Mutually Assured Democracy: Cooperating Under the Compact Clause to Combat Partisan Gerrymandering

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Partisan gerrymandering distorts voter preferences and undermines electoral competitiveness. Independent redistricting commissions and state constitutional litigation have curtailed partisan gerrymandering, but those reforms have proved unstable and insufficient. Single-state redistricting reform has stalled because legislators and voters alike face diminishing incentives to reallocate power to their state's minority party as partisan polarization increases. Gerrymandering remains an arms race: one party does it because the other party does it too.

In the congressional redistricting context, however, interstate compacts could replace those incentives to compete with incentives to cooperate. Under a redistricting compact, the reallocation of congressional seats toward party A *in state* X *would not occur without a corresponding reallocation in favor of party* B *in state* Y*. This incentivizes cooperation, since many voters would trade their party's in-state advantage for improved electoral competitiveness if the other party likewise surrendered redistricting advantages in the states they control. Coordination would transform redistricting from zero-sum competition to positive-sum collaboration.*

The Constitution's Compact Clause permits states to collaborate with each other but requires congressional consent. Yet the Constitution remains silent about which interstate agreements trigger this requirement, how Congress may provide consent, and how the Compact Clause interacts with the Elections Clause. This Comment explains how states could form redistricting compacts even without affirmative congressional approval. Courts consistently interpret the Compact Clause functionally rather than formally: compacts that neither expand compacting states' power against the federal government nor against noncompacting states do not require affirmative congressional approval.

This Comment applies that functionalist doctrine to several types of redistricting compacts, concluding that—even if they count as "compacts" under the Constitution—they would pass muster because they would neither increase the compacting states' congressional representation nor diminish Congress's Elections Clause power. The Comment then sensitizes that conclusion to more formalist reinterpretations of the Compact Clause and assesses how redistricting

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compacts could ensure compacting states' continued commitment without requiring congressional approval.

INTRODUCTION

Partisan gerrymandering subverts representative democracy. When politicians redistrict to maximize their own power at the expense of partisan fairness and competitiveness, political

extremism and unrepresentative policies result.[1] The public understands this threat,[2] demonstrating bipartisan support for redistricting reform.[3]

Yet reform has stalled. At the federal level, partisan gerrymandering remains nonjusticiable and a statutory prohibition against partisan gerrymandering appears unlikely.[4] At the state level, some jurisdictions have created independent redistricting commissions (often through direct democracy) or enforced state constitutional protections against partisan gerrymandering.[5] But even these victories have often proved incomplete or transient. Partisans have captured some ostensibly independent redistricting commissions.[6] Partisan judicial elections have influenced state constitutional litigation.[7] And the political conditions that propelled single-state redistricting reform even just a few years ago are deteriorating.[8]

Interstate compacts can revive congressional redistricting reform.[9] Compacts—the constitutional mechanism for interstate cooperation—have long enabled states to overcome coordination challenges and federal gridlock.[10] But compacts can accomplish more than encouraging states to internalize spillover effects[11] and regionalize public services,[12] traditional functions of compacts that leverage cooperative incentives among states. Compacts can also serve as commitment devices that replace competitive incentives with cooperative ones. The redistricting context offers prime territory for compacts to play this role.

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1 *See infra* Part I.A.

2 *See infra* notes 63, 67.

3 *See infra* note 63.

4 *See infra* text accompanying notes 55–58.

5 *See infra* text accompanying notes 59–66.

6 *See infra* text accompanying notes 87–88.

7 *See infra* text accompanying notes 89–93.

8 *See infra* text accompanying notes 78–83.

9 This Comment targets its proposal toward redistricting of congressional seats, rather than redistricting of state legislative seats, because congressional redistricting compacts would more likely attract political support. *See infra* note 80.

10 *See infra* notes 94–96 and accompanying text.

11 *See, e.g.*, COLO. REV. STAT. § 37-61-101 (2024) (codifying the Colorado River Compact of 1992, which attempted to mitigate water usage externalities).

12 *See, e.g.*, KAN. STAT. ANN. § 12-2524 (West 2024) (codifying the Kansas City Area Transportation District and Authority Compact, which provides for cross-border public transit).

This Comment joins recent scholarship[13] in demonstrating that states could compact to simultaneously adopt—and remain committed to—redistricting processes that promote partisan fairness and competitiveness. Without interstate coordination, each state's majority party is incentivized to continue gerrymandering because unilateral disarmament would help the other party control the U.S. House of Representatives. But under an interstate redistricting compact, the partisan reallocation of congressional seats toward party *A* in state *X* would not occur without a corresponding reallocation in favor of party *B* in state *Y*. This incentivizes cooperation, since many voters would trade their party's in-state advantage for improved electoral competitiveness if the other party likewise surrendered redistricting advantages in the states they control.[14] Coordination would transform redistricting from zero-sum competition to positive-sum collaboration.

Redistricting compacts, capable of embracing just two states or many more, could assume one of two forms. One form would establish reciprocal independent redistricting commissions in each compacting state, where the adoption of a commission in one state triggers the enactment of a similarly constructed commission in the others. The other, more ambitious form would create a single multistate commission with representation from, and redistricting responsibility for, each compacting state.

This Comment advances the conversation championing interstate redistricting compacts as a means of encouraging fair redistricting practices that increase partisan fairness and competitiveness.[15] This Comment also offers two novel contributions in evaluating redistricting compacts' constitutionality. First, it explains how states could constitutionally form redistricting compacts even without express congressional ratification under both the Compact Clause's current functionalist interpretation and more formalist theories. Second, it demonstrates that reciprocal state constitutional amendments, rather than a compact's internal provisions, would offer the most constitutionally defensible constraint to inhibit compacting states from withdrawing.

The first contribution details the current functionalist Compact Clause jurisprudence, applies that doctrine to show that

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[13] *See generally, e.g.*, Zachary J. Krislov, *Reflecting on the 2020 Redistricting Cycle: A Proposal for Interstate Redistricting Agreements*, 128 PENN ST. L. REV. 433 (2024).

[14] *See infra* note 79 and accompanying text.

[15] *See* Krislov, *supra* note 13, at 463–81.

states could lawfully form redistricting compacts even without express congressional approval, and asserts that even more formalist theories would support the same result. The Compact Clause provides, "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State."[16] But despite that prohibitory language, more than a century of Supreme Court precedent permits certain interstate agreements formed without affirmative congressional approval. Under the Court's functionalist reading, not all interstate agreements count as "Agreement[s] or Compact[s]" under the Clause.[17] And even if an interstate agreement counts as a compact, it requires affirmative congressional approval only if it threatens to undermine federalism. When a compact neither violates federal law nor enlarges the compacting states' power relative to other states or the federal government, courts uphold the compact's validity, even without a vote from Congress.[18]

Interstate redistricting compacts would satisfy that functionalist test.[19] To demonstrate, this Comment explores how states could structure redistricting agreements to avoid the Compact Clause's definition of compacts. Next, to consider the validity of redistricting agreements even as compacts within the Constitution's meaning, the Comment compares redistricting compacts to the National Popular Vote Interstate Compact (NPVIC),[20] which would obligate compacting states' presidential electors—once they collectively control a majority of Electoral College votes—to vote for the national popular vote winner. Unlike the NPVIC, which would deny noncompacting states the chance to decide presidential elections,[21] redistricting compacts would not increase the representation of compacting states, marginalize the representation of noncompacting states, or conflict with external legal constraints.[22]

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16 U.S. CONST. art. I, § 10, cl. 3.

17 Although the Constitution references both "Agreement[s]" and "Compact[s]," the Supreme Court uses the terms interchangeably. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460–64 (1978).

18 *See infra* Part III.

19 *See* Krislov, *supra* note 13, at 481–87.

20 *Text of the National Popular Vote Compact Bill*, NAT'L POPULAR VOTE (Mar. 14, 2023) [hereinafter *NPVIC Text*], https://perma.cc/2H9M-PVRQ.

21 The NPVIC has raised awareness of the potential for compacts to reform U.S. politics. But as Part IV.B explains, the NPVIC is likely unconstitutional.

22 *See infra* Part IV.B.

Advancing the literature, this Comment insulates the constitutional analysis against doctrinal evolution. Even nonfunctionalist Compact Clause theories support the constitutionality of redistricting compacts. Redistricting compacts would satisfy sovereignty-centered Compact Clause interpretations that would find any delegation of state sovereignty unconstitutional per se. Because redistricting compacts would modify how compacting states exercise a power assigned from Congress, rather than one innate to their sovereignty, such compacts would not alter state sovereignty.[23] Redistricting compacts would also comport with more textualist Compact Clause interpretations.[24] The Clause's silence about the mechanism for congressional consent, in context with the presumed validity of state redistricting laws under the Elections Clause,[25] suggests implied congressional preapproval for redistricting compacts.

This Comment's second contribution explains how the Constitution enables states to design compacts to ensure continued commitment across redistricting cycles. Rather than conceiving of compacts themselves as imposing binding obligations on compacting states,[26] this Comment argues that compacts should rely on external political constraints to secure enduring participation. Specifically, redistricting compacts should require states to join by state constitutional amendment. By entering compacts in this manner, rather than through ordinary legislation, states would retain the power to withdraw while making such withdrawal—and relapse into partisan gerrymandering—politically difficult. States vary in their constitutional-amendment processes and approval thresholds, but nearly all require citizen approval.[27] Insulating redistricting compacts from new or emboldened legislative majorities, who would benefit from repealing the compacts, would improve (although not guarantee) a redistricting compact's longevity. Additionally, leveraging the external political constraint of state constitutional amendments, rather than inserting withdrawal constraints within the compact itself, would avoid

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23 *See infra* text accompanying notes 239–43.

24 *See infra* notes 244–48 and accompanying text.

25 U.S. CONST. art. I, § 4, cl. 1.

26 *See, e.g.*, Krislov, *supra* note 13, at 484.

27 *See* Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J.F. 191, 196, 213–16 (2023).

entrenchment issues that would endanger the compact's constitutionality without congressional approval.[28]

These contributions about the constitutional issues of forming and sustaining interstate redistricting compacts serve three purposes. First, this analysis attempts to correct misconceptions about the functionality and constitutionality of redistricting compacts, which contributed to the failure of previous compact proposals.[29] Second, the constitutional analysis of redistricting compacts lends insight into other Compact Clause issues, such as the constitutionality of the NPVIC—which continues to attract support[30]—and how states could continue to compact without affirmative congressional approval even under more textualist Compact Clause interpretations.[31] Finally, highlighting an underappreciated constitutional source of multistate direct democracy affirms that bipartisan cooperation remains possible despite polarization among federal and state elected officials.

This Comment proceeds in five parts. Part I establishes the need for a new approach to redistricting reform. Part II recommends redistricting compacts as a viable solution. Analyzing the constitutionality of redistricting compacts, Part III describes the current doctrine governing when states can lawfully compact without affirmative congressional approval. As Part IV explains, redistricting compacts conform with that doctrine and with alternative interpretations of the Compact Clause. With the constitutionality of compact formation established, Part V analyzes how different forms of compacts could secure continued participation by overcoming entrenchment issues.

I. THE NEED FOR A NEW APPROACH TO CONGRESSIONAL REDISTRICTING

Every decade, the Constitution requires a reallocation of congressional seats to account for population change.[32] Once the census apportions the number of representatives to each state, the Elections Clause empowers states to draw congressional

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28 *See infra* Part V.

29 *See infra* notes 107–08 and accompanying text.

30 *See, e.g.*, Nadine El-Bawab, *State Law Takes US a Step Closer to Popular Vote Deciding Presidential Elections*, ABC NEWS (Apr. 21, 2024), https://perma.cc/5CEU-EV4N.

31 *See infra* text accompanying notes 244–48.

32 *See* U.S. CONST. art. I, § 2, cl. 3.

districts.[33] States redistrict differently, but most states employ their typical lawmaking processes, requiring legislative and gubernatorial approval.[34]

This Part explains the proliferation and pernicious effects of partisan gerrymandering. It then explores the obstacles aligned against efforts to reform redistricting on an individualized, state-by-state basis.

A. How Partisan Gerrymandering Damages Representative Democracy

Both major parties gerrymander.[35] In the many states where one party controls the governorship and both chambers of the legislature, the dominant party often maximizes power by drawing political gerrymanders to solidify their incumbency for the next decade.[36] Legislators achieve this advantage by either separating minority-party voters into different districts ("cracking") or cramming them into a single district ("packing").[37] Both tactics impede the minority party from gaining control, ultimately yielding outcomes that diverge from the state's overall partisan preference. This distortion endures even as partisan preferences change because states generally use the same process to draw *state* legislative districts, allowing partisan legislators to secure perpetual advantages over *federal* redistricting by preserving their state legislative majority through the next census.[38]

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[33] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2495–96 (2019) (reviewing how Congress has historically exercised its Elections Clause power to limit states' redistricting authority). No current federal law preempts partisan gerrymandering. *See id.*

[34] *See* CONG. RSCH. SERV., IN11053, REDISTRICTING COMMISSIONS FOR CONGRESSIONAL DISTRICTS 1 (2021).

