Syllabus

19-06

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Court for the convenience of the reader.

Argued June 3, 2019-June 28, 2019. Decided July 5, 2019

In May, Governor ZeroOverZero issued Executive Order 12: The Sierra-North American Union. The Executive Order purported to create a "regional community" to "promote cooperation and integration" between Sierra, Canada, and Mexico. The order was unilateral and there is no evidence on the record that either Mexico or Canada has played any part or made any contact with the government of Sierra in regards to the goals of the order.

Held:

1. While there is somewhat compelling evidence for reading a Foreign Compact Clause into the Constitution, we decline to do something no federal or state court has ever done, and which would go against the overwhelming prevailing legal consensus. The standard under which Compact Clause cases, even those dealing with foreign standards, are to be determined is the one announced in *Virginia v. Tennessee* and *United States Steel Corp. v. Multistate Tax Comm'n*, rather than the earlier standard announced in *Holmes v. Jennison. (*p. 11-18).
2. The absence of the traditional "indicia" of a compact, combined with the fact that the provisions are vague and that there is not yet any agreement between two or more parties, means that a Compact is not currently in place. (p. 19-23).
3. While particular outcomes of the executive order might violate the Compact Clause, others might not, and whether or not a Compact Clause violation has occurred will depend heavily on the specific factual circumstances of future arrangements. Without those facts before us, the executive order in its current form can stand. If specific actions are taken in the future pursuant to the executive order, those would, of course, be open to challenge in their own right. (p. 24-25).

SUPREME COURT OF SIERRA

No. 19-06

IN RE: EXECUTIVE ORDER #12: THE SIERRAN NORTH AMERICAN UNION

[July 5, 2019]

SHOCKULAR, J. delivered the opinion for a unanimous Court. CHEATEM, C.J. filed a concurring opinion. TOASTY, J. (Ret.) took no part in the consideration or decision of the case.

On May 23, 2019, Governor ZeroOverZero issued Executive Order 12: The Sierra-North American Union (hereafter EO12 or "the order"). EO12 purported to establish a "regional community," the stated goal of which was to "promote cooperation and integration of the goals of various regional entities of North America, specifically along the West [sic] coast through programs and action items that foster the relationship between Canada, Mexico, and Sierra." To do this, the countries would hypothetically cooperate in a host of areas, from security to the environment to the economy.

By all indications the order was issued unilaterally and there has been no interaction whatsoever between Sierra and either Canada or Mexico. Counsel for the respondent denies any such contact, and counsel for petitioner does not allege any direct knowledge to the contrary.[1] There is also no evidence on the record that any contact was made. The order appears to be completely aspirational at the current stage.

On June 3, 2019, suit was brought against Sierra in compliance with the rules of this court, alleging a

[1] Petitioner points out that it is unlikely that this could have come together without some communication, but cannot point to direct evidence of this, and respondent's denial has been unequivocal.

violation of the Compact Clause of the Constitution. Article I, Section 10, clause 3.

I

A

We are asked today to determine whether a compact or agreement exists between the State of Sierra and the nations of Canada and Mexico or the provinces therein within the meaning of the Compact Clause of the Constitution. The Compact Clause states, in relevant part, that "No state shall, without the Consent of Congress...enter into any Agreement or Compact with another State, or with a foreign Power…" Article I, Section 10, Clause 3.

On its face, the text seems clear. No state shall enter into ***any*** agreement or compact with another state or foreign power without the consent of Congress. This would seem to suggest that any agreement, no matter how minor or inconsequential, would need to receive the approval of Congress if it is between multiple states or a state and a foreign nation. Subsequent Supreme Court case law has obliterated that plain text meaning, however. Further complicating matters is the fact that case law on the Compact Clause is scant, and case law on the Compact Clause in relation to a foreign power is scanter still.

The first, and only, time the Supreme Court weighed in on the Compact Clause in the context of an agreement with a foreign power was nearly 200 years ago, in 1840, in the case of *Holmes v. Jennison,* 14 Pet. 540 (1840). The case dealt with an American citizen, George Holmes, who was wanted for murder in Quebec. Holmes, who was in Vermont at the time, was arrested and the Governor of Vermont, Silas Jennison, agreed to extradite him to Canadian (and, by extension, British) authorities so Holmes could face the charges. Holmes brought suit, claiming that the state of Vermont was precluded from

doing so because his extradition qualified as an "agreement" in violation of the Compact Clause.

The Supreme Court agreed. In a plurality decision that was treated as controlling, Chief Justice Taney announced a broad and far reaching rule for what constituted a compact. He explained that the word agreement "does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an 'agreement.'" *Id*, at 572. He went further, stating that the warrant of Governor Jennison in and of itself constituted an agreement, because it directed Holmes be delivered to Canadian authorities. "How is he to be delivered unless they accept?" Taney asked. "From the nature of the transaction, the act of delivery necessarily implies a mutual agreement." *Id,* at 573.

