.”⁸⁸ The states filed a lawsuit to determine the boundary, but prior to trial, the Attorneys General of New Hampshire and Maine agreed to a settlement and entered a motion requesting a consent decree to set the boundary.⁸⁹ While the court determined that the consent decree did not require congressional consent, it nevertheless analyzed the consent decree as a compact.⁹⁰

Multiple states adopting a model rule can create a compact. In *U.S. Steel Corp. v. Multistate Tax Commission (MTC)*, individual states adopted the Multistate Tax Compact.⁹¹ Even though states did not negotiate with each other and merely adopted a model rule, the state action was considered a compact.⁹²

Finally, state legislation that becomes active only after other states enact complementary legislation constitutes a compact. In *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, the court noted that when states enact banking laws containing concessions for other states contingent on the other states enacting legislation with reciprocal concessions, then a compact likely exists.⁹³

However, not all instances of coordinate state action are compacts. States are increasingly experimenting with different levels of cooperation, including model rules, interstate administrative agencies, and reciprocal legislation, making identification of compacts more nuanced.⁹⁴ Two rules are currently used to determine whether coordinate state action rises to the level of a compact. First, coordinate state action is a compact if the classic indicia of a compact exist. Second, if coordinate state action creates a legally binding contract, then a compact likely exists. However, the two traditional tests are not robust enough to analyze the ever-expanding universe of coordinate state

86. Delaware River Joint Toll Bridge Comm’n, *Pennsylvania-New Jersey v. Colburn*, 310 U.S. 419, 425-26 (1940).

87. *Id.* at 425.

88. *New Hampshire v. Maine*, 426 U.S. 363, 364 (1976).

89. *Id.* at 364-65.

90. *Id.* at 369.

91. *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 454, 456 (1978).

92. *Id.* at 456 n.5, 496.

93. *Northeast Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985).

94. *See id.*

action. For example, the informal negotiation and independent legislation used to create the WCI is likely not considered a compact under the classic indicia or contract tests even though the WCI is a complex regulatory agreement between twenty-seven different North American governments. Thus, I propose applying the test from antitrust law used to find whether a “contract, combination, or conspiracy” exists between business entities to determine whether coordinate state action creates a compact. Next, the WCI is analyzed under the two traditional tests and under the antitrust conscious parallelism test in order to determine whether a compact exists.⁹⁵

2. Classic Indicia Test

The WCI is likely not a compact under the traditional classic indicia test. Coordinate state action is a compact if the classic indicia of a compact are present.⁹⁶ The classic indicia of a compact were established

95. Even if coordinate state action constitutes a compact under the classic indicia, contract, or antitrust test, the state action is not a compact if it also constitutes a treaty. The Constitution allows states to enter an “agreement or compact . . . with a foreign power” but does not allow states to “enter into *any* treaty, alliance, or confederation.” U.S. CONST. art. 1, § 10, cls. 1, 3 (emphasis added). The courts have struggled to distinguish between agreements or compacts on the one hand and treaty, alliances, or confederations on the other; however, some guidance exists. See *Holmes v. Jennison*, 39 U.S. at 540 (1840); *Virginia v. Tennessee*, 148 U.S. 503 (1893); *MTC*, 434 U.S. at 472. Political or military accords are treaties and are not governed by the interstate compacts clause. In *Virginia v. Tennessee*, the court held that treaties, alliances, and confederations referred to military and political accords with foreign states, while compacts and agreements referred to “private rights of sovereignty” like boundary questions and mutually convenient internal regulations. 148 U.S. at 517-20. Thus, on the rare occasion when states enter into compacts with foreign powers, state action that is political or militaristic in nature is unconstitutional. For example, in *McHenry County v. Brady*, a Canadian municipality and North Dakotan municipality entered a contract to run a drain from North Dakota into Canada. 163 N.W. 540, 543 (Sup. Ct. N.D. 1917). The court had to decide whether this agreement “invade[d] the treaty-making power which is vested in the federal government. *Id.* However, since the agreement did not involve an “essentially . . . national and governmental power,” the agreement did not violate the state treaty power. *Id.* at 544 (contrasting *Holmes*, 39 U.S. at 561). In contrast, a state would not be allowed to agree with Canada to extradite a criminal without federal approval. *Id.* The WCI is probably not a treaty. The WCI is a program that regulates pollution. It does not contain any type of military agreement with Canada or Mexico. The mere presence of foreign powers cannot mean that the WCI is a political agreement. Such an overbroad definition would mean that all state-foreign power coordination would constitute unconstitutional state treaties. However, then Governor Arnold Schwarzenegger stated that California has its own foreign policy and the WCI could be seen as a political accord expressing the WCI states’ foreign policy. Symposium, *Like a Nation State*, 55 UCLA L. REV. 1621, 1622 (2008) (noting Governor Arnold Schwarzenegger’s position that California has its own foreign policy). This seems unlikely, however, because the substance, and not the form, of the compact is what a court looks to when deciding whether a compact exists. A full analysis of the treaty provision is beyond the scope of this Article.

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

in *Northeast Bancorp* and include: reciprocal limitations on state action; the existence of multiple state legislatures in favor of fulfillment of a common goal; evidence of negotiation between states; establishment of a joint body or organization; and restrictions on the state's ability to unilaterally withdraw from the arrangement by modifying its laws.⁹⁷

In *Northeast Bancorp*, Massachusetts passed an act that allowed bank holding companies based in other New England states to acquire Massachusetts-based banks and bank holding companies "provided that the other New England State accord[] equivalent reciprocal privileges to Massachusetts banking organizations."⁹⁸ The Massachusetts law was created under the Douglas Amendment to the Bank Holding Company Act (BHCA) which "regulates the acquisition of state and national banks by bank holding companies" through the Federal Reserve Board.⁹⁹ Under the Douglas Amendment, the Federal Reserve Board is prohibited from "approving an application of a bank holding company or bank located in one State to acquire a bank located in another State, or substantially all of its assets, unless the acquisition is specifically authorized by the statute laws of the State in which such bank is located" ¹⁰⁰ Connecticut took advantage of Massachusetts's legislation by passing a similar statute.¹⁰¹ Rhode Island and Maine then enacted similar but less restrictive legislation.¹⁰²

The *Northeast Bancorp* court was tasked to decide whether the states' legislation taken as a whole amounted to a compact. A compact did not exist because "several of the classic indicia of a compact [were] missing."¹⁰³ Specifically, the states' banking legislation did not establish a joint organization, the states' statutes were not fully conditioned on action by other states, the states could modify or repeal the law unilaterally, and there was no reciprocation of the regional limit by Rhode Island and Maine.¹⁰⁴ Even though the states coordinated with other states to pass the legislation, there was not enough coordinate state action to create a compact.

The WCI likely does not qualify as a compact under the *Northeast Bancorp* classic indicia test either. First, the WCI agreement does not require reciprocal limits on WCI member actions. Reciprocity is the most important indicator of a compact. In *Northeast Bancorp*, Maine and Rhode Island benefited from Massachusetts's and Connecticut's

97. *Id.*

98. *Id.* at 163-64.

