

# Compacts and Collusion

By Michael S. Greve

*Once again, a federal court has slipped on the banana peel of “state cooperation.” The otherwise sensible Fourth Circuit Court of Appeals has sustained the 1998 Master Settlement Agreement on tobacco litigation against an attack under the Constitution’s compact clause. That little-known provision requires that “any agreement or compact” among the states must receive congressional consent. The agreement among state attorneys general and tobacco manufacturers, which imposed a national tobacco tax of some \$250 billion over twenty-five years, never received congressional approval. In nonetheless sustaining the agreement, the Fourth Circuit relied on a 1978 U.S. Supreme Court decision that held that the compact clause means the opposite of what it says: no state compact requires congressional consent, so long as it is otherwise lawful. The upside-down compact clause illustrates the gulf between the modern judiciary’s states’ rights romanticism and the Founders’ far more realistic federalism.*

## Why Bother?

The Master Settlement Agreement, signed in November 1998 by the attorneys general of forty-six states and the major U.S. tobacco manufacturers, ended an unprecedented state litigation campaign against the industry. The MSA provides for the companies’ payment of nearly a quarter of a trillion dollars, over a period of twenty-five years, in “damages” and other payments to the states. In all but name, the payments are a national consumption tax, paid almost entirely by individual smokers (rather than the settling companies’ shareholders or employees). No legislator at any level of government voted for (or against) that tax. Congress did not approve the MSA.

The compact clause of Article I, section 10, of the Constitution provides that “[n]o State shall,

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*without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power.”* The terms of the MSA require approval by 80 percent of the forty-six signatory states for its full implementation. It is plainly an “agreement” among states and, as such, requires congressional consent. In several lawsuits over the MSA, however, federal courts have summarily rejected compact clause claims. In *Star Scientific v. Beales*, the leading appellate case decided in February 2002, a panel of the Fourth Circuit Court of Appeals disposed of the plaintiff’s compact clause claim in five short paragraphs. The panel relied on the Supreme Court’s 1978 decision in *U.S. Steel Corp. v. Multistate Tax Commission*, which sustained a convoluted, unapproved multistate scheme governing (to this day) the taxation of interstate business income. The *U.S. Steel* Court held that state agreements require congressional consent only if they encroach upon the supremacy of the United States. But such agreements are unlawful, or more precisely preempted, even without the compact clause. Thus, *U.S. Steel* read the clause out of the Constitution.

Supreme Court errs! Big dog-bites-man deal. As for the tobacco agreement, 'tis ancient history and remembered, if at all, for far greater outrages—the essentially baseless state lawsuits; the collusive and, in some instances, corrupt relations between the private plaintiffs' attorneys and the state attorneys general who instigated the cases; the legislative abrogation in some states of the tobacco companies' common law defenses during the pendency of the state lawsuits; the symbiotic relationship between the tobacco companies and the state governments that first procured, and have now come to rely on, the monopoly profits of a manufacturers' cartel.<sup>1</sup>

The compact clause, however, is not a constitutional pimple. The Founders enacted the clause, among several constitutional provisions, to guard against two closely related risks: interest group rackets and the tendency of states to exploit sister states and their citizens. The tobacco agreement is a picture book illustration of those dangers. A judiciary that refuses to apply the compact clause to the MSA betrays both an indifference to interest group deals on the backs of citizens and a failure to comprehend federalism's structure. It might just be possible to fix this very large problem—and, in the process, the scandal that is the MSA.

## The Founders' Constitution

To the statespersons of the founding era (as law reviews now call the Founders), the central problem of republican government was the problem of faction. Narrow interests, adverse to the aggregate interests of the community, would occupy the machinery of government and put it to selfish uses. The state legislatures of the pre-Constitution era had supplied endless examples of parochial interest group wheedling.

The constitutional cure, famously described in James Madison's *Federalist* Nos. 10 and 51, is to extend the sphere of republican government. Piggish interests may manage to overrun the Rhode Island legislature. In the extended republic of the *United States*, those factions will bump into countless other factions, with snouts of many different shapes and sizes. Sheer scale thus affords protection against faction.