[35] *See* Nick Corasaniti & Reid J. Epstein, *As Both Parties Gerrymander Furiously, State Courts Block the Way*, N.Y. TIMES (Apr. 2, 2022), https://www.nytimes.com/2022/04/02/us/politics/congressional-maps-gerrymandering-midterms.html. For a visualization of gerrymandering in two large states, see also, for example, *What Redistricting Looks Like in Every State: The Partisan Breakdown of Florida's New Map*, FIVETHIRTYEIGHT (last updated July 19, 2022), https://perma.cc/HHU3-DSAM; and *What Redistricting Looks Like in Every State: The Partisan Breakdown of Illinois's New Map*, FIVETHIRTYEIGHT (last updated July 19, 2022), https://perma.cc/LFC4-ZECG.

[36] *See* Nick Corasaniti, Reid J. Epstein, Taylor Johnston, Rebecca Lieberman & Eden Weingart, *How Maps Reshape American Politics*, N.Y. TIMES (Nov. 7, 2021), https://www.nytimes.com/interactive/2021/11/07/us/politics/redistricting-maps-explained.html.

[37] *See id.*; Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1271 (2016).

[38] *See, e.g.*, Matthew DeFour, *Wisconsin's Assembly Maps Are More Skewed Than Ever—What Happens in 2023?*, PBS WIS. (Dec. 7, 2022), https://perma.cc/J23Y-XUMH

At its extreme, one party can manufacture commanding congressional majorities despite receiving fewer votes nationally. In 2012, a national redistricting strategy enabled Republicans to secure a thirty-three-seat majority in the House of Representatives despite receiving fewer votes overall than Democrats.[39] Nonpartisan redistricting could have altered control of the chamber, or at least yielded a much narrower majority.[40]

But perhaps the divergence between the House popular vote and the House's membership—if indeed it persists[41]—reflects a feature, not a bug, of constitutional design. The Framers distrusted popular majorities.[42] Even when designing the House, the federal government's most majoritarian institution, the Framers limited membership to no more than one representative for "every thirty Thousand"[43] to filter out "the confusion and intemperance of a multitude."[44] The membership cap has since increased, but representatives of some states represent twice as many constituents as representatives of other states[45]—an imbalance usually associated with the antimajoritarian Senate. Moreover, even if one desired the House to reflect majority sentiment, it might seem

(discussing Republican gerrymandering of Wisconsin state legislative maps during the 2010 and 2020 redistricting processes).

39 Stephen Ohlemacher, *GOP Has Built-In Advantage in Fight for US House*, AP NEWS (Mar. 31, 2014), https://perma.cc/JC9M-3QP4.

40 *See* Wang, *supra* note 37, at 1298.

41 The last two congressional elections produced narrow majorities aligned with national preference. *See* CHERYL L. JOHNSON, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 8, 2022, at 55–56 (2023) (recording that Republicans won the House with a nine-seat majority and the popular vote by nearly three million votes); CHERYL L. JOHNSON, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 3, 2020, at 78–79 (2021) (recording that Democrats won the House with a ten-seat majority and the popular vote by more than four-and-a-half million votes).

42 *See generally* THE FEDERALIST NO. 10 (James Madison) (arguing that the republican form of government guards against the dangers of majority factions).

43 U.S. CONST. art. I, § 2, cl. 3. Reinforcing skepticism of the House as a majoritarian institution, the original Constitution neither counted people equally towards representation nor guaranteed universal suffrage. *See id.*, *amended by* U.S. CONST. amend. XIV (containing the Three-Fifths Clause as first written).

44 THE FEDERALIST NO. 55, at 340 (James Madison) (Clinton Rossiter ed., 1961). Founding Father James Madison so distrusted direct democracy that he argued, "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob." *Id.*

45 *See* Chris Chambers Goodman, *Constitutional Revolution: A Path Towards Equitable Representation*, 81 MD. L. REV. 366, 373–74 (2021).

pedantic to focus on partisan bias in any single state's congressional delegation.[46]

Yet misalignment between the electorate and the legislature represents just one of partisan gerrymandering's pernicious effects. Even when partisan gerrymanders offset to produce representative outcomes nationally, partisan gerrymanders inhibit consensus and compromise. The fortification of highly partisan incumbents has created the potential for uncontested elections to outnumber competitive elections.[47] Most districts in the 2022 midterm elections were designed under either party's complete control,[48] contributing to "historically uncompetitive" congressional campaigns[49] in which primaries became the true contest.[50] Representatives accordingly face little incentive to compromise or appeal to the median voter, which risks calcifying extremism as a feature of U.S. democracy.[51]

Moreover, partisan gerrymandering could even decide presidential elections. If no presidential candidate wins a majority of Electoral College votes, each state—not each representative—

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[46] *See* Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409, 420 ("The seat share of each party in Congress is obviously connected to the composition of each congressional delegation, but those delegations are, for these purposes, in some sense arbitrary subparts of the legislative institution.").

[47] *See, e.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 624 (2002). Competitive elections denote races expected to result within a ten-point margin of victory. *Id.*

[48] *See* Chris Leaverton, *Who Controlled Redistricting in Every State*, BRENNAN CTR. FOR JUST. (Oct. 5, 2022), https://perma.cc/YG3T-THJS.

[49] Nathaniel Rakich & Elena Mejia, *The House Map's Republican Bias Will Plummet in 2022—Because of Gerrymandering*, FIVETHIRTYEIGHT (Mar. 31, 2022), https://perma.cc/6AL3-Q89S.

[50] *See, e.g.*, Kevin Sullivan & Clara Ence Morse, *Illinois Democrats Drew New Maps. The Changes Pushed the GOP to the Right*, WASH. POST (Oct. 7, 2023), https://perma.cc/KYG7-TPNQ (describing how partisan gerrymandering has caused consensus-oriented representatives to lose primaries or retire).

[51] *See id.* (citing politicians, voters, and experts who ascribe the erosion of a "middle road" to gerrymandering). The feedback loop between gerrymandering and partisanship begins when "[p]artisan gerrymanders . . . permit[ ] parties to leverage temporary or slight legislative majorities into enduring or decisive control without the trouble of attracting more votes." Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L. J. 400, 415 (2015). This entrenchment can reinforce polarization because "ideological preferences filter down from politicians to voters." Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 413 (2017); *see also* David G. Oedel, Allen K. Lynch, Sean E. Mulholland & Neil T. Edwards, *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 VILL. L. REV. 57, 61–65 (2009) (noting that, despite mixed empirical literature about the relationship between gerrymandering and partisanship, several House members ascribe polarization to anticompetitive mapmaking).

receives one vote in the House to elect the president, so the composition of each state's delegation could influence the highest-stakes outcomes.[52] Despite the low odds of the House deciding the presidency, leaders of both parties acknowledged the House's role as a strategic consideration in the 2020 campaign.[53]

B. The Incomplete and Insecure State of Previous Redistricting Reform

Across the country and the political divide, voters have recognized the harms caused by partisan gerrymandering.[54] With federal intervention unlikely from either Congress or the courts, voters have litigated partisan gerrymandering under their state constitutions and proposed novel redistricting methods to sideline partisans. While these reforms have achieved some success, they have proceeded haltingly on a state-by-state basis and suffer from critical vulnerabilities.

The persistence of partisan gerrymandering reflects the absence of a constitutional prohibition or preemptive federal law. The Supreme Court in *Rucho v. Common Cause*[55] found partisan gerrymandering "incompatible with democratic principles" but nonjusticiable for lack of constitutional standards.[56] The Court invited Congress to limit partisan gerrymandering under the Elections Clause,[57] but Congress has consistently refused.[58]

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[52] U.S. CONST. amend. XII.

[53] *See* Benjamin Siegel, *What Happens If the House Has to Decide the Next President?*, ABC NEWS (Oct. 18, 2020), https://perma.cc/UE3M-B9ZX.

[54] Undoubtedly, redistricting does not always lead among voters' priorities. *See* Bradley Jones, *With Legislative Redistricting at a Crucial Stage, Most Americans Don't Feel Strongly About It*, PEW RSCH. CTR. (Mar. 4, 2022), https://perma.cc/6AAA-5BZD. But the large pool of persuadable voters, *see id.*, and the success of statewide initiatives, described below, indicate potential to energize voters.

[55] 139 S. Ct. 2484 (2019).

[56] *Id.* at 2506–07 (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015)). For a critique of the "law of gerrymandering," see generally Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379 (2020).

[57] *See Rucho*, 139 S. Ct. at 2495, 2508 (documenting historic congressional legislation to preempt state redistricting processes under the Elections Clause, such as requiring continuous districts, and noting that this "avenue for reform . . . remains open"); *see also* Vieth v. Jubelirer, 541 U.S. 267, 275–77 n.4 (2004) (plurality opinion) (discussing the Founding-Era understanding that Congress could preempt partisan gerrymandering through the Elections Clause).

[58] *See* CONG. RSCH. SERV., *supra* note 34, at 2.

States, therefore, have emerged as the primary arena for reform. Through legislature-proposed constitutional referenda[59] and citizen-led ballot initiatives,[60] more than a dozen states have established redistricting commissions. In the 2020 redistricting cycle, nine states, accounting for around 25% of congressional seats, enacted congressional maps through commissions.[61] Another nine states have created redistricting commissions but subordinated the commissions to legislative action.[62] These measures have earned popular support across the ideological spectrum[63] and approval from the Supreme Court, which has upheld the constitutionality of redistricting commissions under the Elections Clause, at least when established by citizen initiative.[64] In other states where traditional redistricting processes endure, citizens have restrained legislators' partisan instincts through state constitutional litigation.[65]

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59 *See, e.g.*, S. Con. Res. 18-004, 71st Leg. (Colo. 2018); COLO. CONST. art. V, § 44 (codifying a congressional redistricting commission after the popular approval of a legislative referral).

60 *See* Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 390 (2007).

61 *See* Leaverton, *supra* note 48. These states are Arizona, California, Colorado, Hawaii, Idaho, Michigan, Montana, New Jersey, and Washington. *See id.*

62 *See* CONG. RSCH. SERV., *supra* note 34, at 1. These states are Connecticut, Indiana, Iowa, Maine, New York, Ohio, Rhode Island, Utah, and Virginia. *See id.*

63 The constitutional amendment to establish Ohio's redistricting commission, for example, passed by a three-to-one margin, with supermajority support among voters from Ohio's most liberal and conservative congressional districts alike. Peter Miller & Annie Lo, *Support for Ohio's Issue 1 Ballot Measure in the 2018 Primary Election*, BRENNAN CTR. FOR JUST. (Nov. 7, 2018), https://perma.cc/4BVY-RFZK.

64 *Ariz. State Legislature*, 576 U.S. at 813–14. The Court's holding embraces two critical points. First, the Elections Clause does not require that state legislatures conduct redistricting. *Id.* Second, voters can exercise that discretion to assign redistricting to a commission, even over the legislature's objection, if state law provides for constitutional initiatives. *Id.* at 816–17 ("We resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process."). The Court reasoned that the word "legislature," as used in the Elections Clause, carried a broad definition at the Founding that included lawmaking power reserved to a state's citizenry. *See id.* at 813–17. In ballot initiative states, therefore, direct democracy checks the legislature's redistricting authority. *See id.* at 817–18. The Court recently relied on *Ariz. State Legislature* for the proposition that state constitutions govern congressional redistricting processes. Moore v. Harper, 143 S. Ct. 2065, 2082–83 (2023) (holding that state legislatures remain subject to state judicial review when they redistrict).

65 *See, e.g.*, League of Women Voters v. Commonwealth, 178 A.3d 737, 803–04 (Pa. 2018) (holding that Pennsylvania's constitution exceeds the enfranchisement protections of its federal counterpart). *See generally* Samuel S.-H. Wang, Richard F. Ober, Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203 (2019).

Both approaches—redistricting commissions and state constitutional litigation—have improved partisan competitiveness and fairness,[66] but both have also encountered obstacles. The remainder of this Section considers those barriers.