99. *Id.* at 162.

100. *Id.* at 163.

101. *Id.* at 164.

102. *Id.* at 175.

103. *Id.*

104. *Id.*

banking laws which preferred New England states. However, there was no requirement in Massachusetts's and Connecticut's banking laws for Maine and Rhode Island to similarly limit their banking laws to favor New England states. Since Maine and Rhode Island benefitted from Massachusetts's and Connecticut's favorable banking laws without paying a price through reciprocal limitations on their actions, there was no compact.

Similarly, WCI members only agree to be bound by minor limits to state action when joining. Members must adopt "an economy-wide greenhouse reduction goal" consistent with the WCI regional goal, develop "a comprehensive multi-sector climate action plan," and participate in TCR.¹⁰⁵ These requirements are largely precatory and aspirational. Each member's legislation may vary from the cap and trade program created by the WCI without penalty. Further, no mechanism reviews whether the WCI members are enforcing these self imposed limits. Additionally, Arizona has chosen not to participate in the cap and trade portion of the WCI and has not been penalized.¹⁰⁶

Second, not all WCI members' legislatures favor the fulfillment of a common goal. In *Northeast Bancorp*, "both legislatures favor[ed] the establishment of regional banking in New England"¹⁰⁷ The governors of the original WCI members stated in 2007 that they "recognize[d] the need for collaboration among states to develop climate change policies that provide consistent approaches to recognize and give credit for actions to reduce GHG emissions."¹⁰⁸ All subsequent members have not agreed to this goal. Arizona Governor Jan Brewer had to withdraw Arizona from the cap and trade portion of the WCI because "[t]he Legislature [of Arizona] has attempted several times to dismantle the state's climate-change programs and forbid its participation in the cap-and-trade system."¹⁰⁹ But some legislatures, including California's, do endorse the WCI.¹¹⁰ As the member with the largest number of emitters and the most to lose from the cap and trade scheme, California's endorsement is especially important.

Third, the WCI shows some evidence of negotiation. In *Northeast Bancorp*, "there [was] evidence of cooperation among legislators, officials, bankers, and others in the two states in studying the idea [of

105. *Five Western Governors Announce Regional Greenhouse Gas Reduction Agreement*, *supra* note 50, at 1-2.

106. Sindya N. Bhanoo, *Arizona Quits Western Cap-and-Trade Program*, N.Y. TIMES, Feb. 11, 2010; Shaun McKinnon, *Arizona Quits Western Climate Endeavor*, ARIZ. REPUBLIC, Feb. 11, 2010.

107. *Northeast Bancorp, Inc.*, 472 U.S. at 175.

108. Gregoire et al., *supra* note 1, at 2.

109. Bhanoo, *supra* note 106; McKinnon, *supra* note 106.

110. CAL. GOV. CODE § 12812.6 (2008) (empowers California executive branch to develop compliance mechanisms to address climate change).

regional banking] and lobbying for the statutes [to enact the compact].”¹¹¹ Here, the WCI agreement was negotiated by the governors of the five original WCI members.¹¹² Also, the cap and trade system and regional climate change goal were both developed collaboratively by WCI members.¹¹³ Moreover, the WCI has grown through stakeholder meetings in individual jurisdictions and through collaborative efforts between jurisdictions.

Fourth, the WCI has, at best, established a weak regional organization. The *Northeast Bancorp* court was skeptical that a compact could exist given the lack of a “joint organization or body.”¹¹⁴ The WCI plans to create a “regional administrative organization” for the cap and trade program “to reduce administrative costs and improve program transparency and consistency.”¹¹⁵ Also, the WCI itself is arguably a regional organization given that it has a leadership structure, publication, events, and committees.¹¹⁶ Moreover, the WCI has extensive ties to TCR which, while broader in scope than the WCI, includes all WCI members. Because multiple organizations with power over specific WCI programs exist, an “administrative body with *extensive* powers delegated to it by the [State]” likely does not exist.¹¹⁷

Fifth, the WCI does not restrict a member’s ability to unilaterally withdraw. There is no restriction on withdrawal from the WCI and Arizona has largely withdrawn from the organization.¹¹⁸ A compact can exist without limitations on withdrawal, however. In *MTC*, a compact existed even though the compact “permit[ed] any party to withdraw from the Compact by enacting a repealing statute.”¹¹⁹ Withdrawal limitations indicate a compact because they show that some of a state’s sovereign power has been transferred from the state to the compact. Here, the WCI does not contain withdrawal limitations or any other real limitations on state power. WCI members are supposed to enact a

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

112. Gregoire et al., *supra* note 1, at 1.

113. DESIGN RECOMMENDATIONS, *supra* note 65, at iv-v.

114. *Northeast Bancorp*, 472 U.S. at 175. Also, in *MTC*, the existence of “a multilateral agreement creating an active administrative body with extensive powers delegated to it by the States” was evidence of a compact. *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 472 (1978).

115. DESIGN RECOMMENDATIONS, *supra* note 65, at 13.

116. Western Climate Initiative, <http://www.westernclimateinitiative.org> (last visited Jan. 16, 2011).

117. *MTC*, 434 U.S. at 472 (emphasis added).

118. Shaun McKinnon, *Arizona quits Western Climate Endeavor*, ARIZ. REPUBLIC, Feb. 11, 2010, available at <http://www.azcentral.com/Arizonarepublic/news/articles/2010/02/11/20100211climate-brewer0211.html>; Sindya N. Bhano, *Arizona Quits Western Cap-and-Trade Program*, N.Y. TIMES, Feb. 11, 2010, at A20, available at <http://www.nytimes.com/2010/02/12/science/earth/12climate.html>.

119. *MTC*, 434 U.S. at 457.

regional GHG reduction goal, create climate change legislation, and join TCR, but none of those actions are permanent or mandatory.¹²⁰ Thus, it is unlikely that any real transfer of sovereign power will occur.

The WCI does not contain most of the classic indicia of a compact. It does not contain reciprocal limits on state action because each state passes, implements, and enforces regulations individually. Furthermore, the WCI members' legislatures do not uniformly support the WCI's goals. Finally, the WCI contains no limitations on withdrawal from the compact. While the WCI does show evidence of negotiation and has established a weak regional organization, on balance, the WCI has less classic indicia than the non-compact in *Northeast Bancorp* and is likely not a compact under the classic indicia test.¹²¹

3. Contract Test

The WCI is likely not considered a compact under the contract test either. Coordinate state action is likely a compact if a contract is negotiated between the states. In *New Hampshire v. Maine*, the two states settled a dispute over fishing rights in Portsmouth Harbor and asked the court to enter a consent decree.¹²² The court accepted without discussion that a settlement agreement between the two states was a compact.¹²³

Contracts between states are not automatically compacts. As the *MTC* court noted, "the mere form of the interstate agreement cannot be dispositive" because "[t]he Constitution looked to the essence and substance of things, and not to mere form."¹²⁴ The court's reaction to this observation in *MTC* was to create the factor based test in *Northeast Bancorp*. After *Northeast Bancorp*, a finding that state action creates a contract is not dispositive. However, because no court has held that a compact does not exist when a legally enforceable contract has been made between states, the existence of a contract strongly suggests a compact.¹²⁵

All traditional contract requirements are likely required for a

120. *Five Western Governors Announce Regional Greenhouse Gas Reduction Agreement*, *supra* note 50, at 1-2.