Even in the extended sphere of the United States, the operation of faction must be further impeded through the separation of powers and supermajoritarian safeguards, such as the requirement for bicameral consent and the presidential veto. These institutional precautions drive up

the costs of transacting legislative business. Conversely, they reduce citizens' monitoring costs. Since our representatives cannot readily perpetrate mischief, we need not watch them all the time. That is a welcome respite, especially when the lawn needs mowing.

The ingenious precautions are worth having, even at the price of having to sacrifice some good laws, because the ordinary constitutional task is to prevent partial legislation from interfering with beneficial or at least harmless activities.<sup>2</sup> The Constitution presumes that private orderings—such as contracts—are generally preferable to political regulation. Market failures will occur and may go unremedied, but such mistakes pale in comparison with those of a more “efficient” legislative system that readily accommodates interest group-driven government.

Before Sex Education encroached on History, every American high school student could rehearse this basic argument. It does, however, have a catch: when prompt and forceful intervention is required, the institutional precautions will prove a liability. In a *federal* republic, that problem is bound to occur with great regularity. Federalism compels factions to operate in an extended republic, but it also permits them to operate at the state level. Absent refinement and modification, the constitutional obstacles that prevent partial laws at the federal level will impede the national government's ability to redress piggishness at the state level. That may be tolerable so long as the factions within each state content themselves with exploiting one another. It becomes an acute problem for the union when factionalism slops across state borders.<sup>3</sup>

James Madison was so dismayed with the faction-ridden state governments of his time, and so fearful of the states' proclivity “to invade the national jurisdiction, to violate treaties and the law of nations & to harass each other with rival and spiteful measures dictated by mistaken views of interest,” that he urged the Constitutional Convention to adopt a congressional negative—that is, a congressional preapproval requirement—for any and all state laws.<sup>4</sup> The convention rejected his proposal and instead adopted, for the great mass of state legislation, a simple supremacy arrangement: state laws may become effective without congressional approval. When such laws interfere with federal laws or prerogatives, the courts will set them aside. Alternatively, Congress may, through the ordinary exercise of legislation, override or, as we now say, preempt the states.

To be sure, the supremacy safeguards may fail. Seemingly innocuous, internal state laws may in fact be veiled

attempts to discriminate against outsiders. Courts may neglect to enforce the rightful supremacy concerns of the United States. Congress can preempt state legislation and correct judicial errors, but the difficulty of procuring the requisite majorities—those excellent protections against the facile exercise of federal authority—will often stand in the way of a remedy. The delegates, though, expected state offenses against national prerogatives and sister-state interests to remain tolerably rare (relative, at least, to the vast mass of state legislation). Permitting a few of those laws to go unremedied would be preferable to the draconian alternative of subjecting all state legislation to federal preapproval—that is, Madison’s negative “in all cases whatsoever.” That alternative, the delegates found “disgusting,” both because it would be cumbersome and because it would leave insufficient room for state autonomy.

Some classes of state laws, however, must be expected in advance to threaten sister states and the union. With respect to those types of laws, the convention heeded Madison’s warnings that mere supremacy would be insufficient to curb local factionalism. Some state laws, such as the coinage of money, ex post facto laws and bills of attainder, and laws impairing the obligation of contract, are prohibited outright. Others are subject to Madison’s negative—they may not take effect without the consent of Congress. State duties on imports and exports fall into that class. So do state duties on tonnage. *And so do state agreements or compacts “with another State, or with a foreign Power.”*

The Constitution, then, adopts one general rule—plain-vanilla supremacy—for run-of-the-mill, mostly internal state regulation. For classes of laws that signal cross-border aggression, exploitation, and discrimination, in contrast, the Constitution requires the affirmative assent of Congress and thus imposes the burden of procuring federal majorities on the advocates, rather than on the opponents, of state legislation.

## Compacts and Federalism

The Constitution does not presume that state agreements are always and invariably bad news. Some such measures, as state agreements to demarcate a preexisting state boundary, may prove trouble-free. Others may provide a means of fruitful cooperation, as when contiguous states agree to manage a common wilderness area. Still others may be interest group rackets but

nonetheless, or perhaps therefore, command congressional approval; Senator James M. Jeffords’s and Senator Patrick J. Leahy’s dairy compacts are an example. Still, the compact clause views state agreements *as a class* to be sufficiently suspect to require congressional approval before any such agreement may take effect. Why is that?