1. Barriers to single-state redistricting commissions.

Single-state redistricting commissions are politically difficult to create and generally require direct democratic influence. Most current redistricting commissions arose from state constitutional amendments.[67] And many of these amendments passed through citizen-led ballot initiatives, or through legislative action influenced by the threat of initiatives, because state legislators lacked the incentive to adopt redistricting reform without public pressure.[68] Partisan gerrymandering not only preserves legislators' self-interest in reelection,[69] but it also minimizes the political costs of opposing redistricting reform. After all, legislators can create highly partisan districts that are unlikely to punish them for maximizing partisan advantage. When designing state legislative districts, the majority party can insulate their members from competition and thereby preserve their mapmaking

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66 *See, e.g.*, Clara Hendrickson, *Redistricting Experts Weigh In on Results of First General Election Under New Maps*, DETROIT FREE PRESS (Dec. 1, 2022), https://perma.cc/ZV2J-2Y4Q; David A. Lieb, *How a Pa. Court Case Paved the Way for the Gerrymandering Lawsuit in Front of the US Supreme Court*, 90.5 WESA (Dec. 7, 2022), https://perma.cc/732U-YSRX. *But see* David Gartner, Arizona State Legislature v. Arizona Independent Redistricting Commission *and the Future of Redistricting Reform*, 51 ARIZ. ST. L.J. 551, 563–65 (2019) (noting mixed evidence about the impact of redistricting commissions on competitiveness).

67 *See* Gartner, *supra* note 66, at 579–84, 580 nn.216–17 (indicating that four out of the five states to approve redistricting commissions in 2018 did so by constitutional amendment).

68 Of the four state redistricting commissions adopted for congressional or state legislative maps in 2018, half originated through citizen initiative and the others passed following legislative referral of ballot questions. *See id.* at 580 & nn.216–17. But even when redistricting commissions do not emerge directly from initiatives, the mere threat of initiatives can influence legislatures to propose commissions. *See id.* at 559; *see also* Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. CAL. L. REV. 997, 1004–05 (2005) (finding that states with ballot initiatives are more likely to create redistricting commissions, although most commissions "were passed through normal legislative means").

69 *See* William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335, 340–41 (2000) (explaining that elected officials act as "rational self-interest maximizers").

advantage for both state and congressional redistricting through the next census.[70]

Yet while direct democracy can override legislative resistance to redistricting reform, only a minority of states allow ballot initiatives.[71] And most of the states that allow ballot initiatives impose intrastate geographic requirements on signature gathering that can function like partisan gerrymanders.[72] As a result, there is a limit on the number of states where single-state redistricting commissions are a viable possibility.

Moreover, fewer than half of the states that provide ballot initiatives have created independent redistricting commissions.[73] Florida and Illinois, two of the most populous partisan gerrymanderers,[74] allow citizen-led constitutional initiatives[75] but have not yet voted on redistricting reform. That voters in these gerrymandered states[76] have not proposed ballot initiatives suggests ambivalence or disapproval of redistricting reform.

Collective action problems, styled like prisoner's dilemmas, likely explain some voter hesitation. In a prisoner's dilemma, two competitors achieve the optimal outcome when they cooperate, but each is incentivized to cheat the other.[77] The current state of redistricting, where both parties have weaponized the gerrymander against each other, follows these dynamics. A coordinated

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70 *See* DeFour, *supra* note 38 (indicating quantitatively that partisan gerrymandering in Wisconsin increased from already high levels after the 2020 redistricting cycle, state Republicans' second consecutive in control).

71 *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 876 (2021). An initiative "allows the electorate to adopt positive legislation," with either constitutional or statutory force, while a referendum merely allows voters to approve or reject constitutional or statutory legislation approved by the legislature. *Ariz. State Legislature*, 576 U.S. at 794; *see also* Bulman-Pozen & Seifter, *supra*, at 876–77.

72 *See* Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 311–16 (2022) (explaining that some states require a certain volume of signatures from different parts of the state, in addition to an aggregate total).

73 *Compare* Bulman-Pozen & Seifter, *supra* note 71, at 876 & n.85 (stating that twenty-four states allow initiatives), *with* CONG. RSCH. SERV., *supra* note 34, at 2 (showing that ten of those states have some form of redistricting commission).

74 *See supra* note 35.

75 FLA. CONST. art. XI, § 3; ILL. CONST. art. XIV, § 3. *But see* Hooker v. Ill. State Bd. of Elections, 63 N.E.3d 824, 838–39 (Ill. 2016) (disqualifying a redistricting commission proposal under the Illinois Constitution's subject-matter limitation on initiatives). Illinois reformers would need to propose a constitutional amendment that complies with (or repeals) the subject-matter limitation on amendments.

76 *See supra* note 35.

77 *See* Richard McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1009–10 (1995).

return to nonpartisan redistricting would restore the states to the optimal cooperative stance, but the attractiveness of such reform will increasingly depend on convincing voters that both parties will disarm simultaneously, such that the opposing party does not benefit.

Because single-state redistricting reform necessarily reallocates power from the majority party to the minority party, the popularity of these ballot initiatives indicates that a substantial number of voters would trade preferred partisan outcomes for increased partisan competition. But as Americans increasingly view members of the other party antagonistically,[78] the prospect of awarding more seats to the political opposition—at least without any reciprocal partisan benefit at the federal level—may grow less attractive. In an era of nationalized politics, voters are generally more concerned with who controls the House than with who represents their community.[79] An interstate "trade" of representatives—one state trades a Democratic seat in return for a Republican seat, or vice versa—would allow many voters to have the best of both worlds by preserving national partisan representation *and* improving electoral competitiveness. Single-state redistricting reform cannot offer that trade.[80] Accordingly, supporters of redistricting reform in ballot-initiative states like Florida and Illinois would likely struggle to build the broad coalitions that propelled reform before the 2020 redistricting cycle even in states with strong partisan leans, such as Ohio[81] and Colorado,[82] because political polarization has intensified.[83]

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78 *See* Domenico Montanaro, *Americans Have Increasingly Negative Views of Those in the Other Political Party*, NPR (Aug. 13, 2022), https://perma.cc/34U8-CNHY.

79 *Cf.* John Lapinski, Matt Levendusky, Ken Winneg & Kathleen Hall Jamieson, *What Do Citizens Want from Their Member of Congress?*, 69 POL. RSCH. Q. 535, 537–38 (2016). More voters identify alignment on national issues as "very important" in supporting a congressional candidate than alignment on local issues. *Id.* at 537. Additionally, most voters responded that a representative of either party would perform equally competently on local issues such as securing federal funding and providing constituent services. *Id.* at 538.

80 Neither could an interstate compact for redistricting state legislative seats. A Democratic Florida congressperson could represent a Democratic Illinois voter's interests on federal issues, but a Democratic Florida state legislator could not represent the Illinoisan's interests on state issues.

81 *See* Miller & Lo, *supra* note 63.

82 In a solidly Democratic state, Colorado voters approved a congressional redistricting commission with over 70% approval. *See* Ben Botkin, *Colorado Amendments Y and Z: Measures Pass Handily*, DENVER POST (Nov. 6, 2018), https://perma.cc/VP9W-7YSG.

83 *See* Montanaro, *supra* note 78.

And even when the political conditions align for single-state redistricting reform, new redistricting procedures have occasionally disappointed voters. Single-state redistricting has not universally improved partisan competition and fairness. Each state's redistricting commission varies, with different partisan compositions, selection criteria, and mapmaking standards.[84]

Some states' commissions prioritize partisan fairness and minimize the risk of partisan capture. Michigan, for example, randomly selects an equal share of Democrats and Republicans, plus independents.[85] Michigan's redistricting commission has dramatically improved partisan competitiveness and fairness.[86]

Other states have opted for more partisan compositions and have suffered accordingly. Ohio's seven-member redistricting commission, for example, consists of three statewide elected officials and four legislative appointees,[87] permitting a dominant political party to control the commission too. Unsurprisingly, Ohio's redistricting process has suffered from partisan infighting and failed to reduce partisan gerrymandering.[88]

2. Barriers to state constitutional litigation.

State constitutional litigation has also met partisan resistance because elected state court judges often affiliate with a political party and face similar incentives as legislators, rendering them imperfect defenders of antigerrymandering provisions. In North Carolina, prior to the 2022 midterms, the state's supreme court held that the legislature's proposed partisan gerrymander violated the state constitution.[89] But a year later, following a partisan campaign, a new majority of justices who identify

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84 *See* Gartner, *supra* note 66, at 586–88 (contrasting how redistricting commissions in Arizona, California, and Washington prioritize competitiveness).

85 *See* MICH. CONST. art. IV, § 6(2).

86 *See* Hendrickson, *supra* note 66.

87 *See* OHIO CONST. art. XI, § 1(A).

88 *See* Dan Balz, *Ohio Voters Asked for Fairness in Redistricting. They Didn't Get It*, WASH. POST (Jan. 17. 2022), https://perma.cc/3GNW-CF9K; Julie Carr Smyth, *GOP Legislative Leaders' Co-Chair Flap Has Brought the Ohio Redistricting Commission to a Standstill*, AP NEWS (Sept. 13, 2023), https://perma.cc/R6AY-4LSQ. Ohio voters are attempting to restructure their state's commission to emulate Michigan's design. *See* Julie Carr Smyth, *Effort to Replace Ohio's Political-Mapmaking System with a Citizen-Led Panel Can Gather Signatures*, AP NEWS (Oct. 12, 2023) [hereinafter Smyth, *Effort to Replace*], https://perma.cc/6KDP-HN7D.

89 Harper v. Hall (*Harper I*), 868 S.E.2d 499, 527–28, 558–59 (N.C. 2022); *see also* Harper v. Hall (*Harper II*), 881 S.E.2d 156, 174 (N.C. 2022) (affirming the state constitutional standard for adjudicating gerrymandering claims).

with the state's dominant legislative party[90] reversed, holding that partisan gerrymanders are nonjusticiable under state and federal constitutional law alike.[91] Likewise, in New York, a change in high-court membership likely affected redistricting litigation seeking to replace relatively competitive judicially drawn maps.[92] As in North Carolina, these efforts bore fruit: the state's high court restricted its judicial review over redistricting and preserved a pathway for "the Democratic-controlled Legislature to have the last word" on redistricting.[93] State courts are therefore unlikely to consistently limit partisan gerrymandering.

* * *

Despite considerable recent success, redistricting reform has stalled. Most states continue to redistrict through partisan processes. And even among the few states that have implemented redistricting commissions or struck down partisan gerrymandering, flawed commission designs and partisan judicial elections have limited progress. With single-state redistricting becoming less viable as polarization leads voters to prioritize partisanship over competitiveness, the next round of redistricting reform will require a new approach.

II. A NEW SOLUTION: INTERSTATE REDISTRICTING COMPACTS

Past redistricting reform efforts have typified the usual practice of trying to solve national challenges through federal intervention or state action. But a binary view of federalism neglects the potential for states to achieve together what they could not achieve individually.[94] Interstate compacts have long enabled innovation on challenging issues, including commercial legislation,

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90 *See* Hannah Schoenbaum, *Republicans Retake Control of North Carolina Supreme Court*, AP NEWS (Nov. 9, 2022), https://perma.cc/VX74-HTWY.

91 Harper v. Hall (*Harper III*), 886 S.E.2d 393, 416 (N.C. 2023) (citing *Rucho*, 139 S. Ct. at 2500).

92 *See* Nicholas Fandos, *New York Is Ordered by Appeals Court to Redraw House Map*, N.Y. TIMES (July 13, 2023), https://www.nytimes.com/2023/07/13/nyregion/redistricting-democrats-ny.html (noting that the Democrats' suit challenged a state high-court decision issued just a year prior under a since-dissipated conservative majority).

93 Alexander Sammon & Mark Joseph Stern, *A New York Court May Have Just Determined Control of the House in 2024*, SLATE (Dec. 12, 2023), https://perma.cc/3KJT-YLQP; *see* Hoffman v. N.Y. State Indep. Redistricting Comm'n, No. 90, at 7–9, 14–15, 29, 33 (N.Y. Dec. 12, 2023).

94 *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 688 (1925).

resource conservation, and public utility regulation.[95] Today, more than two hundred interstate compacts sustain the U.S. economy, criminal justice system, and even the electoral system.[96]

Redistricting compacts could encourage states to adopt or improve nonpartisan redistricting procedures. Perceiving this potential, Congressman Jamie Raskin introduced legislation in 2016 (as a Maryland state senator) to create the "Potomac Compact,"[97] a multistate redistricting commission between Maryland and Virginia.[98] The Maryland and Virginia legislatures, controlled respectively by Democrats and Republicans, gerrymandered after the 2010 census.[99] Each state's dominant party possessed every incentive to continue gerrymandering. By proposing a nonpartisan, interstate redistricting process, the Potomac Compact aimed to eliminate partisan gerrymanders in both states simultaneously.[100]

The Potomac Compact envisioned a single commission composed of Maryland and Virginia delegates charged with drafting congressional maps for each state.[101] Both legislatures would vote on the commission's proposed map for their state without an opportunity to amend.[102] If either state adopted the commission's proposed map, the Compact would require the other to follow suit.[103] And if either state deviated from the commission's recommendation, the other state could also ignore the commission's recommendation and pass a gerrymandered map.[104] The Compact

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95 *See id.* at 695–704.