We believe this section of *Holmes* can be read to support the proposition that it is possible for an offer to be unconstitutional even before assent by a second party if that party's assent would ensure a violation of the Compact Clause.[2]

In supporting his views, Taney pointed to the Founders, who:

> "...manifestly believed that any intercourse between a state and a foreign nation was dangerous to the Union; that it would open a door of which foreign powers would avail themselves to obtain influence in

[2] Indeed, in his dissent, Justice Catron explicitly says that while he agrees that if an agreement *did* exist it would violate the Compact Clause, on the record of the case, "nothing appears that a demand was made by Canada of Holmes; and we do not act upon the supposition such a demand was made; nor consider it in the case." *Holmes,* at 596 (J. Catron, dissenting) (quoting the plurality opinion at 573.) Cantor believed that if no demand was made, no agreement existed, and since there was no evidence on the record of an agreement, the case was not yet ripe for the Court's consideration, and the Court could only act on "some past violation of the Constitution," not the "intention of the Governor to make a future agreement." *Id*, at 596. Catron stated that Chief Justice Taney's plurality opinion was necessarily founded on a violation that had not yet occurred.

> separate states. Provisions were therefore introduced to cut off all negotiations and intercourse between the state authorities and foreign nations. If they could make no agreement, either in writing or by parol, formal or informal, there would be no occasion for negotiation or intercourse between the state authorities and a foreign government. Hence prohibitions were introduced, which were supposed to be sufficient to cut off all communication between them.
>
> *Id,* at 573-574.

The Court believed that the exercise of the power of extradition by the states was "totally contradictory and repugnant to the power granted to the United States." *Id*, at 574. They pointed out that it was the general policy of the federal government at the time to refuse to surrender people who committed offences in foreign countries and took shelter in the United States. *Id.*

If that was the last the Court had spoken on the subject, the only leg Executive Order 12 would have to stand on is the lack of explicit or implied assent to date by the foreign governments in question. But as is so often the case, it's more complicated than that.

B

Since 1840, the Supreme Court has returned to the Compact Clause several times, though never again in the context of a foreign agreement. Subsequent case law from the Court dealt entirely with interstate agreements between states.

Holmes was, as stated, a plurality, and it was not uncontroversial. Justice Catron's dissent sounded the alarm the plurality decision announced a doctrine "calculated to alarm the whole country." *Id*, at 596. He took for granted that the "Constitution equally cuts off the power of the states to agree with each other, as with a

foreign power," but pointed out that for the entirety of the existence of the country, "the states have, in virtue of their own statutes, apprehended fugitives from justice from other states, and delivered them to the officers of the state where the offence was committed…" *Id,* at 597. His concern was that by creating this rule, the Court was also completely preventing interstate agreements on the handing over of fugitives and other matters, because there was no difference between relations with other states and with other nations for Compact Clause purposes.

Catron's concerns proved largely unfounded, as state courts upheld interstate agreements in the immediate aftermath with nary a mention of *Holmes*. *See, ie, Union Branch R. Co. v. East Tennessee & G.R. Co.,* 14 Ga. 327 (1853) (in which the Supreme Court of Georgia upheld an interstate railroad agreement between Georgia and Tennessee.)

The Supreme Court did not weigh in substantially again on the Compact Clause until 1893, in the case of *Virginia v. Tennessee*, 148 U.S. 503 (1893), where the Court brought Taney's earlier interpretation into doubt. That case dealt with a border dispute between Virginia and Tennessee. Tennessee was created out of territory that had formerly belonged to North Carolina. In 1803, Virginia and Tennessee agreed on a boundary which was subsequently approved by the legislatures of the two states. Virginia argued in 1893 that Congress had never approved of that compact, and that the Royal charters under which Virginia and North Carolina were approved should still be binding.

The Court disagreed, upholding the 1803 compact between the states. Chief Justice Field, writing for the Court, said that the designation of a boundary line between two states "does not come within the prohibition" of the Compact Clause. *Virginia*, at 520. The Court

largely based its holding on the idea that Congress had given implied consent to the compact based on subsequent legislation and history. Though the consent was implied and came after the agreement, it was enough to uphold the compact.

Perhaps more critical, though, was dicta in the case that appeared to either change or at the very least question the standard set in *Holmes*. Rather than applying to all compacts and agreements, the Court suggested, "it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." *Id*, at 519. In other words, the Court suggested that it was not the simple fact that an agreement existed that required congressional consent, but that the agreement must either increase the political power of the states entering into the agreement, undermine the supremacy of the United States, or do both.

This was only dicta, however, and so it stayed for the next eighty-three years, strongly persuading but not controlling, until the case of *New Hampshire v. Maine,* 426 U.S. 363 (1976), when for the first time the Court turned that dicta into an explicit holding.