121. *See* *Northeast Bancorp, Inc. v. Bd. of Governors of the Fed. Res. Sys.*, 472 U.S. 159, 175 (1985).

122. *New Hampshire v. Maine*, 426 U.S. 363, 365-66 (1976).

123. *Id.*

124. *MTC*, 434 U.S. at 470 (analyzing a compact created through complementary legislation even though it was not a "more formalized compact").

125. *See* Letter of William H. Taft, IV, Legal Adviser of the Department of State to Senator Byron L. Dorgan of North Dakota regarding a Memorandum of Understanding signed by the State of Missouri and the Province of Manitoba 2 (Nov. 20, 2001), <http://www.state.gov/s/1/22720.htm> (last visited Jan. 16, 2011).

compact to exist.¹²⁶ First, consideration must be exchanged. In *Virginia v. Tennessee*, the border between the states deteriorated and was disputed.¹²⁷ Both states agreed to choose three commissioners each who would meet and mark a boundary line between the states and make recommendations about how to resolve disputes over claims to land on each side of the border.¹²⁸ Subsequently, each state's legislature was to ratify the report of the commissioners.¹²⁹ However, while "[c]ompacts or agreements . . . cover all stipulations affecting the conduct or claims of the parties," neither the appointment of the commissioners nor the ratification by the legislatures created an agreement.¹³⁰ Rather, "[t]he legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it[.]"¹³¹ There was no agreement between the states until Virginia and Tennessee "mutually declared the boundary established by them."¹³² Thus, when the states enacted legislation recognizing the border, an agreement was created because both states received something of value.¹³³

Usually, compacts are negotiated formally and mutual promises by states serve as consideration.¹³⁴ Here, the WCI members purposefully avoided direct negotiations or mutual promises. Members do receive benefits from membership. The members expect that national or international climate change programs will emerge and put them well ahead of the curve on cap and trade implementation and clean energy.¹³⁵ Further, WCI members benefit by becoming moral leaders on a pressing social issue. Finally, the WCI members may also reap "existence value" from preserving the environment.¹³⁶ However, these benefits are likely not consideration because they are not conditioned on mutual promises. The WCI members have passed independent legislation and could receive these same benefits even if acting individually.

126. BROUN ET AL., *supra* note 18, at 17-18.

127. *Virginia v. Tennessee*, 148 U.S. 503, 504-05 (1893).

128. *Id.* at 511.

129. *Id.* at 515.

130. *Id.* at 520-21.

131. *Id.* at 520 (emphasis added).

132. *Id.* at 521.

133. *Id.*

134. ZIMMERMAN & WENDELL, *supra* note 25, at 85.

135. WCI Comments to U.S. House of Representatives on Waxman-Markey Bill 1 (2009) (last visited Jan. 16, 2011), <http://www.westernclimateinitiative.org/component/remository/general/WCI-Comments-to-U.S.-House-of-Representatives-on-Waxman-Markey-Bill/>; WCI Letter to U.S. Senate 1 (2009) (last visited Jan. 16, 2011), <http://www.westernclimateinitiative.org/component/remository/func-startdown/133/>.

136. See David A. Dana, *Existence Value and Federal Preservation Regulation*, 28 HARV. ENVTL. L. REV. 343, 343 (2004).

Second, the compact must be negotiated by an agent empowered by the state. In *Holmes v. Jennison*, the governor of Vermont agreed to extradite a prisoner to Canada where he was wanted for murder.¹³⁷ The plurality noted that “states can act only by their agents and servants; and whatever is done by them, by authority of law, is done by the state itself.”¹³⁸ The governor was acting as the state’s agent in making the compact and therefore the compact was made with the force of state law.¹³⁹ In contrast, in *Louisiana v. Texas*, a state health officer’s quarantine against another state was not an action carrying the force of state law when the state did not authorize or confirm the quarantine.¹⁴⁰

The WCI was likely originally negotiated by agents empowered to bind the states to a compact. While the WCI was not negotiated by specially designated representatives empowered by the state legislatures, it was originally negotiated by state governors. It is unclear whether the WCI governors acted pursuant to instructions from their legislatures, although there was definite authorization in the case of California.¹⁴¹ However, traditionally when governors negotiate compacts they are empowered by their legislature.¹⁴²

Third, an offer and acceptance or meeting of the minds must exist between compacting parties. Here, though the original negotiation of the WCI yielded a “memorandum of understanding” over the principles of the WCI, no true exchange of promises occurred because the WCI members are not *required* to take any action.

In summary, the WCI is probably not a compact under the contract test. While the WCI was negotiated originally by agents with authority to compact, no consideration for an agreement exists and no true exchange of promises occurred.

4. Conscious Parallelism Test

While the classic indicia and contract tests are somewhat helpful in determining whether the WCI is a compact, they are not designed to detect covert state cooperation like the WCI. The WCI does not contain most of the classic indicia of a compact and yet is clearly state coordination on a sophisticated level which may warrant congressional review.¹⁴³ Further, the contract test only applies to one type of

137. *Holmes v. Jennison*, 39 U.S. 540, 561 (1840).

138. *Id.* at 573 (noting that while there was no statute giving the governor the power to extradite Holmes, Vermont’s highest court held the governor’s actions to be legal).

139. *Id.* at 562.

140. *Louisiana v. Texas*, 176 U.S. 1, 23 (1900).

141. CAL. GOV. CODE § 12812.6 (2008).

142. *E.g.*, *Holmes*, 39 U.S. at 540.

143. *See supra* Part III.B.2.

coordinate action, the overt business relationship. As the tulip, oil, steel, baseball, telephone, diamond, and personal computer industries have shown, many instances of coordinate action involve covert behavior. A new test is needed to identify instances where covert state cooperation creates a compact. Courts regularly identify covert coordination in other contexts. For example, the crime of conspiracy is routinely proven by circumstantial evidence of the conspirators' coordinating behavior.¹⁴⁴ Further, in antitrust law, business entities can be liable for secretly working together.¹⁴⁵

A variation of the test developed to sniff out antitrust violations should also be used to determine whether covert state cooperation like the WCI creates a compact. The Sherman Act makes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . illegal."¹⁴⁶ This conscious parallelism test from antitrust law should be used here for several reasons. First, a test based in antitrust law will allow for more consistent and just results in ICC cases. A sophisticated analysis is hard to create in the ICC context because of the low volume of cases heard by the courts. By importing a test from a vigorously debated, litigated, and well developed area of law such as antitrust, ICC jurisprudence will quickly improve.