96 Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2351–52 (2020) [hereinafter Fahey, *Federalism by Contract*] (detailing the volume and variety of interstate compacts); Bridget A. Fahey, *Data Federalism*, 135 HARV. L. REV. 1007, 1043 n.169 (2022) (describing an election data-sharing compact). For a searchable database of interstate compacts, see *Database*, NAT'L CTR. FOR INTERSTATE COMPACTS, https://compacts.csg.org/database/.

97 S.B. 762, 2016 Reg. Sess. (Md. 2016).

98 *See* Rob Richie & Austin Plier, *Maryland Can't Act Alone to End Gerrymandering*, WASH. POST (Mar. 25, 2016), https://perma.cc/JSH5-QSU6.

99 *See id.*

100 *See* Md. S.B. 762; *see also* Krislov, *supra* note 13, at 464 (explaining that the Compact aimed to "win support from Maryland Democrats wary of giving up their advantage in the state's [congressional] delegation without a corresponding payoff elsewhere").

101 Md. S.B. 762 § 1.

102 *See* Krislov, *supra* note 13, at 464 (citing Md. S.B. 762, § 1).

103 Md. S.B. 762 § 1.

104 *See id.* Later drafts provided that a state legislature's failure to adopt a commission-proposed map would eventually compel that state's courts to draw the maps. *See* Krislov, *supra* note 13, at 464.

thus relied on the threat of retaliation, rather than a legal remedy, to enforce nonpartisan redistricting.

Legislators reintroduced the Potomac Compact several times without success.[105] In addition to concerns about the legislation's additional proposal of multimember districts,[106] legislative history also reflected more fundamental gaps in policymakers' knowledge about compacts.[107] Legislators worried that redistricting compacts would be hard to create and easy to circumvent.[108] But as Part I explained, in today's political environment, redistricting compacts may prove *easier* to create than single-state redistricting commissions because they overcome collective action problems. And given that any compacting state could easily retaliate against noncomplying partners by passing their own gerrymandered maps, the Potomac Compact offers more acute deterrence than compacts whose obligations require legal action to enforce.[109]

Despite never passing, the Potomac Compact remains a helpful blueprint to study the structure and constitutionality of redistricting compacts. This Part first theorizes how redistricting compacts neutralize the prisoner's dilemma of single-state redistricting reform by simultaneously balancing partisan gains. It then outlines two models for redistricting compacts. One model, the multistate commission, emulates the Potomac Compact by proposing a joint body where representatives of compacting states propose plans for each state's legislature to approve. A simpler

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[105] *See* H.B. 622, 2017 Reg. Sess. (Md. 2017); H.B. 537, 2018 Reg. Sess. (Md. 2018); H.B. 67, 2019 Reg. Sess. (Md. 2019); H.B. 182, 2020 Reg. Sess. (Md. 2020).

[106] *See* Krislov, *supra* note 13, at 465 (noting "skepticism of multimember districts and the possibility of alternative modes of reform" as "key reasons" for the proposal's failure).

[107] *See Bill Hearing*, MD. GEN. ASSEMB., at 8:18–9:09 (Mar. 2, 2020) https://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=hru&ys=2020RS&clip=JHR_3_2_2020_meeting_1 (questioning whether compacts facilitate continued interstate cooperation); *Hearing*, MD. RULES & EXEC. NOMINATIONS COMM., at 15:00–15:56 (Mar. 3, 2017), https://mgahouse.maryland.gov/mga/play/60351a31521647dbb4c5eaee108aa5c61d?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c (suggesting, amidst discussion of the proposal's multimember district provisions, that a delegate believed compacts require "congressional oversight").

[108] *See Bill Hearing*, *supra* note 107, at 7:38–9:09 (showing legislators' concerns about the difficulty in making and keeping promises with other states).

[109] One legislator expressed frustration with the failure to control upstream pollution under the Susquehanna River Basin Compact (SRBC). *Id.* Indeed, enforcement of the SRBC appears to lie primarily—perhaps exclusively—with the SRBC's commission, rather than the states, because the SRBC assigns the commission the power to investigate noncompliance and sue for injunctive relief. *E.g.*, MD. CODE ANN., ENV'T § 5-301 (West 2024) (codifying the SRBC).

model, reciprocal commissions**,** copies the design of single-state redistricting commissions and adds an element of coordinated action: each compacting state would create their own redistricting commission, but only upon the creation of a corresponding commission in the other compacting states. After comparing these designs, this Part identifies factors that would motivate states to partner.

A. Interstate Redistricting Compacts Could Increase Support for Redistricting Reform

Legislators and voters aligned with a state's majority party oppose single-state redistricting reform because it reallocates their power to the state's minority party.[110] But interstate redistricting compacts would offset partisan gains, at least roughly, across states with different majority parties.[111] This netting process would increase voter support for redistricting reform, inspiring popular support for ballot initiatives (where possible) and placing political pressure on legislators.

Under a redistricting compact, the reallocation of congressional seats toward party *A* in state *X* would not occur without a corresponding reallocation favoring party *B* in state *Y*. This breaks the prisoner's dilemma and turns redistricting from a zero-sum brawl for partisan advantage into a positive-sum collaboration to maximize competitiveness.[112] On balance, neither party would gain a substantial advantage over the other,[113] but voters in both states would benefit from more responsive politics. Voters care more about their representative's performance on national rather than local matters,[114] and a compact—by enshrining competition as a primary redistricting criterion—would enable more voters to hold their representative accountable on those issues.[115]

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[110] *See supra* text accompanying notes 70–83.

[111] States lack incentives to enter redistricting compacts with states controlled by the same party, since such arrangements would diminish that majority party's representation as if both states had implemented single-state redistricting reform.

[112] *See supra* notes 77–83.

[113] Although, as Part II.C recognizes, this raises the challenge of combining states with roughly equal populations and mirrored politics to equalize the seats exchanged as much as possible, especially given the recent history of slim House majorities.

[114] *See* Lapinski et al., *supra* note 79, at 537 tbl.1.

[115] *See* Issacharoff, *supra* note 47, at 615–16 ("Representatives remain faithful to the preferences of the electorate and responsive to shifts in preferences so long as they remain accountable electorally."); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998) ("Only

The success of redistricting initiatives across politically diverse states indicates that voters prefer competitive redistricting. Moreover, since single-state redistricting necessarily reallocates power from one party to another, these results indicate that many voters value competition over partisanship.[116] But as interparty trust wanes, these voters may prioritize partisanship.[117] Interstate redistricting compacts could limit this shift. By offsetting partisan gains across states, compacts would enable voters to support competition without sacrificing much likelihood of their preferred party controlling the House.

Two other features of interstate redistricting compacts could persuade more voters to support them than single-state commissions. First, redistricting compacts would incentivize states to remain committed to independent redistricting. Without interstate compacts, a state's dominant party could reinstitute partisan gerrymandering without consequence. But in a redistricting compact, any state contemplating withdrawal must evaluate the threat of retaliation by other compacting states; if they revert to partisan gerrymandering too, neither party benefits.[118] Second, redistricting compacts may encourage states to adopt the Michigan redistricting model over the Ohio model.[119] Interstate redistricting commissions would generate offsetting partisan gains and more competitive districts only if both states agreed to redistricting procedures that empower political independents and codify partisan fairness and competitiveness as prime redistricting criteria.

B. Alternative Designs for an Interstate Redistricting Compact

Interstate redistricting compacts would help. But how would they work? This Section surveys different compact structures to illustrate the primary choice facing proponents of redistricting

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through an appropriately competitive partisan environment can . . . policy outcomes of the political process . . . [reflect] the interests and views of citizens. But politics shares with all markets a vulnerability to anticompetitive behavior.").

116 *Cf.* Miller & Lo, *supra* note 63 (finding supermajority support for redistricting reform even in regions dominated by Ohio's majority party).

117 *See* Montanaro, *supra* note 78 (documenting sharp increases since 2018, when several states adopted redistricting commissions, in the proportion of voters who describe members of the other party as "closed-minded," "immoral," and "unintelligent").

118 *See, e.g.*, Md. S.B. 762 § 1; McAdams, *supra* note 77, at 1012 & n.26 (showing that "[c]onsiderable evidence demonstrates the success of tit-for-tat in preventing mutual defection in iterated prisoner's dilemmas").

119 *See supra* text accompanying notes 84–88.

compacts: whether to build the compact as a multistate commission or a set of parallel, single-state independent redistricting commissions activated upon ratification of reciprocal state laws.[120]

Many interstate compacts exist without any joint organization as mere reciprocal statutes or constitutional provisions, with one state enacting a law that takes effect only when another state adopts an identical law.[121] For example, to compete with traditional financial hubs, Massachusetts passed a statute that authorized purchases of their banks by financial institutions based in a different New England state, but only if that state granted the same reciprocity for acquisitions by Massachusetts banks.[122] When Connecticut passed a reciprocal statute, Massachusetts banks could purchase Connecticut banks and vice versa.[123]

More complex compacts create interstate organizations. As an exceptionally comprehensive example, the District of Columbia, Maryland, and Virginia formed multiple compacts to provide public transit and establish multi-jurisdictional police.[124] These compacts, operated through representative commissions, possess a variety of rulemaking, procurement, and self-financing authorities.[125] Closer to the scale and subject matter of interstate redistricting, the Electronic Registration Information Center[126] (ERIC) aims to help participating states improve voter registration systems and detect fraud. Compacting states disclose certain voter and motor vehicle data sets in exchange for access to reports sourced from other member states' voter and motor vehicle data.[127] Unlike the D.C.-area compacts, ERIC has no rulemaking authority within its compacting states, but it helps compacting states enforce their own election laws.

With these models in mind, the remainder of the Section compares the political benefits and costs of designing interstate

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120 For additional perspectives, see Krislov, *supra* note 13, at 478–81.

121 *See* MICHAEL L. BUENGER, JEFFREY B. LITWAK, RICHARD L. MASTERS & MICHAEL H. MCCABE, THE EVOLVING LAW AND USE OF INTERSTATE COMPACTS 74 (2d ed. 2016) [hereinafter BUENGER ET AL., INTERSTATE COMPACTS].

122 Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 472 U.S. 159, 163–64 (1985).

123 *See id.* at 164–65.

124 *See* BUENGER ET AL., INTERSTATE COMPACTS, *supra* note 121, at 415–31.

125 *See id.* at 423–26.

126 *What is ERIC?*, ELEC. REGISTRATION INFO. CTR., https://perma.cc/WUD5-GKYF.

127 *See Bylaws and Membership Agreement*, ELEC. REGISTRATION INFO. CTR. Exhibit A (Mar. 17, 2023), https://perma.cc/N5Y6-NSVE (listing the various reports available to members).

redistricting compacts as a multistate commission or reciprocal single-state commissions.

1. Multistate redistricting commissions.

The Potomac Compact illustrates how redistricting compacts could create multistate redistricting commissions, analogous to how ERIC creates a multistate fraud prevention organization. The Potomac Compact would establish a single commission composed of delegates from each participating state to draft congressional districts for each state.[128] After the commission submits its proposals, the compact would require each compacting state's legislature to vote on the commission's plan without amendment.[129] Once any compacting state adopts the commission's plan, the compact would require every other compacting state to follow suit.[130]

The legislation also prescribes a retaliatory remedy for breach by any party state: if any party state deviates from the compact's procedures, the compact would cease to bind the other compacting states.[131] Thus, if one state reverts to partisan gerrymandering, everyone else could too. Accordingly, like ERIC, the multistate commission would lack rulemaking authority. But the compact would encourage collective action by nudging states toward acceptance of the commission's recommendations through procedural defaults.[132]

2. Reciprocal single-state redistricting commissions.

Simple amendments to the Potomac Compact illustrate how a redistricting compact could operate without an interstate organization, like the New England bank acquisition statutes. This reciprocal-commissions approach entails a state creating its own redistricting commission contingent upon the creation of an identical redistricting commission in another compacting state. For example, a Maryland reciprocal commission law would create an independent redistricting commission comprised only of

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[128] Md. S.B. 762 § 1.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] This design resembles other compacts, which do not purport to create law for the compacting states but rather guide them toward similar outcomes. *See* BUENGER ET AL., INTERSTATE COMPACTS, *supra* note 121, at 20–21.

Marylanders for the sole purpose of enacting Maryland congressional boundaries—but the commission would only take effect once Virginia enacted a like redistricting commission.[133] Each state's enacting law, whether a constitutional amendment or statute, could require the state to adopt its commission's plan.

3. Political trade-offs between multistate and reciprocal commissions.

The structure of any redistricting compact would affect how courts evaluate its constitutionality.[134] As an antecedent issue, however, the choice between multistate and reciprocal commissions must reconcile political trade-offs.

