

Spring 2023

Just-Right Government: Interstate Compacts and Multistate Governance in an Era of Political Polarization, Policy Paralysis, and Bad-Faith Partisanship

Jon Michaels
University of California - Los Angeles, michaels@law.ucla.edu

Emme M. Tyler
etyler@omm.com

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Administrative Law Commons](#), [Constitutional Law Commons](#), [Human Rights Law Commons](#), [Judges Commons](#), [Law and Politics Commons](#), [Law and Society Commons](#), and the [Legislation Commons](#)

Recommended Citation

Michaels, Jon and Tyler, Emme M. (2023) "Just-Right Government: Interstate Compacts and Multistate Governance in an Era of Political Polarization, Policy Paralysis, and Bad-Faith Partisanship," *Indiana Law Journal*: Vol. 98: Iss. 3, Article 5.

Available at: <https://www.repository.law.indiana.edu/ilj/vol98/iss3/5>

This Article is brought to you for free and open access by the Maurer Law Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Just-Right Government: Interstate Compacts and Multistate Governance in an Era of Political Polarization, Policy Paralysis, and Bad-Faith Partisanship

JON D. MICHAELS* & EMME M. TYLER**

Those committed to addressing the political, economic, and moral crises of the day—voting rights, racial justice, reproductive autonomy, gaping inequality, LGBTQ rights, and public health and safety—don’t know where to turn. Federal legislative and regulatory pathways are choked off by senators quick to filibuster and by judges eager to strike down agency rules and orders. State pathways, in turn, are compromised by limited capacity, collective action problems, externalities, scant economies of scale, and—in many jurisdictions—a toxic political culture hostile to even the most anodyne government interventions.

Recognizing the limited options available on a binary (that is, federal or state) governance roadmap, this Article prescribes charting a third pathway: interstate agreements and compacts. Such arrangements—largely unnecessary when Washington is not pathologically dysfunctional—have a long and venerable constitutional pedigree and provide a legally sound and politically expedient “just-right” solution. Grouping clusters of states along the Pacific Ocean, the Amtrak Corridor, and the Upper Midwest, we propose and briefly sketch four major compacts as cornerstones of a Blue New Deal.

Beyond detailing the four strategic interventions designed principally to work around the instant federal and state roadblocks (and recognizing similar opportunities for purple and, possibly, red states, too), this Article makes the affirmative, normative case for interstate agreements and compacts playing a long-term, regular, and prominent role in twenty-first-century American governance—a case that sounds in democratic theory, administrative law, and political economy.

* Professor of Law, UCLA School of Law.

** Attorney, Private Practice. Judicial Clerk (2022 Term) to the Honorable Alvin K. Hellerstein (S.D.N.Y.), Law Clerk Designate (2024 Term) to the Honorable Morgan B. Christen (9th Cir.). For helpful comments, correspondence, and guidance, we thank Jessica Bulman-Pozen, Blake Emerson, David Fontana, Aziz Huq, Miriam Seifter, and Justin Weinstein-Tull.

| | |
|---|-----|
| INTRODUCTION..... | 864 |
| I. FEDERAL POLICYMAKING PARALYSIS | 871 |
| II. STATE PROVINCIALISM AND PERVERSITY | 874 |
| III. “JUST-RIGHT” GOVERNANCE..... | 876 |
| A. INTERSTATE COMPACTS AND AGREEMENTS: A BRIEF OVERVIEW | 877 |
| B. THE LAW OF INTERSTATE COMPACTS AND AGREEMENTS | 880 |
| C. THE ARCHITECTURE OF INTERSTATE COMPACTS AND AGREEMENTS ... | 885 |
| IV. COMPACTING TODAY | 888 |
| A. THE GOLDBLOCKS IMPERATIVE | 888 |
| 1. WHY THINGS ARE EVEN STICKIER AT THE FEDERAL LEVEL Now | 891 |
| 2. WHY STATES ARE EVEN WORSE “SECOND BEST” OPTIONS Now | 894 |
| 3. THE NEED (AND PUBLIC MANDATE) FOR AGGRESSIVE, IMPACTFUL GOVERNMENT ACTION IS GREATER NOW THAN IT WAS IN 1925 | 895 |
| 4. COMPACTS AND AGREEMENTS HAVE MANY MORE PERMUTATIONS TODAY..... | 896 |
| 5. A FRESH START..... | 897 |
| B. MODEL COMPACTS: A BLUE NEW DEAL | 902 |
| 1. CLIMATE CHANGE AGREEMENT..... | 902 |
| 2. WORKERS, WORKING FAMILIES, AND ECONOMIC JUSTICE AGREEMENT..... | 904 |
| 3. MULTISTATE PROCUREMENT COOPERATIVE..... | 905 |
| 4. COMMUTER AND STUDENT VOTING AND PUBLIC BANKING AGREEMENT..... | 906 |
| C. VIRTUOUS COMPETITION AND TRANSNATIONAL PARTNERSHIPS..... | 907 |
| 1. RACES TO THE TOP | 908 |
| 2. TRANSNATIONAL COOPERATION..... | 909 |
| V. OBJECTIONS AND CONSIDERING ALTERNATIVES TO (OUR) ALTERNATIVE | 910 |
| A. INTERCITY COMPACTS WOULD BE BETTER | 910 |
| B. MARKET SOLUTIONS | 913 |
| C. LEAVING STATES AND MARGINALIZED COMMUNITIES BEHIND..... | 916 |
| CONCLUSION..... | 918 |

INTRODUCTION

“Respirators, ventilators, all of the equipment—try getting it yourselves.”
—President Donald J. Trump to America’s Governors.¹

1. Greg Sargent, *Governors are Angry at Trump over Coronavirus. That’s Ominous.*, WASH. POST (Mar. 16, 2020, 5:30 PM), <https://www.washingtonpost.com/opinions/2020/03/16/governors-are-angry-trump-over-coronavirus-thats-ominous/> [https://perma.cc/5D24-ZPAV].

“You now literally will have a company call you up and say, ‘Well, California just outbid you[.]’ It’s like being on eBay with 50 other states, bidding on a ventilator.”

—New York Governor Andrew M. Cuomo.²

The COVID-19 pandemic revealed a nation on the brink, fraying at its seams, and any other tired metaphor used to convey the simple fact that we lost the political and cultural capacity (and will) to collectively govern. Disease and economic dislocation respected no political boundaries, sweeping from one state to another entirely indifferent to the sovereign lines drawn by politicians, surveyors, and—back in the day—faraway kings. Yet a serious or sustained national response—one that was coordinated across the fifty states and that would have helped contain outbreaks and redistribute medical and financial resources from well-insulated communities to those hardest hit—never materialized. While the Trump White House dickered and dissembled, some states tried to do what they could, though most were largely helpless to stop the influx of disease from neighboring states³ and were competing against one another in their quest to secure even the most basic of medical supplies;⁴ other states stood down, embracing and amplifying anti-science and hyper-libertarian messaging, while their at-risk populations suffered.⁵

The initial pandemic frenzy may have subsided. But the problems it brought to light endure. Years removed from the reckless presidency of Donald Trump, we nonetheless remain in the midst of a governance crisis. At the federal level, credible allegations of sabotage,⁶ bad faith,⁷ and even treachery⁸ abound. The Right fears—

2. Sarah Mervosh & Katie Rogers, *Governors Fight Back Against Coronavirus Chaos*, N.Y. TIMES (Mar. 31, 2020), <https://www.nytimes.com/2020/03/31/us/governors-trump-coronavirus.html> [https://perma.cc/7E97-BMH5].

3. See, e.g., Brittany Shammass & Lena H. Sun, *How the Sturgis Motorcycle Rally May Have Spread Coronavirus Across the Upper Midwest*, WASH. POST (Oct. 17, 2020, 6:56 PM), <https://www.washingtonpost.com/health/2020/10/17/sturgis-rally-spread/> [https://perma.cc/WBJ3-QEU9].

4. See Mervosh & Rogers, *supra* note 2. But see Julius Kreen, *How America Can Unleash the Untapped Power of Its Regions*, N.Y. TIMES (July 14, 2021) <https://www.nytimes.com/2021/07/14/opinion/regional-compacts-united-states.html> [https://perma.cc/VGR7-NQ9X].

5. Will Chase & Caitlin Owens, *The Pandemic Has Been Deadlier in Red States*, AXIOS (Mar. 25, 2022), <https://www.axios.com/2022/03/25/coronavirus-pandemics-politics-masks-vaccines-deaths> [https://perma.cc/82LW-4KUY]; Elaine Kamarck, *COVID-19 Is Crushing Red States. Why Isn’t Trump Turning His Rallies Into Mass Vaccination Sites?*, BROOKINGS (Jul. 29, 2021), <https://www.brookings.edu/blog/fixgov/2021/07/29/covid-19-is-crushing-red-states-why-isnt-trump-turning-his-rallies-into-mass-vaccination-sites/> [https://perma.cc/CP8U-KQPM].

6. See, e.g., David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753 (2022).

7. See, e.g., MATT JONES WITH CHRIS TOMLIN, MITCH, PLEASE! HOW MITCH MCCONNELL SOLD OUT KENTUCKY (AND AMERICA, TOO) (2020); Dana Milbank, *Lauren Boebert, Lost in a Cacophony of Crazy*, WASH. POST (June 23, 2021), <https://www.washingtonpost.com/opinions/2021/06/23/lauren-boebert-lost-cacophony-crazy/> [https://perma.cc/6QK4-6QQL].

8. See, e.g., Eric Lutz, *Were Republican Lawmakers in on the US Capitol Siege?*, VANITY FAIR (Mar. 5, 2021), <https://www.vanityfair.com/news/2021/03/were-republican->

or feigns to fear—that Joe Biden and Nancy Pelosi will remake America in the image of Denmark or even Cuba. Democrats worry that, despite their party retaking the reins of both houses of Congress and winning the presidency by a decisive majority in 2020, the prospects of safeguarding voting rights, protecting reproductive autonomy, enacting immigration reform, or addressing this country’s systemic racism are slim to none. Indeed, amid all this handwringing, the Supreme Court invalidated two critical Biden administration directives—first, the eviction moratorium⁹ and, more recently, the Department of Labor’s vaccine or testing mandate¹⁰—all but guaranteeing prolonged economic dislocation, work and school shutdowns, hospitalizations, and fatalities. And, far from stopping there, the Court further weakened federal administrative power exercised pursuant to the Clean Air Act and the Clean Water Act.¹¹

With little hope for institutional reform at the national level, it strikes us as worthwhile (in light of these extant challenges) to consider alternative and perhaps more propitious governance venues. Typically, those stymied at the federal level have defaulted to the states as the tried-and-true second-best option.¹² This is precisely what Democrats attempted to do during the George W. Bush and Donald Trump presidencies¹³—and what both Democrats and Republicans may be calling for now.¹⁴ Yet we cannot help but ask: Are states second-bests because they actually prove to be propitious venues? Or are they the easy and natural defaults because they’re the only practical alternative in our binary federal constitutional system? And, if we’re not happy with the answers to those questions, we might further query whether our system is necessarily binary.

To be sure, there are some who continue to sing paeans to states as Brandeisian, laboratories of democracy.¹⁵ For every supposed “race to the top” with states learning

lawmakers-in-on-the-us-capitol-siege [<https://perma.cc/RL38-2EGU>].

9. Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485 (2021).

10. Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., 142 S. Ct. 661 (2022).

11. West Virginia v. Env’t Prot. Agency, 142 S. Ct. 2587 (2022); *see also* Sackett v. Env’t Prot. Agency, No. 21-254 (arg. Oct. 3, 2022) (challenging the EPA’s authority to regulate wetlands as “waters of the United States” under the Clean Water Act).

12. *See* Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2014); Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

13. *See, e.g.*, Ilya Somin, *Making Federalism Great Again: How the Trump Administration’s Attack on Sanctuary Cities Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247 (2019); Tess Owen, *These ‘Gun Sanctuary States’ Want to Destroy Biden’s Gun Control Plans*, VICE (May 5, 2021, 10:29 AM), <https://www.vice.com/en/article/88nnq4/these-gun-sanctuary-states-want-to-destroy-bidens-gun-control-plans> [<https://perma.cc/8K8N-L895>].

14. This is, perhaps, most evident in the flurry of state activity post-*Dobbs*. *See, e.g.*, *Abortion Ruling Prompts Variety of Reactions from States*, AP NEWS (July 21, 2022), <https://apnews.com/article/supreme-court-abortion-ruling-states-a767801145ad01617100e57410a0a21d> [<https://perma.cc/G6MC-T26M>].

15. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the country.”); *see* Ilya Somin, *The Case for Empowering Americans to Vote*

from one another and competing to outshine one another, we're apt to see scores of races to the bottom, inefficiencies due to the absence of economies of scale, and giant collective action problems.¹⁶ We also can't overlook the mounting evidence that state governments aren't exactly exemplars of democracy, have limited capacity, often evade media scrutiny (thanks to the dwindling market for local journalists), and are especially ripe for industry capture.¹⁷ It isn't surprising, therefore, that scholars such as Jacob Grumbach,¹⁸ Steven Levitsky and Daniel Ziblatt,¹⁹ and David Super have each resisted Brandeis's famous formulation, referring instead to the several states (respectively) as "laboratories against democracy," "laboratories of authoritarianism," and "laboratories of destitution," for the reasons we just noted (and then some).²⁰ Indeed, today even the classic pro-localism argument for state governance—that is, regulation tailored to the specific needs of specific communities—is falling by the wayside; evidence continues to mount that state policy is being "nationalized"—centrally coordinated and dictated by national party elites and interest groups.²¹

So where does that leave those intent on tackling the policy and moral crises of the day? Keep plugging away at the federal level? Kill the filibuster? Pack the courts?

What may have seemed possible, even plausible, in late 2020 and early 2021 has proven to be anything but.²² And there's no hint that federal or state pathways will open up, at least not in the short term. So, given the states' shortcomings and the impediments to federal governing, our goal here is to put a third option on the table—and urge consideration (or, in truth, reconsideration) of interstate policy arrangements and compacts.²³ These arrangements allow for similarly minded states to govern collectively. By pooling resources and coordinating policies, compacting states can overcome many of the limitations and pathologies they'd experience were they each working on their own (let alone in some competition with one another). Though such agreements and compacts have long been regular, if inconspicuous, features of American government,²⁴ they've been modest in scope, impact, and

with *Their Feet*, THE WEEK (Dec. 27, 2021), <https://theweek.com/election/1008300/voting-with-your-feet> [<https://perma.cc/4URX-8MMX>]; cf. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

16. See *infra* Part II.

17. See Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. Rev. 107 (2018).

18. See JACOB M. GRUMBACH, *LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS* (2022).

19. See STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE 2* (2018).

20. David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541 (2008).

21. See GRUMBACH, *supra* note 18; DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES* (2018).

22. Ronald Brownstein, *Is Biden a Man Out of Time?*, ATLANTIC (June 30, 2022), <https://www.theatlantic.com/politics/archive/2022/06/biden-roe-response-democrats-2024-election/661449/> [<https://perma.cc/ESD8-HFNF>].

23. Cf. Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 382 (2018) (describing the perpetual rediscovery of "regionalism").

24. See, e.g., Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 5–7 (1997); Duncan B. Hollis, *Unpacking the*

public resonance. In fact, the last time there was significant and politically salient enthusiasm for instruments of interstate governance to tackle major social and economic maladies was practically a hundred years ago.

Rather than be put off by this long period of apparent indifference to interstate compacts,²⁵ consider instead how the political and legal climate of the 1920s and early 1930s resonates fairly closely with what we're experiencing today in terms of legislative, regulatory, and judicial blockages. At that time, legal reformers such as Felix Frankfurter and James Landis found themselves in a predicament similar to our own. Simply stated, the feds were unresponsive, and the states were too small.²⁶ Sound familiar?

It was against this backdrop that Frankfurter and Landis championed a third way—charting a new path for a nation struggling to steer clear of both the Scylla of federal futility and the Charybdis of state parochialism. Their 1925 directive—to modernize and deploy interstate agreements and compacts to implement welfare and regulatory initiatives—made a whole lot of sense. Yet it was quickly forgotten, albeit for reasons its authors no doubt cheered.²⁷ Within a few years of their article going to print, the Depression-era politics of the late 1920s and early 1930s propelled Franklin Roosevelt into the White House, swept large Democratic majorities into Congress and, in due time, compelled the federal judiciary to embrace, rather than reject, ambitious national legislative and regulatory programs.²⁸ In short, FDR and company slayed the Scylla.

Compact Clause, 88 TEX. L. REV. 741 (2010); Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285 (2003); *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 HARV. L. REV. 1958 (2007); NAT'L CTR. FOR INTERSTATE COMPACTS, <https://compacts.csg.org/> [<https://perma.cc/V98H-9ZQE>].

25. There is, we hasten to add, considerable enthusiasm for resurrecting tools of the Progressive Era. See, e.g., William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. REG. 721 (2018); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2018); see also BILL BAER, JONATHAN B. BAKER, MICHAEL KADES, FIONA SCOTT MORTON, NANCY L. ROSE, CARL SHAPIRO & TIM WU, *RESTORING COMPETITION IN THE UNITED STATES* (2020), <https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states> [<https://perma.cc/JK6B-3SBK>]. There are also contemporary scholars doing important and trenchant work on the related concept of regionalism and how regionalism fits within our constitutional system. See, e.g., Bulman-Pozen *supra* note 23; Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58 (2014); Yishai Blank & Issi Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. 1895 (2018). Our project complements those inquiries but differs in important respects—chiefly, insofar as we prioritize for legal and pragmatic reasons interstate arrangements over other jurisdictional arrangements and insofar as we champion interstate administrative governance as potentially superior to extant federal and state administrative architecture and procedures. See *infra* Section IV.A.

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

27. There is an element of Frankfurter and Landis's article that suggests they weren't especially keen on federal governance, even if that were readily forthcoming. See *id.* at 708. It's unclear, at least to us, whether they were categorical skeptics of federal power or simply distrustful of the then-dominant federal political and legal power brokers.

28. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 2: TRANSFORMATIONS* (1998);

Notwithstanding some rather hyperbolic commentary in 2021 comparing Joe Biden with FDR,²⁹ we don't foresee a similar political and jurisprudential sea change in our near future—and hence the instant need, indeed opportunity, to revisit Frankfurter and Landis's original blueprint and invest in interstate regulatory and social welfare programs as our “just-right” solution. If anything, that interstate blueprint makes even more sense today than it did back when Babe Ruth patrolled right field and Calvin Coolidge pattered about the West Wing.³⁰ This is true for several reasons.

First, the problems of federal partisan gridlock and judicial hostility to federal power are more acute today than they were in the mid-1920s—and that's before even factoring in that one of our two political parties has shown itself to be less than fully committed to majoritarian democracy or the rule of law.³¹ Consequentially, the need back in the 1920s to try something new and seemingly radical was less urgent.

Second, the typical, almost reflexive, default to the states is even more undesirable today than it was at the time Frankfurter and Landis wrote. After all, with the likely exception of two or three of our most populous states, individual states today are much less significant, precisely because we're a far more interconnected political economy and culture. With considerably more mobility between and among states for labor, capital, students, and taxpayers, today's races to the bottom will invariably be more aggressive than they were a hundred years ago. And, with fewer unique attributes ascribed to any one state in our more interconnected federal union, the lack of economies of scale seems that much more problematic.

Third, the same social and technological forces that render most individual states less relevant today enable us to create an array of compacting communities that were all but impossible a hundred years ago. Whereas Frankfurter and Landis were limited

WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932–1940 (2009).

29. Nicholas Kristof, *Joe Biden is Electrifying America Like FDR*, N.Y. TIMES (May 1, 2021), <https://www.nytimes.com/2021/05/01/opinion/sunday/biden-fdr-americans.html?searchResultPosition=1> [https://perma.cc/SYH6-ZH9L]; Susan B. Glasser, *Is Biden Really the Second Coming of FDR and LBJ?*, NEW YORKER (Apr. 1, 2021), <https://www.newyorker.com/news/letter-from-bidens-washington/is-biden-really-the-second-coming-of-fdr-and-lbj> [https://perma.cc/7MJV-GX9D]; Charlotte Alter, *How Joe Biden is Positioning Himself as a Modern FDR*, TIME (Oct. 28, 2020, 1:27 PM), <https://time.com/5904569/joe-biden-fdr/> [https://perma.cc/DQ7P-SGSZ].

30. We're not alone in thinking about Goldilocks solutions. See, e.g., *infra* Part III; see also Julius Krein, *How America Can Unleash the Untapped Power of Its Regions*, N.Y. TIMES (July 14, 2021), <https://www.nytimes.com/2021/07/14/opinion/regional-compacts-united-states.html?action=click&module=Opinion&pgtype=Homepage> [https://perma.cc/JS66-D77D].

31. Sam Levine, *Republicans' Anti-Democratic Attacks Are the New Normal*, GUARDIAN (Jan. 6, 2022), <https://www.theguardian.com/us-news/2022/jan/06/republicans-anti-democratic-attacks> [https://perma.cc/4UGK-MSPD]; Peter Wehner, *The GOP Is a Grave Threat to American Democracy*, ATL. (Apr. 26, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/gop-grave-threat-american-democracy/618693/> [https://perma.cc/D86P-HMUR]; DAVID PEPPER, LABORATORIES OF AUTOCRACY: A WAKE-UP CALL FROM BEHIND THE LINES (2021). Moreover, unlike now, the judges most hostile to the exercise of federal powers were then a slim majority and among the oldest, not youngest, on the federal bench.

to small, geographically contiguous compacts—in large part because technologies that facilitated interstate connections were relatively primitive—today’s policymakers can be more expansive and innovative, binding broader or simply more carefully curated clusters of states. Indeed, it is completely plausible and arguably highly advantageous for a compact to sweep into its ambit kindred but hardly proximate West Coast and mid-Atlantic states.