New Hampshire, like all the best cases, involved a dispute over lobster fishing leading to a suit to determine a lateral marine boundary. The Court's opinion, authored by Justice Brennan, held that a consent decree entered into by the two states fell outside the Compact Clause test announced in *Virginia.* He cited another case that cited *Virginia* favorably, stating that the case depended on whether "the establishment of the boundary line may lead or not to the increase of the political power of influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority." *New Hampshire*,

at 369-370, quoting *Wharton v. Wise,* 153 U.S. 155, 168-171 (1894).

The Court did not wait nearly as long to explore the issue again, returning to the Compact Clause two years later in what is still the leading modern case involving the clause. In *United States Steel Corp.* v. *Multistate Tax Comm'n,* 434 U.S. 452 (1978), taxpayers challenged the Multistate Tax Compact, which established the Multistate Tax Commission (hereafter Commission), because it had not been approved by Congress in accordance with the Compact Clause. Drafted in 1966 and becoming effective on August 4th, 1967 when a seventh state adopted it, the Commission had twenty-one state signatories. The main goals of the Commission were to "(1) facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes; (2) [promote] uniformity and compatibility in state tax systems; (3) [facilitate] taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoiding duplicative taxation." *Id*, at 456. Essentially, the states sought to make interstate taxation more efficient.

To accomplish those goals, the Commission was created. To explain its scope, we quote at length from the case:

> Art. VI creates the Multistate Tax Commission, composed of the tax administrators from all the member States. Section 3 of Art. VI authorizes the Commission (i) to study state and local tax systems; (ii) to develop and recommend proposals for an increase in uniformity and compatibility of state and local tax laws in order to encourage simplicity and improvement in state and local tax law and administration; (iii) to compile and publish information that may assist member States in implementing the Compact and taxpayers in complying with the tax laws; and (iv) to do all things

> necessary and incidental to the administration of its functions pursuant to the Compact.
>
> Articles VII and VIII detail more specific powers of the Commission. Under Art. VII, the Commission may adopt uniform administrative regulations in the event that two or more States have uniform provisions relating to specified types of taxes. These regulations are advisory only. Each member State has the power to reject, disregard, amend, or modify any rules or regulations promulgated by the Commission. They have no force in any member State until adopted by that State in accordance with its own law.
>
> Article VIII applies only in those States that specifically adopt it by statute. It authorizes any member State or its subdivision to request that the Commission perform an audit on its behalf. The Commission, as the State's auditing agent, may seek compulsory process in aid of its auditing power in the courts of any State that has adopted Art. VIII. Information obtained by the audit may be disclosed only in accordance with the laws of the requesting State. Moreover, individual member States retain complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax base (including the determination of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due.
>
> Article X permits any party to withdraw from the Compact by enacting a repealing statute.
>
> *Id,* 456-457.

The *United States Steel Corp*. Court rejected strongly the idea of reading the Compact Clause literally. The Court said that while the appellants wanted them to abandon *Virginia v. Tennessee* and *New Hampshire v. Maine*, they offered "no effective alternative other than a literal reading of the Compact Clause." *United States Steel,* at 460. The Court refused to do so, stating that "[a]t this late date, we are reluctant to accept this invitation to circumscribe modes of interstate cooperation that do not

enhance state power to the detriment of federal supremacy." *Id.*

After discussing the history of the Compact Clause, *see* below, at 12, the Court examined a claim that the fact that an independent administrative body was created was dispositive. The Court disagreed, stating that regardless of the number of parties involved in an agreement or whether or not powers were delegated to an administrative body in carrying out that agreement, the pertinent inquiry was to judge those things "in terms of enhancement of state power in relation to the Federal Government." *Id*, at 472.

With that understood, the Court proceeded to uphold the Commission because while "[t]here well may be some incremental increase in the bargaining power of the member states quoad[3] the corporations subject to their respective taxing jurisdictions", and while "[g]roup action in itself may be more influential than independent actions by the States", *Id*, at 472-473, the Compact did not enhance state power with respect to the Federal Government.

The Court decided this way for several reasons. First, the agreement did not "purport to authorize the member States to exercise any powers they could not exercise in its absence." Second, there was no "delegation of sovereign power to the Commission; each State [retained] complete freedom to adopt or reject the rules and regulations of the Commission. Finally, "each State [was] free to withdraw at any time." *Id*, at 473.

Justice White dissented, pointing out that the majority had conceded that the "Compact Clause" reaches interstate agreements presenting even *potential* encroachments on federal supremacy",[4] accused the Court

[3] With respect to.
[4] *Id*, at 479-480 (J. White, dissenting) (emphasis added)

of not following that stated view. He believed that the Court's interpretation of a Compact being acceptable without congressional approval so long as each state individually could do the same thing must be wrong, because that reading would give the Compact Clause no independent meaning, as it would only require "the consent of Congress to agreements between states that would otherwise violate the Commerce Clause…" *Id*, at 482.