Part of the answer is that agreements among states are unlikely to be merely internal to each state; by definition, they concern more than one state. So a federal constitution that seeks to police factionalism at the borders must police compacts among states. Behind that obvious consideration looms federalism’s constitutional logic.

Federalism starts with a premise of formal equality among states. Equality in turn implies a principle of nonaggression and nondiscrimination among states. Favoring citizens over outsiders, however, is what governments do for a living, and so the states chafe under the constitutional constraints. Factionalism systematically pushes across borders: an interest group that manages to impose the costs of some regulatory scheme on outsiders need not beat down domestic opposition.

State aggression and exploitation pose serious problems even when states act individually. The danger increases exponentially, though, when states are permitted to act in concert. Under a constitution without a compact clause, we might have to tolerate a domestic OPEC among oil-producing states, an economic “Fortress New England,” and any number of similar state-based cartels, until and unless the opponents of such schemes managed the difficult task of assembling a national supermajority in defense of the union.<sup>5</sup>

Behind a preconstitutional veil of ignorance, no state would choose a rule that permits collusion. States would instead pick the default rule that the Constitutional Convention did in fact choose: permit state cooperation—with appropriate safeguards. The compact clause guarantees every state a role in sister states’ agreements. In that manner, the clause reduces the costs each state would otherwise incur in monitoring and countermanding cartels and collusion adverse to its own interests. And, as noted, the negative compels the advocates of parochial state combinations, rather than their opponents, to stitch together a sufficient majority for their schemes.

States that may now or then, here or there, contemplate a mutually beneficial bargain will regard the constitutional rule as way harsh. No constitution can guard

against the states' temptation to defect from the rules of the game in those instances. No constitution can ensure an optimal outcome in each case either. (The compact clause negative implies a risk that noncompacting states might hold up efficient state bargains for extraneous reasons, including sheer spite.) What a constitution can and must do is to coordinate transactions among the states, so that the equilibrium outcomes remain within a range that is generally perceived as tolerably fair and efficient. That in turn means that states may not defect to some other coordination mechanism when that happens to be in their short-term interest. A federal constitution must ensure that bargains among states are made in the agreed-upon place and manner—and nowhere else. A constitution that fails to hold the players to their precommitment strategy is not a constitution. It is a mere treaty of convenience.<sup>6</sup>

## Cooperation

The logic just explored is clear enough to have occurred to the authors of just about every federal constitution. No federal system—not even the European Union, which is not even federal yet—permits unsupervised side agreements among states. And if the logic is not clear enough, the plain language of the compact clause should provide an anchor. How, then, did the Supreme Court manage to turn that language on its head?

Like most dreadful intellectual traditions in American politics, this one, too, can be traced to the Progressives. A more complex, interdependent world, the Progressives and their New Deal heirs argued, necessitates increased state cooperation—for the harmonization of duplicative and conflicting state laws, for the administration of multistate metropolitan areas, for the management of common pools (such as waterways and wilderness areas), for the solution of transboundary pollution problems, and for a slew of other regional problems that the Founders, with their stone-age vision of compartmentalized states, did not remotely imagine. In the modern world the compact clause is a cumbersome formality. What is needed, Justice Felix Frankfurter intoned in 1959, is a good measure of “extraconstitutional forms of legal invention” and a free “interplay of living forces of government to meet the evolving needs of a complex society.”<sup>7</sup>

To put this argument for a parallel constitution in its most tenable form, the Founders were not entirely wrong in fearing collusive or otherwise dangerous state compacts. But with the world so new and complex, the universe

of fruitful (or at least harmless) state cooperation has expanded enormously. It looks like the state laws that the Founders subjected to the plain-vanilla supremacy arrangement: it consists, for the most part, of stuff that need not concern Congress. The costs of preventing a few mistakes through the congressional negative would be excessive—and excessively burdensome for the states. Thus, state agreements, like ordinary state laws, should be policed through mere federal supremacy rather than through a federal approval requirement. That, precisely, is what the Supreme Court held in 1978. Sure enough, it cited Felix Frankfurter's paean to “fruitful interstate relationships.”<sup>8</sup>