Fourth, speaking of some arrangement of progressive states that could combine to form a *Blue New Deal*, the imagined content of regulatory compacts and agreements in 1925 was far narrower than ought to be true today. In 1925, the dominant forms of interstate arrangements were understandings regarding shared watersheds and slight adjustments to state boundary lines.³² The first truly modern regulatory compact—the 1921 New York-New Jersey Port Authority—was just four years old and still a narrow and fledgling operation.³³ We credit Frankfurter and Landis for the foresight to see the potential in interstate agreements while appreciating that even they couldn’t have anticipated the range of social and economic challenges that now beset us—and are within our capabilities to address.³⁴ Simply put, we’re facing a torrent of challenges (and, importantly, have the resources to meet those challenges)—and thus envisage even broader possibilities for present-day compacting.

Fifth, one often-raised concern about interstate governance is that trans-jurisdictional projects invariably require trans-jurisdictional administration—and that those trans-jurisdictional administrative authorities aren’t likely to be accessible or accountable.³⁵ Scholars such as Jill Hasday have argued that a lack of political oversight and accountability renders the entities that administer compacts “unresponsive to popular concerns” and “autonomous from the democratic

32. See Frankfurter & Landis, *supra* note 26, at 695–96 (identifying “fields of legislation [that had] elicited application of the Compact Clause”).

33. Agreement of New York and New Jersey establishing Port of New York Authority, ch. 77, 42 Stat. 174 (1921). The Authority’s first bistate project involved the construction of three bridges connecting New Jersey and Staten Island. Two opened in 1928, and the third in 1931. See Amanda Kwan, *Port Authority Bridges Make History, Drive the Economy*, PORT AUTH. NY AND NJ (Nov. 9, 2020), <https://www.panynj.gov/port-authority/en/blogs/land/port-authority-bridges-make-history--drive-the-economy.html> [<https://perma.cc/G8N5-WX8K>]. See also *infra* note 119 and accompanying text.

34. Leaving aside questions of will and motivation, we cannot help but think about the differences in the government’s *capacity* to respond to the Spanish flu and its *capacity* to respond to the COVID-19 pandemic.

35. See Hasday, *supra* note 24; see also VINCENT V. THURSBY, *INTERSTATE COOPERATION: A STUDY OF THE INTERSTATE COMPACT* 141–43 (1953) (suggesting that modern administrative responsibilities require the flexibility and democratic inputs that tend to be lacking from interstate compacts); MARIAN E. RIDGEWAY, *INTERSTATE COMPACTS: A QUESTION OF FEDERALISM* 302 (1971) (cautioning against the creation of difficult-to-monitor administrative bodies far removed from the people and their popularly elected representatives). A second line of concern, articulated by none other than Harold Laski, is that compacts are just too clunky to be effective. Laski posited, “[T]he Compact Clause requires something like geological time to achieve results that are desirable.” HAROLD J. LASKI, *THE AMERICAN DEMOCRACY: A COMMENTARY AND AN INTERPRETATION* 156 (1948).

institutions of government”³⁶ But even assuming interstate compacts and agreements have engendered democratic black holes in the past,³⁷ we understand the current moment as one when compacts and agreements can be particularly fruitful breeding grounds for doing public administration right—that is, more democratic, more inclusive, and (yes) more expert than what we regularly encounter when dealing with many state and federal agencies in the 2020s.

For all of these reasons, this Article strikes a bullish note when it comes to interstate compacts and agreements to target climate change, leverage educational and health resources, and empower workers and working families. In making the legal, political, and economic case for interstate governance, this Article proceeds as follows: Part I takes a clear-eyed, and thus necessarily dim, view of the current state of affairs at the federal level and explains why the political dysfunction and obstinacy in Washington right now are unlikely to abate any time soon. Part II addresses the challenges associated with defaulting to the states. In Part III, we pull a Goldilocks. With federal government being too gridlocked, and the states being too ineffectual, we seek a “just-right” solution. And, for us, that involves reaching all the way to the bottom of the policymakers’ toolkit, retrieving, and repurposing interstate agreements and compacts. Accordingly, Part III recounts the historical uses of compacts, describes how they fit into our legal ecosystem, and discusses why compacting agreements, unlike federal initiatives, are less likely to get bottled up by Congress or the courts.³⁸ Part IV then explains the power and dynamism latent in these interstate tools, shows their potential to reinvigorate American public administration writ large, and sketches four model agreements to address some of this era’s most pressing challenges. Part V considers counterarguments, drawbacks, and alternatives to *our* alternative.

I. FEDERAL POLICYMAKING PARALYSIS

We are in a protracted period of gridlock and dysfunction at the federal level. Little is likely to change in the near future, and quite possibly for considerably longer.³⁹ Even when the Democrats controlled the presidency and both houses of

36. See Hasday, *supra* note 24, at 22.

37. In fairness, Hasday acknowledges compacts aren’t necessarily antidemocratic. See Hasday, *supra* note 24. And more to the point, we might invite a Thursby or Ridgeway (and certainly a Laski) to revisit his or her claims in light of what we now know about federal administrative agencies and administrative procedure. See *supra* note 33 and accompanying text.

38. These claims are especially important in allaying those otherwise concerns about “insider-outsider” problems. See Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 CHI. L. REV. 1743 (2013).

39. See Lee Drutman, *How Much Longer Can This Era of Federal Gridlock Last?*, FIVETHIRTYEIGHT (Mar. 4, 2021, 6:00 AM), <https://fivethirtyeight.com/features/how-much-longer-can-this-era-of-political-gridlock-last/> [<https://perma.cc/7DUF-5JRJ>] (“[M]ore divided government is probably imminent, and the electoral pattern we’ve become all too familiar with—a pendulum swinging back and forth between unified control of government and divided government—is doomed to repeat, with increasingly dangerous consequences for our democracy.”).

Congress in 2021 and 2022, they were regularly stymied thanks to the filibuster rule, which prevents most bills from becoming law absent the support of sixty senators. Despite pressure to reform or jettison this antidemocratic rule, the filibuster rule survived the 117th Congress and appears here to stay.⁴⁰ So, as long as the parties remain bitterly divided (again, something unlikely to change anytime soon), having a majority in the Senate (and broad popular support)⁴¹ isn't nearly enough.⁴²

No biggie, some might say. We've been down this road before. President Obama, for instance, faced similarly challenging circumstances. And Biden, like Obama, can work around legislative gridlock through what Elena Kagan calls "presidential administration"⁴³—deploying all of the existing statutory (and constitutional) authority at the president's disposal to advance policy priorities through regulatory and other bureaucratic channels.⁴⁴

And that seems to be what Biden has been trying to do on a number of fronts.⁴⁵ But here, too, we strike a note of pessimism. As one of us has written, presidential administration (whatever its other merits or problems) is simply less likely to work now and going forward—at least for Democrats given their policy priorities and

40. See Joe Manchin III, *I Will Not Vote to Eliminate or Weaken the Filibuster*, WASH. POST (Apr. 7, 2021, 7:40 PM), https://www.washingtonpost.com/opinions/joe-manchin-filibuster-vote/2021/04/07/cdbd53c6-97da-11eb-a6d0-13d207aadb78_story.html [https://perma.cc/G2F6-U4BF]; Kyrsten Sinema, *We Have More to Lose than Gain by Ending the Filibuster*, WASH. POST (June 21, 2021, 8:31 PM), <https://www.washingtonpost.com/opinions/2021/06/21/kyrsten-sinema-filibuster-for-the-people-act/> [https://perma.cc/LD88-756B]. This pair even opposed a proposed carveout to protect abortion rights nationwide. Kimberly Leonard, *Biden's Call for a Filibuster Carveout for Abortion Rights Unlikely to Gain Traction because Manchin and Sinema Oppose It*, BUS. INSIDER (June 30, 2022, 12:43 PM), <https://www.businessinsider.com/manchin-and-sinema-oppose-ending-filibuster-to-codify-roe-v-wade-2022-6> [https://perma.cc/5MH4-9872].

41. See Factbox: *Broad U.S. Support for Abortion Rights at Odds with Supreme Court Restrictions*, REUTERS (June 24, 2022, 6:56 PM), <https://www.reuters.com/world/us/broad-us-support-abortion-rights-odds-with-supreme-courts-restrictions-2022-06-24/> [https://perma.cc/ED3T-HUTM].

42. Note that all of this is magnified by the undemocratic nature of the Senate itself. In the 2021 50-50 Senate, the Democratic half of the upper house represented 41,549,808 more people than the Republican half. Ian Millhiser, *America's Anti-Democratic Senate, by the Numbers*, VOX (Nov. 6, 2020, 8:00 AM), <https://www.vox.com/2020/11/6/21550979/senate-malapportionment-20-million-democrats-republicans-supreme-court> [https://perma.cc/453X-6W8G]; see also Simon Barnicle, *The 53-State Solution*, ATLANTIC (Feb. 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/case-new-states/606148> [https://perma.cc/92NP-M3NL].

43. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

44. See Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104 (2021).

45. See, e.g., Constitutionality of the Comm'r of Soc. Sec.'s Tenure Prot., 45 Op. O.L.C. 1 (July 8, 2021), <https://www.justice.gov/olc/file/1410736/download> [https://perma.cc/BJ9T-TWMP]; Andrea Hsu, *Biden Moves to Restrict Noncompete Agreements*, NPR (July 9, 2021, 10:41 AM), <https://www.npr.org/2021/07/09/1014366577/biden-moves-to-restrict-non-compete-agreements-saying-theyre-bad-for-workers> [https://perma.cc/4FJS-URPE].

given the current composition of the judiciary.⁴⁶ First, a lot of those extant authorities have already been expansively and creatively employed, not just by Obama but also Clinton (who had his own Mitch McConnell, namely House Speaker Newt Gingrich)—meaning that there is only so much more that one can do without additional legislative authority and funding.⁴⁷ Second, since the Obama years, and even more so since the Clinton years, the federal bureaucracy—the very folks necessary to carry out regulatory directives—has been downsized, demoralized, and degraded, leaving a smaller, weaker, and less respected shell of that critical institution still standing.⁴⁸ Third, the courts have shown—again since the Obama years but even more so during Biden’s presidency—increased hostility to the exercise of regulatory powers and the expert officials wielding those powers.⁴⁹

The courts’ hard shift to the right does not just endanger federal regulations but also existing statutes, as well as any legislation that may somehow garner Republican votes (or become law through a process called reconciliation⁵⁰).⁵¹ Today’s Supreme Court is willing to buck long-settled precedents and invalidate (or carve out big chunks of) all sorts of legislation and rules,⁵² including ones pertaining to climate

46. Emerson & Michaels, *supra* note 44.

47. *Id.* at 109.

48. See JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC (2017).

49. See Emerson & Michaels, *supra* note 44; Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4033753 [<https://perma.cc/H3XY-GG7J>].

50. Reconciliation is a mechanism created to streamline the process by which Congress sets the federal budget, and it allows for budgetary measures to pass with only a bare majority. (Senators cannot filibuster reconciliation bills.) Given the politics of the moment, reconciliation is the best, if not only, way that the Democratic majority can enact legislation. Dylan Matthews, *Budget Reconciliation, Explained*, VOX (Nov. 23, 2016, 1:10 PM), <https://www.vox.com/policy-and-politics/2016/11/23/13709518/budget-reconciliation-explained> [<https://perma.cc/3BD9-3NQT>]. That said, reconciliation cannot be used for any and all legislative proposals. As the Biden administration has already learned, there are quite stringent limits in terms of what substantive matters are germane (rather than “extraneous”) to the budget process and also how frequently reconciliation can be employed. RICHARD KOGAN & DAVID REICH, CTR. ON BUDGET & POL’Y PRIORITIES, INTRODUCTION TO BUDGET “RECONCILIATION” (2022), <https://www.cbpp.org/research/federal-budget/introduction-to-budget-reconciliation> [<https://perma.cc/Y39B-X486>]; Daniella Diaz, Priscilla Alvarez & Ali Zaslav, *Senate Parliamentary Rejects Democrats’ Second Attempt to Include Immigration in Economic Bill*, CNN (Sept. 29, 2021, 5:12 PM), <https://www.cnn.com/2021/09/29/politics/senate-parliamentarian-immigration-budget-economy/index.html> [<https://perma.cc/L6ZA-DRWJ>].

51. See Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023).

52. See Simon Lazarus & Robert Litan, *The Supreme Court’s Total War on Congress*, NEW REPUBLIC (July 8, 2021), <https://newrepublic.com/article/162914/supreme-court-roberts-war-congress> [<https://perma.cc/M8FA-6HQP>].

change and the environment,⁵³ civil rights and privacy,⁵⁴ public health (COVID-19⁵⁵ and reproductive health⁵⁶), public safety (guns),⁵⁷ and voting rights.⁵⁸ In short, because neither federal lawmaking nor federal rule promulgation seems especially easy or durable, it behooves us to look elsewhere in the hope of finding more receptive and responsive institutions and officials.⁵⁹

II. STATE PROVINCIALISM AND PERVERSITY

When efforts to govern, let alone change policy, are thwarted at the federal level, the natural move is to turn to statehouses and state courts in the hope those venues prove more hospitable. Such toggling between Washington and state capitols is a tried-and-true practice, supported by everyday custom, history, and constitutional architecture.⁶⁰ Yet states seem particularly problematic venues for the type of policy interventions that many view as urgently needed right now.

Most plainly, states are too interconnected for any one state to regulate by its lonesome. The nature of our highly integrated federal union means that quite a large number of public concerns spill over beyond the political boundaries of any one state. Thus, with the arguable exception of geographically isolated states such as Alaska and Hawaii, it is quite difficult for any one state to, by itself, confidently and comprehensively address environmental or public health issues for the simple reason that it cannot control what happens just across the state line.

53. *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587 (2022).

54. *See* Kiara Alfonseca, *Supreme Court Opens Door to Overturning Rights to Contraceptives, Same-Sex Relationships and Marriage*, ABC NEWS (June 24, 2022, 12:14 PM), <https://abcnews.go.com/Politics/supreme-court-opens-door-overturning-rights-contraceptives-sex/story?id=85639162> [<https://perma.cc/2NU8-7VMT>]; Tierney Sneed, *Supreme Court's Decision on Abortion Could Open the Door to Overturn Same-Sex Marriage, Contraception and Other Major Rulings*, CNN (June 24, 2022, 1:39 PM), <https://www.cnn.com/2022/06/24/politics/abortion-ruling-gay-rights-contraceptives/index.html> [<https://perma.cc/ZGR3-S7BG>].

55. *Nat'l Fed'n of Indep. Bus. v. Dept. of Lab.*, 142 S. Ct. 661 (2022) (invalidating Department of Labor's vaccine or testing emergency temporary standard).

56. *See, e.g.*, Victoria Nourse, *Why Codifying Roe Will Land Right Back at the Supreme Court*, CNN (June 30, 2022, 6:32 PM), <https://www.cnn.com/2022/06/30/opinions/codifying-roe-scotus-abortion-nourse/index.html> [<https://perma.cc/GKR6-2WYY>]; Amanda Hollis-Brusky, *Can Congress Resurrect Roe if it's Overturned? Well, It Could Try*, WASH. POST (May 4, 2022, 11:12 AM), <https://www.washingtonpost.com/politics/2022/05/04/roe-overturned-congress-abortion-law/> [<https://perma.cc/HD78-ABS3>].

57. Sam Baker, *Gun Control Takes 1 Step Forward in Congress, 2 Steps Back*, AXIOS (June 24, 2022), <https://www.axios.com/2022/06/24/gun-control-congress-supreme-court-biden> [<https://perma.cc/3TVH-98QR>] (referring to Adam Winkler explaining how *Bruen* imperils federal legislation).

58. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

59. We here leave to the side the question whether Biden and his allies should govern pursuant to presidential administration, even if they could. Emerson & Michaels, *supra* note 44.

60. *See* Hershkoff, *supra* note 12.

Closely connected to concerns over spillover effects are those associated with *races to the bottom*. Just as viruses, particulate matter, and contaminated water do not suddenly stop at the border between, say, Kentucky and Ohio, neither do people or businesses. As a result, state officials may be hesitant to enact strong environmental or labor laws; they may likewise prove reluctant to provide generous or even adequate public health and welfare benefits. Their hesitancy stems from fear—fear that neighboring states, ones that maintain a more limited suite of regulatory initiatives and benefit programs (and, presumably, levy lower taxes), will draw enterprising firms and high-income families to those less regulated and less taxed jurisdictions. These officials may worry, too, that by offering more generous health and social service benefits, their states will become so-called welfare magnets. To be clear, we don’t endorse such thinking. The literature on mobility and races to the bottom suggest that such fears are likely overblown.⁶¹ Nevertheless, we recognize that this thinking—whether sincere (but misguided) or simply pretextual—runs deep⁶² and thus stands as a real obstacle to enacting impactful legislation in at least a substantial number of state houses.

A third set of problems sounds in the absence of economies of scale. It is politically and fiscally expensive for each state, even assuming it’s so motivated, to beef up its regulatory or benefits infrastructure—everything from research to administration to enforcement. Granted, states already have existing agencies and skilled professionals working on a wide range of programs and initiatives. But it strikes us as a potential disincentive for state officials in every state to have to broaden or intensify their efforts—and to do so in at least some isolation from one another. The same is true when it comes to the amount of risk pooling that any one state, on its own, can achieve.⁶³ One of the true advantages of a larger, more populous union is its ability to withstand geographically circumscribed economic dislocations, health crises, or natural disasters. It’s simply harder for individual states to do that in isolation. And, of course, states acting apart from one another often lack effective purchasing power for services and goods. This is true when it comes to the acquisition of regular prescription drugs for which higher volume purchases means lower per-unit costs. And it was especially true with respect to the acquisition of

61. See, e.g., William D. Berry, Richard C. Fording & Russell L. Hanson, *Reassessing the “Race to the Bottom” in State Welfare Policy*, 65 J. POL’Y 327 (2003); George J. Borjas, *Immigration and Welfare Magnets*, 17 J. LAB. ECON. 607 (1999); Richard McGahey, *State Tax Increases on the Wealthy Won’t Make Them Move*, FORBES (Sept. 17, 2020, 3:37 PM), <https://www.forbes.com/sites/richardmogahey/2020/09/17/state-tax-increases-on-the-wealthy-wont-make-them-move/?sh=76b9c0bc582f> [<https://perma.cc/FF6J-YRXV>].

62. David Schultz, *Stupid Public Policies and Other Political Myths* 8–9, 21–24 (Dec. 18, 2008) (unpublished manuscript), <https://perma.cc/6MKE-JCSP>.

63. See Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1098–1100 (2018) (describing difficulties associated with interstate coordination on an already decentralized federal landscape); see also Robert Jackel & Alex Green, *How Treaties Between States Could Keep Obamacare Alive*, ATLANTIC (Feb. 4, 2017), <http://www.theatlantic.com/politics/archive/2017/02/interstate-compacts-save-obamacare/515604> [<https://perma.cc/3ZSF-4BJH>] (noting that if the Affordable Care Act were repealed, California would have the resources and population to run its own state health exchange, whereas smaller states, such as Oregon and Washington would struggle to do the same because they lack economies of scale).

COVID-19 countermeasures. During the early stages of the pandemic, there was both the standard concern about high per-unit costs and the special concern of ruinous competition, with desperate states aggressively bidding against one another for scarce resources. Beyond medical interventions, acute purchasing problems and distortions arise in the context of K-12 textbooks. Given its size, Texas is able to effectively dictate the content for much of the nation. Small and mid-size states, by contrast, tend to lack the market share necessary to motivate the publishing industry to accommodate their particular needs and interests.⁶⁴

Perhaps the strongest argument in favor of decentralized regulatory governance is one that sounds in a commitment to localism—namely, that state officials are far better-positioned than those in Washington to attend to the specific challenges besetting specific communities. Narrowly and specially tailored government may, therefore, be prized notwithstanding the absence of economies of scale, the high likelihood of races to the bottom, and the inevitable challenges associated with externalities. What’s more, when many states are engaged in narrowly and specially tailored governance projects, there is the hope that they serve as laboratories of democracy.⁶⁵ With dozens of small-scale pilot programs running across the country, states can evaluate which programs are working the best and adopt them accordingly. The problem, however, is that the fabled “laboratories” account is largely divorced from reality.⁶⁶ And that’s especially true today, given that national networks of political and interest group elites are more or less dictating the political and programmatic agendas of state and local officials around the country. If nothing else, the power and relevance of those national elites reduce the likelihood that state officials are going to engage in bespoke policymaking—that is, designing what we just described as narrowly and specially tailored policy initiatives. Instead, state officials will implement a cookie-cutter version of what the national elites prescribe.⁶⁷ Under such circumstances, the localism and democratic experimentation arguments fall by the wayside.

III. “JUST-RIGHT” GOVERNANCE

With federal lawmaking and regulation impeded in the ways described and state venues compromised, we feel a bit like Goldilocks, reluctant to settle for the better of two poor options. We are not the first to have a hankering for just-right porridge, though it’s been a long time and a lot has changed in the intervening hundred years. As noted above, it was back in 1925 when Frankfurter and Landis put pen to paper advocating for interstate agreements and compacts as tools of modern regulatory

64. See Rob Alex Fitt, *Conservative Activists in Texas Have Shaped the History All American Children Learn*, WASH. POST (Oct. 19, 2020), <https://www.washingtonpost.com/outlook/2020/10/19/conservative-activists-texas-have-shaped-history-all-american-children-learn/> [<https://perma.cc/HY52-TZLB>]; Gail Collins, *How Texas Inflicts Bad Textbooks on Us*, N.Y. REV. (June 21, 2012), <https://www.nybooks.com/articles/2012/06/21/how-texas-inflicts-bad-textbooks-on-us/> [<https://perma.cc/3XK5-46AQ>].

65. See *supra* note 15 and accompanying text.

66. See Super, *supra* note 20. See generally Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEG. STUD. 593 (1980).

67. See generally GRUMBACH, *supra* note 18; HOPKINS, *supra* note 21.

government. Those authors are, of course, far more famous for their later work as important and impactful architects of the modern federal administrative state.⁶⁸ Still, the fact that Frankfurter and Landis championed interstate governance at a moment when the prospects for expansive federal regulatory and redistributive programs seemed politically and constitutionally out of reach should give us added reason to heed their example and revisit the case today.