Second, states regulated by the ICC act similarly to the business entities regulated by antitrust law. As market participants, states generally act rationally and efficiently.¹⁴⁷ While states are sometimes motivated by civic concerns other than economics, generally, state policies are market driven. Thus, importing antitrust law principles will benefit ICC jurisprudence.

Two basic elements must be present for an antitrust violation to exist: consciously parallel behavior and a "plus factor." Each will be discussed in turn.

First, "conscious parallelism refers to the common practice among firms in a concentrated industry of conducting their similar businesses in a uniform manner, aware that their counterparts are pursuing the same course of action."¹⁴⁸ This practice results in reduced competition among participants.¹⁴⁹ The "effects of conscious parallelism . . . are

144. *E.g.*, *United States v. Shabani*, 513 U.S. 10 (1994) (defining conspiracy under federal law).

145. Sherman Anti-Trust Act, 15 U.S.C. § 1 (2010).

146. *Id.*

147. States are routinely recognized as rationale market participants by the courts. *E.g.*, *Reeves v. William Stake*, 447 U.S. 429, 437 (1980).

148. D.J. Simonetti, Note, *Conscious Parallelism and the Sherman Act: An Analysis and a Proposal*, 30 VAND. L. REV. 1227, 1228 (1977).

149. *Id.*

similar to the effects of an overt conspiracy” without the agreement.¹⁵⁰ An antitrust violation does not exist based on conscious parallelism alone, however. Most businesses are motivated by similar goals and, thus, produce similar policies.¹⁵¹ Further, businesses know their actions will be replicated by their competitors.

The Supreme Court recognized this principle in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*¹⁵² In *Theatre Enterprises*, owners of suburban movie theatres “uniformly rebuffed” offers to show new movies in the suburban movie theatres and “adhered to an established policy of restricting first-runs . . . to the eight downtown theatres.”¹⁵³ All of the owners “advanced much the same reasons for denying [the] offers[,]” including the economic unfeasibility of the offers.¹⁵⁴ Even though the theatre owners engaged in parallel business behavior no antitrust violation occurred.¹⁵⁵ The Court refused to assume a conspiracy existed because all the businesses had an independent economic incentive to refuse the offer.¹⁵⁶ Thus, consciously parallel action among businesses, while suspicious, is not sufficient to create a “contract, combination, . . . or conspiracy.”¹⁵⁷ Similarly, Congress should not have the authority to regulate WCI members who merely enact parallel policies without more proof of coordinate action. Just like other market participants, the WCI members will enact climate change policies that balance risk and reward most efficiently. This behavior is not sufficient to prove a compact exists.

When consciously parallel action by WCI members is accompanied by additional factors, however, it should be strong evidence of a compact. Courts have recognized at least three factors which, when combined with parallel action, support a finding of a compact: express collusion, actions against self interest, and market manipulation.

First, express collusion combined with consciously parallel behavior creates a “contract, combination, . . . or conspiracy.”¹⁵⁸ In *Cackling Acres, Inc. v. Olson Farms, Inc.*, the plaintiffs alleged that egg distributors and producers conspired to monopolize the production, distribution, and price of eggs.¹⁵⁹ The egg distributors and producers’

150. *Id.* at 1229.

151. Donald F. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1207 (1969).

152. 346 U.S. 537, 541 (1954).

153. *Id.* at 539.

154. *Id.* at 540.

155. *Id.* at 541.

156. *Id.*

157. Sherman Anti-Trust Act, 15 U.S.C. § 1 (2010).

158. *Id.*

159. 541 F. 2d 242, 243 (10th Cir. 1976).

“price parallelism” was not enough to prove an antitrust violation.¹⁶⁰ However, a conspiracy was proven when the price parallelism was coupled with evidence of express collusion shown by “numerous meetings,” “correspondence,” and “constant telephone calls between the various co-conspirators.”¹⁶¹

Similarly, evidence of express “collusion” by the WCI coupled with consciously parallel action shows that a compact exists. The WCI, almost by definition, engages in express “collusion” because it is an organization. The WCI regional organization regularly communicates with members, deliberates over WCI policies, and promulgates regulations.¹⁶² Further, just like in *Cackling Acres*, the interactions by the WCI regional organization are substantial and not merely ministerial.¹⁶³ These interactions, combined with parallel action by WCI members is likely sufficient to create a compact.

Second, a business action against self interest combined with consciously parallel behavior creates a “contract, combination, . . . or conspiracy.”¹⁶⁴ In *Reading Industries, Inc. v. Kennecott Copper Corp.*, vertically integrated members of the copper industry were accused of suppressing prices by rationing copper to buyers.¹⁶⁵ “The defendants acknowledge[d] that each of them could have charged higher prices without losing sales . . . and that each of them did ration supplies among its customers, but they argued that each acted independently in refraining from raising its prices”¹⁶⁶ The business reasons the copper sellers proffered as motivating their parallel action were unpersuasive to the court because the actions were not in the copper sellers’ best interest.¹⁶⁷

Similarly, the WCI members’ actions against self interest coupled with consciously parallel action show that a compact exists. Here, the WCI members may be acting against their self interest by joining the WCI. In the short term, competitor states and provinces could easily undercut the WCI members by not joining the WCI. Non-member States and provinces would not be bound by the WCI’s GHG emissions caps and reporting requirements. Thus, competitor states and provinces could lure businesses out of the WCI to their own jurisdictions. In the long term, it is arguably still against the WCI members’ self interest to

160. *Id.* at 245.

161. *Id.*

162. See *WCI 2009-10 Work Plan* (2009), available at <http://www.westernclimateinitiative.org/component/repository/func-startdown/113/> (last visited Jan. 16, 2011).

163. *Western Climate Initiative*, <http://www.westernclimateinitiative.org> (last visited Jan. 16, 2011).

164. Sherman Anti-Trust Act, 15 U.S.C. § 1 (2010).

165. 477 F. Supp. 1150, 1152 (S.D.N.Y. 1979).

166. *Id.* at 1154.

167. *Id.* at 1156.

join because as the WCI implements GHG caps, non-members will free ride on the benefits attained unless forced to join. WCI members expect that joining the WCI will provide an innovation and first mover advantage in environmental policy. However, that advantage will only occur if cap and trade becomes mandatory or universally accepted, an uncertain proposition. Thus, in the present economic and political climate where no global climate change regulation or construct is widely supported, it is arguably against the WCI members' economic self interest to join.