White did not argue for a literal reading of the Compact Clause--in fact, no Justice did--but opined that "even if a realistic potential impact on federal supremacy failed to materialize at one historic moment, that should not mean that an interstate compact or agreement is forever immune from congressional approval," and thought that the majority was approving "this Compact without congressional ratification purely on the basis of its form: that no power is conferred upon the Multistate Tax Commission that could not be independently exercised by a member State." He worried that this view eliminated the possibility of Congress requiring the approval of the agreement in the future if it more clearly implicated a federal interest if the Compact was not changed. He believed that it failed "to provide the ongoing congressional oversight that is part of the Compact Clause's protections." *Id*, at 490.

After laying out several reasons he believed the Multistate Tax Commission was in violation of the *Virginia* standard, White warned that if the Compact "is not a compact within the meaning of Art. I, § 10, then I fear there is very little life remaining in that section of our Constitution." *Id*, at 496.

II

The *United States Steel* standard is still the controlling standard, at least for interstate agreements. A new question emerges, however, when we remember that the Sierra-North American Union is alleged to be a *foreign* compact, not an interstate compact. The Supreme Court has never held that the *United States Steel* standard applies to foreign compacts as well as interstate compacts.

Petitioner argues that *Virginia v. Tennessee* and its successors deal with interstate, rather than foreign, compacts, and are thus not binding. They argue that *Holmes* is still the relevant precedent in foreign compact clause cases. *See Petitioner Response to Brief Opposing Grant of Certiorari*, at 3.

Respondent, in turn, argues that petitioner's argument is a "'legal absurdity,' as the words 'Agreement or Compact' cannot have one meaning in relation to interstate relations and an entirely different one in relation to foreign relations." *See Respondent's reply to Petitioner's Response to Brief Opposing Grant of Certiorari.* In support of this assertion, respondent states that different "contexts do not change the basic meaning of key terms in the Constitution. As Justice Frankfurter wrote in relation to a similar case regarding the duplicate Due Process Clauses, "[t]o suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.' *Malinski v. New York,* 324 U.S. 401, 415 (1945)." *Id.*

The question is whether there is one Compact Clause, applying to both foreign and interstate compacts and agreements, or two, creating different standards for foreign and interstate compacts. Petitioner's argument is not as frivolous as respondent alleges, and must be given careful consideration. There is considerable evidence in the history of the clause, the treatment of the Supreme Court of other similar clauses, and in scholarly work that

a reading of a so-called Foreign Compact Clause might be warranted.

"At the time of the framing, the concept of a 'treaty' apparently had a distinct meaning from an 'agreement'; they were terms of art, requiring no additional explanation. But the founding documents provide little evidence as to just what these terms meant." *Unpacking the Compact Clause*, 88 Tex. L. Rev 741, at 772 (2010).

"The prohibition against treaties, alliances, and confederations makes a part of the existing articles of Union; and for reasons which need no explanation, is copied into the new Constitution." So wrote James Madison in Federalist 44. On agreements and compacts, he made no mention. The Framers clearly expected us to understand these distinctions, but their faith has proved misplaced. "The records of the Constitutional Convention...are barren of any clue as to the precise contours of the agreements and compacts governed by the Compact Clause. This suggests that they used the words...as terms of art, for which no explanation was required and with which we are unfamiliar. Further evidence that the Framers ascribed precise meanings to these words appears in contemporary commentary. Whatever distinct meanings the Framers attributed to the terms...were soon lost." *United States Steel*, at 460-463 (internal citations omitted.)

Some scholars have suggested that the terms were understood by the Founders in the context of contemporary French scholar Emer de Vattel's *The Law of Nations*, the leading international law treatise of the day. *See, eg,* David E. Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?,* 64 MICH. L. REV. 63, at 76. There is evidence to support this. In a December 19, 1775 letter to Charles F.W. Dumas, Benjamin Franklin wrote that "circumstances of a rising State make it necessary frequently to consult the

law of nations," and that Vattel's work "has been continually in the hands of the members of our Congress now sitting." See Letter from Benjamin Franklin to Charles F. W. Dumas (Dec. 19, 1775), in 2 Francis Wharton, Revolutionary Diplomatic Correspondence of the United States 64, 64 (1889). James Wilson, who wrote the initial text of the Compact Clause that was marked up by Edward Rutledge, acknowledged Vattel during the Pennsylvania ratification convention. James Wilson, Address at the Convention of the State of Pennsylvania (Dec. 4, 1787), in 2 Elliot's Debates, supra note 78, at 453, 454.

For Vattel, an agreement had "temporary matters for their object" and were "accomplished by one single act, and not by repeated acts…" A treaty, by contrast, led to some sort of ongoing obligation. So, something like a border dispute could be settled with an agreement, since it was a one time event, but a deal involving the ongoing trade of goods would fit under the definition of treaty.

In his article advocating for the theory of a separate Foreign Compact Clause, Professor Duncan B. Hollis argues that interstate and foreign agreements, and the limiting thereof, have vastly different roots, and may thus be treated differently. He outlines the historical differences between boundary disputes between the colonies and their success in avoiding direct petitions to the Crown and the problems with negotiations with Native American tribes.