A. Interstate Compacts and Agreements: A Brief Overview

Interstate compacts may strike contemporary audiences as dull and arcane—“rule against perpetuities” dull and arcane. But bear with us: we need to describe the basics of compacting—a precursor to our explaining how potentially powerful, even transformative, these heretofore obscure governance arrangements can be. And, remember, you can’t fight climate change or secure a living wage through a deft application of the rule against perpetuities. But you might just be able to do both courtesy of a well-crafted interstate compact.

Interstate compacts, provided for in Article I, Section 10 of the Constitution, are vehicles through which two or more states bind themselves to an arrangement or unified, collective agenda. We follow the customary usage and distinguish interstate compacts, which require congressional approval,⁶⁹ from a whole host of interstate agreements that do not. For purposes of this quick overview, we use the terms compact and agreement interchangeably, holding for later discussions of why some arrangements—specifically, compacts—warrant congressional endorsement and why we think the kinds of interstate arrangements of particular usefulness right now are ones that do not require Congress’s consent.

Compacts resolve interstate boundary disputes, allocate water rights between two or more states, help groups of states pool or otherwise share resources (such as education and infrastructure), and address overlapping governance problems. Conceptually, these interstate arrangements of various types liberate us from the dualistic tension between having to choose either federal or state policymaking, which Frankfurter and Landis insisted was America’s “untrue antithesis.”⁷⁰ What

68. Soon enough, Frankfurter would join the Court, helping to solidify a majority comfortable with expansive federal powers. But even before donning his robe, he was a trusted advisor to Roosevelt and used his sway with the White House to help place many of his protégés—including Landis—in positions of influence throughout the federal government. Landis, for his part, served on the FTC, led the SEC, headed the Office of Civilian Defense, chaired the Civil Aeronautics Board, and—years later—drafted a landmark report for the Kennedy administration on administrative governance.

69. See *infra* notes 97 and 98 and accompanying text; see also *infra* Section III.B.

70. Frankfurter & Landis, *supra* note 26, at 688; *id.* at 729 (“The overwhelming difficulties confronting modern society must not be at the mercy of the false antithesis embodied in the shibboleths ‘States-Rights’ and ‘National Supremacy.’”); see RICHARD H. LEACH & REDDING S. SUGG, JR., *THE ADMINISTRATION OF INTERSTATE COMPACTS* 215 (1959) (describing compacting as a middle-way solution); BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 97–98 (2019) (offering philosophical assessments of an American federalism far more expansive than the orthodox, binary federalism that’s most salient in legal and political discussions).

better way, after all, could we split the difference than by retaining at least some of the advantages of local autonomy and decision-making, while enjoying greater economies of scale and capturing the spillover effects inescapably created when individual states' regulatory reach—but not their problems—stop at political boundaries?

In the first 140 or so years of the republic, interstate agreements centered almost exclusively on the resolution of boundary disputes and water rights. This narrow focus ought not be surprising. There were, after all, complexities, ambiguities, and variance among early surveys and various colonial-era treaties and understandings, quite a few of which remained unresolved at the time of the Founding;⁷¹ and, of course, during those early, pre-industrial decades, there was a rather limited appetite for social and economic regulatory and welfare programs. (And where such an appetite existed, states back then were properly sized and sufficiently autonomous from one another to effectively handle regulatory and redistributive initiatives.)⁷²

As we see it, interstate compacts, and their explicit inclusion in Article I of the Constitution, reflect a dynamic vision of the framing generation as one very much mindful of the experimental nature of their constitutional undertaking and open, even encouraging, of later generations to be inventive in how they see fit to configure and reconfigure their political communities to meet specific sets of challenges. And, true to form, later waves of interstate agreements—particularly those starting in the early twentieth century—involved shared governance projects of a more regulatory stripe.⁷³ These agreements addressed, among other things, the governance of shared watersheds for such uses as irrigation, fishing, navigation, transportation, land use and reclamation, and bridge-building.⁷⁴ By the early 1920s, New York and New Jersey crafted what many view as the first truly modern, truly administrative, and in many respects, truly trailblazing compact: the Port Authority.

The Port Authority was still in its infancy when Frankfurter and Landis proposed using the very same legal instrument more broadly and consistently to address a range of the most pressing social and economic challenges of their time. During that period of rapid industrialization, urbanization, and democratization,⁷⁵ significant

71. See, e.g., *Virginia v. Tennessee*, 148 U.S. 503 (1893) (resolving a border dispute over a strip of land approximately 113 miles long and two to eight miles across); *Florida v. Georgia*, 58 U.S. 478 (1855) (settling boundaries over 1.2 million acres of land in dispute due to vagaries in colonial era surveying and layers of treaties among states, foreign powers, and Indian tribes); see also LEACH & SUGG, *supra* note 70, at 5; Hasday, *supra* note 24, at 3–4 (noting that all but one of the thirty-six compacts enacted before 1921 resolved boundary disputes). Once again, not all interstate agreements are interstate compacts.

72. Cf. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920* (1982) (describing states as central sites for early American governance and regulation).

73. LEACH & SUGG, *supra* note 70, at 6 (describing interstate “cooperative action in fields where [states] cannot act effectively or do not wish to act alone . . .”).

74. See *Wharton v. Wise*, 153 U.S. 155 (1894) (addressing the pre-constitutional compact between Virginia and Maryland to share the Pocomoke River and Bay for fishing and transportation). The Atlantic States Marine Fisheries Commission promotes better use of Atlantic coast fisheries. See ATL. STATES MARINE FISHERIES COMM’N, <http://www.asmfrc.org> [https://perma.cc/JU6U-MJMK].

75. See Frankfurter & Landis, *supra* note 26, at 688.

segments of the population were beginning to appreciate (or were newly politically empowered to insist upon)⁷⁶ the importance of regulatory safety measures to protect workers, consumers, and children alike. And though the electorate was starting to become more sensitive to and ready to address these challenges, there were obstacles, particularly at the federal level, likely to resonate with contemporary observers.

For starters, *that* Supreme Court—the Taft Court—demonstrated considerable skepticism to federal regulatory legislation. Concluding that very little of the American political economy was actually national in scope, the Court struck down regulatory legislation as unwarranted under the Commerce Clause⁷⁷ or, in the alternative, as violating the freedom to contract.⁷⁸ The Court would more or less continue adhering to this crabbed understanding of our national economy for another decade.⁷⁹

In addition, at the time Frankfurter and Landis were writing, the states were not especially fruitful loci for regulatory interventions. They penned their article when the nation was still in the throes of the *Lochner* era⁸⁰—and thus, the Court was hostile to state regulatory efforts too.⁸¹ Perhaps just as importantly, even if the Court had been more deferential to state regulatory laws, it appears to us that Frankfurter and Landis would still have pressed the case for interstate compacting. The authors were fairly adamant in their belief that, in many respects, states were simply too small and had too many overlapping interests with one another to be effective regulatory venues.⁸²

So, seeking to thread the needle between the inhospitable feds and the impractical states—and taking seriously the possibility that regional, multistate governance was, at that particular moment, a superior option in general⁸³—Frankfurter and Landis sought to supercharge interstate agreements.

Yet compacting of the Frankfurter-Landis stripe never took off. But that's at least partly because the door to federal policymaking soon swung open. With the onset of the Great Depression and the subsequent election of a president and large congressional majorities committed to advancing ambitious national welfare programs, the political branches evidenced a clear commitment to federal regulatory legislation. And no doubt somewhat influenced by the massive political pressure in favor of such legislation, the hardliners on the judiciary waved the white flag and

76. See, e.g., U.S. CONST. amend. XIX.

77. Jane Perry Clark, *Interstate Compacts and Social Legislation*, 50 POL. SCI. Q. 502, 503 (1935) (acknowledging that there were, at the time, legal-constitutional limits on congressional power to engage in social and economic regulation).

78. Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

79. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

80. See Sunstein, *supra* note 78; see also GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, *CONSTITUTIONAL LAW* 755–56 (7th ed. 2013).

81. See Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 631 (2007) (explaining that the Court “deferred neither to state legislative factfinding nor to the states’ police power obligations to protect the public welfare”).

82. Frankfurter & Landis, *supra* note 26.

83. See *id.*

started turning aside constitutional challenges to exercises of federal authority.⁸⁴ What is more, in fairly short order, the New Deal started garnering bipartisan support, effectively instantiating the federal welfare state;⁸⁵ and the courts, in turn, began embracing a new jurisprudence far more supportive of federal and state social welfare programs.⁸⁶ This dramatic change in legal and political fortunes (particularly at a moment when we were experiencing two crises of not only national but also transnational proportions—the Depression and then World War II) diminished the need for Frankfurter and Landis’s multistate pathway.⁸⁷

B. The Law of Interstate Compacts and Agreements

Earlier we noted that some interstate governance arrangements require congressional approval and others do not. The key issues here are the Constitution’s Compact Clause⁸⁸ and the judiciary’s interpretation of the scope of that Clause. Some commentators read the Compact Clause as sweeping—prohibiting all interstate engagement absent express congressional approval.⁸⁹ These commentators emphasize the Clause’s textual proximity to various other prohibitions imposed on states.⁹⁰ (In fairness, the entirety of Article I, Section 10 certainly contains a long list of limitations and prohibitions on what the states may do.)⁹¹

Perhaps not surprisingly, Frankfurter and Landis took a different, more nuanced view of interstate arrangements. Among other things, Frankfurter and Landis acknowledged that the Compact Clause’s textual proximity to a litany of restrictions had had the effect of obscuring the true “significance of what was granted”; consistent with the Court’s then-prevailing reading, they understood the Clause as implicating only a subset of interstate agreements.⁹²

We are inclined to agree. The Compact Clause’s placement in Section 10 is especially instructive insofar as all three of Section 10’s clauses seem to reflect an overriding (if not singular) concern over state undertakings that threaten federal prerogatives. The first clause categorically prohibits what states may do regarding,

84. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

85. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1991).

86. See *supra* text accompanying note 84.

87. To be clear, many of those federal programs were administered either by the states or regionally. See Bulman-Pozen, *supra* note 23; see also *supra* note 84. Moreover, none of this is meant to suggest compacting and other interstate or federally devised but region-specific arrangements didn’t take place in the modern era. See, e.g., National Center for Interstate Compacts Database, <https://apps.csg.org/ncic/> [<https://perma.cc/VVK7-BY6B>]; Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841 (2014); Yanbai Andrea Wang & Justin Weinstein-Tull, *Pandemic Governance*, 63 B.C. L. REV. 1949 (2022); Bulman-Pozen, *supra* note 23; Blank & Rosen-Zvi, *supra* note 25; Owen, *supra* note 25.

88. U.S. CONST. art. I, § 10, cl. 3.

89. See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 537, 550–55 (2008); Greve, *supra* note 24.

90. U.S. CONST. art. I, § 10.

91. LEACH & SUGG, *supra* note 70, at 4–5 (describing the Compact Clause as a limitation on the states); THURSBY, *supra* note 35, at 4–5.

92. Frankfurter & Landis, *supra* note 26, at 691 n.25.

among other things, international diplomacy, naval adventurism by privateers, and the debasement of currency. (Diplomacy, defense, and coinage are all express powers of the national government.)⁹³ The second and third clauses contain prohibitions subject to override by congressional consent. Specifically, the second clause deals with restrictions on states' power to regulate interstate or transnational trade, likewise centering the Framers' worries over state interference with a core federal prerogative; here, however, Congress may consent to (and oversee) said trade restrictions, and any revenue raised by those states must be deposited in the federal treasury.⁹⁴ The third—and obviously most directly related—clause likewise restricts (again, absent congressional consent) state involvement in other facets of international trade, defense, and diplomatic affairs. When we read compacting alongside of these other possible exercises of state power, it is quite apparent that the Framers classified interstate arrangements as constitutionally significant (and worrisome) only to the extent those arrangements—like troop mustering or war making—threatened federal supremacy.⁹⁵

Frankfurter and Landis also stressed functional considerations. Their narrow reading of what types of interstate agreements necessitate congressional approval made considerable sense, particularly in the then-dawning modern era when, for various reasons, the feds hadn't yet built up their regulatory capacity and the states, acting alone, were (even back then) often ineffectual. The benefits of interstate cooperation were simply too great to risk undue congressional interference.⁹⁶

Of course, once installed on the Supreme Court, Frankfurter was able to fold his academic views into American jurisprudence. As suggested above, the Court had already largely embraced what we are terming the more expansive understanding of interstate arrangements.⁹⁷ But it still helped that, in writing for the Court in *New York v. O'Neill*, now-Justice Frankfurter underscored that “[t]he Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships.” Based on that understanding, he and his colleagues continued to affirm the legitimacy and legality of any number of “cooperative governmental activities not formulated in the Constitution but not offensive to any of its provisions or prohibitions.”⁹⁸ In other words, there is a wide range of options for interstate

93. U.S. CONST. art. I., § 10, cl. 1. The Clause also prohibits bills of attainder, ex post facto laws, the issuance of titles of nobility, and the impairment of contracts—all things Congress may likewise not do.

94. *Id.* cl. 2.

95. *Id.* cl. 3.

96. Frankfurter & Landis, *supra* note 26, at 703–08. Other legal scholars and political scientists share Frankfurter and Landis's understanding. Notable among them is Laurence Tribe. See *infra* note 103.

97. See *Virginia v. Tennessee*, 148 U.S. 503 (1893), *aff'd in relevant parts*, *New Hampshire v. Maine*, 426 U.S. 363 (1976); *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).

98. *New York v. O'Neill*, 359 U.S. 1, 11 (1958); see also *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27–28 (1951). That Frankfurter remained interested in regional governance may further be attested to by his contributing a foreword to a volume titled *Regionalism in America*. See Felix Frankfurter, *Foreword* to THE UNIV. OF WIS. PRESS, *REGIONALISM IN AMERICA*, at xv–xvi (Merrill Jensen ed., 1951).

governance, only a select few of which rise to the level of a compact and thus require congressional assent.

The breadth of interstate cooperation and how stringently or capaciously legislators and judges understand the Compact Clause is of special importance to us—and not just because we are lawyers writing principally for other lawyers in a law journal. It is also of special importance because seeking congressional approval in this political climate is, for the reasons put forth in Part I, a dicey proposition.

As we read the caselaw and understand past practices, a good deal of the types of interstate arrangements we think are warranted in this moment do not need congressional authorization (at least assuming the Court doesn't completely discard two hundred years of settled doctrine). Here is why:

Interstate agreements have the potential to rattle our basic constitutional architecture along two axes: the vertical and the horizontal. Vertical challenges arise out of agreements that threaten, impose on, or infringe upon federal prerogatives. When it comes to vertical affronts, the Court speaks consistently and decisively, insisting that any such agreements are compacts and, thus, must be ratified by Congress. Curiously, though, the justices have shown little interest in horizontal disruptions. By horizontal disruptions, we think of agreements that have the incidental effect of impinging on other (that is, nonparty) states' prerogatives. One such example might involve an interstate agreement that entails the pooling of, say, higher education resources and, thus, works (incidentally) to the disadvantage of nonparty states that, on their own, lack such a wealth of resources. The Court has all but signaled its indifference to any such horizontal disruption,⁹⁹ seemingly paving the way for any number of interstate agreements on the environment, labor, public health, and other social welfare initiatives. (There may, of course, be preemption issues, but preemption has to do with the particular policies advanced via interstate governance, not to the interstate arrangement itself.)

The Court's doctrinal distinction between the vertical and horizontal was apparent before any real consideration of modern regulatory instruments.¹⁰⁰ And it has remained so during modern times as well. We already mentioned the Court's 1958 *O'Neill* case affirming that interstate agreements required congressional authorization only when they challenged federal power.¹⁰¹ That understanding was substantially endorsed yet again some twenty years later in what is generally treated as the landmark modern interstate agreement case to reach the Court.¹⁰² In *United States Steel Corp. v. Multistate Tax Commission*, the Justices cited approvingly earlier examples of interstate agreements that did not rise to the level of compacts because they did not threaten the "supremacy of the United States."¹⁰³ This position

99. See *Virginia*, 148 U.S. at 520 (holding that only interstate agreements that increase the "political power or influence" of the parties to that agreement and challenge "the full and free exercise of federal authority" necessitate congressional approval); *Multistate Tax Comm'n*, 434 U.S. at 460 (affirming the position that the requirement of congressional consent only extends to a limited sub-set of all multistate agreements).

100. *Virginia*, 148 U.S. at 520.

101. *O'Neill*, 359 U.S. at 1.

102. See *Multistate Tax Comm'n*, 434 U.S. at 460.

103. *Id.* at 468; see also *Northeast Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 472 U.S. 159 (1985). Our reading of the caselaw comports with Laurence Tribe's, as spelled

drew a sharp dissent by Justice White. Justice White believed that the Compact Clause ought to take into account various “encroachments on the authority and power of non-Compact States” and consider the “competitive disadvantage” that such agreements engender.¹⁰⁴ Yet Justice White’s claim, which commanded the support of only one other justice, was readily brushed aside by the majority, which explained that any economic or political disadvantage to non-party states cannot be treated as if it were “an affront to the sovereignty” of said states.¹⁰⁵

Perhaps the Court’s fixation of vertical power dynamics is a jurisprudential misstep and an unwarranted fetishization of textualism; the Court has been known to ignore or misapprehend the basics of how government units function.¹⁰⁶ *But we will tell if you will not.* And, again, this focus on vertical affronts matters because the types of regulatory compacts most needed today do not threaten federal constitutional prerogatives. Welfarist issues of the sort we are focused on—such as those pertaining to the environment, labor, housing, education, childcare, and transportation—are not the exclusive province of the federal government; and governance through multistate arrangements do not threaten the sovereignty (or supremacy) of the federal government.

It is possible our reading of the text and doctrine is overly confident; it is also quite possible that states interested in multistate regulatory solutions would prefer the certainty associated with congressionally approved compacts. There are, of course, advantages to securing congressional consent. One is to ward off judicial

out in his constitutional law treatise. There, Tribe remarks that the narrow, premodern doctrinal understanding of what triggers congressional approval has been “fully embraced by the Court in the leading contemporary case on compacts.” LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1238–40 (3d. ed. 2000).

104. *Multistate Tax Comm’n*, 434 U.S. at 494–95 (White, J., dissenting).

105. *Id.* at 477–78. Justice White was, in fact, making the case seemingly endorsed, in dicta, by the Court in 1854. *See Florida v. Georgia*, 58 U.S. 478 (1854). Again, the Court disavowed any connection between horizontal equity concerns and the Compact Clause. *See Virginia*, 148 U.S. 503, 520–21 (1893) (holding compact did not require congressional consent because the purely horizontal agreement between the states setting a boundary line “would in respect displace the relation of either of the states to the general government”).

106. *See, e.g., Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010) (Breyer, J., dissenting) (underscoring how the Court’s remedy did not advance the majority’s purported commitment to privileging a unitary executive); *see also* Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court’s Political Theory*, 73 HASTINGS L.J. 371 (2022). Scholars have long worried that the courts pay too little attention to the horizontal dimensions of federalism. *See, e.g.,* Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289, 292, 328 (2003) (lamenting the asymmetry between judicial attention to vertical federalism and horizontal federalism, albeit without mention of the compact clause); Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001) (describing horizontal aggrandizement as a threat to state autonomy, albeit without mention of the compact clause). Of perhaps some relevance, Heather Gerken and Ari Holtzblatt argue that politics, not litigation, can and should safeguard horizontal federalism. Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57 (2014).

challenges, ensuring a safe harbor from a Supreme Court that has shown itself neither beholden to precedent nor smitten with government regulation at any level.¹⁰⁷

The second is that congressional approval has the effect of converting interstate agreements into federal law, making it stickier in ways that inhibit strategic and unilateral defections by states whose officials prove unable to shake their “race to the bottom” priors. We will address this scenario in greater detail below; but for now, we will simply state that we are not convinced that the stickiness that attaches once Congress consents is necessarily an unalloyed good.

The third possible advantage is that a compact is less likely than an agreement to be preempted or superseded by federal law. Here, we would be more worried about preemption via judicial challenge than that Congress will act affirmatively to supersede an interstate arrangement. It is always within Congress’s power to undo a bona fide compact—that is, one they have already authorized—meaning *ex ante* congressional approval does not preclude later Congresses from rescinding the grant. Moreover, and perhaps more importantly, the same forces that we’ve been describing as impeding regulatory and redistributive legislation at the federal level are likely to prevent conservative coalitions within Congress from taking affirmative steps to undo creative and expansive regulatory and redistributive multistate agreements. Preemption, by contrast, poses an immediate and credible threat. Officials working in service of interstate agreements will have to exercise care to avoid butting up against federal laws and regulations, and that will surely constrain how ambitious they can be in rolling out new initiatives. So, in those policy domains where preemption is apt to come into play, parties to interstate agreements have to dampen their expectations or try to secure congressional consent.

On that note, let’s assume for the moment that congressional consent is necessary because preemption looms so large, because we are misreading the doctrine, or because this Court may revisit compacting jurisprudence to impede economic and social regulatory programs.¹⁰⁸ Even under any of those scenarios, the Senate may well invoke cloture, thereby ensuring an interstate compact would not be filibustered. Though we just discussed concerns about horizontal inequities—and the possible ways in which left-out states are disadvantaged—we recognize that those inequities have different subjective valences. And we recognize those different subjective valences are likely most deeply experienced in a period, such as ours, of gaping wide political polarization. Progressive Democrats might worry that an interstate regulatory or redistributive agreement would be exclusionary and thus leave some (*poor, unfortunate*) nonparty states behind. But for those more hostile to regulatory or redistributive agreements, it stands to reason that they would be perfectly happy to let (*misguided and wasteful*) neighboring states ratchet up regulatory and redistributive programs. Imagine a progressive Upper Midwest environmental agreement entered into by Pennsylvania, Michigan, Illinois, Wisconsin, and Minnesota. (If you prefer, make it a workers’ rights agreement; it does not matter.)

107. See *supra* notes 97, 99, 101 and accompanying text. They could, for instance, adopt something like the functional, four-part test proffered by Michael Greve. See Greve, *supra* note 24, at 287–305. But that would, to be sure, require a whole lot of doctrinal and methodological acrobatics on the part of even a highly results-driven court.