Notwithstanding its stupendous historical influence, the cooperation argument is quite probably nonsense. It assumes not only that the world has become more complex and interdependent (dog bites man again!); it also assumes that the potential for fruitful intergovernmental cooperation has increased *without* a corresponding increase in the potential for interest group rackets and interstate exploitation. That seems very unlikely. A more complex political world means less fully informed citizens and, in turn, more maneuvering room for selfish factions and ambitious politicians. Intergovernmental cooperation further increases the information asymmetries, as it allows the participants to blame the other guy for whatever goes wrong. Ordinary citizens can no longer finger the culprits.

Empirical studies show that state regulatory compacts are practically always enacted at the behest of parochial, state-based interests. Studies further show that the commissions and agencies that administer those compacts—over 200, at last count—are plagued by severe accountability and control problems, ranging from bureaucratic empire building to wholesale corruption.<sup>9</sup> Which brings us back to the 1998 tobacco agreement.

## A Room of Their Own

The first state lawsuit against tobacco manufacturers was filed in 1994, at the suggestion (and subsequently with the cooperation) of an antitobacco trial lawyer by Mississippi's enterprising attorney general, Michael Moore. The lawsuit included a claim for recovery of Medicaid costs allegedly attributable to smoking. Moore lobbied other state attorneys general to file similar cases. By mid-1997, thirty-one states had followed suit. Tobacco lawyers, plaintiffs' attorneys, and attorneys general met to hammer out a comprehensive financial and regulatory

agreement. Their so-called resolution, a precursor to the MSA, was submitted to Congress for its approval. The resolution was introduced in the Senate, debated and amended in committee, and sent to the floor. In June 1998 the bill died after a failed cloture vote.

As the prospects for a federal enactment dimmed, nine state attorneys general met in secret negotiations with trial lawyers and industry representatives to work out an agreement along the lines of the resolution, though somewhat more moderate in scope. The MSA was released in November 1998, and the forty-six state attorneys general promptly approved it. Four states (Mississippi, Minnesota, Florida, and Texas) had reached earlier settlements with the industry (totaling \$40 billion), which were preserved under the MSA. Unlike the resolution, the MSA was not presented to Congress for approval.

Why did the MSA process succeed where the legislative process failed? Congress, it turns out, had to contend with pesky interests—tobacco farmers, populist demagogues agitating against tax increases, antitrust bureaucrats who fretted over the resolution’s anticompetitive implications, and public health advocates who wished to lay waste to, rather than to regulate, the tobacco industry. Under the weight of those conflicting interests, the resolution collapsed. Antitobacco activists larded the compromise resolution with so many demands that the tobacco companies eventually withdrew their support. The MSA process, in contrast, excluded everyone except a bunch of tobacco lobbyists, the trial lawyers, and the state attorneys general they had bought and paid for. The agreement, in other words, was produced by scaling Madison’s extended republic down to a medium-size hotel room.<sup>10</sup>

## Cooperative Taxation

The contraction of the range of interest group conflict does not quite explain how states with very different tobacco policies, and accustomed though they are to a prickly insistence on their sovereignty and independence, could *unanimously* agree on a massive tax and regulatory scheme. The answer lies in the structure of the MSA as a national sales tax.

To meet their payment obligations under the MSA, the four “original participating manufacturers,” who at the time accounted for close to 99 percent of the U.S. cigarette market, had to increase prices. Since price competition would have precluded the requisite, dramatic price

increase (of some thirty-five cents per pack), the MSA allocates the manufacturers’ share of the payments in proportion to current market share. A higher market share means higher payments and thus renders price competition for a higher market share futile. To protect the manufacturers against new market entrants, the MSA provides nonparticipating manufacturers with an incentive to join the agreement without incurring proportionate payment obligations—provided, however, that those small manufacturers agree to stabilize their sales at pre-MSA levels.