Third, market manipulation combined with consciously parallel behavior is enough to find a "contract, combination, . . . or conspiracy." In *American Tobacco v. United States*, the three largest U.S. tobacco companies regularly bid up the market price of raw tobacco to price small tobacco companies out of the market.¹⁶⁸ Further, all three companies concurrently raised cigarette prices approximately seven percent.¹⁶⁹ The companies averred that the price increase was because of "confidence in our industry" and the opportunity to secure additional advertising revenue.¹⁷⁰ Subsequently, all three concurrently cut cigarette prices approximately fifteen percent in order to "defeat the threat from lower priced cigarettes" ¹⁷¹ The evidence of market manipulation established an antitrust violation.¹⁷²

Similarly, market manipulation by WCI members coupled with consciously parallel action shows that a compact exists. Here, the WCI is, in a sense, manipulating the market for individual state climate change regulation. Because the WCI is regulating collaboratively, their regulations will carry more weight with businesses, the federal government, and foreign governments than an individual state's regulations. The WCI regulations are more likely to be copied by other individual states who wish to reduce costs because the WCI regulations are more likely to be adopted as the norm. The WCI members will corner the market on climate change regulation. This market manipulation indicates both that the WCI members are acting collaboratively and that a compact exists.

The WCI is a compact under the proposed conscious parallelism test. WCI members have purposefully engaged in parallel legislation to form the WCI. This consciously parallel behavior, when coupled with the three other plus factors, indicates that the WCI is a compact. All three plus factors exist: the WCI members engage in express coordination to carry out their individual legislation, WCI members may have acted

168. 328 U.S. 781, 801-02 (1946).

169. *Id.* at 805.

170. *Id.*

171. *Id.* at 806.

172. *Id.* at 814.

against their self interest by joining the WCI, and WCI members manipulated the climate change regulation market by regulating collectively with independent but parallel legislation. Thus, it is likely that the WCI's covert coordinate state action constitutes a compact.

5. The WCI is a Compact

In conclusion, the WCI is a compact even though it will be implemented by individual legislation in each state. Though the WCI does not qualify as a compact under the classic indicia or contract tests, it should be analyzed under the proposed conscious parallelism test because it is an example of informal state coordination at a high level, which is purposefully structured to avoid the necessity of congressional consent. Here, the WCI is likely a compact under the conscious parallelism test. The WCI members have engaged in covert coordination by individually passing parallel legislation to create the WCI. Further, the WCI members have expressly coordinated their actions through numerous interactions and organizations, may have acted against self interest, and have manipulated the market for climate change legislation. Thus, the WCI is likely a compact under the conscious parallelism test.

C. Does the WCI Require Congressional Consent?

1. Introduction

If the individual, parallel legislation of the WCI members is a compact, Congress likely has to approve it. Textually, the Constitution requires all interstate compacts “irrespective of form, subject, duration, or interest to the United States” to receive congressional consent before they are valid.¹⁷³ However, for over one hundred years judicial gloss on the interstate compacts clause has limited the types of agreements requiring congressional consent to compacts that could impact the federal system.¹⁷⁴

In *Virginia v. Tennessee*, the Court limited the types of compacts requiring congressional consent to those compacts “tending to the increase of political power in the states, which may *encroach upon* or *interfere with* the just supremacy of the United States.”¹⁷⁵ In *Virginia v. Tennessee*, the states compacted to re-mark the boundary between their states.¹⁷⁶ If the boundary line, when drawn, “cut off an important and

173. U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 459 (1978).

174. *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

175. *Id.* at 519 (emphasis added).

176. *Id.* at 520.

valuable portion of the state, the political power of the state enlarged would be affected by the settlement of the boundary” and “the consent of congress may well be required.”¹⁷⁷ However, if the boundary simply “serve[d] to mark and define that which actually existed before, but was undefined and unmarked . . . the agreement . . . would in no respect displace the relation of either of the states to the general government.”¹⁷⁸ Thus, a distinction was drawn between compacts that involved matters that were provincial such as the sale of a small parcel of land between states, a contract for one state to transport another state’s goods, drainage of a swamp, and state cooperation to fight an outbreak of disease—and compacts that were national and which impacted the federal system, such as agreements that increased “the political power of the state.”¹⁷⁹

This limitation on the language of the Constitution has been justified on at least three grounds. First, it was necessary because the meaning of “agreement” and “compact” as used in the Constitution was unknown by the time *Virginia v. Tennessee* was decided in 1893; thus, “it was necessary to construe the terms of the Compact Clause by reference to the object of the entire section in which it appears.”¹⁸⁰ The prohibition on interstate compacts is listed in the Constitution alongside other state action which could potentially hurt the federal government if abused.¹⁸¹ For example, if states are allowed to keep troops or warships or to engage in war without federal consent, federal military power would weaken.¹⁸² Similarly, if states are allowed to create compacts that impact the federal system, federal political power might weaken. Second, given the large number of minor agreements that states must make with each other in order to operate, the limitation on consent is practically necessary.¹⁸³ Third, the limitation is favored because it supports the policy of increased state freedom to solve “supra-state, sub-federal” problems without impairing the federal government’s power to stop improvident compacts.¹⁸⁴

Later Supreme Court decisions expanded the ambit of compacts requiring congressional consent to instances of mere *potential* impact on the federal system.¹⁸⁵ The dissent in *MTC* succinctly explained why a

177. *Id.*

178. *Id.* at 520-21.

179. *Id.* at 518, 520.

180. *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 468 (1978).

181. U.S. CONST. art. 1, § 10, cl. 3.

182. *Id.*

183. *See Union Branch R.R. Co. v. E. Tenn. & Ga. R.R. Co.*, 14 Ga. 327, 340 (Ga. 1853).

184. *MTC*, 434 U.S. at 460 (“At this late date, we are reluctant to accept this invitation to circumscribe modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy.”).

185. *Id.* at 473.

potential impact on the federal system triggered the need for congressional approval by comparing the interstate commerce clause and interstate compacts clause.¹⁸⁶

[There is an] important distinction between the Compact Clause and the Commerce Clause. States may legislate in interstate commerce until an *actual* impact upon the federal supremacy occurs. For individual States, the harm of *potential* impact is insufficiently upsetting to require prior congressional approval. For States acting in concert, however, whether through informal agreement, reciprocal legislation, or formal compact, “potential . . . impact upon federal supremacy” is enough to invoke the requirement of congressional approval.¹⁸⁷

Thus, congressional consent is necessary if the WCI compact has a potential impact on the federal system. Compacts can potentially impact the federal system in several ways. First, the federal system is impacted if compacting states have increased power over the federal government;¹⁸⁸ second, the federal system is impacted if the compact supersedes or conflicts with federal law;¹⁸⁹ and third, the federal system is impacted if noncompacting states are threatened.¹⁹⁰ Finally, the federal system is never impacted by local compacts.¹⁹¹

2. Increased State Power

The WCI impacts the federal system if the compacting states can accomplish through a compact what they could not accomplish individually.¹⁹² In *MTC*, states compacted to form the Multistate Tax Commission which had the power to develop uniform tax regulations, advise the states, and perform audits on the states behalf.¹⁹³ Twenty-one states were members of the compact¹⁹⁴ which was designed to promote uniform tax laws and prevent duplicative¹⁹⁵ taxation between states.¹⁹⁶ The compact was formed after Congress “authorized a study for the purpose of recommending legislation establishing uniform standards to

186. *Id.* at 484 (dissent).