108. See, e.g., Michael Gentithes, *Janus-Faced Judging: How the Supreme Court is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83 (2020).

Note we left out Indiana and Ohio, both for argument's sake and because those states tend to be far less politically enthusiastic about such initiatives.

How then would the senators from those nonparty states vote on a congressional resolution to approve the Upper Midwest agreement as a compact? Perhaps they might be reflexively antagonistic and support a filibuster. Republicans have, after all, been known to act against their self-interest, opposing legislation that disproportionately helps red states in order to “own the libs.”¹⁰⁹

But, quite possibly, they would not take the Larry David—that is, *spite*—approach to legislative voting. Not necessarily consumed by the need to “own the libs,” they might cast aside any impulse to be spiteful and instead recognize how politically advantageous it may be to them—and their home states—when (again, *misguided and wasteful*) neighboring states enact tighter regulations and increase taxes and expenditures. They might view the Upper Midwest compact as a foolish undertaking, serving (so they think) principally to help businesses in the less-taxed and less-regulated states of Indiana and Ohio prosper and to entice firms (and wealthy families) to relocate to Indiana and Ohio from Michigan, Wisconsin, or Illinois. Heck, Indiana and Ohio might even enjoy a host of positive externalities, including a marginally better climate thanks to the conscientious efforts of their neighbors in the Upper Midwest compact to reduce toxic emissions in the air and water. Lastly, those senators (plus any number of other red state senators) may be especially solicitous of interstate compacts insofar as those arrangements may lessen the urgency for federal regulatory and redistributive interventions (and much-needed reinvestment in the federal bureaucracy). That is to say, senators from within the Upper Midwest compact—at least somewhat satisfied by what their states can accomplish on a regional level—may be marginally less aggressive in clamoring for national regulation or redistribution. All of this is to say that the incentives to filibuster the Upper Midwest compact are leagues different from the incentives to filibuster federal laws of similar substance and political import.

C. The Architecture of Interstate Compacts and Agreements

The last piece of the puzzle is what these compacts or agreements actually look like. Agreements or compacts may be simple, straightforward, and require no ongoing policy-formulating or governance responsibilities. A compact to fix a

109. Consider the thirty Republican senators who voted against the 2021 Infrastructure Bill, despite the fact that the twenty-one states those senators represented stood to receive billions of much-needed relief money for roads, bridges, and public transportation. See Elizabeth Crisp, *These 30 Republicans Voted Against Infrastructure Bill; Here's What It Would Give Their States*, NEWSWEEK (Aug. 11, 2021, 4:42 p.m.), <http://newsweek.com/these-30-republicans-voted-against-infrastructure-bill-heres-what-it-would-give-their-states/1618521> [<https://perma.cc/3BD2-4NXH>]. Missouri Senator Josh Hawley voted against the bill, even though his state would have received over \$6 billion in funding, because it advanced “Joe Biden’s woke agenda under the guise of infrastructure.” *Id.* Both senators from Arkansas—Tom Cotton and John Boozman—voted against the bill, even though Arkansas would have received over \$4 billion in aid to repair its decrepit infrastructure because, according to Cotton, “[Arkansans] do not want President Biden’s ‘social infrastructure’ and climate alarmism, especially under the threat of increased inflation and higher taxes.” *Id.*

heretofore disputed boundary line would fit into this category.¹¹⁰ Some interstate understandings may require ongoing administration but still be fairly straightforward—for instance, agreements among states on how to manage, allocate, or continue to share a watershed that runs through said states. Such agreements might specify general goals and expectations and establish some administrative body to further those discrete goals (by, among other things, promulgating rules and enforcing them against those who flout them).

An even more complex and multifaceted agreement might be something like the Port Authority—a sprawling operation with an expansive mandate. The Port Authority builds, operates, and polices all sorts of transportation hubs and pathways, manages land and properties (it owns, among other things, the World Trade Center, including all of the shops, parks, and buildings on the sixteen-acre campus), and advances its own, heavily trumpeted,¹¹¹ environmental projects. Celebrating its one-hundredth anniversary in 2021, the administrative infrastructure for the Port Authority has over the years grown exponentially, with an annual operating budget of \$3.2 billion.¹¹² By way of comparison, Montana's state budget is \$5.1 billion,¹¹³ —and Dallas, Boston, and Detroit's budgets are each a bit shy of \$3 billion.¹¹⁴ The Port Authority employs around 7000 employees—a number a little south of what the city of Memphis employs,¹¹⁵ a little north of Oakland's workforce,¹¹⁶ and twice that of Miami.¹¹⁷ Its police department—whose presence is highly visible at all three metropolitan airports, the Port Authority Bus Terminal, the Port Authority Trans-Hudson (PATH) stations, and (of course) in and around the World Trade Center—

110. LEACH & SUGG, *supra* note 70, at 5.

111. See *Environmental Initiatives*, PORT AUTH. OF N.Y. AND N.J., <https://www.panynj.gov/port-authority/en/about/Environmental-Initiatives.html> [https://perma.cc/ZG9U-U8KS].

112. See Press Release, Port Auth. of N.Y. and N.J., Port Auth. Bd. of Comm'rs Approves 2021 Operating and Cap. Budgets (Dec. 27, 2020), <https://www.panynj.gov/port-authority/en/press-room/press-release-archives/2020-press-releases/port-authority-board-of-commissioners-approves-2021-operating-and-capital-budgets.html#:~:text=The%202021%20budget%20comprises%20%243.2,debt%20service%20and%20other%20expenses> [https://perma.cc/RTA2-QGKG].

113. H.B. 0002, 66th Leg., Reg. Sess. (Mont. 2019), <https://leg.mt.gov/bills/2019/sesslaws/ch0483.pdf> [https://perma.cc/K4TX-QUHQ].

114. *Analysis of Spending in America's Largest Cities*, BALLOTPEdia, https://ballotpedia.org/Analysis_of_spending_in_America%27s_largest_cities [https://perma.cc/6BY3-6CZ4] (2015 data).

115. *Careers*, CITY OF MEMPHIS, <https://www.memphistn.gov/government/careers/#:~:text=Our%20team%20of%20over%208%2C000,life%20for%20Memphians%2C%20every%20day> [https://perma.cc/VF2G-P78E].

116. CAL. STATE CONTROLLER'S OFF., CALIFORNIA CITIES, <https://publicpay.ca.gov/Reports/Cities/Cities.aspx> [https://perma.cc/A2HP-7KJ3] (reflecting data last updated on October 24, 2022).

117. *FAQ – General*, CITY OF MIA. DEP'T OF HUM. RES., <http://archive.miamigov.com/employeeel/pages/faq/general.asp#:~:text=On%20the%20average%2C%20however%2C%20the,covering%20more%20than%20500%20classifications.&text=Answer%3A%20The%20City%20of%20Miami%20offers%20the%20following%20options%20in,Certified%20Police%20Officer> [https://perma.cc/589X-FT3F].

numbers just over 2200 uniformed officers.¹¹⁸ That's roughly the same size force as the San Francisco Police Department and the sum total of all police officers in Montana (working across 119 state and local departments). Furthermore, the Port Authority Police Department is considerably larger than Detroit's, San Antonio's, Boston's, and all of Delaware's police forces (scattered across forty-nine state and local bureaus). Again, very little of this was contemplated at the time officials from New York and New Jersey decided to pool resources for better, more constructive management of freight and passengers arriving at, departing from, or moving around that significant metropolitan hub.¹¹⁹ In fact, there was no police department until 1928, when forty officers were commissioned to police the two bridges connecting Staten Island and New Jersey.¹²⁰

Needless to say, there is considerable variation between and among agreements and compacts when it comes to the design of decision-making and administrative bodies—e.g., who sits on them, who elects or appoints them, how their roles may expand or contract over time, how they vote, what independent enforcement, taxing, and revenue-raising powers they have, and how they engage with and empower members of the public and affected stakeholders. In recent times, agreements and compacts have been deemed highly problematic for being byzantine, easily captured by special interests, and undemocratic.¹²¹ Concerns of this sort, particularly within

118. *PAPD Mission & History*, PORT AUTH. OF N.Y. AND N.J., <https://www.panynj.gov/police/en/about/history.html> [https://perma.cc/K8ZP-X5QD].

119. *See History*, PORT AUTH. OF N.Y. AND N.J., <https://www.panynj.gov/port-authority/en/about/history.html> [https://perma.cc/3K2Y-3RFF] (noting that the interstate agency was formed “to develop and modernize the entire port district in order to improve trade and commerce”).

120. Education compacts also took off in the twentieth century. For example, a large contingent of states formed the Western Interstate Commission for Higher Education. *See The Western Regional Education Compact*, June 29, 1959, <https://www.wiche.edu/wp-content/uploads/2019/04/Western-Region-Educational-Compact.pdf> [https://perma.cc/3SKN-K9ZK]. Within a few years' time, thirteen states agreed to participate at the undergraduate level, and fourteen at the graduate level. These compacts appear to be motivated by a twin desire to expand educational opportunities for the citizens of these states and to reduce the costs of providing such education. *See* Frank C. Abbott, *A Bigger Bang for the Buck: College Compacts Lower Costs for All*, 64 J. STATE GOV'T 84 (1990). For a very different higher education compact, see Daniel J. Sharfstein, Brown, *Massive Resistance, and the Lawyer's View: A Nashville Story*, 74 VAND. L. REV. 1435 (2021).

121. *See* Hasday, *supra* note 24. We would be remiss not to acknowledge the problems plaguing the Port Authority at present, with New Jersey announcing and passing a state law to withdraw from the Waterfront Commission, see Ch. 324, 2017 N.J. Laws 2102 (2018), notwithstanding the fact that the compact does not provide for unilateral withdrawal by either party—in fact, it is silent on the issue of withdrawal. The Waterfront Commission filed suit against New Jersey, seeking a declaratory judgment and injunctive relief, prohibiting it from withdrawing, but, on appeal, the Third Circuit held that state sovereignty barred the Commission's suit. *See Waterfront Commission of N.Y. Harbor v. Governor of N.J.*, 961 F.3d 234, 242 (3d Cir. 2020); *cf. Hess v. Port Auth. Trans Hudson Corp.*, 513 U.S. 30 (1994) (holding that the Port Authority was not entitled to state sovereign immunity under the Eleventh Amendment). The import of the ruling is that the Waterfront Commission has no power to act in self-preservation, and if the Third Circuit was correct, it raises serious questions about the enforceability and longevity of any compact. To resolve the dispute, New

the contexts they were raised,¹²² ring true—and thus ought to be taken seriously. But, as we will show, the antidemocratic features of existing compacts and agreements are hardly inherent in interstate governance.¹²³ In fact, well-designed agreements or compacts may be *radically* democratic and far more politically accountable than many state and federal agencies.¹²⁴

IV. COMPACTING TODAY

In this Part, we first explain why compacting makes even more sense today than in earlier periods—namely, because federal governance seems especially and perhaps intractably dysfunctional right now, because states are even (contextually speaking) smaller and more undifferentiated from one another than in prior eras, and because even the somewhat open channels and pathways for regulatory governance at the federal level and in most states are cluttered in ways that cry out for a variety of reforms.

Second, we proffer sketches of model interstate agreements, ones seemingly in line with the instant agenda for socioeconomic, environmental, and good governance reform. Consistent with our aims of surfacing and supercharging interstate agreements, we purposely provide just skeletal accounts—leaving it to those with special substantive expertise in specific domains of law and public administration to do the vitally important work of designing effective and sensible instruments of regulation and redistribution.

A. *The Goldilocks Imperative*

Frankfurter and Landis got lucky. Sure, their compacting project fizzled, but a giant opening for federal regulation soon emerged. And, for the longest time, that

York has filed a complaint against New Jersey, invoking the Supreme Court's original jurisdiction, also seeking to challenge and prevent New Jersey's withdrawal. *See* Petition for Certiorari, *New York v. New Jersey*, No. 220516 (2022). Argument took place in February 2023, and the Court will issue a ruling some time before June 2023. Although a ruling in New Jersey's favor quite obviously be adverse to New York's interest in forcing New Jersey to continue operating the Waterfront Commission as a joint venture, the takeaway for states looking to enter policy- (rather than project-) based compacts moving forward is that they should be explicit in drafting the various provisions, including specifying whether and how a party (or parties) may withdraw.

122. *See* Hasday, *supra* note 24, at 7–8 (questioning the assumption that compacts are “the product of deliberative, collective self-determination” and arguing that even if they are, they severely interfere with self-governance because they “limit[] a party state’s power to respond to changing preferences and circumstances”).

123. Some might point to the problems plaguing the Port Authority of NY and NJ, *see id.*, as evidence against the advisability of interstate compacts. We choose to take a different view. We see the compact as largely successful and, in any event, view the frustrations and challenges now arising as learning opportunities. Future compact drafters may study existing compacts (and political and legal challenges to them)—and accordingly craft better agreements.

124. *See infra* Section IV.A.5.

opening seemed stable, if not permanent.¹²⁵ As Cass Sunstein wrote in 2000, the nondelegation doctrine—an ostensible constitutional impediment to Congress assigning sweeping regulatory authority to federal agencies—“has had one good year, and 211 bad ones (and counting).”¹²⁶ That one good year—1935—was before the Court began the long process of what Bruce Ackerman might call the effective constitutional ratification of the modern administrative state.¹²⁷ Sunstein’s 2000 article was published just a few months before a unanimous Supreme Court, led by Antonin Scalia, swiftly, decisively, and perhaps even scornfully turned aside what some deemed¹²⁸ the first credible nondelegation doctrine challenge in decades.¹²⁹

A lot has changed in the past two decades. What had been fairly staid and largely subterranean tussles over the size and shape of the federal administrative state¹³⁰ have now turned into full-out wars, waged in the courts of law¹³¹ and public opinion.¹³² The Court seems poised to resurrect the nondelegation doctrine, again the legal linchpin of the modern administrative state,¹³³ and possibly strike a mortal blow to the administrative state itself.¹³⁴ (Telegraphing these moves while still on the Tenth Circuit, then-Judge Neil Gorsuch railed against what he deemed to be swollen and swaggering “bureaucracies . . . [that] concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”¹³⁵

125. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000); Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1 (2017).

126. Sunstein, *supra* note 125, at 322.

127. Ackerman, *supra* note 28.

128. *Am. Trucking Ass’n v. Env’t Prot. Agency*, 175 F.3d 1027 (D.C. Cir. 1999).

129. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457 (2001).

130. See Jon D. Michaels, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465 (2020).

131. Metzger wrote of the “anti-administrativist” challenges and the likelihood of their picking up steam with the addition of then newest justice Neil Gorsuch. Metzger, *supra* note 125, at 3. Since then, Justices Kavanaugh and Barrett have joined the bench, replacing Justices Kennedy and Ginsburg, respectively. But even before then, Justice Scalia—initially a champion of broad delegations and considerable deference to agencies—was signaling greater frustration with those executive entities. See, e.g., *Michigan v. Env’t Prot. Agency*, 576 U.S. 743 (2015). Compare *Auer v. Robbins*, 519 U.S. 452 (1997) (endorsing broad deference to agencies interpreting their own rules), with *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67–69 (2011) (Scalia, J., concurring) (doubting the propriety of *Auer* deference).

132. See Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018).

133. See David Rivkin, *Alito Teases a Judicial Revolution*, WALL ST. J. (June 23, 2019, 3:10 PM), <https://www.wsj.com/articles/alito-teases-a-judicial-revolution-11561317002> [<https://perma.cc/3EHP-JTCY>].

134. See *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021); *Lucia v. Sec. & Exch. Comm’n*, 138 S. Ct. 2044 (2018); *Tiger Lily, LLC v. Dep’t of Hous. & Urb. Dev.*, No. 21-5256 (6th Cir. July 23, 2021) (Thapar, J., concurring).

135. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

As Gorsuch announced in that same opinion, sounding like the man soon to elevate him to the Supreme Court,¹³⁶ the time had “come to face the behemoth.”¹³⁷

Indeed, officials in Congress and in the Trump White House were simultaneously engaged in a sustained and highly effective attack on the legitimacy, credibility, and honesty of administrative officials—an attack that resonated deeply with at least a significant segment of the American public. What’s perhaps most striking is that this attack didn’t just zero in on relatively easy targets—the real-world Leslie Knopes easily, if unfairly, disparaged as tree hugging do-gooders. No, they went far broader, sweeping in world-renowned public health experts,¹³⁸ career prosecutors,¹³⁹ three successive FBI directors,¹⁴⁰ and, most gallingly, highly decorated four-star generals.¹⁴¹

For the reasons that follow, we think there is little hope for a quick reversal. Hence, we believe that policy entrepreneurs’ incentives to form interstate

136. See Martin Pengelly, *Trump’s Obsession with Deep State Conspiracy ‘Delusional,’ John Boehner Says*, GUARDIAN (Apr. 6, 2021, 10:43 AM) <https://www.theguardian.com/us-news/2021/apr/06/john-boehner-book-trump-obsession-deep-state-conspiracy> [https://perma.cc/K4D3-SYEX]; Jon D. Michaels, *How Trump is Dismantling a Pillar of the American State*, GUARDIAN (Nov. 7, 2017, 8:36 AM), <https://www.theguardian.com/commentisfree/2017/nov/07/donald-trump-dismantling-american-administrative-state> [https://perma.cc/PQC8-BP8Z].

137. *Gutierrez-Brizuela*, 834 F.3d at 1149.

138. See Natasha Korecki & Sarah Owerhohle, *Attacks on Fauci Grow More Intense, Personal, and Conspiratorial*, POLITICO (June 4, 2021, 11:00 AM), <https://www.politico.com/news/2021/06/04/fauci-attacks-personal-conspiratorial-491896> [https://perma.cc/9GKW-EYMD]; Max Cohen, *Trump Blasts Birx After She Warns Coronavirus Pandemic is ‘Extraordinarily Widespread’*, POLITICO (Aug. 3, 2020, 10:37 AM), <https://www.politico.com/news/2020/08/03/trump-blasts-birx-after-coronavirus-claims-390881> [https://perma.cc/7E2M-N3SD].

139. Louise Radnofsky, Rebecca Ballhaus & Aruna Viswanatha, *Trump Steps Up Attacks on Mueller Investigation*, WALL ST. J. (Mar. 19, 2018, 9:32 AM), <https://www.wsj.com/articles/trump-says-he-never-saw-mccabe-take-notes-1521385809> [https://perma.cc/7WRF-HAW8]; Dartunorro Clark, Michael Kosnar, Dareh Gregorian & Tom Winter, *All Four Roger Stone Prosecutors Resign from Case After DOJ Backpedals on Sentencing Recommendation*, NBC NEWS (Feb. 11, 2020, 1:06 PM), <https://www.nbcnews.com/politics/politics-news/doj-backpedalling-sentencing-recommendation-trump-ally-roger-stone-n1134961> [https://perma.cc/KRB6-CFEX].

140. Jordyn Phelps, *Trump Attacks His Own FBI Director After He Defends Report Finding No Anti-Trump Plot*, ABC NEWS (Dec. 10, 2019, 10:14 AM), <https://abcnews.go.com/Politics/trump-attacks-fbi-director-defends-report-finding-anti/story?id=67622299> [https://perma.cc/MCK5-7SKR]; Ed Pilkington, *Trump Threatens Comey with ‘Years in Jail’ Over FBI Russia Report*, GUARDIAN, (Dec. 15, 2019, 2:15 PM), <https://www.theguardian.com/us-news/2019/dec/15/james-comey-sloppiness-fbi-surveillance-trump-page-fox-news-sunday> [https://perma.cc/56BE-CFM4]; Radnofsky, Ballhaus & Viswanatha, *supra* note 139.

141. PHILIP RUCKER & CAROL LEONNIG, A VERY STABLE GENIUS: DONALD J. TRUMP’S TESTING OF AMERICA (2020) (calling top military officials “a bunch of dopes and babies”); see Caroline Vakil, *Tucker Carlson Calls Joint Chiefs Chairman a ‘Pig,’ ‘Stupid’*, THE HILL (June 25, 2021, 10:14 AM), <https://thehill.com/policy/defense/560209-tucker-carlson-lashes-out-at-milley-not-just-a-pig-hes-stupid> [https://perma.cc/MR9V-JWV2].

agreements, and the comparative advantages of compacting, ought to be correspondingly high.

1. Why Things Are Even Stickier at the Federal Level Now

We already explained that federal policymaking pathways are significantly obstructed. Our main intention here is to underscore that today's obstruction—and concomitant dysfunction—is far worse now than at other times in the modern era.

First, the power of incumbency and lack of competitive districts are both so acute right now that we're far less likely to see the type of congressional turnover that enabled a fairly swift transition from the pro-business 1920s to the New Deal 1930s. By no means do we suggest that elections or electoral politics in the 1920s and 1930s were all hunky-dory. Far from it. Jim Crow was, to be sure, alive and well,¹⁴² we were anything but an inclusive democracy, and congressional districts encompassing unequal numbers of people were still tolerated.¹⁴³ Of perhaps greatest importance, however, was one of the persistent pathologies of our federal system—namely the constitutionally hardwired disproportionate southern sway over national politics—worked then (unlike now) in favor of the New Deal.¹⁴⁴

In any event, the story of political power between then and now has largely been one of increasingly democratic progress. It may have been painfully, sometimes tragically, slow. But most agree that we had been trending in the right direction.¹⁴⁵ The current moment puts a lot of that progress into doubt, as campaigns to refute election results¹⁴⁶ and suppress voting rights¹⁴⁷ have emerged from the shadows and come out into the open, with champions adopting shamelessly antidemocratic and,

142. We were, after all, decades from passage of the Voting Rights Act (1965) and ratification of the Twenty-Fourth Amendment, which abolished poll taxes (1964). U.S. CONST. amend. XXIV, § 2.

143. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

144. See RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 144–47 (2004); V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* (1949). Reliance on support from representatives from the unreconstructed South had the additional effect of rendering significant parts of the New Deal morally compromised given all the concessions Roosevelt and his allies had to make to the Senate's southern barons, quite a few of whom chaired key committees. See IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013) (emphasizing that “liberal democracy prospered because of an accommodation with racial humiliation”).

145. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* (2000).

146. Ashley Parker, Amy Gardner & Josh Dawsey, *How Republicans Became the Party of Trump's Election Lie After Jan. 6*, WASH. POST (Jan. 5, 2022, 6:09 PM), https://www.washingtonpost.com/politics/republicans-jan-6-election-lie/2022/01/05/82f4cad4-6cb6-11ec-974b-d1c6de8b26b0_story.html [<https://perma.cc/STK4-TTNB>].

147. Ed Pilkington, *Report Shows the Extent of Republican Efforts to Sabotage Democracy*, GUARDIAN (Dec. 24, 2021, 2:00 PM), <https://www.theguardian.com/us-news/2021/dec/23/voter-suppression-election-interference-republicans> [<https://perma.cc/G7GT-EEGF>]; *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST., (Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021> [<https://perma.cc/NTC7-9332>].

often, racially subordinating measures.¹⁴⁸ The road to advance these voter suppression laws has been paved by a Court that has registered indifference, if not outright hostility, to the 1965 Voting Rights Act.¹⁴⁹ And whereas what passed for redistributive and regulatory New Deal legislation in the 1930s was endorsed by southern segregationists, similar pushes today¹⁵⁰ depend heavily on the support of Americans of color, especially Black voters.¹⁵¹

Second, party polarization and cohesion have reached such extremes that there are few, if any, principled members of the Republican Party capable of winning elections. To the extent any Republican comes close to cooperating with the Democrats in Congress or Biden in the White House, they are likely to do so as a

148. Sam Levine, *Republicans' Anti-Democratic Attacks are the New Normal*, GUARDIAN (Jan. 6, 2022, 10:00 AM), <https://www.theguardian.com/us-news/2022/jan/06/republicans-anti-democratic-attacks> [<https://perma.cc/6P6K-WYVA>]; *The Impact of Voter Suppression on Communities of Color*, BRENNAN CTR. FOR JUST. (Jan. 10, 2022), <https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color> [<https://perma.cc/RGC2-Q9CG>]. The Supreme Court recently heard argument in a case involving the so-called Independent State Legislature Doctrine. Petition for Certiorari, *Moore v. Harper*, No. 21-1271 (2022); cf. *Smiley v. Holm*, 285 U.S. 355 (1932) (holding that state governors have the power to veto redistricting proposals passed by state legislatures). Proponents, including the likes of John Eastman who sought to pressure state legislatures to override the will of voters in the 2020 presidential election, contend that the Elections Clause, U.S. Const. art. I, § 4, cl. 1, and the Presidential Electors Clause, U.S. Const. art. II § 1, cl. 2 gives unfettered control over state election regulations to state legislatures and renders any state judicial action to the contrary unconstitutional. (For his alleged involvement in trying to invalidate the 2020 election, Eastman is facing debarment and possible criminal prosecution, Mariana Alfaro, *Calif. Seeks to Disbar Trump Adviser John Eastman over Jan. 6 Charges*, WASH. POST (Jan. 26, 2023, 9:20 PM), <https://www.washingtonpost.com/politics/2023/01/26/eastman-trump-disbar-california/> [<https://perma.cc/U74H-N7C8>]; Freddy Brewster, *Why the Jan. 6 Committee Handed out a Criminal Referral to a former California Law Professor*, L.A. TIMES (Dec. 19, 2022, 1:57 PM), <https://www.latimes.com/politics/story/2022-12-19/jan-6-charges-who-is-john-eastman> [<https://perma.cc/H7NL-2CGD>]). Any opinion endorsing this anti-democratic theory will undoubtedly compound the problems we already see. Seemingly state legislators—themselves the products of often heavily gerrymandered districts—would have license to substitute their will for that of the people themselves, rendering election day results nothing more than symbolic or advisory.

149. See David Gans, *Selective Originalism and Selective Textualism: How the Roberts Court Decimated the Voting Rights Act*, SCOTUSBLOG (July 7, 2021, 11:10 AM), <https://www.scotusblog.com/2021/07/selective-originalism-and-selective-textualism-how-the-roberts-court-decimated-the-voting-rights-act/> [<https://perma.cc/4AWZ-2C5Z>]; *The Roberts Court Systematically Dismantles the Voting Rights Act*, WASH. POST (July 1, 2021, 4:04 PM), <https://www.washingtonpost.com/opinions/2021/07/01/voting-rights-act-roberts-supreme-court-dismantle/> [<https://perma.cc/T528-BZFB>].

150. Albeit ones that wouldn't redound to the disproportionate benefit of Whites. See KATZNELSON, *supra* note 144.

151. See Rashawn Ray, *How Black Americans Saved Biden and American Democracy*, BROOKINGS (Nov. 24, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/11/24/how-black-americans-saved-biden-and-american-democracy/> [<https://perma.cc/6M29-MH66>].

swan song on their way out of public office.¹⁵² This was beginning to be true even before the melding of the MAGA movement and the Republican Party,¹⁵³ but has taken on a new and more feverish intensity now.¹⁵⁴ None of this was true even a couple of decades ago, and certainly not in the 1940s and 1950s when the New Dealers relied heavily on Republicans to endorse and in important respects expand upon the basic architecture and central programs of the welfare state.¹⁵⁵ Again, there is seemingly no daylight within the national Republican Party today for even principled center-right solutions to deal with the instant, pressing challenges.¹⁵⁶

Third, there is reason, we think, to take a dimmer view of today's judges and legislators intent on thwarting federal legislative and regulatory power. It's not that we look especially favorably on the likes of Justices McReynolds and Sutherland and their various positions on and off the bench. Rather, perhaps that generation could be more readily excused for failing to appreciate both the importance and

152. See, e.g., Robert Costa, Philip Rucker & Sean Sullivan, 'Dangerous,' 'Utterly Untruthful': Two Retiring GOP Senators Sound Alarm on Trump, WASH. POST (Oct. 25, 2017), https://www.washingtonpost.com/powerpost/dangerous-utterly-untruthful-two-retiring-senators-sound-alarm-on-trump/2017/10/24/35403472-b8f1-11e7-a908-a3470754bbb9_story.html [<https://perma.cc/L6MX-2DWH>]; Andrew Prokop, *The Bizarre Situation Where Only Retiring Republicans Will Talk About Trump's Fitness for Office*, VOX (Oct. 10, 2017, 9:00 AM), <https://www.vox.com/policy-and-politics/2017/10/10/16447276/bob-corker-trump-world-war-iii> [<https://perma.cc/B4YW-DH8X>].

153. See Jonathan Martin, *Eric Cantor Defeated by David Brat, Tea Party Challenger, in G.O.P. Primary Upset*, N.Y. TIMES (June 10, 2014), <https://www.nytimes.com/2014/06/11/us/politics/eric-cantor-loses-gop-primary.html> [<https://perma.cc/JMC3-BJN7>]. We note that Republicans in Congress are more ideologically coherent and further from the political center than are their Democratic counterparts, a disparity that further complicates Democrats' ability to advance its legislative priorities. See Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 215 (2018).

154. See Marianna Sotomayor & Jacqueline Alemany, *House Republicans Oust Cheney for Calling Out Trump's False Election Claims, Minimize Jan. 6 Attack on Capitol*, WASH. POST (May 12, 2021, 6:48 PM), https://www.washingtonpost.com/politics/cheney-trump-mccarthy-vote/2021/05/11/1bb8fa56-b2a9-11eb-ab43-bebddd5a0f65_story.html [<https://perma.cc/MF8M-SRZP>]; Josh Dawsey, *Trump Ally Pushes Republican Party to Expel Cheney, Kinzinger*, WASH. POST (Jan. 31, 2022, 5:11 PM), <https://www.washingtonpost.com/nation/2022/01/31/rnc-expel-cheney-kinzinger/> [<https://perma.cc/55Z6-XWZ3>]; Allan Smith & Sahil Kapur, *Another Republican who Backed Trump's Impeachment Concedes Defeat*, NBC NEWS (Aug. 9, 2022, 11:44 PM), <https://www.nbcnews.com/politics/2022-election/another-republican-backed-trumps-impeachment-concedes-defeat-rcna42252> [<https://perma.cc/E7EB-K4L6>].

155. See Ackerman, *supra* note 28. Even Roosevelt's presidential opponents—notably Landon and Wilkie—largely embraced the New Deal's instruments and policy aims. *Id.*

156. See Paul Waldman, *The Only Thing Republicans are Debating is their Degree of Loyalty to Trump*, WASH. POST (May 3, 2021, 12:55 PM), <https://www.washingtonpost.com/opinions/2021/05/03/only-thing-republicans-are-debating-is-their-degree-loyalty-trump/> [<https://perma.cc/JZ34-GNXY>]; Matthew Brown, *'His Presence is Dominating': How State and Local Republican Parties are Turning Ever More Toward Trump*, USA TODAY (June 5, 2021, 7:01 AM), <https://www.usatoday.com/story/news/politics/2021/06/05/trumps-influence-gop-hardens-down-state-and-local-levels/5182775001/> [<https://perma.cc/PUE2-Y8X6>].

feasibility of a truly national welfare state. Those folks weren't sure what such an edifice might even look like, whether it was compatible with liberal democracy,¹⁵⁷ or whether it was even necessary. Public officials today, by contrast, have much more knowledge—and legal and fiscal assurances of a national welfare state's utility. The welfare state hasn't, wild rhetoric notwithstanding, led us down the road to serfdom, impoverishment, fascism, or Marxism. Instead, it has enabled us to improve the quality of lives for so many Americans, lessen the severity of economic downturns, and successfully prosecute a global war against fascism, and then sustain seventy-plus years of economic and military hegemony. (Again, for the longest time, claims of the sort we just made were widely treated as unobjectionable.¹⁵⁸) Given what contemporary jurists now know—and given how reliant almost all of us have become on the instruments and instrumentalities of the modern state—the fact that a handful of judges seem willing to choke off legislative and regulatory policymaking strikes us as something more destructive, irresponsible, and reckless. That is to say, there is no present-day analog (*and, in truth, there may need to be two*) to someone like Justice Owen Roberts, who ultimately blinked, distanced himself from the right-wing bloc, and acceded to the political forces clamoring to pass federal welfare legislation.

2. Why States Are Even Worse “Second Best” Options Now

If states were problematically small loci of governance in the mid-1920s, they are even more so today, as we are surely an even more fully interconnected political economy now with a suite of regulatory problems that pay no heed to the subdivisions that delineate state boundary lines. And precisely because we're so interconnected, the races to the bottom discussed in Part II will be that much more aggressively (and thus ruinously) competitive. This is for the simple reason that it is much easier and more common for both individuals and firms to relocate from state to state; state legislators must thus compete even more aggressively with their counterparts from other states to retain (and attract) businesses and high-wealth families wary of government spending and regulatory programs.¹⁵⁹

Additionally, the costs of state-based policymaking are significantly higher, if only because there are even fewer economies of scale today than there were one hundred years ago. Back then, states had greater variation from one another (again, because our economies were, admittedly, at least partially localized). So, there was marginally less learning that could be achieved by tracking precisely what other

157. See, e.g., James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMPAR. L. 747 (1991).

158. See JACOB S. HACKER & PAUL PIERSON, *AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER* (2016) (describing bipartisan consensus for the post-WWII welfare state).

159. See, e.g., Jeremy B. White, *Tesla Sues—and Elon Musk Threatens to Leave—California Over Lockdown*, POLITICO (May 9, 2020, 7:04 PM), <https://www.politico.com/states/california/story/2020/05/09/tesla-sues-and-elon-musk-threatens-to-leave-california-over-lockdown-1283316> [<https://perma.cc/B3LP-GFPH>]; Shelly Banjo, *Nike Presses for 40-Year Tax Deal in Oregon*, WALL ST. J. (Dec. 14, 2012, 9:11 PM), <https://www.wsj.com/articles/SB10001424127887324296604578177771076945076> [<https://perma.cc/HK73-Z2WY>].

states were doing. But now of course, though there are some specialized exceptions, most states have fairly varied economies (in ways that mark them as similar to most other states); most states have a mixture of urban, suburban, and rural parts. When the states have more in common with one another, it makes far less sense—and wastes far more resources—for each one to be, in effect, inventing its own wheels from scratch or bidding against one another for goods and services.

3. The Need (and Public Mandate) for Aggressive, Impactful Government Action Is Greater Now Than It Was in 1925

Another difference is that the need (and mandate) to legislate and regulate today is far more urgent. The costs of health care and higher education continue to spiral out of control. We've been overdue for major immigration reform for several decades. Economic inequality is greater now than at any time since the Census Bureau started tracking such data more than five decades ago.¹⁶⁰ We need a more durable infrastructure to address health and energy crises. And the moral imperative to advance long-needed racial justice initiatives can no longer be ignored. There is, we hasten to add, popular support for each of these measures;¹⁶¹ such support may well be a function of American society, despite the extant efforts to disenfranchise various communities, being a more racially, ethnically, and socioeconomically

160. Taylor Telford, *Income Inequality in America is the Highest it's Been Since Census Bureau Started Tracking it, Data Shows*, WASH. POST (Sept. 26, 2019, 3:57 PM), <https://www.washingtonpost.com/business/2019/09/26/income-inequality-america-highest-its-been-since-census-started-tracking-it-data-show/> [https://perma.cc/6MRV-XSRV].

161. See *Americans Support Reforms that Address Border, Dreamers, Farmworkers*, IMMIGRATION NAT'L FORUM (Feb. 28, 2022), <http://immigrationforum.org/article/americans-support-reforms-that-address-border-dreamers-farmworkers> [https://perma.cc/5G57-F6HZ]; *New National Polling on Support for Criminal Justice Reform*, Benenson Strategy Group Public Opinion Strategies (Oct. 20, 2022), <http://fwd.us/wp-content/uploads/2022/10/FWD.us-Criminal-Justice-Release-Poll-Memo.pdf> [https://perma.cc/2JNR-59DY] (finding eighty percent of voters support criminal justice reform and sixty-six percent support completely overhauling or majorly reforming the system to reduce incarceration); Steve Liesman, *Majority of Americans support progressive policies such as higher minimum wage, free college*, CNBC (Mar. 27, 2019, 5:00 p.m.), <http://cnbc.com/2019/03/27/majority-of-americans-support-progressive-policies-such-as-paid-maternity-leave-free-college.html> [https://perma.cc/53Y4-LTUR]. In January 2023, the Federal Trade Commission issued a notice of proposed rulemaking that would ban virtually all noncompete agreements. See Federal Trade Commission, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition* (Jan. 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition> [https://perma.cc/E2NW-E28Z], published at 88 Fed. Reg. 3482 (Jan. 19, 2023). The proposal has been met with widespread support from workers and others across the political divide. See, e.g., Editorial Board, *Banning Noncompete Clauses Would Be an Economic Game Changer*, WASH. POST (Feb. 4, 2023), <https://www.washingtonpost.com/opinions/2023/02/04/ftc-noncompete-clauses-workers-ban/> [https://perma.cc/GS3Q-QVNB].

diverse (and inclusive) polity than ever before¹⁶²—and thus collectively far more attentive to the way in which legislators and regulators need to play a role in countering, among other things, the vagaries and at times cruelties of the market economy, civil society, and the criminal justice system.

The same could not readily be said about life in 1925. This is not to say that there weren't grave and acute challenges when it came such things as racial justice, health care, education, and workers' rights. It is just that those challenges were not nearly as politically pressing. Again, by no means are we trying to shortchange the array of difficulties Americans faced in 1925, particularly people of color, women, wage laborers, and those with various disabilities. We are making a narrower, but (we hope) still salient, point—namely, because there really was not the political will among then-enfranchised citizens to take such steps, the gap between what the electorate demanded and what elected officials were willing and able to deliver was considerably smaller. Put slightly differently, the failure to address at least a good percentage of the racial and socioeconomic ills back then could be explained for reasons other than the states being too small or to the federal courts striking down national legislation. We're not sure that the same is true today.

4. Compacts and Agreements Have Many More Permutations *Today*

Today's interstate arrangements and compacts can bring together political communities in many more combinations than were practicable before. For much of the nineteenth and twentieth centuries (and surely throughout the 1920s when Frankfurter and Landis were pressing their claims), regulatory compacts pretty much had to be between and among contiguous or otherwise proximate states. This was a function of the limited mobility of labor, capital, and culture—and also the nature of the challenges we faced back then compared to today. In the 1920s, California, Maryland, Minnesota, and Connecticut would have been an absurd regulatory community. But now bicoastal compacts and other non-contiguous configurations are eminently plausible and, indeed, potentially quite sensible whenever those states share a common vision for such things as environmental justice, police reform, education policy, or labor protections—and are more closely connected and interconnected through shared markets for labor, capital, and culture.¹⁶³

And, of course, the nature (and urgency) of environmental regulation has changed. Just a generation or so ago, officials were understandably focused on what we now consider to be old-school pollutants, ones that were fairly geographically concentrated.¹⁶⁴ Today our biggest threat comes from greenhouse gases and those,

162. William H. Frey, *The Nation is Diversifying Even Faster than Predicted, According to New Census Data*, BROOKINGS (July 1, 2020), <https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/> [https://perma.cc/WT6J-Y2CU].

163. Bulman-Pozen, noting that various forms of “Regionalism without Regions” may be noncontiguous, hits upon the perhaps more revealing reason why such arrangements may be necessary—namely, that “partisanship overshadows place.” See Bulman-Pozen, *supra* note 23, at 432; see also *id.* at 438 (“Even as party and section remain closely connected . . . partisanship has assumed greater force in predicting jurisdictional alignments.”).

164. One need recall only Justice Scalia's frustration with classifying greenhouse gases as

we know, circulate broadly and diffusely. That is to say, New Yorkers may not benefit greatly from California's restrictions on particulate matter—and vice versa. But those East Coasters are inescapably part of California's ecosystem when it comes to the latter's carbon emissions.

5. A Fresh Start

Beyond the far greater number of possible interstate spatial permutations, compacts and other agreements provide administrative lawyers and public administration experts opportunities for a fresh start. In the 1920s, there was not any concern, or likely even a vague apprehension, about federal (or state) administration being hopelessly saddled by outdated and ill-suited procedural requirements—let alone that agencies would be especially parsimonious when it came to requirements to ensure robust democratic engagement. Yet that is the world we encounter today, with a federal Administrative Procedure Act (APA) that, however transformative and however much celebrated,¹⁶⁵ has very serious limitations. Meaningful public notice and participation are often sorely lacking, leaving well-heeled special interests with ample room and opportunity to wield disproportionate influence.¹⁶⁶ Longstanding and bipartisan focus on cost-benefit analysis systematically overvalues certain interests and interest groups over others.¹⁶⁷ Judicial challenges (increasingly the exclusive province of parties alleging economic injuries¹⁶⁸) wind their way through, up, and down the court system, posing tremendous costs on agencies and leaving many regulatory landscapes underregulated or subject to rules and policies sorely in need of updating.¹⁶⁹ And, now, litigants are persuading courts to revisit longstanding

pollutants. *See* *Massachusetts v. Env't Prot. Agency*, 549 U.S. 497, 549–60 (2007) (Scalia, J., dissenting).

165. *See, e.g.,* Danielle A. Schulkin, *ACUS and the APA: Celebrating 75 Years of the Administrative Procedure Act*, ADMIN. CONF. OF THE U.S. (June 7, 2021, 11:40 AM), <https://www.acus.gov/newsroom/administrative-fix-blog/acus-and-apa-celebrating-75-years-administrative-procedure-act> [<https://perma.cc/J95Z-GY9B>]; Soojin Jeong, Margaret Sturtevant & Karis Stephen, *Celebrating the 75th Anniversary of the APA*, THE REGUL. REV. (June 26, 2021), <https://www.theregreview.org/2021/06/26/saturday-seminar-celebrating-75th-anniversary-apa/> [<https://perma.cc/Z7WC-38KN>]; *The 75th Anniversary of the APA: The George Mason Law Review's 3rd Annual Symposium on Administrative Law*, THE C. BOYDEN GRAY CTR. (June 1, 2021), <https://administrativestate.gmu.edu/events/the-75th-anniversary-of-the-apa-the-george-mason-law-reviews-3rd-annual-symposium-on-administrative-law/> [<https://perma.cc/BN6A-M87B>].

166. *See, e.g.,* K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2016); BLAKE EMERSON, *THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* (2019).

167. *See, e.g.,* FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2004).

168. *See* Caleb Nelson, *"Standing" and Remedial Rights in Administrative Law*, 105 VA. L. REV. 703 (2019); *cf.* Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229 (2019).

169. *See* JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 225–50 (1990); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997).

commitments to agency deference,¹⁷⁰ Congress's authority to set the conditions for the appointment and removal of high-ranking agency officials,¹⁷¹ and Congress's delegation power.¹⁷² For these reasons, many (across the political spectrum) label the federal administrative state as captured, sclerotic, ossified, and undemocratic¹⁷³—not to mention deeply imperiled.¹⁷⁴

In addition, in spaces where we had long privileged expertise and a modicum of independence, political appointees, presidents, and, more recently, the courts themselves have worked to shred the layers of insulation and undermine the central role of apolitical experts that many see as the backbone of a vibrant, knowledgeable, and truth-seeking bureaucracy.¹⁷⁵ Witness the decades-long efforts to contract out the work of federal bureaucrats¹⁷⁶ and to reclassify career civil servants as at-will employees (subject to politically motivated hiring and firing decisions);¹⁷⁷ witness, too, recent political moves to force out some of the most talented civil servants.¹⁷⁸

170. See Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022); Nicholas Bagley, *Chevron Deference at Stake in Fight over Payments for Hospital Drugs*, SCOTUSBLOG (Nov. 29, 2021, 9:28 AM), <https://www.scotusblog.com/2021/11/chevron-deference-at-stake-in-fight-over-payments-for-hospital-drugs/> [<https://perma.cc/4DHR-EVD2>].