Colonies would often compete with each other to secure favorable agreements with tribes at the expense of other colonies. The situation became so worrisome that the Crown appointed a superintendent of Indian affairs to centralize colonial-Indian relations.

Hollis also points to Benjamin Franklin's 1754 Albany Plan of Union, which influenced the Articles of

Confederation. The Albany Plan proposed centralizing treaty making with Native Americans.

Finally, Hollis points out[5] that the Articles of Confederation (which Madison seemed to suggest had been intended to be directly transferred in condensed form to the Constitution in Federalist 44, see above) had two separate clauses for foreign and interstate agreements, with the foreign clause reading, in relevant part, "No State, without the consent of the United States in Congress assembled shall...enter into any conference, agreement, alliance or treaty with any King, Prince or State…"[6] and the other reading "No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue."[7] This suggests that the Founders may have intended the Compact Clause to have two separate meanings, one for interstate agreements and one for foreign agreements.

Hollis also points out that despite several chances to do so, the Supreme Court has never, even in dicta, explicitly said that the reasoning of *Virginia v. Tennessee* has supplanted *Holmes v. Jennison.* "In [*United States Steel]*, the Court went out of its way to reconcile *Virginia v. Tennessee*--which had not referenced *Holmes*--with that earlier opinion. *Holmes*, the Court said had involved 'the power to extradite...which was part of the exclusive foreign-affairs power expressly reserved to the Federal Government.' Moreover, the Court suggested that Taney himself might have differentiated the agreement in *Holmes* - which implicated the foreign-affairs power - from interstate compacts that might only warrant congressional consent where they infringed on the federal

[5] *Unpacking the Compact Clause*, at 769-772.
[6] Articles of Confederation, Article VI, cl. 1
[7] Articles of Confederation, Article VI, cl. 2

government's enumerated powers." *Unpacking the Compact Clause,* at 782.

In essence, Hollis is suggesting that because *Holmes* technically remains good law[8], it must mean something independent of *United States Steel.*

Professor Edward Swaine has pointed out reasons why treating the Compact Clause as two separate entities might not be the "legal absurdity" respondent claims. He relies on Supreme Court precedent that has suggested in dicta that the interstate commerce power and the foreign commerce power might be treated differently[9], even though the Commerce Clause reads that Congress has the power "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes…" Article I, Section 8, Clause 3.[10]

While the case for separate readings of the Compact Clause in interstate and foreign agreements is somewhat convincing, especially in the light of the Supreme Court's

[8] There is some evidence to support the government has considered *Holmes* the standard post *Virginia v. Tennessee.* For instance, in 1909, Attorney General George Wickersham invoked *Holmes* to suggest the Constitution "prohibits a State from making any kind of an agreement with a foreign power" without the consent of Congress, including a proposed agreement by Minnesota with Canadian authorities for the construction of a dam.

[9] *See,* e.g. *Bowman v. Chicago & N.R.Co.,* 125 U.S. 465, 482 ("It may be argued [that] the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States."; Reeves Inc. v. Stake, 447 U.S. 429 at 437-38 & n.9 (1980) (noting that "we have no occasion to explore the limits imposed on state proprietary actions by the "foreign commerce' Clause," but that "scrutiny may well be more rigorous when a restraint on foreign commerce is alleged"); Kraft General Foods, Inc. v. Iowa Dept. of Revenue and Finance, 505 U.S. 71, 75 (1992) ("constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded to interstate commerce"); Japan Line, Ltd. v. Los Angeles County, 441 U.S. 434, 448 (1979) (despite parallel phrasing of foreign and interstate commerce clause "there is evidence that the Founders intended the scope of the foreign commerce power to be the greater."

[10] For further cases Swaine cites, see his article *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 Duke L.J. 1127, fn. 66 (2000).

general jurisprudence on foreign relations[11], no court has ever explicitly adopted this view, and "[w]hen it comes to the interpretation of the Compact Clause, it is widely taken for granted that agreements with foreign governments are on the same footing as interstate compacts." Fabien Gelinas, *The Constitution of Agreement: A Brief Look at Sub-Federal Cross-Border Cooperation,* 2006 Mich. St. L. Rev. 1179, at 1182 (2006). This is the position taken in the Restatement (Third) of the Foreign Relations Law of the United States §302(f) (1986). ("By analogy with inter-State compacts, a State compact with a foreign power requires Congressional consent only if the compact tends "to the increase of political power in the States which may encroach upon or interfere with the just supremacy of the United States.")
It is also the consensus view in scholarly literature[12] and in the courts that have so far weighed in on the question.