Compared with multistate commissions, reciprocal commissions would require less political capital to create and maintain because they operate independently, despite taking effect only upon reciprocal action by other states. The compacting states would not need to agree on as many infrastructural issues, such as funding the commission or sharing voter information. Moreover, while reciprocal commissions would commit to common redistricting criteria, their in-state membership and scope could appeal to voters and legislators concerned about out-of-state influence on the redistricting process. Similar issues about out-of-state influence over sensitive subjects have plagued ERIC, which has lost nine compacting states since 2022 due to data security concerns (some inspired by conspiracy theories).[135]

But while multistate commissions impose more costs than reciprocal commissions, these costs are manageable. Reciprocal commissions require infrastructure and financial investment too, limiting the marginal costs of multistate commissions. Multistate commissions can also address the concern about local control, as illustrated by the Potomac Compact, by necessitating approval from the state legislature to enact the commission's proposal for that state.

Plus, even if reciprocal commissions prove more politically feasible, multistate commissions could generate a bigger payoff.

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[133] For an example of reciprocal language, see Md. S.B. 762 § 2.

[134] *See infra* Part IV.

[135] *See* Acacia Coronado & Christina A. Cassidy, *Texas is Largest State to Leave Bipartisan National Effort to Prevent Voter Fraud*, AP NEWS (July 20, 2023), https://perma.cc/UP73-FCFN; Miles Parks, *How the Far Right Tore Apart One of the Best Tools to Fight Voter Fraud*, NPR (June 6, 2023), https://perma.cc/VCX8-8NX4.

Populating a redistricting commission with citizens of different states reduces the risk of concentrated political interests capturing the redistricting process; even if one state's majority party captures its state's commission membership, the other state's commissioners would counterbalance them. They could also consistently apply redistricting standards, such as partisan representation and competitiveness, across more seats.[136] This broader vision could help equalize partisan gains across states with different population sizes and partisan leans.

C. Identifying Compact Partners

Regardless of structure, compacts require partners. The historic pattern of compact formation and the political dynamics of redistricting reform suggest three ingredients for interstate cooperation.

First, states generally collaborate with their neighbors.[137] Regional affinity—perhaps even a shared sense of political community—may prove important to forming redistricting compacts. Second, because redistricting reform has proven more popular with voters than legislators, redistricting compacts will more likely include states that allow popular constitutional initiatives.[138] The availability of initiatives would also help enforce the compact by embedding compliance within state constitutions rather than the compacts themselves.[139] Finally, the compact must embrace states with approximately equal populations and counterbalancing partisan distributions. Only this equivalence would facilitate the interstate exchange of partisan advantage necessary to break the collective action problem where no state has a first-mover incentive to eliminate partisan gerrymandering.[140]

The potential for more than two states to compact[141] allows for more combinations to balance partisan gains. Illinois would be unlikely to partner with either Indiana or Wisconsin alone, for

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[136] The downside risk, however, is that "the impact of 'bad' mapmaking [including due to partisan capture] is multiplied." Krislov, *supra* note 13, at 480.

[137] *See* BUENGER ET AL., INTERSTATE COMPACTS, *supra* note 121, at 24 (noting that many compacts emerge from metropolitan areas where people work, live, and recreate across different states).

[138] *See supra* text accompanying notes 67–70. For a list of initiative states, see *Initiative and Referendum States*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 15, 2023), https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-states.

[139] *See infra* Part V.

[140] *See supra* text accompanying notes 77–83.

[141] *See* Krislov, *supra* note 13, at 478–79.

example, because Illinois commands roughly twice as many congressional seats as either of its more conservative counterparts.[142] But combining the states as a trio could generate equitable partisan redistribution. And Indiana and Wisconsin would benefit too from engaging with Illinois together, since their unity would negate any negotiating advantage by the much larger Land of Lincoln.

Perhaps some of these conditions—regionality, initiative allowance, and population-weighted partisan balance—could be relaxed. Significant improvements in partisan fairness and competitiveness may require large and distant states to compact. Illinois and Florida, for example, stand hundreds of miles apart yet feature large, gerrymandered delegations and figure prominently in each other's political discourse and migration patterns.[143] Although it would require considerable political organizing, voters in both states could coordinate to propose similar constitutional initiatives.[144]

More ambitiously, some voters may care enough about competitiveness that they would support compacts even if the partisan gains did not fully offset. Under such circumstances, the two largest and diametrically opposed states could partner. California has already adopted an independent redistricting commission, yet it neither enshrines competitiveness as a requirement nor articulates standards for partisan fairness.[145] Would California voters consider remodeling their redistricting commission if the Texas legislature[146] created one of its own? If Californians valued competitiveness more than Democratic advantage, and Texans would surrender some in-state Republican advantage for the chance to balance California's larger delegation, the states could compact.

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142 *2020 Census: Apportionment of the U.S. House of Representatives*, U.S. CENSUS BUREAU (Apr. 26, 2021), https://perma.cc/KG8C-LNXQ.

143 *See* Alix Martichoux & Addy Bink, *Leaving Illinois: The Top Destinations for People Who Left Last Year*, WGN (Nov. 20, 2023), https://perma.cc/B44T-QPUV; Alix Martichoux & Addy Bink, *More Than 228,000 Moved to Illinois Last Year: Where Did They Come From?*, WGN (Nov. 20, 2023), https://perma.cc/VX64-Y7YR.

144 Illinois petitioners would additionally need to satisfy certain constitutional restraints on initiatives. *See* Hooker v. Ill. State Bd. of Elections, 63 N.E.3d 824, 838–39 (Ill. 2016).

145 *See* CAL. CONST. art. XXI, § 2(d).

146 Texas does not allow popular initiatives. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 138.

III. COMPACT CLAUSE DOCTRINE: WHEN CAN STATES COOPERATE WITHOUT CONGRESSIONAL APPROVAL?

Interstate redistricting compacts can overcome the political impediments to states enacting redistricting reform unilaterally. Redistricting compacts could take one of two forms: multistate commissions (independent commissions with membership from and influence over each compacting state) or reciprocal commissions (independent commissions in each state triggered by reciprocal state laws). But would either model pass constitutional muster under the Compact Clause?

While the constitutionality of redistricting compacts is untested, the Supreme Court would likely uphold one expressly approved by Congress. The Elections Clause empowers Congress to regulate the redistricting process,[147] and the Compact Clause authorizes Congress to approve interstate agreements. But as Part I discussed, Congress has never meaningfully curtailed partisan gerrymandering.[148] Thus, to guard against continued congressional inaction, states must find constitutional authority to compact without express congressional approval.[149] A close look at the Elections Clause and the Compact Clause reveals how a state could structure redistricting compacts to comply with the Constitution without affirmative approval from Congress.

The Elections Clause presents minimal obstacles because it does not require state legislatures to conduct redistricting themselves. In initiative states, voters can establish independent redistricting commissions through direct democracy.[150] Additionally, state legislatures may themselves delegate redistricting to independent redistricting commissions.[151]

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147 *See Rucho*, 139 S. Ct. at 2508.

148 *See id.* at 2495 (noting that while statutes previously required contiguous and compact congressional districts, neither requirement endures).

149 The Potomac Compact's text suggests that its sponsors believed that they did not require congressional approval to form a multistate redistricting commission. The Compact's multimember district provisions would not take effect unless Congress approved, Md. S.B. 762 § 2, but the Compact made no similar provision for the creation of the multistate redistricting commission itself.

150 *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 813–14 (2015); Moore v. Harper, 143 S. Ct. 2065, 2083 (2023) (relying on *Ariz. State Legislature* to reject "the contention that the Elections Clause vests state legislatures with exclusive and independent authority when [regulating] federal elections").

151 *Ariz. State Legislature*, 576 U.S. at 813–14 ("[T]he people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do.").

The Compact Clause, however, presents a higher hurdle because its text appears to foreclose compacts absent congressional approval. The Compact Clause provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State."[152] But the Compact Clause's history, including its original understanding and more than a hundred years of Supreme Court precedent culminating in a functionalist two-part test, paints a more nuanced picture. Indeed, no federal court has ever found an interstate compact unlawful, even those formed without affirmative congressional approval.[153] This Part outlines the Supreme Court's two-part test for the constitutionality of such compacts, and Parts IV and V analyze how redistricting compacts would satisfy it.

A. Origins of the Compact Clause

The Framers left little direct evidence to help future generations interpret the Compact Clause. Records of the Constitutional Convention reveal no direct discussion about the Clause's origin or intended scope.[154] Founding Father James Madison considered the meaning of the Compact Clause "so obvious" that he offered no elaboration in the Federalist Papers.[155] Nevertheless, the historical record and text of the Compact Clause suggest a concern with specific types of coordinated state action that could undermine the federalist structure.

Land disputes between the states informed the Compact Clause's earliest interpretations. During English rule, as colonial populations grew and migrated, colonies claimed increasingly extensive territory.[156] The more land a colony controlled, the more

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[152] U.S. CONST. art. I, § 10, cl. 3.

[153] *See* Katherine Mims Crocker, *A Prophylactic Approach to Compact Constitutionality*, 98 NOTRE DAME L. REV. 1185, 1189 (2023).

[154] *See* Jacob Finkel, Note, *Stranger in the Land of Federalism: A Defense of the Compact Clause*, 71 STAN. L. REV. 1575, 1582–83 (2019) (highlighting records that suggest that the Compact Clause was drafted in response to Madison's concern about the threat compacts pose to the national union but leave no indication about what compacts would fall within the Clause's scope).

[155] THE FEDERALIST NO. 44, at 280 (James Madison) (Clinton Rossiter ed., 1961). Even if one knew certainly whether Madison believed that the Compact Clause would absolutely bar compacts without congressional approval or only compacts that functionally undermine federalism, he may have had political incentive to conceal his true beliefs from his colleagues. *See* Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 309–13 (2003). This further complicates the task of discerning a shared original understanding of the Compact Clause.

[156] *See* BUENGER ET AL., INTERSTATE COMPACTS, *supra* note 121, at 5.

economic and political capital it gained. To help quell rivalry between colonies, the colonies would propose boundaries to the sovereign, which was perceived as a neutral party.[157] The Compact Clause (and its predecessor in the Articles of Confederation) embodied the republican continuation of this peaceful settlement process.[158] By resolving disputes through Congress, the Compact Clause sought to prevent secession or armed conflict.[159] Historical usage of the Compact Clause confirms the centrality of land disputes to its development: most interstate agreements formed during the United States' first 150 years concerned state borders.[160]

But the Framers cared about more than mediating boundary disputes; they also cared about protecting the federal government's power. Under the Articles of Confederation, only "treat[ies], confederation[s], or alliance[s]" between states were viewed suspiciously.[161] The Constitution's Compact Clause broadened this list significantly by requiring congressional approval of "any Agreement or Compact."[162] Scholars and even the Supreme Court have grappled with the significance of adopting such a sweeping prohibition.[163] In all likelihood, the Framers desired broader language to match the expanded scope of federal power under the new charter. As the subjects of congressional jurisdiction expanded, the types of interstate arrangements that could thwart federal power also grew.[164] Some scholars theorize that, to mitigate the unique threat of coordinated interstate action to the federal structure, the Framers deliberately substituted the default supremacy model, where congressional silence would permit state laws to operate, with a "congressional negative" model that would require compacts to obtain affirmative congressional approval.[165]

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157 *See* Frankfurter & Landis, *supra* note 94, at 692–93.

158 *See id.* at 693–94; BUENGER ET AL., INTERSTATE COMPACTS, *supra* note 121, at 5–7.

159 The Compact Clause's roots might trace to Chief Justice John Jay's concern, expressed in *The Federalist No. 5*, that states might fracture into confederations and form alliances with foreign nations. *See* Roderick M. Hills, *Keeping the Compact Clause Irrelevant*, 44 HARV. J.L. & PUB. POL'Y 29, 31 (2021).

160 *See* Frankfurter & Landis, *supra* note 94, at 735–54 (cataloguing interstate compacts formed with and without congressional assent between the Founding and 1925).

161 ARTICLES OF CONFEDERATION OF 1781, art. VI, cl. 2.

162 U.S. CONST. art. I, § 10, cl. 3.

163 *See, e.g.*, BUENGER ET AL., INTERSTATE COMPACTS, *supra* note 121, at 7–8; U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 461–63 (1978).

164 *See* BUENGER ET AL., INTERSTATE COMPACTS, *supra* note 121, at 9–10.

165 Greve, *supra* note 155, at 312–13 (emphasis omitted).

Yet the Constitution never defines what counts as a compact, the prerequisite for the congressional consent requirement.[166] Chief Justice John Marshall suggested a functionalist definition, with interstate compacts requiring congressional consent only if they would interfere with federal interests.[167] As the cases discussed below demonstrate, not every interstate compact, even those within the Constitution's definition of the term, threatens federalism.[168] And the Compact Clause's silence regarding when or how a compact must secure congressional consent[169] suggests that the appropriate body for addressing the threats that compacts pose to Congress's power—by first determining what interstate arrangements fall within the constitutional definition of compacts—is Congress itself.[170]

B. Compact Clause Jurisprudence: Elements for Compacting Without Affirmative Congressional Approval

Amidst the tension between the Compact Clause's absolutist text and its ambiguous reach, the Supreme Court has consistently adopted a functionalist interpretation concerned with minimizing interstate disputes and protecting federalist structure.[171] This Section describes when interstate cooperation meets the definition of a compact under the Constitution and when states may lawfully compact without Congress's express approval. Under the Court's functionalist interpretation, an interstate agreement does not require affirmative congressional approval, even if it

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166 David E. Engdahl, *Characterization of Interstate Arrangements: When is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 75 (1965).