171. See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020); *Collins v. Yellen*, 141 S. Ct. 1761 (2021).

172. Ian Millhiser, *A New Supreme Court Case Could Gut the Government's Power to Fight Climate Change*, VOX (Nov. 3, 2021, 10:30 AM), <https://www.vox.com/2021/11/3/22758188/climate-change-epa-clean-power-plan-supreme-court> [<https://perma.cc/Y7V5-NRUN>].

173. See, e.g., The Law and Political Economy Project's Symposium on Democratizing Administrative Law, LPE PROJECT (2019), <https://lpeproject.org/symposia/democratizing-administrative-law/> [<https://perma.cc/W4UZ-8W2X>]; McGarity, *supra* note 169; EMERSON, *supra* note 166; Thomas W. Merrill, *Capture Theory and the Courts*, 72 CHI.-KENT L. REV. 1039 (1997).

174. See Metzger, *supra* note 125; Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599 (2018).

175. See, e.g., MICHAELS, *supra* note 48, at 10–13; STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE 9–12 (2021); PAUL R. VERKUIL, VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT 15–18 (2017).

176. MICHAELS, *supra* note 48, at 111; VERKUIL, *supra* note 175, at 48.

177. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2331–35 (2006); Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023, 1049–50 (2013).

178. Lisa Rein, Tom Hamburger, Juliet Eilperin & Andrew Freedman, *How Trump Waged War on His Own Government*, WASH. POST (Oct. 29, 2020, 6:00 AM), https://www.washingtonpost.com/politics/trump-federal-civil-servants/2020/10/28/86f9598e-122a-11eb-ba42-ec6a580836ed_story.html [<https://perma.cc/7J48-SFZC>]; Andrea Shalal, *Trump Order Could Spark Mass Firings of Civil Servants, Lawmakers Warn*, REUTERS (Nov. 25, 2020, 4:56 PM), <https://www.reuters.com/article/usa-election-transition-civilservants/trump-order-could-spark-mass-firings-of-civil-servants-lawmakers-warn-idUSKBN285380> [<https://perma.cc/X5JE-8RJT>]; Jonathan Swan, *A Radical Plan for Trump's Second Term*, AXIOS (July 22, 2022), <https://www.axios.com/2022/07/22/trump-2025-radical-plan-second-term> [<https://perma.cc/K2EZ-Q56K>].

Similarly, most states have created civil service workforces roughly in league with what exists at the federal level;¹⁷⁹ and they their own versions of the APA (and draw upon a Model State Administrative Procedure Act).¹⁸⁰ Not surprisingly, that means many states are experiencing the same political efforts—couched as reforms—to outsource and politicize rank-and-file bureaucrats.¹⁸¹

Add to these longstanding efforts a new wave of populist attacks. These attacks have reached a fever pitch starting in 2020 with wholesale attacks on educators (surrounding COVID-19 protocols, support for Black Lives Matter, and the implementation of antiracist curricula,¹⁸² and most recently, for recognizing and supporting the equal dignity of trans children), public health officials,¹⁸³ and election officials. If anything, states are in a lot worse shape than the federal government. As the recent and trenchant work by Miriam Seifter illustrates, compared to the feds, most state agencies are less well funded, less expert, less legally independent from elected officials and insulated populist hostility, and less closely monitored by interest groups and journalists.¹⁸⁴

We are bringing this up for the sole but, we think, important reason that the extant federal and state administrative structures are hardly ideal instruments for democratic or expert policymaking. While it should of course be a priority to bolster federal and state workforces, administrative structures, and processes,¹⁸⁵ we are, again, not

179. See Paul Verkuil, *Deprofessionalizing State Governments: The Rise of Public At-Will Employment*, 75 PUB. ADMIN. REV. 188, 188–89 (2015).

180. See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1839 (2015) (describing similarities and conformities between state and federal administrative procedure); Katherine Shaw, *State Administrative Constitutionalism*, 69 ARK. L. REV. 527, 532–33 (2010) (noting common origins for much of state administrative procedure and acknowledging similarities as well as variations among the states).

181. See Verkuil, *supra* note 179; Michaels, *supra* note 177, at 1037–40, 1044–50 (characterizing the marketization and likely politicization of bureaucracies),

182. Lynn Jennings, *U.S. Public Education is Under Attack. It's Time to Take a Stand*, THE EDUCATION TRUST (Feb. 28, 2022) <http://www.edtrust.org/the-equity-line/u-s-public-education-is-under-attack-its-time-to-take-a-stand/> [<https://perma.cc/XKF8-BU7U>].

183. Salvador Rizzo, *Local Health Officials Report Threats, Vandalism, and Harassment During the Pandemic, Study Finds*, WASH. POST (Mar. 17, 2022, 4:20 p.m.), <http://www.washingtonpost.com/health/2022/03/17/public-official-health-harassment/> [<https://perma.cc/K9BL-XFLF>].

184. Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 110–11 (2018); Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 519–25 (2017); Miriam Seifter, *State Institutions and Democratic Opportunity*, DUKE L.J. (forthcoming 2022) (manuscript at 23–40). *But see* Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1093–98 (2018) (extolling the professionalism and strength of state bureaucracies). Even with the massive infusion of stimulus money in March 2021, we remain doubtful that states can and will dramatically invest in bureaucratic renewal (given how many other pressing needs governors and legislators must prioritize, including infrastructure, debt servicing, and economic relief initiatives). See Manny Fernandez & Sabrina Tavernise, *Stimulus Bill Transforms Options for State and Local Governments*, N.Y. TIMES (Mar. 15, 2021), <https://www.nytimes.com/2021/03/13/us/stimulus-biden-states-cities.html> [<https://perma.cc/NP4V-C9RL>].

185. See, e.g., K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1674–76 (2018) (reviewing JON

optimistic that efforts in that direction will gain any traction.¹⁸⁶ So, with all that in mind, consider interstate governance an opportunity to create administrative structures and procedures anew—stripped of the baggage of good-faith attempts that haven’t worked out or that have been directly and sometimes shamelessly sabotaged.¹⁸⁷ (This is all in addition to the various requirements intentionally imposed to slow down and disrupt the regulatory processes from the outset.¹⁸⁸)

On this tabula rasa of interstate public administration, more expert, more democratic, and (perhaps in time) more legitimate processes and policies can be crafted.¹⁸⁹ We won’t drill down on specifics other than to note that interstate bodies need not follow the blueprint of other, mid-to-late twentieth century compacts that have been subject to justifiable criticism¹⁹⁰—and could, instead, adopt some of the reform proposals that are, for a variety of reasons, too difficult or cumbersome for legacy agencies at the federal and state levels to adopt. Today’s agreements can incorporate such things as proportional representation based on such metrics as member states’ relative populations and the relative allocation of responsibilities, etc. Technocratic responsibilities can be better insulated from political, partisan overseers.¹⁹¹ Experts can be recruited and retained through the assurances of competitive pay and, crucially, protection from partisan arm-twisting. Meaningful public participation can be secured through any number of measures more contemporary and comprehensive than simply posting dense notice of meetings and opportunities for comment on websites monitored only by white-shoe lobbyists. Compacting entities may even call for groups of empaneled administrative jurors—ensuring virtual public representation—something leading scholars and government reformers have hoped would take root at the federal level.¹⁹²

D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC (2017)); BRIAN J. COOK, THE FOURTH BRANCH: RECONSTRUCTING THE ADMINISTRATIVE STATE FOR THE COMMERCIAL REPUBLIC 229–34 (2021).

186. See Posner & Vermeule, *supra* note 38.

187. Noll, *supra* note 6, at 824.

188. Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267 (John E. Chubb & Paul E. Peterson eds., 1989); c.f. Dara Kay Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 712–14 (2006).

189. This presumes, of course, that the states are sufficiently limited to reform their existing administrative structures yet would be willing and able to commit to more robust and democratic structures and procedures when designing interstate governance regimes. One reason why we strike a note of cautious optimism is that when it comes to new interstate designs, states won’t have to confront and overcome those with vested, entrenched interests in preserving the status quo already mobilized to resist reforms—as of course is the case vis-à-vis existing state laws, structures, programs, and personnel. See Posner & Vermeule, *supra* note 38, at 1763–66.

190. See Hasday, *supra* note 24, at 7–11.

191. For an interesting example of states creating a nonprofit organization to help manage an interstate agreement on greenhouse gases, see LEIGH RAYMOND, RECLAIMING THE ATMOSPHERIC COMMONS: THE REGIONAL GREENHOUSE GAS INITIATIVE AND A NEW MODEL OF EMISSIONS TRADING (Sheldon Kamieniecki & Michael Kraft eds., 2016); BARRY G. RABE, CAN WE PRICE CARBON? 148–49 (Sheldon Kamieniecki & Michael Kraft eds., 2018).

192. RAHMAN, *supra* note 166, at 112–13; see also David J. Arkush, *Direct Republicanism*

What's more, the development of interstate bodies with substantial responsibilities right now would have the incidental, but arguably highly salutary, effect of deemphasizing and decentering the federal courts.¹⁹³ Interstate regulatory bodies would, as we see it, take some pressure off agencies and Congress to do as much heavy lifting—allowing them time to prioritize challenges of a truly national or international character while still regrouping and rebuilding administrative capacity after decades of disparagement and what David Noll calls sabotage.¹⁹⁴ One byproduct of this shift away from centralized federal regulation is that disputes arising out of regulation and enforcement by interstate compacting entities can be handled by newly constituted adjudicatory bodies (thus circumventing the whole “pack the courts/strip the courts of power” political campaigns that seem increasingly futile).¹⁹⁵

Surely, it is conceivable that disputes arising out of interstate compacting would find their way into federal courts under diversity jurisdiction. But the substance of those challenges would then turn principally on the new laws of interstate administrative agreements—perhaps more akin to contract law or the law of corporations. And, of course, we're aware of the challenges associated with circumventing federal law and federal courts; we certainly don't think anything akin to mandatory commercial arbitration should be the default for interstate bodies. Nor do we think that what, for instance, Facebook has set up in the form of its private oversight board, is necessary or appropriate.¹⁹⁶ But we are, again, open to thinking about the bypassing of an increasingly unrepresentative and out-of-touch federal bench as a fortuitous consequence of interstate governance.¹⁹⁷ Indeed, we can imagine rotations of judges from the benches of member states or (if the agreement is capacious enough to so warrant) a new court—chosen in ways that prioritize expertise and democratic equity—to take on the solemn duties of judging.

We recognize these are abrupt and incredibly costly departures from the status quo. Goldilocks didn't have to build a just-right bed or prepare just-right porridge

in the *Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1494 (2013).

193. For work aimed at deemphasizing the power of a highly undemocratic Court, see Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021); Written Statement to the Presidential Commission on the Supreme Court of the United States, Nikolas Bowie, Assistant Professor of L., Harvard L. Sch., *The Contemporary Debate over Supreme Court Reform: Origin and Perspectives* (Jun. 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf> [<https://perma.cc/24FW-YLF7>].

194. Noll, *supra* note 6, at 763.

195. See Alexandra Hutzler, *Biden Doesn't Support Expanding the Supreme Court, White House Says*, ABC NEWS (June 25, 2022, 3:14 PM), <https://abcnews.go.com/US/biden-support-expanding-supreme-court-white-house/story?id=85703773> [<https://perma.cc/Y8CH-2N8Z>].

196. See generally Cecilia Kang, *What is the Facebook Oversight Board?*, N.Y. TIMES (May 5, 2021), <https://www.nytimes.com/2021/05/05/technology/What-Is-the-Facebook-Oversight-Board.html> [<https://perma.cc/PFN8-RFEH>]; Shira Ovide, *The Limits of Facebook's 'Supreme Court'*, N.Y. TIMES (May 5, 2021), <https://www.nytimes.com/2021/05/05/technology/facebook-oversight-board-trump.html> [<https://perma.cc/3Y72-RMXQ>]; *infra* Section V.B.

197. See *supra* note 182 and accompanying text.

from scratch. And that's precisely what we're calling for. But the cost of inaction, of otherwise continuing to countenance huge amounts of corporate welfare to pass highly watered-down legislation, and of waiting and hoping the federal courts don't invalidate new laws and rules, are themselves already intolerably high. And, on the substance of interstate governance laws and policies, we hesitate to label any of what we've just suggested as particularly radical. Though such administrative features suggest a sharp break from much of federal and state administrative law, there is nothing—ideologically speaking—radical about anything we just proposed.

B. Model Compacts: A Blue New Deal

Whether and how to enter into interstate agreements is a tricky question. When it comes to considering interstate agreements versus federal interventions, we might be tempted to insist, as a threshold matter, that before opting for the former, it ought to be established that a national (that is, federal) solution is unlikely to be forthcoming any time soon. Though that might make sense as a presumption, we recognize that a preference for superior public administration may, by itself, justify circumventing the extant federal and state pathways. Indeed, it may well be the most salient long-term reason, assuming that those federal pathways do not remain permanently bottled up. What's more, it also may be the case that regional governance—not fully mediated or directed by federal agencies, as is currently the case¹⁹⁸—stands as an independent and completely valid reason for compacting.

Reasons for bypassing the states are even more numerous; they follow directly from the discussions as to why states are often the wrong loci for addressing complex problems. Specifically, we understand four discrete but often overlapping bases for seeking interstate solutions: to internalize spillover effects, to cancel or at least reduce races to the bottom, to increase economies of scale, and to take advantage of cross-border efficiencies. Mindful of those four bases, we propose four corresponding sketches.¹⁹⁹ These sketches—two of which are ambitious and capacious and two of which are narrow and modest—are tentative; we intend them to be simple, rough, and open-ended templates.

1. Climate Change Agreement²⁰⁰

Participating states agree to act swiftly and decisively to combat climate change.

198. See Bulman-Pozen, *supra* note 23, at 379–82.

199. We have no particular quarrel with the goals of the proposed National Popular Vote Interstate Compact but leave it to the side for a variety of reasons. These include that it has already been extensively discussed and debated, that it doesn't purport to be a just-right solution (because it is constitutional stickiness, rather than federal political and policymaking dysfunction that is the chief impediment), and that it depends on a critical mass of states to join.

200. We appreciate the significance of the Biden administration's passage of the Inflation Reduction Act of 2022, particularly its truly game-changing provisions targeting climate change. See Rebecca Leber, *The US Finally Has a Law to Tackle Climate Change*, Vox (Aug. 16, 2022, 4:46 PM), <https://www.vox.com/policy-and-politics/2022/7/28/23281757/whats-in-climate-bill-inflation-reduction-act> [<https://perma.cc/2EKL-RDY6>]. Yet that legislation,

Consistent with applicable federal laws, member states agree to:

- Set and enforce emission reduction goals (no less than the applicable federal standards) for firms and industries operating within any and all of the member states;
- Accord preferential contractor status (for all state, local, and interstate administrative contracts) for firms operating anywhere within the jurisdiction of interstate agreement that exceed the agreement's prescribed reductions by ten percent or more over a specified period of time;
- Provide state and local tax credits for firms that exceed the agreement's prescribed reductions by fifteen percent or more over a specified period of time;
- Provide grants to colleges and graduate schools that develop or broaden their programs on climate change abatement and environmental justice;
- Subsidize student tuition for those enrolled in climate change or environmental justice programs;
- Plan multistate reforestation and wetlands preservation initiatives that take advantage of the best spaces for such initiatives anywhere within the agreement's boundaries;
- Establish a legal-aid-like program for lawyers, scientists, and public health experts committed to combating climate change or advancing environmental justice; and
- Increase opportunities and public funding for transporting people and goods across the member states in vehicles powered by renewable energy.

Among the interstate parties, we could imagine agreements of this sort along the West Coast and Hawaii ("Pacifica"), a Mid-Atlantic ("Amtrak Corridor Agreement"), and perhaps even the Upper Midwest, with the possibility that, down the road, each of those groupings adds new members or two or more of the groupings merge (or essentially adopt reciprocal standards).

Note that an agreement of this sort seeks to capture spillover effects, as emissions of traditional pollutants and also greenhouse gases disperse across state lines. But internalizing externalities is hardly the only reason to prefer interstate governance of this sort. Like-minded states all agreeing to tighten environmental standards are, most assuredly, preempting races to the bottom vis-à-vis recruiting and retaining businesses and high-wealth families. There are also cross-border efficiencies built into this particular agreement. Not every state college needs to invest in the same

which cannot single-handedly stem the tide of global warming, required a stroke of fortune, a whole lot of arm twisting, and plenty of fossil fuel set-asides. It also may get tied up in the courts. Thus, soon after its passage, many were lauding California's ambitious (and additional) new climate bill. See Brad Plumer, *California Approves a Wave of Aggressive New Climate Measures*, N.Y. TIMES, (Sept. 29, 2022), <https://www.nytimes.com/2022/09/01/climate/california-lawmakers-climate-legislation.html>[<https://perma.cc/QX8J-DJXS>]. We note this flurry of activity to underscore the ongoing need for supplemental climate change bills, our skepticism that Congress can follow up on the Inflation Reduction Act anytime soon, and the obvious benefits of interstate, rather than a single-state, solutions.

environmental programming. The different flagship universities can agree to divvy up the specialties, allowing students from anywhere within the agreement to receive the benefits of in-state tuition (and, perhaps, admissions preferences).²⁰¹ Likewise, if all states benefit from tree reforestation efforts or wetlands expansion, but not all states have climates or terrain conducive to either forests or wetlands, those inconducive states can still do their part by helping to underwrite those out-of-state projects.

2. Workers, Working Families, and Economic Justice Agreement

Participating states agree to act swiftly and decisively to improve the economic and social conditions of work. Consistent with applicable federal laws, member states agree to:

- Set and enforce payment of a minimum wage (no less than twenty percent above the federal minimum) for all employees;
- Set and enforce a guarantee of up to two months' paid leave for all employees eligible under current federal law for an unpaid leave of absence;
- Provide child-care tuition assistance (on a sliding scale) to all working parents earning less than twice the federal poverty line;
- Provide a guarantee of two years of tuition-free community college (anywhere within the zone of agreement) for all high school graduates; and a guaranteed two years of additional tuition-free university education at all state schools within the agreement for those who maintain a B or higher grade while earning an Associate's degree at any community college within the agreement;
- Create a no-minimum basic (deposit-and-checking) public banking option, administered through each agreeing state's DMV or other such widely accessible facility; and
- Provide a one-time housing relocation assistance for any individual or family moving anywhere within the boundaries of the party states.

Similar in many respects to the Climate Agreement, the Economic Justice Agreement mitigates races to the bottom (while simultaneously reducing welfare magnets) and captures cross-border efficiencies. This Agreement also enjoys economies of scale, specifically in terms of spreading the benefits and pooling the risk of economic downturn across a larger, more diversified political economy.

201. For example, Penn State, roughly halfway between Philadelphia and Pittsburgh, is hundreds of miles from coastal waters. The University of Rhode Island is, by contrast, just a couple of miles from the Atlantic Ocean. In an Amtrak Corridor Agreement, it makes sense for Pennsylvania to subsidize Rhode Island's programs that specialize in coastal effects while Rhode Island subsidizes a forestry program at Penn State. Likewise, it makes sense for the states to allow their respective residents to cross-enroll in each other's programs.

3. Multistate Procurement Cooperative

Participating states agree to act swiftly and decisively to improve their ability to receive goods and services at lower costs and with greater attention to the member states' particular needs. Consistent with applicable federal laws, member states agree to:

- Compare lists of purchases each state has made over the past two years;
- Decide which of those purchases can benefit from bulk purchasing; and
- Enter into agreements with each other—and with vendors—to that effect.

This is a fairly narrow agreement focused exclusively on increasing economies of scale, but one we still think is worthy of institutionalizing rather than simply encouraging ad hoc and opportunistic pooling of resources. Such institutionalized cooperation is of special importance when it comes to high priced items, such as pharmaceuticals; items, such as textbooks, that when purchased in bulk may be specifically tailored to the needs of the highest-volume customer; and, of course, items of some scarcity, such as personal protective equipment (PPE) and other medical countermeasures, otherwise likely to pit states against one another particularly during moments of crisis and thus urgency.

Using the textbook example, consider a purple state coalition. Given that California and Texas currently wield such large and distorting influence over the design of educational materials,²⁰² there may be a whole swath of states allergic to the Lost Cause nostalgia central to the Texas curriculum²⁰³ but hesitant to adopt what they might see as California's too "woke" approach.²⁰⁴ Yet many of the culturally middle-of-the-road states lack the purchasing power. Hence a Purple Procurement Pact could be a game changer—and could, of course, be used for any number of other acquisitions too, ranging from electric cars to staple medications.

202. See Rob Alex Fitt, *Conservative Activists in Texas have Shaped the History All American Children Learn*, WASH. POST (Oct. 19, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/10/19/conservative-activists-texas-have-shaped-history-all-american-children-learn/> [<https://perma.cc/6FD9-BD4L>]; see also Dana Goldstein, *Two States. Eight Textbooks. Two American Stories*, N.Y. TIMES (Jan. 12, 2020), <https://www.nytimes.com/interactive/2020/01/12/us/texas-vs-california-history-textbooks.html> [<https://perma.cc/6RQL-6W53>].

203. See, e.g., Paul Stinson, *Texas Senate Votes to Remove Required Lessons on Civil Rights*, BLOOMBERG L. (July 16, 2021, 8:11 PM), <https://news.bloomberglaw.com/social-justice/texas-senate-votes-to-remove-required-lessons-on-civil-rights> [<https://perma.cc/W63V-4GKV>]; Michael Powell, *In Texas, a Battle over What Can be Taught, and What Books can be Read*, N.Y. TIMES (Dec. 14, 2021), <https://www.nytimes.com/2021/12/10/us/texas-critical-race-theory-ban-books.html> [<https://perma.cc/QVF6-NLSW>].

204. See, e.g., Leah Asmelash, *After Years of Debate, California Finally Adopts Ethnic Studies Model Curriculum*, CNN (Mar. 22, 2021, 5:44 PM), <https://www.cnn.com/2021/03/22/us/california-ethnic-studies-high-school-trnd/index.html> [<https://perma.cc/2XYU-AXQA>].