In *McHenry County v. Brady*, 37 N.D. 59 (1917), the Supreme Court of North Dakota upheld an agreement between that state and Canada regarding a water drain that ran between the two countries. In that case, the Court looked to *Virginia v. Tennessee*, noting in relation to

[11] E.g., Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) ("The United States . . . are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective."); The Chinese Exclusion Case, 130 U.S. 581, 606 (1889) ("For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (noting that the federal government "has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government" and that "[i]f it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations"); Henderson v. Mayor of New York, 92 U.S. 259, 273 (1875) (noting that regulation "must of necessity be national in its character" when it affects "a subject which concerns our international relations")

[12] See, eg, Herbert H. Naujoks, Compacts and Agreements Between States and Between States and a Foreign Power, 36 MARQ. L. REV. 219, 233 (1952-53); Matthew Schaefer, The "Grey Areas" and "Yellow Zones" of Split Sovereignty Exposed by Globalization: Choosing Among Strategies of Avoidance, Cooperation, and Intrusion to Escape an Era of Misguided "New Federalism", 24 CAN.-U.S. L.J. 35, 44 (1998); Editorial, The Power of the States to Make Compacts, 31 YALE L.J. 635, 635-36 (1922).

Holmes that "the later decisions of the [Supreme] court seem to adopt the theory that not all intercourse is forbidden, or contracts prohibited, but only those agreements or compacts which affect the supremacy of the United States, or its political rights, or which tend in any measure to increase the political power of the states as against the United States or between themselves." *McHenry County*, at 71. See also, eg, *Fraser v. Fraser*, 415 A.2d 1305, 1305 (R.I. 1980) (finding that the Court had changed from the literal approach used in *Holmes* to a 'functional view' of the Compact Clause.)

Also noteworthy is that while, as stated above, the Supreme Court has never explicitly overruled *Holmes*, it is also true that in *United States Steel*, when the Court distinguished *Holmes*, it had a clear opportunity to distinguish it on the basis of its foreign rather than interstate nature. Instead, the Court distinguished it on the narrower grounds that it dealt specifically with *extradition* with foreign nations, a power expressly reserved to the federal government. *United States Steel,* fn 15.

There is also text within *Virginia* that suggests it is intended to replace *Holmes*, at least in part. For instance, in *Holmes,* the Court wrote "the words 'agreement' and 'compact' cannot be construed as synonymous with one another" *Holmes,* at 571, while in *Virginia* the Court stated that they did not perceive any difference in the meaning of "compact" and "agreement." *Virginia,* at, 520.

While there is an argument for foreign and interstate compacts being treated differently as a whole, to suggest that in the Constitution, "compact" and "agreement" mean the same thing in terms of interstate compacts but different things in the context of foreign compacts would indeed be a "legal absurdity."

The state of reality also suggests that foreign agreements between states and foreign nations are not as forbidden as petitioner claims. Hollis acknowledges that 340 foreign agreements were concluded by 41 different U.S. states in the years between 1955 and 2009, including more than 200 between 1999 and 2009 on a wide variety of topics. *Unpacking,* at 744. Not one has been struck down.

Without further guidance from the Supreme Court, or indeed any federal court, we decline to be the first to read a Foreign Compact Clause into the Constitution, or to suggest that foreign compacts are held to a different standard than interstate compacts.[13] We therefore hold that under current precedent, the proper standard through which to examine the alleged agreement at question in this case is the standard in *United States Steel Corp.* v. *Multistate Tax Comm'n.*

III

A

The standard being determined, we now look to the actual executive order in question and apply it to that standard.

In a later Compact Clause case involving a challenge to interstate banking regulations, the Supreme Court explained that several classic "indicia" of a compact were missing. There was no compact because:

1. No joint organization or body was established.
2. No actions were conditioned on action by another party.

[13] Aside from the possibility that a deal with a foreign sovereign would as a general rule possibly be more likely to encroach upon the supremacy of the federal government. See, e.g., *United States v. California*, 332 U.S. 19, 35 (1947) ("[P]eace and world commerce are the paramount responsibilities of the nation, rather than an individual state . . . ."); *Clark v. Allen*, 331 U.S. 503, 517 (1947) (describing the "forbidden domain of negotiating with a foreign country"); *United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively.")

3. All parties were free to unilaterally modify or repeal their law.
4. Neither party required reciprocation from another party.

Northeast Bancorp v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, at 175 (1985).

We examine these indicia in turn and apply them to the facts of the executive order in question.

1. No joint organization or body was established for regulation or any other purpose.

EO12 certainly appears to have ambitions to create joint bodies, but not necessarily regulatory bodies, nor anything of substance. The order proposes: a committee on Emergency Management be created to share emergency resources and funds in the case of severe natural disasters, EO12, e(i)(2)(a); a committee for security is proposed to share policy and security information, Id, e(3); an Environmental Initiative to work on cooperating on regulations and for other purposes, Id, e(ii)(3)(a); a committee for Agribusiness and Wildlife, Energy, and Environment and Water for collaboration in a number of areas, Id, e(ii)(4); a committee for Art and Culture, Education, and Health Services, to sponsor exchange trips, provide favorable preference to candidates from participatory states, and scientific research to be shared with universities and agencies in the involved states, Id, e(iii)(4); a Board of Commerce to work on easing regulations and fostering economic cooperation for members, Id, e(iv)(1)(a) and; a committee for Economic Development, Financial and Legal Services, Real Estate, Tourism, and Infrastructure and Ports to do the same, Id, e(iv)(1)(b).