167 James F. Blumstein & Thomas J. Cheeseman, *State Empowerment and the Compact Clause*, 27 WM. & MARY BILL OF RTS. J. 775, 785–86 (2019) (citing Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833)). Chief Justice Marshall distinguished the limitations on agreements between states and foreign nations from the limitations on agreements among states by observing: "If these compacts are with foreign nations, they interfere with the treaty making power which is conferred entirely on the general government, [but] if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the [C]onstitution." *Id.* at 786 (quoting *Barron*, 32 U.S. at 249).

168 Ten interstate compacts, covering topics as diverse as railroad rights-of-way and levee financing, took effect between the Founding and 1925 without congressional ratification—each without judicial objection. *See* Frankfurter & Landis, *supra* note 94, at 749–54.

169 *See* Crocker, *supra* note 153, at 1200–01 (citing Virginia v. Tennessee, 148 U.S. 503, 521 (1893)) (noting that the Compact Clause does not specify consent procedures).

170 *See* Frankfurter & Landis, *supra* note 94, at 694–95 ("[O]nly Congress is the appropriate organ for determining what arrangements between States might . . . come within the [ ] class of 'Agreement or Compact.'").

171 *See U.S. Steel*, 434 U.S. at 459–60 & n.9, 468–72 (citing examples of such cases).

qualifies as a compact under the Constitution, if it does not undermine federalism.

The analysis begins by defining which state laws count as constitutional compacts. The Supreme Court initially adopted a formalistic definition, suggesting that a mere "similar declaration" among compacting states could indicate sufficient "consideration" to demarcate a compact.[172] More recently, however, the Court has applied a multifactor analysis considering the existence of reciprocal state laws, evidence of legislative cooperation, establishment of a joint organization, conditioning of one state's action upon the actions of other states, and restraints on states' power to unilaterally modify or repeal their laws.[173] Interstate cooperation characterized by even multiple indicia could fall beyond the constitutional definition of a compact.[174]

But even if an interstate agreement satisfies the definition of a compact, not every compact formed without congressional approval violates the Compact Clause under the Court's functionalist jurisprudence. Rather, states can compact without affirmative congressional approval provided that (1) the compact does not increase the power of the compacting states relative to the federal government, including by violating federal law, and (2) the compact does not increase the power of the compacting states relative to noncompacting states. This Section explains each prong of that test in turn.

1. Effect of the compact on federal sovereignty.

The first prong of the test provides that a compact can take effect without affirmative congressional approval if it does not aggrandize state power against the federal government. Like any state law, congressionally unapproved compacts cannot survive if they are otherwise preempted by federal law.[175] But even a compact compliant with federal law must obtain congressional approval if it "increase[s] [ ] the political power or influence of the States affected, and thus encroach[es] . . . upon the full and free exercise of Federal authority."[176]

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[172] *Virginia*, 148 U.S. at 520.

[173] Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 175 (1985).

[174] *See id.*

[175] "To the extent that the state statutes might conflict in a particular situation with other federal statutes . . . they would be pre-empted by those statutes, and therefore any Compact Clause argument would be academic." *Id.* at 176.

[176] *Virginia*, 148 U.S. at 520.

This rule emerged from *Virginia v. Tennessee*,[177] a border dispute case. In 1800, the Virginia legislature discovered a surveying error that created a jurisdictional gap between Virginia and the recently admitted state of Tennessee. This sparked practical challenges, including the refusal by some residents of this twilight zone to pay tax to either state or even to the federal government.[178] Virginia and Tennessee created a joint commission, which established the border respected by both states for decades.[179] But in the late nineteenth century, Virginia sought to absorb some of Tennessee, claiming authority from Virginia's original English charter.[180] To accomplish this annexation, Virginia asked the Supreme Court to declare the Virginia-Tennessee commission unconstitutional under the Compact Clause because it lacked congressional approval.[181]

The Court determined that the Compact Clause's congressional consent requirement does not extend to every compact because such an unlimited reach would include arrangements "to which the United States can have no possible objection or . . . interest in interfering with."[182] Rather, the Court applied contextual canons of construction to determine that the Compact Clause limits the formation only of compacts that would increase the political influence of one or more states relative to the federal government.[183] The Court noted that the other prohibitions in the Compact Clause relate to powers of war, diplomacy, and importation; in other words, issues of exclusive federal sovereignty.[184] This convinced a unanimous Court that the consent requirement attached to the Compact Clause's general terms—"compacts" and "agreements"—likewise only governs arrangements that could threaten federal supremacy.[185]

Applying this functionalist rule, the Court upheld the compact even without congressional approval because it did not increase either state's political influence. The survey merely

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177 148 U.S. 503 (1893).

178 *Id.* at 510.

179 *See id.* at 510–16.

180 *See id.* at 504, 517.

181 *Id.* at 517.

182 *Virginia*, 148 U.S. at 518; *see also* BUENGER ET AL., INTERSTATE COMPACTS, *supra* note 121, at 8–9 (citing Wharton v. Wise, 153 U.S. 155, 170–71 (1894); Union Branch R.R. v. E. Tenn. & Ga. R.R., 14 Ga. 327, 339 (1853)).

183 *Virginia*, 148 U.S. at 519.

184 *See id.* (applying the noscitur a sociis canon of construction).

185 *See id.*

"mark[ed] and define[d] that which actually existed before, but was undefined and unmarked."[186] Even if the survey slightly altered the border, the Court must have considered this a de minimis reallocation of power, in contrast to an annexation of "an important and valuable portion of a State" that increased "the political power of the State enlarged," which *would* require congressional approval.[187]

2. Effect of the compact on noncompacting states' sovereignty.

Under the test's second prong, states may compact without affirmative congressional approval if the compact does not increase the power of the compacting states relative to noncompacting states. The Supreme Court explained this requirement in *United States Steel Corp. v. Multistate Tax Commission*,[188] which upheld a compact designed to improve corporate tax administration.[189]

After the Supreme Court and Congress authorized states to tax out-of-state corporations, some states compacted to form the Multistate Tax Commission, a multistate tax agency with authority to recommend unified tax policy and revenue procedures for the compacting states.[190] Under the Compact's Article VIII, a compacting state could direct the Commission to perform audits on its behalf, with powers to seek compulsory process in the courts of any compacting state that also adopted this Article.[191] Some taxpayers, objecting to the audits, challenged the Commission's validity under the Compact Clause.[192]

Applying *Virginia*, the Court first concluded that the compact did not enhance the compacting states' power at the expense of federal sovereignty. After all, it did not "authorize the member States to exercise any powers they could not exercise in its absence"[193] since states could already tax and audit their citizens. The Commission did not expand these powers; it merely provided states with different procedures to exercise them.[194]

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186 *Id.* at 520.
187 *Id.*
188 434 U.S. 452 (1978).
189 *Id.* at 456, 478.
190 *See id.* at 454–57.
191 *Id.* at 457, 475–76.
192 *Id.* at 458.
193 *U.S. Steel*, 434 U.S. at 473.
194 *See id.* at 473–76.

The Court then rejected an argument that the compact would impair the sovereignty of noncompacting states. Citing the Commission's potential to solve complex state-taxation issues, the challengers contended that the Commission would pressure noncompacting states to join it.[195] The Commission would prove so effective, the challengers feared, that states would feel constrained to exercise their sovereign tax and auditing powers in a particular way—by joining the compact.[196] Yet the Court recognized that "[a]ny time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result."[197] It would not be unconstitutional for one state to adopt new tax policies just because those reforms might influence neighbors to follow suit. That analysis holds even when a state legislature adopts the recommendations of an advisory multistate commission, because such collaborative policy ideation merely serves as a more efficient vehicle for the same ends that states could reach themselves.[198]

Tying the two prongs together, a compact lacking affirmative congressional approval would need to more seriously endanger the "federal structure" or the sovereignty of the noncompacting states to violate the Compact Clause.[199] A compact would require congressional approval if it purported to exercise powers beyond those reserved to the states.[200] For example, a compact between midwestern states to coin their own currency would violate the Compact Clause, absent affirmative congressional approval, since only the federal government can coin currency.[201] Additionally, a compact might fail without affirmative congressional approval if states attempt to delegate their sovereign power to the compact (such as the authority to set tax rates[202]), bind themselves to rules

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195 *See id.* at 477.

196 *See id.*

197 *Id.* at 478.

198 *See U.S. Steel*, 434 U.S. at 477–78 (explaining that even if the compact affected noncompacting states' tax policies, such effects "could not be ascribed" to the compact because "[e]ach member State is free to adopt the auditing procedures it thinks best, just as it could if the Compact did not exist," meaning that "[r]isks of unfairness and double taxation [ ] are independent of the Compact").

199 *Id.* at 478.

200 *See id.* at 473 ("[T]he test is whether the Compact enhances state power [with respect to] the National Government.").

201 *Cf.* U.S. CONST. art. I, § 10, cl. 1.

202 While the Multistate Tax Commission could propose tax regulations, compacting states retained "complete control" to regulate tax rate, base, and collection. *U.S. Steel*, 434 U.S. at 456–57.

established by an interstate organization, or limit their own ability to withdraw in the future.[203]

C. Stability of Current Doctrine

Other scholars have similarly assessed the current state of Compact Clause doctrine, which provides the starting point for probing the constitutionality of hypothetical interstate redistricting compacts.[204] This Comment further examines that doctrine's health, establishing background to support alternative theories for upholding the lawfulness of redistricting compacts formed without congressional approval.

Despite the apparently restrictive language of the Compact Clause, courts have reviewed interstate agreements extremely permissively. No federal court has ever invalidated any of the numerous compacts formed without obtaining congressional approval.[205] Only one court has ever struck down a compact for violating the congressional consent requirement: a Missouri trial court, which issued a one-page decision that was later dismissed as moot on appeal.[206] The Supreme Court has tolerated lower courts' permissive, functionalist review, having declined its most recent invitation to reinvigorate the congressional consent requirement.[207]

But the issue could resurface. Some scholars have criticized the current doctrine for depriving the Compact Clause of independent meaning beyond basic supremacy and federalism principles.[208] And in dictum, the Court has used absolutist language to describe Congress's role in approving compacts, suggesting at least some receptiveness to a literal interpretation of the Compact Clause as mandating congressional approval without exception.[209] But even if courts reevaluated the Compact Clause, not everyone

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[203] *See id.* at 473; *accord Ne. Bancorp.*, 472 U.S. at 175–76.

[204] *See, e.g.*, Krislov, *supra* note 13, at 484–87.

[205] *See* Crocker, *supra* note 153, at 1189–90.

[206] *See id.*; Sauer v. Nixon, 2015 WL 4474833, at *1 (Mo. Cir. Ct. Feb. 24, 2015), *appeal dismissed as moot*, 474 S.W.3d 624 (Mo. Ct. App. 2015).

[207] *See* S&M Brands, Inc. v. Caldwell, 562 U.S. 1270 (2011) (denying certiorari); Petition for Writ of Certiorari at i, *S&M Brands*, 562 U.S. 1270 (No. 10-622) (presenting the question of "[w]hether a binding agreement among multiple States, with both intrastate and interstate effects, violates the Compact Clause . . . in the absence of congressional approval").

[208] *See, e.g.*, Finkel, *supra* note 154, at 1586–87; Greve, *supra* note 155, at 304–08, 312–13.

[209] *See* Texas v. New Mexico, 138 S. Ct. 954, 958–59 (2018).

who argues that the Compact Clause requires affirmative congressional approval in *more* cases would argue that the Compact Clause requires affirmative congressional approval in *all* cases.[210] And as Part IV explains, the relationship between federal and state authority varies by subject, with a presumption of approval for interstate cooperation emerging in certain contexts.

IV. TESTING THE CONSTITUTIONALITY OF INTERSTATE REDISTRICTING AGREEMENTS

This Part returns to the interstate redistricting compacts described in Part II—multistate and reciprocal commissions—and tests whether states could constitutionally create such commissions without Congress's approval. First, this Part examines whether either form of interstate cooperation would fall within the Constitution's definition of a compact. Second, assuming both would qualify as constitutional compacts, this Part tests them against the prevailing functionalist doctrine. It concludes by arguing that even if a court determined that the Compact Clause required Congress to approve interstate redistricting agreements, another constitutional provision, the Elections Clause, provides "preapproval" for redistricting compacts, subject to congressional veto.