4. Commuter and Student Voting and Public Banking Agreement

Participating states agree to act swiftly and decisively to improve their residents' and workers' ability to vote and avail themselves of any public banking services. Consistent with applicable federal laws, member states agree to:

- Establish voting branches in out-of-state communities where a sizable number of its residents work or attend school;
- Provide for banking reciprocity for residents and employees of member states (assuming, per *Agreement 2*, states embrace public banking options).

This Agreement too, is fairly narrow, intended to capture cross-border efficiencies. But the realities of life, particularly for individuals who, say, work in Manhattan but live in New Jersey (or Connecticut or Pennsylvania) or work in Boston but live in New Hampshire, is that it may be difficult to vote and/or engage in various forms of state-mediated commerce when they have long, arduous workdays and long commutes home. Why not, we say, establish a polling center in or around Penn Station, Grand Central Station, and—*dare we double our compacting fun?*—the Port Authority's PATH depots and Bus Terminal. Why not, we say, have the equivalent of a voting food court, perhaps even in the literal food court, of student centers at our large universities, ones that draw students from around the nation?

We would extend such out-of-state services too, for those commuters and students eligible for various state-level welfare benefits. Public banking is, for sure, not available in most of the country.²⁰⁵ But it is an increasingly popular idea,²⁰⁶ and may take off at the state level sooner than later. If that's true, its hours may (understandably) be limited to typical nine-to-five business hours, hence the need to have branches in, once again, major commercial hubs frequented by cross-state commuters.

Red state confederations may, of course, likewise be assembled. We don't focus on them because Republican legislative and regulatory priorities today seem quite different from those that typically benefit from interstate cooperation. Unlike blue states, which today may use compacting to try to insulate public policy and administration from the rightwing Supreme Court, red states need not fear pushback from the federal courts.²⁰⁷ Additionally, red states seeking to advance traditional,

205. See *History of BND*, BANK OF N.D., <https://bnd.nd.gov/history-of-bnd/> [<https://perma.cc/K9LU-SGLK>].

206. *Senators Gillibrand and Sanders Reintroduce Postal Banking Act to Fund United States Postal Service and Provide Basic Financial Services to Underbanked Americans*, GILLIBRAND (Sept. 17, 2020), <https://www.gillibrand.senate.gov/news/press/release/senators-gillibrand-and-sanders-reintroduce-postal-banking-act-to-fund-united-states-postal-service-and-provide-basic-financial-services-to-underbanked-americans> [<https://perma.cc/4EDK-NLQB>].

207. Perhaps the most notorious of conservative compacts was the clearly racist Southern Regional Education Compact, organized principally to circumvent the Court's landmark (mid-twentieth century) civil rights cases desegregating American public colleges and universities. See, e.g., Sharfstein, *supra* note 120, at 1450–51.

conservative-libertarian deregulatory goals need not be as worried about collective action problems or spillover effects—precisely because those jurisdictions are likely to benefit from being more (as opposed to equally) deregulatory and more anti-tax than neighboring and other like-minded states.²⁰⁸ And those red states seeking to advance versions of what is described as anti-democratic “grievance politics”²⁰⁹—e.g., by restricting voting in the name of “election security,” banning certain subjects from being taught in schools, policing the bodies of pregnant women and transgender individuals, and regulating social media²¹⁰—likewise don’t appear to have much to gain by the pooling of resources or by internalizing externalities.²¹¹ What’s more, red states are often highly skeptical of bureaucracy too, and we suspect that adding new administrative bodies might strike officials in those states as anathema.²¹²

C. *Virtuous Competition and Transnational Partnerships*

Again, interstate governance is not meant to replace federal or state policymaking but, rather, to supplement, complement, and quite possibly compete with those traditional domains. What follows are some ways multistate agreements’ competition with both the feds and state governments might produce positive externalities and forge broader connections and partnerships.

208. See, e.g., *supra* Section III.B.

209. See, e.g., Nathan Layne & James Oliphant, *Analysis: Out of Power in Washington, Republicans Pursue Hard-Right Agenda*, REUTERS (May 7, 2021, 6:17 AM), <https://www.reuters.com/world/us/out-power-washington-republicans-pursue-hard-right-agenda-across-country-2021-05-07/> [https://perma.cc/3K7Q-YAMY].

210. See, e.g., Rashawn Ray & Alexandra Gibbons, *Why are States Banning Critical Race Theory?*, BROOKINGS (Nov. 21, 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> [https://perma.cc/3RL8-79Y5]; Laurence H. Tribe & Stephen I. Vladeck, *Texas Tries to Upend the Legal System with its Abortion Law*, N.Y. TIMES (July 19, 2021), <https://www.nytimes.com/2021/07/19/opinion/texas-abortion-law-reward.html> [https://perma.cc/8KVQ-D9ES]; Travis Waldron, *Republican States Have Already Enacted 19 New Anti-Trans Laws this Year*, HUFFPOST (June 16, 2021, 1:03 PM), https://www.huffpost.com/entry/republicans-anti-trans-laws-sports-health-care_n_60c9ffe1e4b0d2b86a813b40 [https://perma.cc/AG5L-ZVTD].

211. Red state collaboration amid today’s Republican rightwing lurch doesn’t seem to rely on anything requiring ongoing interstate planning or administration. See A. Martinez, Jeevika Verma, Simone Popperl & Amanda Michelle Gomez, *GOP Governors Sent Buses of Migrants to D.C. and NYC – With No Plan for What’s Next*, NPR (Aug. 6, 2022, 10:04 AM), <https://www.npr.org/2022/08/05/1115479280/migration-border-greg-abbott-texas-bus-de-nyc-mayors> [https://perma.cc/A8H7-KEPP]; Alex Horton, *South Dakota Governor Sending National Guard to Mexico Border on Mission Funded by GOP Megadonor*, WASH. POST (June 29, 2021, 8:10 PM), <https://www.washingtonpost.com/national-security/2021/06/29/south-dakota-national-guard-texas-border/> [https://perma.cc/3GAS-H6C3].

212. See Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. (forthcoming 2023) (on file with authors) (describing state laws deputizing private individuals to enforce brand-new restrictions on voter outreach, the provision of abortions, the teaching of critical race theory, and the inclusion of children on sports teams based on the students’ gender identity as opposed to assigned gender).

1. Races to the Top

With regulation by individual states, even fairly large ones, races to the bottom are anticipated. The same perverse incentives exist when it comes to the expansion of social services offerings, as government officials worry about becoming “welfare magnets.” Whether the effects are real is, in many respects, beside the point. State governments—and corporate executives and well-heeled, tax-allergic donors chirping in their ears—act as if magnet effects are all but certain to occur.

But now consider clusters of states bound together via agreements or compacts. Member states commit themselves to uniform environmental, labor, or income-assistance programs. When we have uniform legislation across state lines, the ease with which businesses and high-wealth individuals can flee regulation and taxation decline precipitously. It may be somewhat easy for firms and families to leave New York for New Jersey. Or to leave Rhode Island for Massachusetts. But now, with agreements and compacts, those same seemingly mobile firms and families would have to bear even higher costs, forced as they would be to leave, say, the entirety of the Amtrak Corridor.²¹³ Again, we’re not making the strong argument that there is tremendous mobility today. But, to the extent state officials are deterred from staking out strong positions *because they assume high-wealth individuals and firms will move*, those officials should find agreements and compacts emboldening, removing some of the disincentives that currently inhibit prudent state-level welfarism.

Indeed, we might push this claim further. There is the possibility that when clusters of states combine—and do good things that at least some state officials wish they could currently do—there will be pressure on other states, either to join as full members or, more modestly, to enact comparable laws and launch comparable programs. And even if it isn’t the public demanding that its state officials “level up” (because it’s good public policy), leveling up might be a *fait accompli* given how many influential and impactful businesses operate in most, if not all, of the fifty states. What we mean here is that firms retooling to conform to heightened regulatory requirements imposed by the Amtrak Agreement or the Pacifica Pact may simply end up conducting all of their domestic operations that way. In short, major firms will apply one standard across the board—and that standard may be dictated by what the Amtrak Agreement and/or Pacifica Pact requires. So, in effect, North Carolina or Utah may end up being dragged along on veritable races to the top.

213. Though not a perfect study by any means, the high volume of movement during the COVID-19 pandemic is revealing. Those who left New York primarily moved to the suburbs of New Jersey and Connecticut—or to other, similarly “blue” major metropolitan areas such as Chicago, Philadelphia, and Los Angeles. See Katherine Burton, Annie Massa, Amanda L. Gordon & Jonathan Levin, *Wall Street A-Listers Fled to Florida. Many Now Eye a Return*, BLOOMBERG, (Mar. 10, 2021, 8:14 AM), <https://www.bloomberg.com/news/articles/2021-03-10/wall-street-a-listers-fled-to-florida-many-are-eyeing-a-return> [https://perma.cc/V3AF-EW5L]. In explaining why, despite Florida having no state income taxes, New Yorkers were not permanently relocating to the Sunshine State, but were, instead, moving to the places mentioned above, one financial industry insider quipped: “The main problem with moving to Florida is that you have to live in Florida.” *Id.*

2. Transnational Cooperation

Ecosystems, markets for capital and goods, and increasingly even labor transcend not only state borders but also national borders. For a variety of reasons, it isn't clear that the federal government is sufficiently nimble to develop policies in recognition of that reality. A perfect example of this is the tiny community of Point Roberts, Washington, which is physically tethered to British Columbia and noncontiguous with the rest of the United States. For much of 2020 and parts of 2021, American citizens residing in Point Roberts were famously "stuck" in the sleepy bedroom community due to pandemic related border closings.²¹⁴

While the Point Roberts saga may be compelling, it was fairly short-lived and didn't register as especially salient along traditional economic, demographic, or legal metrics. But what about Tijuana and San Diego, Juarez and El Paso, Detroit and Windsor, and Seattle and Vancouver? Surely those pairings are as integrally and importantly connected as, say, St. Louis and the Illinois counties just across the Mississippi River—bound together by the 1949 Bi-State Development Compact?²¹⁵ And, no doubt, those cross-national shared communities are thousands, if not millions, of times more economically, socially, and environmentally significant than the Dresden School District (established pursuant to a 1963 interstate compact) which straddles the Vermont-New Hampshire border not far from Dartmouth College.²¹⁶

Further, what makes sense for the Portland to Vancouver corridor (so, Oregon-Washington-British Columbia) or the California-Baja corridor²¹⁷ is of course very different from what makes sense for U.S.-Canada or U.S.-Mexico relations writ large. And this is true for contiguous social and political communities and shared watersheds or other natural resources. In such cases, employing foreign—that is, international—compacts provide twice the benefits. Not only do compacts enable those communities to remain strongly and resolutely connected notwithstanding the possibility of a sputtering, depleted, or unstable diplomatic relations but they also allow for regional-specific tailoring of various policies in precisely the ways that Frankfurter and Landis most heartily approved.

There is, we hasten to add, yet a third reason for compacting of this sort—and, to be sure, congressional assent would be required, given foreign affairs is a paradigmatic federal power.²¹⁸ This third reason is connected to federal dysfunction, but bespeaks a different pathology from the congressional gridlock story that figures prominently in our account. Consider the century-long rise of the imperial presidency²¹⁹ that has, of late, taken on a particularly dangerous valence given

214. See Richard Read, *A U.S. Town Marooned at the Tip of a Canadian Peninsula*, L.A. TIMES (June 24, 2021, 5:00 AM), <https://www.latimes.com/world-nation/story/2021-06-24/point-roberts-stranded-canada-border> [<https://perma.cc/ZBF2-QG39>].

215. See Pub. L. No. 81-743, 64 Stat. 568; Act of August 31, 1950 Pub. L. No. 86-303, § 2, 73 Stat. 582.

216. See Pub. L. No. 88-177, 77 Stat. 332 (1963).

217. Or, officials could even add Sonora, Chihuahua, Arizona, New Mexico, and Texas.

218. See, e.g., Hollis, *supra* note 24, at 750–59.

219. In part, this dynamic has been hastened or accelerated because of partisan gridlock. See Emerson & Michaels, *supra* note 44, at 110–17.

Donald Trump's recent authoritarian proclivities and given how the Republican Party remains enthralled with Trump and his anti-democratic commitments. One of us has elsewhere called for decentralizing foreign policy, as part of an urgent insurance scheme the Biden administration should install to limit the power of any future would-be autocratic presidents.²²⁰ It strikes us that investing in foreign-state compacts today is consonant with that call. After all, such compacts establish and cement greater and different forms of transnational cooperation even if (*and especially when*) relations between Washington and Ottawa or Washington and Mexico City are fraught or strained.²²¹

V. OBJECTIONS AND CONSIDERING ALTERNATIVES TO (OUR) ALTERNATIVE

Agreements and compacts offer a middle-ground solution and a workaround to federal gridlock and the perversities of state governance. Though we focus on pro-regulatory cases for interstate agreement, we note again that these arrangements could, and perhaps should, be an attractive option for progressives and conservatives alike. (Recall the latter may prefer to pool their resources, pull power—regardless of political valence—away from Washington and, by their reckoning, benefit from being less regulated and taxed than some of the neighbors.)

In the course of making the case for interstate governance, we've attempted to acknowledge and address specific drawbacks and difficulties with policymaking of that sort. Here, we confront a pair of more global concerns.

A. Intercity Compacts Would Be Better

Scholars, frustrated by both federal and state governance, have recently turned toward advocating for cities going it alone. Rather than focusing on interstate agreements and arrangements, they would prefer to focus on municipalities.²²² This

220. See Emerson & Michaels, *supra* note 44, at 128–29.

221. See Ryan Lizza, *Donald Trump Blows Up the U.S.-Mexico Relationship*, NEW YORKER (Jan. 27, 2017), <https://www.newyorker.com/news/ryan-lizza/donald-trump-blows-up-the-u-s-mexico-relationship> [<https://perma.cc/7LAS-7H9K>]; Fareed Zakaria, *Trump is Destroying Three Decades of Hard Work with Mexico*, WASH. POST (June 6, 2019, 7:06 PM), https://www.washingtonpost.com/opinions/global-opinions/trump-is-destroying-three-decades-of-hard-work-with-mexico/2019/06/06/9e3f00d4-8898-11e9-a870-b9c411dc4312_story.html [<https://perma.cc/Y62D-FZ93>]; *Trudeau Says Canada-U.S. Relations Need to Rebuild. Just How Bad Did It Get with Trump?*, YAHOO! NEWS (Feb. 28, 2021), <https://ca.news.yahoo.com/trudeau-says-canada-u-relations-090000654.html> [<https://perma.cc/6MWU-CYHG>]; Rob Gillies & David Crary, *Canada-US Relations at a Low After Trudeau-Trump Trade Tiff*, AP (June 14, 2018), <https://apnews.com/article/north-america-donald-trump-us-news-ap-top-news-international-news-5131817a9cd449ff964b221a75eafe02> [<https://perma.cc/37KG-LSVK>]; *c.f.* Bulman-Pozen, *supra* note 23, at 435. After Trump withdrew the United States from the Paris Climate Agreement, several states “announced a partnership to support the global agreement.” *Id.* (describing the U.S. Climate Alliance).

222. For example, Ran Hirschl has argued that we should focus on assigning cities greater constitutional status and standing. RAN HIRSCHL, *CITY, STATE: CONSTITUTIONALISM AND THE MEGACITY* (2020). Hirschl urges shaking up what he sees as stagnant constitutional thought

is because city dwellers and workers in, say, Indianapolis, Atlanta, or Austin share a lot in common with one another—and are demographically, culturally, politically, and economically very different from their fellow Hoosiers, Georgians, or Texans, respectively.

These champions of cities are not wrong. And we're not averse in principle to innovative initiatives centered on urban-specific problems and opportunities. But while we recognize their value,²²³ we are not convinced cosmopolitan compacts are superior instruments, nor that the strong delineation between urban and nonurban communities is empirically or normatively appropriate.

In terms of simple legal logistics, cities lack constitutional status.²²⁴ Municipalities have limited independent authority and can only do so much without the full support of their states.²²⁵ This means that municipal level successes may be frustrated or reversed. Here, places like Houston, Texas, or New Orleans, Louisiana, come to mind. But even highly progressive cities in blue states might be held back for various reasons including that cosmopolitan urban compacts may make it difficult for the state (and those people with the least resources) to manage disparate regulatory regimes across otherwise seamlessly integrated spaces. One of the chief selling points vis-à-vis interstate agreements is the opportunity to widen regulatory circles; cosmopolitan compacts may widen certain, select circles, but tighten a whole lot of others.

Second, and related, the notion of cities as discrete islands of progressivity is overstated. Commentators often run the risk of exaggerating the blueness of major American cities and underestimate the blueness of the suburbs and exurbs that bleed into those cities (and one another). The November 2020 election results cast some doubt over the conventional assumptions regarding demographic and geographic

of spatial governance, which he views as overly fixated on state or province-based federalism, regions, and electoral districts. *See id.* at 15. According to Hirschl, cities are the chief service providers, house the majority of each country's members, and are distinguished by the functions as hubs of diversity and close human interaction. Their unmatched diversity (and sheer population size) is more conducive to cultural openness, pluralism, and to competitive democracy than are less diverse or far smaller settings. *See id.*

223. *See, e.g.,* Kristina Cooke & Ted Hesson, *What are 'Sanctuary' Cities and Why is Trump Targeting Them?*, REUTERS (Feb. 25, 2020, 11:37 AM), <https://www.reuters.com/article/us-usa-immigration-crime/what-are-sanctuary-cities-and-why-is-trump-targeting-them-idUSKBN20J25R> [<https://perma.cc/PAG8-H4J3>].

224. *See* Sarah Swan, *Constitutional Off-loading at the City Limits*, 135 HARV. L. REV. 831, 882–887 (2022) (arguing in favor of constitutional status for large American cities, something they currently lack).

225. *See* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018) (arguing that recent state preemption efforts threaten the viability of local initiatives aimed at progressive reforms involving gun control, workplace conditions, sanctuary cities, antidiscrimination laws, and environmental and public health regulation). As one recent example illustrates, governors may attempt strip local officials deemed recalcitrant of certain responsibilities. *See DeSantis Suspends Florida Prosecutor for Refusing to Enforce Abortion Law*, REUTERS (Aug. 4, 2022, 6:20 PM), <https://www.reuters.com/world/us/desantis-suspends-florida-prosecutor-refusing-enforce-abortion-law-2022-08-04/> [<https://perma.cc/3ZP7-5854>].

divides that pollsters and pundits have long touted.²²⁶ And, in a survey of changing residential patterns in California in 2021, thanks to more extensive opportunities for individuals to work from home, plenty of heretofore left-leaning urban professionals left their city abodes in favor of suburban and exurban offerings.²²⁷

There is, we recognize, a larger or at least more statistically meaningful distinction between large core cities and suburbs, and small core cities and suburbs.²²⁸ Residents of large urban centers and their suburbs are significantly more likely to identify as Democrats than are their counterparts elsewhere.²²⁹ Those who live in the suburbs of small metropolitan areas are considerably less likely to identify as Democrat. But much of the discussion of cosmopolitan governance focuses on big cities; thus, to exclude the nearly-as-progressive suburbs and the just-as-integrated surrounding counties that supply many of the goods, materials, and human capital that sustain the cities seems perilously shortsighted.²³⁰

Third, and also related, even if we could divorce cities from, say, their suburban or exurban peripheries, we should not. To begin, there is good reason to think that such a distinction would have little positive practical effect, especially in light of recent and fairly promising pushes for greater racial and socioeconomic integration of both the cities and nearby suburbs.²³¹ Perhaps there is value in considering, say, a

226. Holly Otterbein, *Why Biden Didn't Do Better in Big Cities*, POLITICO (Nov. 15, 2020, 6:50 AM), <https://www.politico.com/news/2020/11/15/big-cities-biden-election-436529> [<https://perma.cc/2UH3-EJTN>]; Zack Stanton, *How 2020 Killed Off Democrats' Demographic Hopes*, POLITICO (Nov. 12, 2020, 6:17 PM), <https://www.politico.com/news/magazine/2020/11/12/2020-election-analysis-democrats-future-david-shor-interview-436334> [<https://perma.cc/UK2W-YGG6>]. *But see* Briffault, *supra* note 225, at 1995 (arguing that the rise of the new preemption is linked to the partisan and ideological polarization between red states and their blue cities).

227. Sarah Parvini, *Wealth, Class and Remote Work Reshape California's New Boomtowns as People Flee Big Cities*, L.A. TIMES (July 7, 2021), <https://www.latimes.com/california/story/2021-07-02/el-dorado-migration-bay-area> [<https://perma.cc/WY9S-MM86>].

228. Dante J. Scala & Kenneth M. Johnson, *Political Polarization Along the Rural-Urban Continuum? The Geography of the Presidential Vote, 2000–2016*, 672 ANNALS AM. ACAD. POL. SOC. SCI. 162, 169 (2017).

229. Between 2016 and 2020, democratic support grew stronger in the suburbs. Geoffrey Skelley, Elena Mejia, Amelia Thomson-DeVeaux & Laura Bronner, *Why the Suburbs Have Shifted Blue*, FIVETHIRTYEIGHT (Dec. 16, 2020), <https://fivethirtyeight.com/features/why-the-suburbs-have-shifted-blue> [<https://perma.cc/7UDN-D3HW>]; Richard Florida, Marie Patino & Rachael Dottle, *How Suburbs Swung the 2020 Election*, BLOOMBERG (Nov. 17, 2020), <https://www.bloomberg.com/graphics/2020-suburban-density-election/> [<https://perma.cc/NKT8-DCUU>].

230. *See, e.g.*, Richard C. Schragger, *Localism All the Way Up: Federalism, State-City Conflict, and the Urban-Rural Divide*, 2021 WIS. L. REV. 1283 (2021).