187. *Id.* (emphasis added).

188. *Id.* at 472-73.

189. *See* U.S. CONST. art. 6, cl. 2.

190. *MTC*, 434 U.S. at 477.

191. *McHenry County v. Brady*, 163 N.W. 540, 545 (N.D. 1917).

192. *MTC*, 434 U.S. at 477.

193. *Id.* at 456-57.

194. *Id.* at 454, 456.

195. *Id.* at 455.

196. *Id.*

be observed by the States in [taxation].”¹⁹⁷ Member States retained complete control over all tax legislation and could withdraw from the compact at any time.¹⁹⁸ The compact did not increase the power of states over interstate commerce or foreign relations because the states could carry out the functions of the compact individually and their power *vis-à-vis* the federal government had not increased. However, the dissent criticized the majority for ignoring the potential and “actual synergistic powers in the [compact]” which could work to undermine federal resolve and actually increase state power in the taxation arena by driving corporate clients to the compacting states.¹⁹⁹

The WCI does not impact the federal system because compacting states do not have increased power over interstate commerce. The cap and trade program issues permits and offsets that must be fungible between jurisdictions and must undertake a coordinated auction of permits.²⁰⁰ The permits and offsets might be considered articles of commerce over which WCI members would exercise increased power because only emitters within WCI jurisdictions are able to purchase these products.²⁰¹ However, because the permits are the legal creation of the WCI and have no value outside of the WCI jurisdictions, the WCI’s power over interstate commerce does not functionally increase. While WCI members’ power over interstate commerce might increase if the WCI required emitters outside of the WCI to have permits to sell energy inside of the WCI, the WCI only requires entities within WCI member jurisdictions to have permits.²⁰² Admittedly, the WCI creates additional burdens on interstate commerce within the WCI member jurisdictions. However, “each State presumably could impose similar . . . requirements individually.”²⁰³ Finally, while the WCI increases each individual state’s power to combat climate change by allowing the WCI members to enact complimentary climate change legislation, synergistic benefits from the coordinated action are not enough to impact the

197. *Id.*

198. *Id.* at 457.

199. *Id.* at 491 (White J., dissenting).

200. DESIGN RECOMMENDATIONS, *supra* note 65, at 8-10.

201. Symposium, *Like a Nation State*, 55 UCLA L. REV. 1621, 1659 (2008).

202. DESIGN RECOMMENDATIONS, *supra* note 65, at 3. Cap and trade programs often experience “leakage” problems where unregulated sources outside the regulated area are imported into the regulated area and undercut domestic sources. The WCI cap and trade scheme avoids leakage problems by regulating the First Jurisdictional Deliverer (FJD) of electricity. *Id.* “For sources within WCI jurisdictions, the FJD is the generator.” *Id.* “For power that is generated outside the WCI jurisdictions (or generated by a federal entity or on tribal lands) for consumption within a WCI jurisdiction, the FJD is the first entity that delivers that electricity over which the consuming WCI jurisdiction has regulatory authority.” *Id.*

203. *MTC*, 434 U.S. at 475.

federal system.²⁰⁴

However, the WCI does impact the federal system by increasing the compacting states' power over foreign policy. Sub-national governments are not permitted to engage in foreign relations under U.S. law. Foreign policy is generally considered the exclusive province of the federal government under the "one voice" theory articulated in *Crosby v. National Foreign Trade Council*²⁰⁵ and the Dormant Foreign Commerce Clause theory upheld in *Zschernig v. Miller*.²⁰⁶ The WCI gives its U.S. members a voice in foreign affairs they would not have individually. First, the WCI establishes "collaborative efforts" between U.S. states and foreign powers in Canada and Mexico on climate change.²⁰⁷ Second, the WCI weakens the U.S. international bargaining position on climate change.²⁰⁸ Parts of the cap and trade program require members to comply with the Kyoto Protocol.²⁰⁹ By endorsing the Kyoto Protocol the WCI destroys the united voice the federal government has sounded against Kyoto and other international climate change treaties. Third, if a U.S. state withdraws from or breaches the WCI compact, the federal government is bound by action taken by states toward foreign powers. Under the customary international law doctrine of state responsibility, countries are potentially responsible for violations of international agreements by their substate entities regardless the legality of the violation under the state or substate's domestic law.²¹⁰ Thus, under international law, the United States could be responsible for a breach of the WCI agreement by California toward Manitoba, for example. Because states can breach the WCI agreement and expose the federal government to international embarrassment, state power is increased *vis-à-vis* the federal government. In summary, the WCI's voice in the international climate change policy arena increases the WCI states' power relative to the federal government and, thus, impacts the federal system.

3. Superseding Federal Law

If there is a possibility that the WCI compact will supersede or conflict with federal law, then it impacts the federal system.²¹¹ A

204. *Id.* at 496.

205. *Crosby*, 530 U.S. at 363.

206. *Zschernig v. Miller*, 389 U.S. 429 (1968); see *Nat'l Foreign Trade Council v. Natsios*, 181 F. 3d 38, 66 (1st Cir. 1999).

207. Gregoire et al., *supra* note 1, at 2.

208. See *Crosby*, 530 U.S. at 363.

209. DESIGN RECOMMENDATIONS, *supra* note 65, at 11 (stating that offset programs must comply with the Kyoto protocol).

210. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

211. Marissa S. Briggett, Comment, *State Supremacy in the Federal Realm: The*

compact obviously impacts the federal system when it displaces federal law that would otherwise be supreme.²¹² Conversely, compacts do not impact the federal system when the compact is created pursuant to federal law. In *Northeast Bancorp*, the Court noted that even if the actions taken by the states constituted a compact, the compact would not require congressional consent because the compact was passed pursuant to a federal banking statute.²¹³ Further, under the federal avoidance doctrine, if the compact failed to comply with the federal law that authorized it, then the compact would be preempted and “any Compact Clause argument would be academic.”²¹⁴

It is unlikely that the WCI supersedes or conflicts with federal law. Congress has not passed climate change legislation. Congress has failed to enact multiple proposals to address climate change including the Clear Skies Act, which requires power plants to significantly reduce emissions,²¹⁵ the Waxman-Markey federal cap and trade plan,²¹⁶ an information gathering approach favored by Senators Pete Domenici and Jeff Bingaman,²¹⁷ and a command and control regulation approach favored by Senator Jim Jeffords.²¹⁸ Congress’s lack of action is not a policy that the WCI can supersede or conflict with. In *MTC*, Congress studied but failed to address the duplicative taxation problem the state compact remedied.²¹⁹ However, Congress’s *mere interest* in the problem of duplicative taxation did not bar the compact from going forward.²²⁰ Similarly, Congress’s study of climate change and floor votes on climate change legislation do not bar the WCI. Therefore, the WCI probably does not supersede or conflict with federal law.