To date, no appointments have been made to any of these various bodies by the Governor, and there is no evidence

whatsoever on the record that Canada, Mexico, nor any of the specific regions involved (British Columbia, Baja California, Sonora, and Chihuahua) have been in contact with Sierran authorities, have agreed to cooperate in any way, or are even aware of the Governor's idea.

More importantly, it does not appear any of these bodies is intended to have any kind of binding authority--or any authority, really--over any of the hypothetical parties. In other words, the bodies created have "no authority ordinarily associated with a regulatory organization." *United States Steel*, at 481. The facts in *United States Steel* are similar. Article IV of the Compact discussed in that case authorized the body to "'[s]tudy State and local tax systems…', '[d]evelop and recommend proposals…' and… 'assist the party States in implementation...'" Id. The bodies created seem to be created to collaborate and cooperate, but these powers "are strictly limited to an advisory and informational role." Id.

2. No actions were conditioned on action by another party.

Here, we run into an interesting dilemma. EO12 explicitly says, in a final catch-all clause, that "The Union is only intended to provide cooperation between participants and does not create any legally binding rights or obligations, nor is any part of this order meant to supersede or interfere with federal law." EO 12, section v. On the other hand, certain provisions within the order appear to unambiguously attempt to create such rights or obligations. For instance, section iii(1) reads "Sierra public universities shall provide favorable preference to candidates from participatory states." It is very difficult to find a reading where this provision is not a direct instruction by the Governor to Sierra's public universities to provide favorable admissions preference to candidates from the states participating in the Union. The provision says they *shall* grant that favorable preference to those

candidates. Further, it identifies an action that must be taken by a foreign government as a condition for that preferential treatment (participation in the Union.) The inverse would suggest that if a party were to leave the Union, they would lose the preferential treatment.

Section iii(3) is similar. The section reads, "[s]cientific research conducted by the Sierra government or public universities shall be made available to universities and agencies within the Union." In other words, if a party joins the union, the Governor is ordering entities to share scientific research with them, which would presumably not be shared if they were not a member of the Union.[14]

The rest of the agreement can be read consistently with section v, at least to this point. While there are many aspirations, there do not appear to be any other provisions where one side gets something specific in exchange for the other side taking an action. There are other sections that make vague promises, such as eased regulations to Union members, but nothing that is specific enough to be actionable.

Even the promise of preferential treatment is vague, and begs many questions as to specifics. It appears too vague to be actionable, and courts have found that arrangements where multiple parties have agreed "fall under the universally recognized but implicit rule that the Compact Clause does not apply to 'good faith' or 'handshake' agreements, or even 'memoranda of understanding.' These have in common the loosely defined intention of not being legally binding, though many include terms that would otherwise be considered as generating obligations." *McHenry County,* at 544.

[14] While this is not explicitly stated in the order, one must wonder why the provision would exist if it was covering only research that would be available whether or not another party is part of the Union.

3. All parties were free to unilaterally modify or repeal their law.

Instead of a law in this case, we have an order. There appears to be no doubt that Sierra could rescind or change this order on a whim, or that any other party could come or leave freely and participate in only the sections of the agreement they wish to. There is no mechanism specified for entry or exit, nor are there any penalties or restrictions preventing anyone from doing so.

4. Neither party required reciprocation from another party.

There is no reciprocation requirement. While there are vague promises of cooperation, there is no penalty for not cooperating, and cooperation, despite the "shall" language, appears to be entirely optional.

Taken together, these factors point to a lack of a Compact currently being in place.

B

We now address the elephant in the room, which also weighs heavily in favor of the state: there does not appear to be an agreement between Sierra and any of the proposed participants in the Union.

A compact is a contract. *Green v. Biddle*, 21 U.S. 1, at 7 (1823). A contract is a "promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement of the Law, Contracts 2d §1. For purposes of our analysis, there is no notable difference in the meaning of compact and agreement. In *Virginia v. Tennessee*, the Court wrote, "Compacts or agreements -- and we do not perceive any difference in the meaning, except that the word 'compact' is generally used with

reference to more formal and serious engagements than is usually implied in the term 'agreement'..." Id, at 520. While this might leave one to wonder why the drafters used two different words if they mean the same thing, this is the best guidance we have on that issue from the Supreme Court.

Virginia v. Tennessee also gives us some guidance on the issue of the committees and other bodies created. The Court explained, "The mere selection of parties to run and designate the boundary line between two States, or to designate what line should be run, of itself imports no agreement to accept the line run by them, and such action of itself does not come within the prohibition." *Id*, at 520.