A. Would Interstate Redistricting Agreements Count as Compacts?

If an interstate redistricting agreement does not amount to a compact under the Constitution, discussion of congressional consent becomes moot.[211] While a fellow redistricting commentator argues that "redistricting agreements likely would not escape scrutiny as a compact,"[212] at least some permutations could evade the "compact" label.

Recall that not every interstate agreement establishes a compact. In *Northeast Bancorp v. Board of Governors of the Federal Reserve System*,[213] the Supreme Court doubted that Massachusetts and Connecticut actually formed a compact when

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[210] *See, e.g.*, Finkel, *supra* note 154, at 1606–12 (arguing that the congressional consent requirement should only embrace compacts that intend to supplant congressional action in a given legislative field).

[211] *See supra* text accompanying notes 171–74.

[212] Krislov, *supra* note 13, at 484.

[213] 472 U.S. 159 (1985).

they passed statutes facilitating reciprocal interstate bank purchases.[214] The reciprocal statutes lacked several compact indicia: they did not establish a joint organization, restrain either state from subsequently changing their laws, or condition the statutes' operation on action by the other state.[215]

Northeast Bancorp does not offer the clearest guidance on that third missing factor. After all, each state's interstate bank acquisition statute conditioned its operation on the other state's enactment of reciprocal policies.[216] This suggests that the rule against conditioning a statute's operation on the action of another state is not a formal prohibition. Rather, it is informed by the character of the resulting obligation on the state subject to the condition. The less a condition constrains state agency, the less likely a court would consider it a compact. For example, conditioning the enactment of a provision on the reciprocal action of another state, as the states did in *Northeast Bancorp*, only obliges a state to follow its own, newly enacted law. But conditioning a state's performance under the law on the actions of the other state results in an ongoing dependence on the other state—the kind of dependence that would indicate a compact under *Northeast Bancorp*.

A multistate redistricting commission such as the proposed Potomac Compact would likely satisfy the constitutional definition of a compact.[217] Creation of a joint organization would likely tip the scales.[218] But compacts structured as reciprocal commissions—State *A* creates an independent redistricting commission if State *B* creates one identically—could keep the agreements beyond the current constitutional definition of compacts.

Reciprocal commissions would function like the reciprocal banking laws in *Northeast Bancorp*, which the Court determined were not compacts within the Constitution's definition and therefore did not require congressional approval. Laws enacting the redistricting commissions in each state would create identical policies, require reciprocal action from participating states to take effect, and reflect interstate coordination. But once implemented,

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214 *See id.* at 175.

215 *Id.*

216 *See id.* at 164.

217 *But see* Hills, *supra* note 159, at 30–34 (urging that the Compact Clause's text and limited purpose suggest "that mere coordination among states does not amount to a compact . . . unless such coordination is accompanied by [a judicial] enforcement mechanism").

218 *See Ne. Bancorp*, 472 U.S. at 175 (describing the establishment of a joint organizations as a "classic" indicator of a compact).

no further state action would turn on the partner state's actions. Under a reciprocal commission approach, the only interstate coordination occurs at the formation of each state's own identically constructed redistricting commission. After formation, each state's only obligation would be to follow its new redistricting procedures as codified in the state's own laws.[219] The enacting legislation could clearly communicate the absence of ongoing interstate obligations by only referencing other states in the provisions detailing when the state's redistricting commission, procedures, and criteria take effect.

Through this structure, reciprocal commissions and their enacting legislation would not create "legally enforceable rights between the states,"[220] but rather serve merely as a timing mechanism for states to simultaneously amend their electoral law. Perhaps the absence of legally enforceable interstate obligations would increase the risk of relapse to partisan gerrymandering.[221] But the benefit of potentially avoiding the Compact Clause's congressional consent requirement at least partially offsets that weakness.

B. Even as Compacts, Redistricting Agreements Would Not Require Affirmative Congressional Approval Under the Court's Functionalist Approach

If a court concluded that interstate redistricting agreements, regardless of structure, count as compacts, it would next consider whether those compacts could arise without affirmative congressional approval. Compacts must obtain congressional approval only if they undermine specific attributes of federalism: the supremacy of the federal government or the sovereign equality of each state. A redistricting compact, whether fashioned as a multistate commission or reciprocal commissions, would not require affirmative congressional approval under those tests.

First, redistricting compacts would not increase the compacting states' power against the federal government. Boundary disputes lend an analogy. In *Virginia*, the Court found the

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[219] A different analysis would follow if the state laws creating the reciprocal commissions provided that repeal by one state constitutes repeal in the other state too, because action in one state would trigger a response in another. The effect of withdrawal and termination constraints are discussed in Part V.

[220] *See* Krislov, *supra* note 13, at 484.

[221] *See id.*

noncongressionally approved surveying agreement lawful because it merely "mark[ed] and define[d] that which actually existed before, but was undefined and unmarked."[222] This agreement differed from a hypothetical compact by which one state gains "an important and valuable portion of a State, [such that] the political power of the State enlarged would be affected by the settlement of the boundary."[223] A compact that enlarges a state's territory will likely increase its population, facilitating greater control over federal legislation through increased congressional representation. Such agreements could upset the balance of power between the state and the federal government.[224]

But a redistricting compact carries no such risks. It would change *who* the state elects to Congress, but not *how many* representatives the state elects. Redistricting compacts may affect the House's partisan composition, especially if one compacting state's population exceeds another's, but no state would gain representation. Only the size of a state's delegation affects the power a state exerts over the federal government. Thus, once the census allocates House seats to each state, the redistricting process merely serves to "mark and define" the state-federal relationship created by the allocation.

Moreover, redistricting agreements would not threaten Congress's legislative authority. If Congress wished for states to conduct redistricting differently, the Elections Clause empowers Congress to intervene, as it has before. Congress once exercised this authority to require single-member districts, contiguous districts, compact districts, and population equality.[225] Today, however, only the single-member district statutory requirement remains.[226] Until Congress provides otherwise, it has left the field open for states to select redistricting procedures.

Second, a redistricting compact would not increase the compacting states' power as against noncompacting states. Noncompacting states would maintain their full allotment of seats without any obligation to redistrict differently. Because the House of Representatives is a zero-sum institution, the corollary to the fact that redistricting compacts would not increase a compacting

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222 *Virginia*, 148 U.S. at 520.
223 *Id.*
224 *Cf. id.*
225 *See Rucho*, 139 S. Ct. at 2495.
226 *Id.*

state's representation is that it would not diminish a noncompacting state's representation. Again, a comparison to boundary compacts is useful. A boundary compact can, at least minimally, expand the compacting states' political representation, police power, and tax base relative to noncompacting states without necessitating congressional approval.[227] But even minimal expansion, such as the absorption of a hamlet, could harm noncompacting states.[228] A redistricting compact carries no comparable risk of increasing its members' power at the expense of noncompacting states.

To reinforce the point, compare redistricting compacts with the National Popular Vote Interstate Compact. The NPVIC—triggered once enough states join to control a majority of Electoral College votes—would bind the electors of compacting states to vote for the presidential candidate who wins the national popular vote.[229] The NPVIC continues to attract support; in 2024, Maine enacted a bill that made the state the NPVIC's eighteenth member.[230] But many doubt the NPVIC's constitutionality.[231] If the NPVIC took effect, no noncompacting state could ever determine the outcome in presidential elections because only the compacting states' electoral votes—cast together as a majority—would decide the winner. The noncompacting states' sovereignty would severely suffer.

In contrast, redistricting compacts would not undermine interstate relations. Unlike the NPVIC, redistricting compacts directly influence local, not national, elections. Noncompacting states would remain free to elect their full allotment of representatives according to maps drawn through their own procedures. And even if the success of redistricting compacts influenced other

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[227] *See Virginia*, 148 U.S. at 510, 520–21 (upholding a compact formed without affirmative congressional approval even though it slightly expanded the population of both Tennessee and Virginia by eliminating a legal no-man's-land between them).

[228] In two of the previous six censuses, the margin for losing a congressional seat was fewer than 250 residents. *See* Shane Goldmacher, *New York Loses House Seat After Coming Up 89 People Short on Census*, N.Y. TIMES (Apr. 26, 2021), https://www.nytimes.com/2021/04/26/nyregion/new-york-census-congress.html.

[229] *See NPVIC Text*, *supra* note 20.

[230] *See* El-Bawab, *supra* note 30.

[231] *See, e.g.*, Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173, 216–18 (2011). For an argument for the NPVIC's constitutionality, see Adam Schliefer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 738–41 (2007).

states to join or adopt independent redistricting commissions, the Constitution does not prohibit peer pressure.[232]

Finally, federal law does not otherwise preempt redistricting compacts. Constitutional and statutory law impose other redistricting parameters,[233] but none confine redistricting authority to state legislatures or prohibit states from considering partisan representation and competitiveness. Moreover, case law still supports the constitutionality of independent redistricting processes, at least those created by ballot initiative,[234] despite changes in Supreme Court membership and fresh opportunities to entertain similar challenges.[235] The Court's rejection of the independent state legislature theory averted imperiling independent commissions.[236] Redistricting compacts that emulate the Potomac Compact in allowing compacting states' legislatures to reject commission proposals, albeit subject to retaliation by other states,[237] would help reassure any lingering Elections Clause concerns.

C. What If the Doctrine Changes?

The preceding analysis presumes that a federal court, if confronted with a constitutional challenge to an interstate redistricting compact formed without congressional approval, would abide by the Supreme Court's Compact Clause precedent. But redistricting compacts should obtain judicial approval even if the courts reevaluate Compact Clause doctrine.

One plausible revision to the doctrine would add a fourth element: Does the compact delegate a state's sovereign power? The Supreme Court has hinted at this element before within the question of whether a compact expands a state's power relative to the

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[232] *See U.S. Steel*, 434 U.S. at 478 ("Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result.").

[233] *See* Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (citing U.S. CONST. art. I, § 2) (requiring rough population equality among congressional districts); Miller v. Johnson, 515 U.S. 900, 920 (1995) (subjecting racial gerrymanders to strict scrutiny); Allen v. Milligan, 143 S. Ct. 1487, 1502–04 (2023) (holding that the Voting Rights Act of 1965 prohibits dilution of minority voters); *supra* notes 225–226 and accompanying text.

[234] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 813 (2015).

[235] Since *Ariz. State Legislature*, citizens in other states have passed constitutional amendments requiring redistricting reform. *See, e.g.*, Jane C. Timm, *'Success Stories': Michigan, Virginia Adopt New Maps After Creating Redistricting Commissions*, NBC NEWS (Dec. 30, 2021), https://perma.cc/3XVE-6GM9.

[236] *See* Moore v. Harper, 143 S. Ct. 2065, 2083 (2023) (holding that state legislatures do not possess exclusive authority over the redistricting process).

[237] *See* Md. S.B. 762 § 1.

federal sovereign or its coequal states.[238] If the Supreme Court insisted, however, that states cannot delegate sovereignty by compact without affirmative congressional approval—regardless of whether such delegation would increase the compacting states' power relative to that of the federal government or other states—it could complicate the analysis for redistricting compacts, especially for multistate commissions where a joint organization would draft and propose maps for each compacting state.

But such compacts would not impermissibly delegate state sovereignty because congressional redistricting is not a sovereign state power at all.[239] The protection of state sovereign powers emanates from the Tenth Amendment. When the states ratified the Constitution, they reserved all sovereign powers not granted to the federal government.[240] These sovereign powers include the authority to draw state legislative districts, since state legislatures and their associated electoral procedures preceded the Constitution.[241] Unlike state legislatures, however, there was no House of Representatives before the Constitution. Accordingly, there was no sovereign power over congressional redistricting for the states to reserve.[242] States' congressional redistricting authority operates as a delegated power from Congress, not as a reserved sovereign power.[243] Accordingly, interstate redistricting commissions would not alter state sovereignty.

A second reinterpretation of the Compact Clause could place greater textual emphasis on the congressional consent requirement.[244] But even some proponents of a categorical congressional consent requirement acknowledge that the Constitution does not specify how Congress can provide its consent.[245] After all, "[t]he

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238 *See U.S. Steel*, 434 U.S. at 472–73, 478.

239 *See* Cox, *supra* note 46, at 413.

240 United States Term Limits v. Thornton, 514 U.S. 779, 801 (1995).

241 *See* Cox, *supra* note 46, at 413.

242 *Cf. Thornton*, 514 U.S. at 786–87, 802–03 (holding that states cannot impose term limits on congressmembers because states had no preexisting right to establish qualifications for a legislature born with the Constitution).

243 *See* Cox, *supra* note 46, at 413; THE FEDERALIST NO. 32, at 194 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing states' reserved sovereignty as limited to rights possessed before ratification and not exclusively delegated to the United States).