For the regulation of “renegade” producers who refuse to accept that bargain, the MSA imposes a “diabolically clever” regime of interstate transfer payments.<sup>11</sup> If the participating manufacturers suffer sales losses exceeding 2 percent of their aggregate market share, they may reduce their base payments to the states by 3 percent for each percentage of market share loss above that level. Any state may, however, escape an adjustment by enacting a model statute that “fully and effectively neutralizes” the participating manufacturers’ cost disadvantages. While new market entrants have by definition caused none of the damages that the MSA is supposed to redress, the MSA model statute requires them to make escrow payments, equivalent to roughly 150 percent of the payments they would incur under the MSA itself, supposedly in anticipation of future costs and liabilities. Should new market entrants still cause market share losses for the participating manufacturers, the ensuing payment reductions will be imposed on states that have failed to enact and enforce the model statute. (The calculations are performed by an MSA body called “The Firm.”) Predictably, all states have enacted a qualifying model statute.

The MSA ensures that its costs will be passed on to consumers, in the form of a uniform national sales tax. And there’s the rub: a state can, of course, opt out of the MSA payments *but not* the costs of the agreement, since its citizens will be hit with the tax one way or the other. By virtue of that asymmetry, the first movers—once they had gained a critical mass and the tobacco industry’s support—triggered a dynamic that compelled even the most recalcitrant states to accept the bargain. Major tobacco-manufacturing states (Virginia, North Carolina, Kentucky, and Tennessee) refrained from suing tobacco manufacturers, as did Delaware and Wyoming. In the end, they all took the money. Alabama attorney general William Pryor—the state official of first, last, and perhaps

only resort for defenders of constitutional government—lobbied and inveighed against his colleagues’ scheme in public and behind closed doors.<sup>12</sup> In the end, he, too, signed the MSA. That was not his choice in any meaningful sense. The choice had been made for Pryor and his constituents long before—by the attorneys general of Mississippi and Minnesota.

## Revisit It

A \$250 billion tax, “legislated” by a cabal of monopolists, trial lawyers, and attorneys general in a closed room and administered by a made-up body that sounds like it escaped from a Grisham novel, has nothing to do with constitutional government. Nobody who recalls Bill Pryor’s ferocious protests against the MSA can seriously contend that its architects showed any respect for federalism’s irreducible constitutional principles—the equality and integrity of the states. The MSA sets an awful precedent, and it may well come back to haunt us.

For one thing, the MSA may be reopening itself. MSA payments to the states have fallen short of expectations—partly because of reduced tobacco consumption and partly because renegade manufacturers have captured roughly 5 percent of the national market, often without making the required escrow payments. (Some three-dozen states have filed lawsuits against those producers.)<sup>13</sup> If and when the MSA unravels, the state attorneys general will portray the MSA baseline as their birthright, demand more money, and perhaps seek to enlist the national government in the defense of their handiwork.

Speaking of money, the states have done with the tobacco proceeds what a drunkard does with a handout for a bowl of soup: they have blown it, along with the proceeds of a decade of economic growth, on just about all but the ostensible purpose of reducing tobacco consumption, and they are again pleading starvation. They have also grown to like the MSA’s modus operandi. The states’ current policy demands include the authorization of another interstate cartel, this one providing for the imposition of sales taxes on electronic commerce. That scheme has so far foundered on the resistance of a few holdout states, as well as on the fact that the nation’s diverse consumer industries cannot be corralled into a cartel quite so easily as the tobacco oligopoly.<sup>14</sup> Sooner or later, though, the states will hit upon a viable cartel scheme and, on the authority of the MSA, will insist on

their inalienable right to implement it without congressional leave.

That sort of “federalism” is a kind of states’ rights Brezhnev doctrine: the constitutional territory seized by the states is theirs, and we get to argue about the remains. Instead of acceding to the conquest, we should attempt to recapture real federalism’s principles. To that end, we should cram the tobacco compact into Congress, where it belongs.