We read this passage to essentially say that an "agreement to agree" or an agreement to consider something does not rise to the level of a compact or agreement for Compact Clause purposes. Many of the clauses of EO12 fit into this category.[15]

IV

The Governor's order is long on promises and short on specifics. There are promises to work on strengthening ecological efforts, forming joint carbon marketplaces, fostering incentives to work together, share funds in the case of natural disasters, easing regulations, and a host of other things. Despite this, there is nary a specific, and at its heart, EO12 does not do much of anything.

The state is agreeing to *try* to agree to do *something* in these areas, but based on our reading of *Virginia* and *United States Steel*, this is not enough. When and if Canada and Mexico agree to participate, and when those

[15] We also note that even by the *Holmes* standard, it is very possible that EO12 would not violate the Compact Clause. Even the extraordinarily broad reading of the Compact Clause in *Holmes* notes that there must be something assented to by both parties, *Holmes*, at 572, despite Justice Catron's complaint that they did not follow their own statement.

specifics are ironed out, there may well be violations of the Compact Clause or other doctrines[16] in play, but to say there has already been one is premature at this stage. The standard under *Virginia v. Tennessee* for a Compact to be voided is a high one, and "[c]ourts have in fact never struck down [a compact] for lack of congressional consent, finding in every challenge brought since 1893 that consent was not required under the Compact Clause." *Negotiating Federalism,* at 1181.

Here, since no second party has agreed to join, participate in, or even listen to any proposal, it is simply not possible that Sierra has entered into an agreement or compact with a foreign state at this stage. There are potential outcomes of EO12 that would violate the Compact Clause, and potential outcomes that would not. Whether or not the Clause is violated will require an inquiry into the specifics of the action, which we do not yet have.

If the goals of EO12 are acted upon, it would result in a constitutional minefield that might prove impossible for Sierra to traverse, but they have not set out on that trek yet. In a way, the order's toothlessness and lack of utility has saved the state's (Canadian) bacon.

For those reasons, EO12 is allowed to stand for the time being. Should anything come of it, those actions would, of course, be open to challenge in their own right.

It is so ordered.

[16] Preemption, for instance, might prove relevant. A preemption claim was not raised in this case, and when asked if any provision of EO 12 conflicted with federal law or treaty petitioner was unaware of any such conflict. See Oral Argument. As the issue was not raised, we take no position and do not rule on that question.

SUPREME COURT OF SIERRA

IN RE: EXECUTIVE ORDER #12: THE SIERRAN NORTH AMERICAN UNION

[July 5, 2019]

CHIEF JUSTICE CHEATEM, concurring.

Article I, section 10, clause 3 of the United States Constitution provides as follows: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ."

In a sane world, under a rational jurisprudence, we would interpret "no state" as meaning "no state" and "any agreement" as meaning "any agreement"; the analysis would, and ought to, end there: EO12 attempts to enter the state into an agreement or compact between itself and a "foreign power"; as a result, the order ought to be found constitutionally infirm and of no effect.[17]

[17] We are also asked to believe that the nonexistence of any formal consent by a foreign power renders the "agreement" or "compact" nonexistent here. This argument is unpersuasive; the law of criminal conspiracy shows why. For some time, the charge of criminal conspiracy--a crime in which two or more persons agree to undertake a criminal act--required both persons to intend to agree to the criminal act. Lessons of time have since revealed that this requirement defeats the rule.

Accordingly, the majority rule now follows that proposed under the Model Penal Code, where the charge of criminal conspiracy may be brought where one party believes he has made an agreement to engage in an unlawful act even if the other party has subjectively intended not to engage in any such act. I see no reason why a parallel rule should not apply here, which also involves unlawful agreements between parties.

CHEATEM, C.J., concurring

Whether the agreement in question tends to "increase" the "political power in the states" or "encroach upon or interfere with the just supremacy of the United States" ought to be treated as inane policy questions irrelevant to the legal questions before us, not legitimate considerations upon which the outcome of this case turns. The Compact Clause does not specify that it prohibits agreements and compacts that tend to increase the "political power in the states." It instead says "no" state may enter "any" agreement or compact. In short, and with apologies to Dr. Seuss, whose constitutional interpretation credentials now exceed those of the federal high court: The Constitution meant what it said and said what it meant.

Alas, this Court lacks the power to undo rulings of the United States Supreme Court on matters of federal law, no matter how Kafkaesque they might be. Instead, as the Majority's twenty-four page tome reveals, we are required to set aside all reason and principles of constitutional interpretation when considering the Clause. Finding ourselves lightyears from home in search of a coherent jurisprudence, and having thus departed into *Interstellar*'s Tesseract, wherein anything is possible provided one tries hard and believes in oneself, we must today find that "no state" means "some states" and that "any agreement or compact" means "some agreements or compacts so long as the unelected justices of the United States Supreme Court happen to like their substance."

Exhausted and reluctantly, I therefore concur.

In light of the above, the notion that we must wait until the State of Sierra has in fact created its own version of the European Union is preposterous.