231. *See, e.g.*, Zack Beauchamp, *The Stimulus Shows Why the Left Should Stop Worrying and Learn to Love the Suburban Voter*, VOX (Mar. 8, 2021, 9:30 AM), <https://www.vox.com/policy-and-politics/22256052/democrats-white-suburban-voters-economy> [<https://perma.cc/6UE9-WV3D>]; David Weigel, *The Six Political States of Georgia*, WASH. POST (Sept. 27, 2020), <https://www.washingtonpost.com/graphics/2020/politics/georgia-political-geography/> [<https://perma.cc/9JTL-3S2M>] (describing the “Atlanta Burbs” as a place built by “segregation and ‘White flight’” that is now becoming increasingly more

union of New York City, San Francisco, and Chicago as an intercity political economy onto itself, unmoored from the people and businesses geographically adjacent, financially co-dependent, and perhaps psychologically tethered to those metropolises. But the drawbacks seem significant.²³²

B. Market Solutions

When markets fail, as they invariably do, we've come to expect government(s) to step up and correct or offset the particular failure or failures. That expectation is, in many respects, the principal (or least controversial) justification for state interventions of a regulatory or redistributive flavor.²³³

What happens when government fails? We don't usually think about government failure, at least in terms of the United States. Not dwelling too much on government failure may, in the past, have been excusable as better left to those who study comparative law and politics.²³⁴ Today, though, such disregard for what used to be a far-fetched hypothetical would seem irresponsible or naïve. Indeed, this Article fixates on government failures at the federal level (due to a corrosive brand of politics and to the pivotal roles played by anti-democratic institutions) that cannot be fully

diverse and liberal-leaning); David Weigel, *The Seven Political States of Pennsylvania*, WASH. POST (Sept. 8, 2020), <https://www.washingtonpost.com/graphics/2020/politics/pennsylvania-political-geography/?tid=graphics-story> [<https://perma.cc/P2NK-SWZG>] (describing similar dynamics in the Philadelphia suburbs); David Weigel, *The Six Political States of North Carolina*, WASH. POST (Aug. 23, 2020), <https://www.washingtonpost.com/graphics/2020/politics/north-carolina-political-geography/?tid=graphics-story> [<https://perma.cc/5GVC-PVK2>] (emphasizing that the real divide in North Carolina is not between cities and suburbs but rather between rural communities and urban-suburban ones). These connections between and among cities and inner suburbs—in addition, of course, to the legal benefits of state-to-state regional governance arrangements—are among the reasons we are less than fully ecumenical when it comes to embracing interstitial governance of all the varieties that animate some enthusiasts of American regionalism.

232. Indeed, we fear that a special law for cities (or cities and inner suburbs) driven by elite industries such as law, finance, and tech run the risk of looking like special economic zones of the sort found in parts of the world that otherwise lack liberal political economies. While not perfect or perhaps even close analogies, here we're thinking of places such as Guangzhou, China, locales in Pakistan and Uzbekistan open only to Chinese investment, and the planned city of Neom, Saudi Arabia, that intends to apply some version of neoliberalism in lieu of Saudi shariah. See, e.g., Rory Jones, Summer Said & Stephen Kalin, *Saudi Crown Prince's Vision for Neom, a Desert City-State, Tests His Builders*, WALL. ST. J. (May 1, 2021, 8:00 AM), <https://www.wsj.com/articles/saudi-crown-princes-vision-for-neom-a-desert-city-state-tests-his-builders-11619870401> [<https://perma.cc/H7MV-U2BY>].

233. See, e.g., STEPHEN BREYER, REGULATION AND ITS REFORM 15–30 (1982) (describing classical justifications for government interventions).

234. There is, to be sure, a big difference between government failure and government waste, and between government failure and government inefficacy. Waste, fraud, and inefficacy have, of course, been central themes of modern American law and public administration. See JOHN D. DONAHUE, THE PRIVATIZATION DECISION (1989); DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992).

addressed by the states (due to their limited reach and resources and given the likelihood of ruinous competition between them).

In response to those failures, we have offered a third, though *still-very-much public* pathway. But, perhaps, a private option would be better. In a liberal democracy, where the state and private sectors complement and rival one another, some semblance of equity or mutual codependency might counsel in favor of a market solution.²³⁵

Already we have seen some efforts in this direction—namely, private solutions to what strike us as inherently government problems, again when and where the extant state institutions are not willing or able to address those problems.²³⁶ Neither the feds nor enough states are taking COVID-19 seriously enough? No problem, said the NBA, which turned around and created a bubble city of its own, renting out much of the Walt Disney World campus, taking functional sovereign dominion over that space and those who work and reside there, and ensuring a basketball season can proceed safely and expeditiously.²³⁷ A government unwilling—or, more importantly, constitutionally unable—to regulate anti-democratic hate speech and misinformation on social media platforms? Perhaps we can at least consider the possibility of social media companies stepping up. Facebook, for one, has put some effort, resources, and a whole lot of PR spin into its Oversight Board, modeled expressly, if clumsily, on an American appellate court.²³⁸

Likewise, the recent push to build physical company towns—with tech giants undertaking city planning projects to focus on sustainable and (somewhat) affordable living in tech hubs in Seattle and Silicon Valley—can be readily lampooned or lamented as just another vanity project by corporations enjoying year upon year of

235. See Jon D. Michaels, *What about Private Options?*, in *POLITICS, POLICY, AND PUBLIC OPTIONS* 58 (Ganesh Sitaraman & Anne Alstott eds., 2021). The term private option is a play on “public options”—forms of government market participation in such spaces as health care and banking. See Anne Alstott & Ganesh Sitaraman, *Introduction*, in *POLITICS, POLICY, AND PUBLIC OPTIONS* 1 (Ganesh Sitaraman & Anne Alstott eds., 2021).

236. Michaels, *supra* note 235. Government agencies contracting out for private assistance is, we think, still fundamentally a state intervention. See Michaels, *supra* note 130, at 525–27.

237. See, e.g., Mark Medina, *Inside the NBA’s Bubble Setup at the ESPN Wide World of Sports Complex During Resumed 2020 Season*, USA TODAY (June 16, 2020, 8:28 PM), <https://www.usatoday.com/story/sports/nba/2020/06/16/nba-disney-world-bubble-inside-espn-wide-world-sports-setup/3203198001/> [https://perma.cc/7TH4-HSEN]. Individual teams also hosted 2020 voting drives, perhaps another way to offset some combination of government paralysis and hostility to voting rights. See Michael Lee, *How Athletes Built a Voter-Turnout Machine for 2020 and Beyond*, WASH. POST (Dec. 5, 2020, 5:34 PM), <https://www.washingtonpost.com/sports/2020/12/03/nba-wnba-turnout-georgia-primary/> [https://perma.cc/W39X-57W9].

238. See, e.g., Michaels, *supra* note 235, at 71; see also Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018); Tony Romm, *Facebook Unveils Charter for Its ‘Supreme Court,’ Where Users Can Go to Contest the Company’s Decisions*, WASH. POST (Sept. 17, 2019, 4:00 PM), <https://www.washingtonpost.com/technology/2019/09/17/facebook-unveils-charter-its-supreme-court-where-users-can-go-contest-companys-decisions/> [https://perma.cc/MEK9-GSSL].

supernormal profits.²³⁹ But one reason why they're not bitterly opposed (even if, in theory, they ought to be),²⁴⁰ is because most people, including those with principled objections, recognize that housing, transportation, and environmental problems have long bedeviled city managers, county supervisors, and state legislators.

So where does that leave us? Perhaps: voting rights brought to you by Coca-Cola²⁴¹ and the NBA;²⁴² and racial justice by LeBron James and Maya Moore?²⁴³ This is, to be sure, a problematic strategy. It relies in good part on what naysayers call "woke capitalism" that's divisive and unreliable.²⁴⁴ For every General Motors pressuring Georgia to walk back its new voter suppression laws,²⁴⁵ there's a Toyota lining the coffers of members of Congress best known for denying the 2020 election results.²⁴⁶ Even within the NBA, there is a delicate dance within the league and

239. David Streitfeld, *Welcome to Zucktown. Where Everything Is Just Zucky.*, N. Y. TIMES (Mar. 21, 2018), <https://perma.cc/HUP3-R9XM> [<https://perma.cc/7JWS-EU5Y>]; Leanna Garfield, *Facebook and Amazon Are So Big They're Creating Their Own Company Towns – Here's the 200-year Evolution*, BUS. INSIDER (Mar. 26, 2018, 9:27 AM), <https://www.businessinsider.com/company-town-history-facebook-2017-9> [<https://perma.cc/7WSL-EH52>].

240. Company towns of the nineteenth and early twentieth century were, if nothing else, problematic institutions. See QUENTIN R. SKRABEC, JR., BENEVOLENT BARONS: AMERICAN WORKER-CENTERED INDUSTRIALISTS, 1850–1910, at 53–56 (2015); LINDA CARLSON, COMPANY TOWNS OF THE PACIFIC NORTHWEST 36–40 (2003); see also *Marsh v. Alabama*, 326 U.S. 501 (1946) (insisting company towns be treated as state actors for First Amendment purposes). Cf. Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807 (2012).

241. David Gelles & Andrew Ross Sorkin, *Hundreds of Companies Unite to Oppose Voting Limits, but Others Abstain*, N.Y. TIMES (Apr. 14, 2021), <https://www.nytimes.com/2021/04/14/business/ceos-corporate-america-voting-rights.html> [<https://perma.cc/W2ZS-ECUU>].

242. Victor Mather, *N.B.A. Won't Play on Election Day, in Hopes of Encouraging Voting*, N.Y. TIMES (Aug. 16, 2022), <https://www.nytimes.com/2022/08/16/us/politics/nba-games-election-day.html> [<https://perma.cc/48RS-PG4K>].

243. Curtis Bunn, *How LeBron James Has Become a Leading Voice for Social Justice in a Racially Divided Nation*, NBC NEWS (June 23, 2020, 11:08 AM), <https://www.nbcnews.com/news/nbcblk/how-lebron-james-has-become-leading-voice-social-justice-racially-n1231391> [<https://perma.cc/4R94-WN25>]; Katie Barnes, *Inside WNBA Legend Maya Moore's Extraordinary Quest for Justice*, ESPN (July 10, 2021), https://www.espn.com/wnba/story/_/id/29315369/inside-wnba-legend-maya-moore-extraordinary-quest-justice [<https://perma.cc/23MH-2U3D>].

244. See, e.g., Jesse Washington, *We Finally Have Answers About Michael Jordan and 'Republicans Buy Sneakers, Too'*, ANDSCAPE (May 4, 2020), <https://andscape.com/features/we-finally-have-answers-about-michael-jordan-and-republicans-buy-sneakers-too/> [<https://perma.cc/38C4-H9SG>]; Memorandum from Lewis F. Powell, Jr. to Eugene B. Syndor, Jr., Chairman, U.S. Chamber Com. Educ. Comm. (Aug. 23, 1971), <https://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf> [<https://perma.cc/UC4K-FX32>].

245. Gelles & Sorkin, *supra* note 241.

246. Joseph Choi, *Toyota Defends Donations to Lawmakers who Objected to Certifying Election*, THE HILL (June 27, 2021, 9:17 PM), <https://thehill.com/policy/transportation/automobiles/560472-toyota-defends-donations-to-lawmakers-who-objected-to> [<https://perma.cc/VVQ3-DK8H>]. Soon afterward, Toyota did decide to distance themselves

among its players: how to be advocates of equality and dignity at home while ignoring human rights abuse in China (a source of tremendous revenue for the sport, its teams, and its players).²⁴⁷

Similarly, when it comes to city planning, are Amazon and Google (or Tesla and Uber) just playing around—something to do while their founders decide whether to go *From the Earth to the Moon*, venture *20,000 Leagues Under the Sea*, or *Journey to the Center of the Earth*? And will they do so only until a more serious generation of antitrust regulators and tax collectors come a-knocking? And what happens if and when Facebook’s Oversight Board makes a decision that imperils the profitability of the colossus of Menlo Park? Will the gray-tee-and-hoodie bros shut the Board down?

We apologize for our churlishness, but it comes from a place of love, and a sincere appreciation for the ephemerality of capitalism. The logic of the Market is fundamentally distinct from that of the State. We get that, and we respect it. Of course, corporations and high-wealth individuals can engage in statecraft—many certainly have the means, infrastructure, and ego to do so. But there are presently no guardrails constraining such engagement; no rules, few norms, and no abiding commitments.²⁴⁸ So even if we concede that in the short term and with respect to some specific tasks, some private interventions may address government shortcomings in a salutary fashion, we nonetheless worry about such interventions offering durable or reliable, let alone democratic (and legally accountable) solutions.

C. Leaving States and Marginalized Communities Behind

Given that we just voiced misgivings about leaving the suburbs and suburbanites behind, we recognize that we are opening ourselves up to the criticism that interstate agreements leave nonparty states behind. Put even more pointedly, by championing a Blue New Deal, we’re leaving behind historically disadvantaged groups (for example, African Americans in the deep south) whose interests are perennially discounted by their home-state legislatures. This is, for sure, one of the most salient counterarguments teed up in response to recent stirrings that blue states should *secede* from the Union.²⁴⁹

from those legislators.

247. Henry Bushnell, *The NBA, China and Racial Justice: How to Untangle the League’s Messy Relationship with Human Rights*, YAHOO! SPORTS (July 30, 2020), <https://sports.yahoo.com/the-nba-china-and-racial-justice-how-to-untangle-the-leagues-messy-relationship-with-human-rights-165906175.html> [<https://perma.cc/H7VR-JA24>].

248. Michaels, *supra* note 130; Michaels, *supra* note 235. Public law scholarship has zeroed in on the healthy conflicts that exist within government bureaucracies, ones that run counter to the type of organizational streamlining that’s customary, if not necessary, in the private sector. See, e.g., Daniel A. Farber & Anne Joseph O’Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375 (2017); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009).

249. Compare Paul Blest, *Blue-State Secession is Dumb and Cruel*, NATION (Mar. 13, 2017), <https://www.thenation.com/article/archive/blue-state-secession-is-dumb-and-cruel/> [<https://perma.cc/L6UK-SKGQ>] with Kevin Baker, *It’s Time for a Bluexit*, NEW REPUBLIC (Mar. 9, 2017), <https://newrepublic.com/article/140948/bluexit-blue-states-exit-trump-red-america> [<https://perma.cc/WEB5-Y78N>].

Casting aside secession claims, we struggle to give too much credence to the claim that a blue state agreement visits new or special harms on, say, Black voters in Alabama or Indigenous communities in states like South Dakota. (For purposes of this discussion, we're willing to stipulate that those communities vote overwhelming Democratic and have little, if any, effective representation in their red states). Assuming, as we do, that the alternative to interstate compacts and agreements is today's status quo, we see only one instance in which robust and aggressive interstate arrangements would hurt those communities—namely, if the interstate arrangements are so successful that it dampens Democrats' enthusiasm for national (federal) regulatory and redistributive initiatives.

But even this singular scenario assumes that undampened enthusiasm for federal reforms—such as would be the case were we to forget interstate agreements and, again, stick with the status quo—can be translated into meaningful and salutatory programming. It further assumes (again forgetting interstate agreements) that blue states won't, in isolation (and thus much more inefficiently) have no choice but to take up more of the workload, which would also “leave behind” communities of color in Alabama, Texas, and South Dakota. And, it lastly assumes that, for instance, solidly progressive communities in bright red states aren't the beneficiaries of positive externalities from agreements and compacts that, among other things, help combat climate change (via lower carbon emissions), advance infrastructure and transportation projects, and quite possibly raise wages (and worker and consumer safety protections) across the country.²⁵⁰

We fully recognize that interstate mobility is relatively unlikely, as has historically been the case. But it's plausible that the incentive to move would be marginally greater if and when Blue New Deal agreements came into being. This is for the simple reason that people may be more likely to leave their ancestral communities to move into substantially (rather than just slightly) more attractive political jurisdictions. In other words, why leave Arkansas for Illinois right now if Illinois, like every other state, is at best able to provide the same centrist federal regulatory policies that Arkansans are already familiar with—and then only a smattering of center-left state regulatory policies that don't stray too far from the federal mean (if only because the Illinois state legislature fears welfare magnets and ruinous races to the bottom)? But leaving Arkansas for a muscular consortium of deep blue states that are far less fearful of welfare magnets and ruinous competition? That's at least conceivably a more attractive proposition.

Last, we again appreciate there is some superficial tension between our position here and our position in Section V.A—namely, “don't leave suburbanites behind.” But our suburban solicitude is not based on any moral calculation of the relative value of suburbanites in, say, blue or purple states compared to historically disadvantaged and discriminated against communities in red states. Far from it. Our defense of suburbanites is pragmatic—a reflection of the social, economic, and

250. See Juliet Eilperin & Dino Grandoni, *EPA Moves to Give California Right to Set Climate Limits on Cars, SUVs*, WASH. POST (Apr. 26, 2021, 5:48 PM), <https://www.washingtonpost.com/climate-environment/2021/04/26/california-car-climate-waiver/> [<https://perma.cc/L2DX-WLLF>] (indicating that California is a market driver for car sales and thus, even when regulating on its own, exerts influence over the standards that car manufacturers include in all of their vehicles).

geographic interconnectedness of suburban and urban communities, of the enduring legal relevance of states qua states, and of the fact that there are demographic and political spillovers between cities and their immediate suburbs. Also note that to the extent interstate agreements and compacts do leave some communities behind, they also have the potential to loop in others. Recall our point about the potential to use regional governance to advance transnational agreements, particularly ones involving Mexican states that abut California, Arizona, and New Mexico. One quite salient and oft-voiced critique of national redistributive policies is that they transfer wealth within fairly bounded (Westphalian) communities, taking care of struggling fellow Americans with no greater intrinsic moral claim to assistance than similarly struggling non-Americans living elsewhere around the world. After all, the beneficiaries of redistribution within the United States are, in absolute terms, almost invariably far better off than struggling populations in the developing world. To the extent these claims have value, we note that interstate agreements of the sort we're privileging have the potential to sweep in communities in Mexicali and Tijuana, communities otherwise and in many respects easily ignored when we regulate as members of a common American nation-state or as members of individual American states.

CONCLUSION

Our goal in spotlighting interstate compacts and agreements is to reopen a third, public pathway to advance legislative and regulatory initiatives. Interstate governance may (still) seem quirky, perhaps even gimmicky. But, as we recounted, it has a long and sturdy constitutional and historical pedigree. Even more importantly, the spirit that motivates interstate cooperation—specifically of finding “just-right” solutions to thorny problems—is entirely in keeping with the Framers’ recognition that their founding of this federal union was just the beginning, not the end, of America’s democratic experiment. It is also in keeping with a similar recognition by the architects of the modern welfare state that public administration would (and should) continue to evolve for reasons sounding in law, politics, and economics. And few, if any, of those New Deal architects embody that spirit more so than Frankfurter and Landis.

Our chief regret with this Article is that it has not proceeded from what in the past were understood to be neutral principles. At the moment, we confess some doubt whether such an undertaking—in this space, at least—would be productive or, more importantly, sincere. We write at a time when powerful factions within one political party are seeming at some, perhaps great, odds with the most basic commitments to democracy and the rule of law.²⁵¹ Hence, our audience is necessarily circumscribed,

251. See, e.g., Linda Greenhouse, *On Voting Rights, Justice Alito is Stuck in the 1980s*, N.Y. TIMES (July 15, 2021), <https://www.nytimes.com/2021/07/15/opinion/Voting-rights-supreme-court.html> [<https://perma.cc/8QKS-D2AT>] (expressing dismay that the majority compared restrictions to voting with inconveniences that may present themselves to those seeking admission to a museum); Ryan Nobles, Ted Barrett, Manu Raju & Alex Rogers, *Senate Republicans Block January 6 Commission*, CNN (May 28, 2021, 5:31 PM), <https://www.cnn.com/2021/05/28/politics/january-6-commission-vote-senate/index.html> [<https://perma.cc/MXD6-8ZQD>]; Paul Kane & Scott Clement, *Just 27 Congressional*

limited to the camp of those serious about governing, who pay heed to science, and who fully embrace the project of majoritarian democracy. To the extent there is disagreement within that camp about how dire certain problems are, how to prioritize certain policy initiatives over others, what those initiatives should look like, or whether they are problems better addressed through carrots or sticks, we heartily welcome dissent—and, of course, invite rejoinders and rebuttals.

Republicans Acknowledge Biden's Win, Washington Post Survey Finds, WASH. POST (Dec. 5, 2020, 2:15 PM), https://www.washingtonpost.com/politics/survey-who-won-election-republicans-congress/2020/12/04/1a1011f6-3650-11eb-8d38-6aea1adb3839_story.html [https://perma.cc/9PBF-ZNL7]; Josh Gerstein, *Lawmakers who Conspired with Capitol Attackers in Legal Peril*, POLITICO (Jan. 14, 2021, 7:38 PM), <https://www.politico.com/news/2021/01/14/lawmakers-capitol-attackers-legal-459519> [https://perma.cc/PL9J-EKQN]; Mark Joseph Stern, *Federal Judge Claims the COVID Vaccine Kills More People than Mass Shootings Do*, SLATE (June 7, 2021, 5:58 PM), <https://slate.com/news-and-politics/2021/06/california-assault-weapons-covid-vaccine.html> [https://perma.cc/AEA3-QT84]; Ken Bredemeier, *Republican Groups Censure Party Lawmakers who Voted to Impeach, Convict Trump*, VOA (Feb. 16, 2021, 1:57 PM), <https://www.voanews.com/usa/us-politics/republican-groups-censure-party-lawmakers-who-voted-impeach-convict-trump> [https://perma.cc/A86D-JZKF]; Michelle L. Price, *Nevada GOP Censures Elections Official who Defended Results*, AP NEWS (Apr. 11, 2021), <https://apnews.com/article/donald-trump-barbara-cegavske-nevada-elections-bccf4ffe9a52dd6ebb6e93ad0285e5a> [https://perma.cc/EQS4-D6VS]; *Georgia Republican Party Passes Resolution to Censure Secy. of State Brad Raffensperger*, WSB-TV NEWS (June 5, 2021, 11:19 PM), <https://www.wsbtv.com/news/local/georgia-republican-party-passes-resolution-censure-secy-state-brad-raffensperger/2DMVKJITTVFG3M5JLHWH2A7XTU/> [https://perma.cc/D3CU-VRDD].

Copyright of Indiana Law Journal is the property of Indiana Law Journal and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.