But who is “we,” kemo sabe? The trial lawyers have long walked off with the money. (Their proceeds, minus aggregate purchases of Jaguars, judges, and congressmen, are awaiting investment in another liability campaign.) Big tobacco has managed to turn itself into a public utility—the only one without government ratemaking—and is enjoying both its monopoly profits and its cozy alliance with the states, which can no longer afford to let trial lawyers bankrupt the industry. State governments are locked into the MSA. The taxpaying public is too diffuse to be easily organized for political action. (Smokers face a somewhat smaller collective action problem than the general public because they are already clustered in front of office buildings, but they feel too bad about their habit to make noise.)

Since the interests that created and now benefit from the MSA have enough national clout to forestall federal intervention, Washington will not volunteer to reopen the debate—not now, not ever.<sup>15</sup> There is no point in bemoaning that abdication of authority. The Founders fully anticipated it. That is precisely why, for compacts and other problematic state laws, they placed the burden of producing an affirmative national majority on the proponents of the states’ schemes, rather than on their adversaries. The appropriate cure, in other words, is the compact clause negative—provided the courts enforce it, either in *Star Scientific* (where the plaintiffs have asked for a rehearing by the full Fourth Circuit) or in some future case.

## The Supreme Court’s Federalism

The Founders did not entirely trust the courts—which, to them, meant principally state courts—as the first line of defense against state encroachments. But they saw no real alternative to that arrangement, and so they did what could be done: they wrote constitutional prohibitions and negatives on state laws with an eye toward minimizing judicial discretion and error: not

any state agreement or compact without congressional consent, period. Getting that language wrong requires willfulness or else massive intellectual confusion.

Willfulness and confusion, alas, are what the federal judiciary of the twentieth century produced. The post–New Deal Supreme Court dismantled the compact clause, along with many other constitutional obstacles to intergovernmental cooperation, not because the Court failed to see the connection between factions and federalism but rather because it recognized, or at least sensed, that federalism’s forms would leave too little room for interest group bargains. That was the willfulness. The confusion lies in the contemporary Supreme Court’s failure to comprehend that a “cooperative” federalism is the antithesis of the real thing.

While the Court has revived some plausible federalism doctrines (notably, the notion that the Constitution contains judicially enforceable limitations on Congress), it has often wandered off into a states’ rights perspective that emphasizes federalism’s “etiquette” or the “dignity” of state governments. The modern Court no longer shares the New Dealers’ fondness for interest group deals, but its neo-Confederate romanticism about states and their perceived “closeness to the people” is just as far removed from Madison’s fear of parochial, faction-ridden states. In viewing “federalism” as a kind of shorthand for the states’ opportunistic agenda, the Court tends to forget that states’ rights must end where another state’s rights begin. It tends to forget that federalism is not simply a question of what the national government may do to the states but also, and importantly, a question of what states may do to one another.

A more realistic, constitutional federalism would require very different judicial doctrines, which would sweep across a broad range of federal programs and policies. Even a perfectly clearheaded Supreme Court would approach that project with considerable trepidation. The compact clause, however, provides both a limited field and a crystal-clear case. A compact clause jurisprudence that reads the plain text to mean the opposite of what it says should plainly be revised. Nothing illustrates that need so perfectly as the MSA, that pristine example of interstate collusion and exploitation on behalf of special interests.

To reverse course and to enforce the compact clause, the Supreme Court need not fully comprehend what has gone wrong with federalism jurisprudence, or why, and it need not revisit more than a few obscure orphans of its New Deal patrimony. All it would take is a decent

respect for Mr. Madison and his constitutional commands. As they say on the avenue that bears his name: Just do it.

## Notes

1. For an excellent account of the MSA’s genesis and a passionate critique of the agreement, see Martha Derthick, *Up in Smoke: From Legislation to Litigation in Tobacco Politics* (2002).

2. The necessity of safeguarding against partial legislation is a central argument for bicameralism and the presidential veto in the *Federalist Papers*. Hamilton, for instance, defended the presidential veto as a safeguard against “the mischiefs of that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments. . . . The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.” *Federalist Papers* No. 73 (Clinton Rossiter ed., 1961), p. 444.

3. Of course, states have their own institutional safeguards, comparable to those that operate at the national level, against interest group exploitation. But those precautions will be least effective where legislative exploitation of citizens in other states is involved. They will be still less effective when law is made, not through legislatures but, as in the tobacco litigation, through direct executive action. The force that most reliably disciplines factionalism at the state level is the threat that its victims might vote with their feet and move to another state. The effectiveness of this exit option, though, depends on making the citizens of each state bear the full costs of their own government’s schemes. Any way one looks at the matter, federalism dictates that factionalism must stop at the borders.