244 *See* Finkel, *supra* note 154, at 1588 & n.85 (2019) (citing Texas v. New Mexico, 138 S. Ct. 954, 958 (2018)) (noting that Justice Neil Gorsuch, writing for a unanimous Court, cited a pre-*Virginia* decision that considered congressional approval necessary for compact formation).

245 *See U.S. Steel*, 434 U.S. at 484–85 (White, J., dissenting) (citing *Virginia*, 148 U.S. at 522) (noting that consent may be inferred by years of acquiescence or provided in advance).

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."[246] Some scholars have argued that this ambiguity authorizes Congress to enact a "report-and-wait" statute, where any compact submitted after that statute's enactment would take effect unless Congress objected within a certain period.[247] But scholars have not evaluated whether such a scheme already exists in the redistricting context through the Elections Clause.

The Elections Clause empowers Congress to preempt partisan gerrymandering and independent redistricting commissions, but Congress's refusal to do so implies that it approves of prevailing redistricting procedures.[248] Practically, the pattern of congressional indifference to state redistricting laws should hold for interstate redistricting agreements since they would neither infringe on Congress's Elections Clause authority nor obviously benefit either party. Accordingly, as with any other redistricting law, a court could presume congressional consent from the longstanding permissiveness toward state redistricting processes.

As a final alternative, even a court skeptical of a redistricting compact's constitutionality may refuse to adjudicate the issue under the political questions doctrine. The threshold matter of the constitutional definition of a compact may raise a nonjusticiable political question.[249] But even if the definition of compacts is justiciable, the relationship between different constitutional provisions suggests—in this context, at least—that Congress is better situated than the courts to judge compacts' constitutionality. The Compact Clause fails to specify how Congress may consent to compacts, but the Elections Clause supplies a mechanism for Congress to consent to redistricting laws. Because an interstate

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[246] *Virginia*, 148 U.S. at 521.

[247] *See generally* Crocker, *supra* note 153.

[248] Implied approval of partisan gerrymandering follows from statutory history, since Congress repealed contiguity and compactness requirements it had previously passed in "an attempt to forbid . . . the gerrymander," and from structural constitutional design, since the Elections Clause defaults to the lawfulness of state redistricting procedures. *Rucho*, 139 S. Ct. at 2495 (quoting ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 12 (1907)).

[249] *Cf.* Curtis A. Bradley, *State International Agreements: The United States, Canada, and Constitutional Evolution*, 60 CAN. Y.B. INT'L L. 6, 13 (2022); Frankfurter & Landis, *supra* note 94, at 694–95 ("[O]nly Congress is the appropriate organ for determining what arrangements between States might fall within the . . . [definition of] 'Agreement or Compact.'").

redistricting compact is, at its core, a redistricting law, and because it poses no more threat to federalism than any other redistricting law, the Elections Clause fills the missing gap in the Compact Clause in this context. The Constitution has made a "textually demonstrable [ ] commitment" of redistricting issues to Congress, allowing state laws to proceed by default.[250] The Elections Clause could therefore read as a subject-matter exception to the Compact Clause's "congressional negative,"[251] allowing congressional silence to imply acquiescence to redistricting compacts.

V. A COMPACT, IF YOU CAN KEEP IT

Redistricting compacts would hibernate for nine of the ten years between redistricting cycles, making continued state participation vital to a compact's lifespan. The Potomac Compact envisioned a deterrence mechanism to address this concern: if any compacting state failed to implement the multistate commission's proposal, the compact allowed remaining states to retaliate by gerrymandering again.[252] But could a compact go further by expressly prohibiting compacting states from withdrawing in the first place?

The answer depends on the structure of the compact and the method by which states join it. *Internal* withdrawal constraints are available only to multistate-commission compacts, whereas *external* withdrawal constraints are available to both multistate- and reciprocal-commission compacts. Parts V.A and V.B address each in turn and conclude that, between the two, external withdrawal constraints provide a more promising path forward to creating long-lasting redistricting commissions.

A. Internal Withdrawal Constraints

Whether a compact could prevent its compacting states from unilaterally withdrawing depends on two issues: Does the compact intend to prevent withdrawal, and if so, is that constraint lawful? As an interpretive issue, any compact purporting to

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[250] Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)) (explaining the elements of political questions); *see also Rucho*, 139 S. Ct. at 2508 ("[T]he Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause.").

[251] *See* Greve, *supra* note 155, at 312–13 (emphasis omitted).

[252] *See* Md. S.B. 762 § 1.

constrain its compacting states from withdrawing must clearly state that intent. As a constitutional issue, even with a clear statement, a withdrawal constraint may require congressional approval, making the compact more difficult to form.

The Supreme Court recently refused to imply a withdrawal constraint into a compact. In *New York v. New Jersey*,[253] the two states compacted to create the Port Authority, to which they delegated sovereign authority to conduct regulatory and police activities.[254] While the compact required the two states to agree to any "[a]mendments and supplements," it did not address either state's power to unilaterally withdraw.[255] After seventy years, New Jersey enacted a statute to reclaim sovereign authority over its territory within the Port.[256] Applying contract principles, the Court unanimously rejected New York's bid to compel New Jersey's continued participation in the compact.[257] Deeming it unlikely that a state would permanently cede a portion of its sovereignty without a clear statement, the Court declined to infer a provision to that effect.[258]

Although *New York* differs from redistricting compacts because the Port Authority delegated indisputably sovereign powers and received congressional ratification,[259] the clear statement rule likely generalizes. As drafted, the Potomac Compact contained no limitation against compacting states withdrawing unilaterally. Rather, its breach provisions anticipated that some compacting states might leave.[260] Under these terms, a court would not prevent a state from exiting the compact at will.

States could likely craft compacts that expressly constrain withdrawal—for example, by agreeing that "no party state may leave the multistate commission without the consent of other party states." Because a compact, like any contract, depends on keeping promises, the Supreme Court has suggested that sovereigns may limit their powers of unilateral amendment, provided

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253 143 S. Ct. 918 (2023).

254 *Id.* at 922.

255 *Id.*

256 *Id.* at 923.

257 *See id.* at 924–25 (noting that a contract "that contemplates 'continuing performance for an indefinite time is to be interpreted as stipulating only for performance terminable at the will of either party'" (quoting 1 R. LORD, WILLISTON ON CONTRACTS § 4:23, at 570 (4th ed. 2022)).

258 *New York*, 143 S. Ct. at 925.

259 *Id.* at 922, 925.

260 *See* Md. S.B. 762 § 1.

they do so clearly. When a government enters an agreement with another government, its actions implicate both its powers as a sovereign and as a contracting party.[261] These powers conflict. As a sovereign, a state cannot bind successive legislatures without thwarting democratic accountability.[262] As a contracting party, a state cannot assure commitment unless it concedes its power to amend its promises unilaterally.[263] Complicating this paradox, the Contract Clause forbids states from passing any "Law impairing the Obligation of Contracts."[264]

The Supreme Court's unmistakability doctrine reconciles the issue. By default, a government can always unilaterally amend its contracts by subsequent legislation, but a government may surrender that power in the initial contract provided it does so clearly.[265] Much of the Supreme Court's unmistakability jurisprudence has addressed promises made by the federal government toward private entities and the states,[266] but case law from state courts suggests that the unmistakability doctrine extends to interstate compacts.[267]

The problem, however, is that while states could likely invoke the unmistakability doctrine when compacting to prevent withdrawal, those constraints would prove difficult to enforce without congressional approval. In *U.S. Steel*, the Court found it significant in upholding a compact created without congressional approval that each state could withdraw at any time.[268] This suggests that interstate compacts seeking to bind its compacting states to, rather than nudge them toward, enduring participation require congressional approval.[269]

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[261] *See* Fahey, *Federalism by Contract*, *supra* note 96, at 2391–92.

[262] *See id.* For a rebuttal of the assumption that legislatures cannot bind their successors, see generally Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002).

[263] *See* Fahey, *Federalism by Contract*, *supra* note 96, at 2392.

[264] U.S. CONST. art. I, § 10, cl. 1.

[265] *See* Fahey, *Federalism by Contract*, *supra* note 96, at 2392 (citing United States v. Winstar Corp., 518 U.S. 839, 874–78 (1996) (plurality opinion)).

[266] *See id.* at 2391–96.

[267] *See, e.g.*, Kimberly-Clark Corp. v. Comm'r of Revenue, 880 N.W.2d 844, 845, 850–51 (Minn. 2016) (applying the unmistakability doctrine to determine Minnesota's obligations as a signatory to the Multistate Tax Compact).

[268] 434 U.S. at 473.

[269] *See* Williams, *supra* note 231, at 218.

B. External Withdrawal Constraints

Fortunately, a familiar alternative can achieve the same effect: entering redistricting compacts by state constitutional amendment rather than statute.[270] This route to compact formation presents fewer political costs than one might expect. While constitutional amendments require broad support, they account for most redistricting reform to date due to the issue's popularity among voters.[271] And although not every state provides direct ballot access for constitutional amendments, some untapped potential remains in states that offer the initiative but maintain partisan redistricting processes.[272] Moreover, voters who previously established redistricting commissions may desire improvements to commission structure.[273]

The legal advantage of this strategy flows from inserting the commitment device not within the terms of the compact but rather through the external political process of constitutional amendments. States that join redistricting compacts (whether structured as multistate commissions or reciprocal commissions) by constitutional amendment would remain free to withdraw unilaterally. The constitutional-amendment process would merely raise the political cost of that option. With a constitutional amendment in place, states could no longer withdraw from a compact by passing another statute, as New Jersey did to withdraw from the Port Authority.[274] Instead, a state would need to approve a subsequent constitutional amendment authorizing withdrawal from the compact. The withdrawal limitation derives from the ultimate source of state sovereignty rather than the interstate instrument itself, satisfying *U.S. Steel*'s concern for states' ability to leave of their own accord[275] and obviating entrenchment concerns.

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[270] States have joined compacts by constitutional amendment since the founding generation, a practice the Supreme Court has accepted. *See, e.g.*, KY. CONST. OF 1792, art. VIII, § 7; Green v. Biddle, 21 U.S. (8 Wheat.) 1, 11–13 (1823).

[271] *See supra*, notes 63, 67–68.

[272] *Compare* CONG. RSCH. SERV., *supra* note 34, at 2 (illustrating states with redistricting commissions), *with Initiative and Referendum States*, NAT'L CONF. OF STATE LEGISLATURES, *supra* note 138 (listing states with a ballot-initiative process). For example, voters in Missouri and Oregon, two states without independent redistricting commissions, can place constitutional initiatives directly on the ballot. *See* CONG. RSCH. SERV., *supra* note 34, at 2; *Initiative and Referendum States*, NAT'L CONF. OF STATE LEGISLATURES, *supra* note 138.

[273] *See* Smyth, *Effort to Replace*, *supra* note 88.

[274] *New York*, 143 S. Ct. at 923.

[275] *See U.S. Steel*, 434 U.S. at 473.

CONCLUSION

Mounting polarization and stalling reform expose the need for an innovative approach to encourage nonpartisan redistricting processes that promote partisan representation and competition. Just as compacts have long facilitated interstate coordination to solve national challenges, redistricting compacts could accelerate reform by breaking partisan incentives to gerrymander. Such compacts could take one of two forms. A multistate redistricting commission could propose maps for all compacting states, with each state's legislature politically incentivized to adopt the commission's draft for their state. Alternatively, reciprocal commissions in each compacting state—which would take effect only upon each state adopting identical membership selection rules and redistricting criteria—could directly implement maps for their respective states.

The Compact Clause's text and history support this proposal. Under the prevailing functionalist precedent, the Compact Clause permits compacts formed without affirmative congressional approval if they neither undermine federalism nor interfere with federal law. Redistricting compacts comply with both requirements because they do not expand compacting states' political representation or violate other electoral law—or even affect state sovereignty at all. But even under more formalist theories, not all redistricting agreements would count as compacts under the Constitution. And even if they did, the Constitution's delegation of redistricting authority to the states indicates tacit preapproval for redistricting compacts, subject to congressional veto, with the Elections Clause operating as a subject-matter exception to the Compact Clause's "congressional negative."

Ultimately, establishing redistricting compacts will require policymakers to resolve interdependent issues of politics and constitutional law. The choice between a multistate commission and reciprocal interstate commissions, for example, presents practical trade-offs: multistate commissions could prove more effective but more politically challenging to form. But that choice would also inform the legal analysis of interstate redistricting agreements. Reciprocal commissions could avoid the constitutional label of a compact altogether, making the issue of congressional consent irrelevant. Likewise, the more a compact attempts to prevent its compacting states from withdrawing, the more likely that it would require congressional ratification. The most viable

commitment device—establishing the compact through state constitutional amendment—would avoid entrenchment concerns but would trigger heightened vote thresholds to enact redistricting reform in many states.

This Comment addressed legal issues to interstate redistricting cooperation, but time will answer the political questions. The vitality of democracy may depend on it.