4. Severe Economic Pressure on Noncompacting States

The WCI also impacts the federal system if it places severe economic pressure on noncompacting states. In *MTC*, the economic benefit the compact generated for Member States did not decrease the political power of the nonparty states because “[a]ny time a State adopts a fiscal policy or administrative policy that affects the programs of a sister State, pressure to modify those programs may result [But] it

Interstate Compact, 18 B.C. ENVTL. AFF. L. REV. 751, 758 (1991).

212. U.S. CONST. art. 6, cl. 2.

213. *Northeast Bancorp, Inc. v. Bd. of Governors of the Fed. Res. Sys.*, 472 U.S. 159, 176 (1985).

214. *Id.*

215. GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra* note 6, at 86.

216. *Id.* at 87.

217. *Id.*

218. *Id.* at 90.

219. *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 455-56 (1978).

220. *Id.* n.33.

is not clear how our federal structure is implicated.”²²¹ The compact’s provisions to reduce double taxation on businesses in compacting states was not “an affront to the sovereignty of nonmember States” because the compact’s provisions did not “touch[] upon constitutional strictures” and no “threat to the sovereignty of other States” existed.²²² Thus, mere economic pressure resulting from adoption of a particular policy by a group of states does not impact the federal system unless the pressure triggers some independent constitutional bar.²²³

The competitive advantage the WCI members gain over other states is not severe enough to impact the federal system. While the WCI members gain a first mover advantage over other states with respect to any subsequent mandatory climate change regulations, this advantage is not enough to create a severe impact on non-WCI members.²²⁴ The future competitive advantage in climate change regulation that the WCI offers to its members is no more of an advantage than the future efficiency gains created by providing favorable tax laws to corporations that the compacting states in *MTC* enjoyed. Thus, the WCI probably does not severely impact noncompacting states.

5. Local Compact

Finally, the WCI does not impact the federal system if it is a local compact. When a compact involves local matters there is no threat to the federal system because the compact does not affect other states or the federal government. For example, in *McHenry County v. Brady*, a compact between the county board of commissioners in Meadow township, North Dakota and the municipality of Arthur, Canada to place a drain in the Canadian territory was not required to have congressional consent because it was a matter “that can in no respect concern the United States.”²²⁵ Additionally, in *Fisher v. Steele*, the court sarcastically noted that a compact was not “a treaty of alliance . . . a joint scheme of commercial or industrial enterprise, or . . . the establishment of a new confederacy,” but was merely a compact between Louisiana and Arkansas to build a levee and, thus, did not require congressional consent.²²⁶ In contrast, the Port Authority of New York administers New York harbor, a vital U.S. port, and has annual

221. *Id.* at 478.

222. *Id.*

223. *Id.* *But see Id.* at 495 (White, J., dissenting) (noting that compacting states attract multistate corporations and thus create economic pressure by offering uniform tax law across all compacting states).

224. *Id.* at 479.

225. *McHenry County v. Brady*, 163 N.W. 540, 545 (1917).

226. *Fisher v. Steele*, 1 So. 882, 888 (Sup. Ct. La. 1887).

revenues in excess of one hundred million dollars.²²⁷ While it is local in the sense that it governs a small geographic area, the compact creating the Port Authority of New York is more than a local compact.²²⁸

The WCI is also not a local compact. While GHGs are emitted locally within the WCI jurisdictions and environmental impacts are ultimately felt locally, it is unlikely that the WCI would be considered a local compact.²²⁹ The WCI is not comparable to a contract to build a levee or an agreement to locate a drain; rather it is similar to the Port of New York Authority compact which required congressional consent. The WCI will soon administer a program that regulates a large percentage of the U.S. economy and virtually all of Canada's economy.²³⁰ Additionally, after the cap and trade permit auctions begin in 2012, the cap and trade program will probably have revenues comparable to the Port Authority of New York. Finally, as the Supreme Court noted in *Massachusetts v. EPA*, climate change is a global problem.²³¹ Thus, the WCI is not a local compact.

In conclusion, the WCI does not supersede or conflict with federal law, does not severely impact noncompacting states, and is not a local compact. However, the WCI probably increases the power of the compacting states *vis-à-vis* the federal government because the U.S. WCI members will have an increased voice in foreign affairs. Thus, congressional consent is probably necessary for the WCI to be constitutional.

D. Has Congress Consented to the WCI?

Assuming that the WCI is a compact and that congressional consent is required, the third inquiry in deciding if the WCI is a constitutional interstate compact is whether Congress has consented. Congress may consent in several ways. "The constitution does not state when the consent of congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied."²³² Congress may consent in at least four ways.

First, Congress may expressly consent in advance to state compacts. For example, Congress consented in advance to the Interstate Agreement on Detainers by enacting the Crime Control Consent Act of

227. *Tobin v. United States*, 306 F.2d 270, 271 (D.C. Cir. 1962) (one hundred million dollars in the 1960s).

228. *Id.*

229. Symposium Article, *State Law Responses to Global Warming: Is it Constitutional to Think Globally and Act Locally?*, 21 PACE ENVTL. L. REV. 53, 57 (2003).

230. Arnoldy, *supra* note 2, at 1.

231. *Massachusetts v. EPA*, 549 U.S. 497, 536 (2007).

232. *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893).

1934.²³³ In the early part of the twentieth century, the federal government actively encouraged interstate compacts by issuing broad advanced consent to interstate compacts on a variety of national issues like flood control, crime, and tobacco.²³⁴ However, the practice tapered off after compacts failed to achieve significant success and were criticized as an inferior surrogate for national action.²³⁵

Second, Congress may consent by expressly ratifying a completed compact. For example, in *North Carolina v. Tennessee*, Tennessee was created out of the territory of North Carolina.²³⁶ Congress expressly consented to the boundary marker that was negotiated by the states.²³⁷ Congressional consent was still valid even though the boundary varied from the line Congress approved because the consent was “very general.”²³⁸

Third, Congress may consent by implicitly ratifying previous state compacts. For example, in *Virginia v. Tennessee*, congressional consent was “fairly implied from [Congress’s] subsequent legislation and proceedings” when federal election districts were drawn based on the boundary agreed upon in the compact.²³⁹

Finally, Congress may be able to implicitly consent in advance to state compacts. In *Northeast Bancorp*, states attempted to form a compact pursuant to an exception to a federal banking law and the compact was deemed consented to by Congress if the compact did not violate the federal banking law.²⁴⁰ The Court reasoned that Congress created the exception in anticipation that states would compact.²⁴¹ Thus, Congress was deemed to have implicitly consented in advance to the compact. However, Congress should not often be able to give implicit advance consent because it does not allow Congress to consciously consider the merits of a compact as it would with ratification and does not allow Congress to negotiate the terms of the compact as it would with express consent. In summary, “Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have

233. *Cuyler v. Adams*, 449 U.S. 433, 441 (1981). *See also* S. Rep. No. 73-1007, 1 (1934) (noting that the CCCA was designed “to remove the obstruction imposed by the Federal Constitution and allow the States cooperatively and by mutual agreement to work out their problems of law enforcement”).