4. The quotation appears in a pre-convention letter from James Madison to George Washington (April 16, 1787). *The Papers of Madison*, vol. 9, pp. 382, 384 (Robert A. Rutland et al., eds., 1975). For an excellent account of Madison’s negative and its fate at the convention, see Larry D. Kramer, “Madison’s Audience,” *Harvard Law Review*, vol. 112 (1999), p. 611.

5. Lawyers may be tempted to object that we can police such arrangements under the “negative commerce clause”—that is, the doctrine that state laws that discriminate against sister states in interstate commerce are unconstitutional, even in the absence of a conflicting federal law. That doctrine operates a lot like the Madisonian negative, inasmuch as Congress may authorize, through explicit legislation, state laws that would otherwise violate the negative commerce clause. The construct does not appear, however, in the original Constitution. It is a judicial creation, which the Founders may or may not have anticipated. In any event, the fact that a subsequently introduced judicial

negative may protect against interstate exploitation is no argument for refusing to enforce an explicit constitutional negative.

6. On this point, and on the notion of a constitution as a means of coordination in general, see Peter C. Ordeshook, "Constitutional Stability," *Constitutional Political Economy*, vol. 3 (1992), p. 137.

7. *New York v. O'Neill*, 359 U.S. 1, 10–11 (1959). Frankfurter borrowed the former phrase from a pathbreaking law review article he coauthored with James M. Landis decades earlier, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," *Yale Law Journal*, vol. 34 (1925), pp. 685, 691.

8. *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 470 (1978).

9. On compacts as interest group creations, see, for example, Weldon V. Barton, *Interstate Compacts in the Political Process* (1965), especially pp. 8–33, and William E. Leuchtenburg, *Flood Control Politics: The Connecticut River Valley Problem, 1927–1950* (1953). On corruption, control problems, and mission creep, see, for example, Marian E. Ridgeway, *Interstate Compacts: A Question of Federalism* (1971); Emmanuel Celler, "Congress, Compacts, and Interstate Authorities," *Law and Contemporary Problems*, vol. 26 (1961), p. 682; and Jill Elaine Hasday, "Interstate Compacts in a Democratic Society: The Problem of Permanency," *Florida Law Review*, vol. 59 (1997), p. 1.

10. The point has been made by Derthick, *Up in Smoke*, p. 220; and David S. Samford, "Cutting Deals in Smoke-Free

Rooms: A Case Study in Public Choice Theory," *Kentucky Law Journal*, vol. 87 (1999), p. 845.

11. Hanoch Dagan and James J. White, "Governments, Citizens, and Injurious Industries," *N.Y.U. Law Review*, vol. 75 (2000), pp. 354, 381. The article provides an excellent discussion of the MSA's operation and economics.

12. See, for example, William Pryor, "A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits," *Tulane Law Review*, vol. 74 (2000), p. 1885; and Pryor, "Litigators' Smoke Screen," *Wall Street Journal*, April 7, 1997.

13. Marc Kaufman, "States Get a Surprise in Tobacco Settlement," *Washington Post*, March 9, 2002.

14. See "E-Taxes: Between Cartel and Competition," *Federalist Outlook*, no. 8 (available at [www.federalismproject.org/outlook/9-2001.html](http://www.federalismproject.org/outlook/9-2001.html)).

15. In support of that prediction, consider Washington's conduct in the wake of the MSA. The state tobacco lawsuits purportedly recouped tobacco-related Medicaid expenses, roughly half of which had been paid by the national government. On the plaintiffs' own idiosyncratic theory, in other words, the states had recovered the national government's funds. In 1999, when the Clinton administration hinted that the feds might be entitled to a portion of the MSA payments, Congress surrendered its claim by amending the federal Medicaid statute. The Clinton administration then filed its own baseless recoupment lawsuit against the tobacco companies, which Attorney General Ashcroft's Department of Justice has continued to pursue.