234. ZIMMERMAN & WENDELL, *supra* note 25, at 6.

235. *Id.* at 6-7.

236. *North Carolina v. Tennessee*, 235 U.S. 1, 6 (1914).

237. *See id.*

238. *Id.* at 16.

239. *Virginia v. Tennessee*, 148 U.S. 503, 522 (1893).

240. *Northeast Bancorp, Inc. v. Bd. of Governors of the Fed. Res. Sys.*, 472 U.S. 159, 175 (1985).

241. *Id.*

already joined.”²⁴² Congress may also be able to give implicit advance consent.²⁴³

Congress has no explicit or implicit power to change its consent to an interstate compact once it has consented.²⁴⁴ Compacts, once consented to, are federal law.²⁴⁵ Further, Congress may not condition its consent on the right to “alter, amend, or repeal” consent.²⁴⁶ Congress may only attach conditions to its consent if the condition is constitutional.²⁴⁷ Thus, Congress cannot use the “conditional spending” ploy in the interstate compact context. However, Congress often uses its consent power to force states to negotiate with the federal government to create a compact more favorable to federal prerogatives.²⁴⁸ “Congress is much more likely to permit a regional agreement if it can maintain some control over the terms and enforcement of the compact.”²⁴⁹ Upon successful negotiation, Congress will often pass legislation consenting to the compact.²⁵⁰

Congress may control *continuing* compacts, however, using its plenary regulatory power to safeguard vital federal interests.²⁵¹ For example, in *Tobin v. United States*, Congress consented to a compact creating the Port Authority of New York conditioned on the power to “alter, amend, or repeal” its consent.²⁵² While Congress could not constitutionally condition its consent on the right to revoke its consent, it could use its regulatory authority over vital federal interests like interstate commerce and national defense to control the continuing operations of the Port Authority.²⁵³ However, Congress is limited to regulating compacts through subsequent legislation and not through mere agency or executive action.²⁵⁴

The WCI has not been consented to by Congress. First, Congress did not give express consent in advance to the WCI. Congress is studying climate change and investigating strategies to address the problem but

242. *Cuyler v. Adams*, 449 U.S. 433, 441 (1981).

243. See Appendix 1, Table 1, Summary of Congressional Consent Methods.

244. *Tobin v. United States*, 306 F.2d 270, 273 (D.C. Cir. 1972).

245. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 566 (1855).

246. *Tobin*, 306 F.2d at 273.

247. *Id.* at 272-73 (“If Congress does not have the power under the Constitution, then it cannot confer such power upon itself by way of a legislative fiat imposed as a condition to the granting of its consent.”).

248. Claire Carothers, Note, *United We Stand: The Interstate Compact as a Tool For Effecting Climate Change*, 41 GA. L. REV. 229, 257 (2006).

249. *Id.*

250. *Id.*

251. *Tobin*, 306 F.2d 270 at 273.

252. *Id.* at 271.

253. *Id.* at 274.

254. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 566 (1855).

has not taken decisive action.²⁵⁵ Thus, Congress has not requested the WCI members to compact. Second, Congress has obviously not expressly ratified the WCI. Third, Congress has not endorsed the WCI by enacting a complementary cap and trade scheme to link with the WCI system. Congress has not interfered with the WCI's efforts either, however. Finally, Congress probably did not implicitly consent in advance to the WCI's creation. No federal environmental law encourages states to create climate change compacts on a level comparable to the *Northeast Bancorp* banking law's endorsement of regional banking.

State-foreign power compacts are even less likely to receive congressional consent because Congress is unlikely to consent to a compact that includes foreign members. On October 3, 2008, then President George W. Bush signed a "joint resolution expressing the consent and approval of Congress to an interstate compact regarding water resources in the Great Lakes-St. Lawrence River Basin."²⁵⁶ Congress refused to consent to the compact until separate agreements were created for the Canadian and American sections of the Great Lakes.²⁵⁷ The WCI faces a similar challenge from Congress regarding consent as did the Great Lakes-St. Lawrence River Basin Compact given the enormous political and economic impact the WCI will have on the United States once its cap and trade system is operational. The Great Lakes Basin Compact was easily restructured and the WCI could be as well. However, the WCI desires to be an international agreement,²⁵⁸ and it is unlikely that the WCI would restructure to placate Congress.

IV. CONCLUSION

States will continue to experiment with new methods of coordination like the WCI given the current wave of federalism. The courts will likely be faced with more ICC challenges to state authority to regulate across state lines in the coming years, especially from businesses regulated by the WCI cap and trade program beginning in 2012. States will continue to try to mask their coordination by agreeing only to principles in "memoranda of understanding" and by passing regulations through independent state legislation. The application of the conscious parallelism test to the ICC context advocated in this Article will help courts effectively identify when state coordination like the WCI is a

255. GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra* note 6, at 86.

256. S.J. Res. 45, 110th Cong. (2008).

257. Bielecki, *supra* note 41, at 199.

258. Design Update, *supra* note 4, at 5.

compact requiring congressional consent.

Here, the WCI is an unconstitutional interstate compact in its present form because it is a compact which requires but has not yet received congressional consent. First, while the WCI resembles individual state legislation, in reality, it is a compact governed by the ICC compacts clause. While the WCI does not contain most of the classic indicia of a compact and is likely not a compact under the contract test, the WCI is a compact under the conscious parallelism test. WCI members have consciously enacted parallel legislation and have expressly coordinated their actions, acted against their self interest, and have “manipulated” the climate change regulation market. Second, the WCI requires federal approval through congressional consent. The WCI does not supersede or conflict with federal law, prejudice noncompacting states, and is not a local compact, but, the WCI increases the power of the compacting states by inserting those states’ voices into U.S. foreign policy on climate change. Third, Congress has not chosen to consent to the WCI yet.

The WCI was formed with little more than a handshake. Five governors sat down together and decided to address GHG emissions and climate change while Congress sat on its hands. Though their actions were noble, the WCI members needed congressional approval before they could regulate. For all their good intentions, handshake deals like the WCI which establish sufficiently weighty regulatory schemes are simply not constitutional without federal approval.

Appendix 1.

Table 1 Summary of Congressional Consent Methods

	Consent in Advance	Ratification
Explicit Consent	Crime Control Consent Act of 1934 (<i>Cuyler v. Adams</i>)	Cession Act ratifying border (<i>North Carolina v. Tennessee</i>)
Implicit Consent	Statute does not bar states from enacting reciprocal legislation (<i>Northeast Bancorp</i>)	Using border compact to define federal election jurisdictions (<i>Virginia v. Tennessee</i>)

