The Constitutionality of Multistate Litigation under Article I's Compact Clause

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Introduction

Multistate litigation[1] is enjoying a heyday. State attorneys general (AGs) routinely band together with their counterparts across the country, wielding the combined power of their offices to target federal or corporate activity. Indeed, the Trump administration was hit with nearly 160 multistate challenges during its one term,[2] and corporations faced 36 multistate actions on antitrust grounds alone in one recent year.[3] These suits have become so common that big law firms have started to create whole practice groups to defend against them.[4] In very little time, multistate litigation has woven its way into the fabric of American law.

Despite this growth, multistate litigation remains under-examined by academics, particularly constitutional legal scholars. This is concerning because the practice arguably implicates constitutional principles, such as federalism and the separation of powers—and

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[1] This paper uses Professor Paul Nolette's definition of multistate litigation: suits in which "two or more [state attorneys general] coordinate efforts in a case or controversy with a third party." Ongoing cooperation in several aspects of the suit, especially the pooling of resources, is a distinguishing feature. PAUL BRIAN NOLETTE, ADVANCING NATIONAL POLICY IN THE COURTS: THE USE OF MULTISTATE LITIGATION BY STATE ATTORNEYS GENERAL 14–15 (2011).

[2] *Multistate Litigation Database*, AttorneysGeneral.org (accessed May 2, 2022), https://attorneysgeneral.org/multistate-lawsuits-vs-the-federal-government/list-of-lawsuits-1980-present/. Multistate suits against the federal executive are a bipartisan sport; the Obama administration faced nearly 80 such actions. *Id.*

[3] *Keyword Search: "Year Initiated: 2005,"* NAAG STATE ANTITRUST LITIGATION DATABASE, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL (accessed May 1, 2022), https://www.naag.org/issues/antitrust/state-antitrust-litigation-and-settlement-database/results/?_year_initiated=2005.

[4] *E.g.*, Patty Tascarella, *Jones Day starts State AG Enforcement practice*, PITTSBURGH BUSINESS TIMES (Mar. 2, 2021), https://www.bizjournals.com/pittsburgh/news/2021/03/02/jones-day-starts-state-ag-practice.html.

possibly even contravenes them. This critique is not new. Lawmakers and legal observers have decried multistate litigation's seemingly shaky constitutional footing for at least two decades.[5] But as one scholar, Jason Lynch, noted in his defense of multistate litigation, the constitutional critique of multistate litigation has not been propounded comprehensively or seriously.[6] This paper aims to help rectify that. It is a formal attempt to contribute to the argument that multistate litigation threatens our constitutional order.

Specifically, this paper argues that multistate litigation may flout the constitutional principle of federalism, as evidenced by its transgression against the federalist balance enshrined in Article I's Compact Clause. The argument proceeds in four Parts. As a preliminary step, Part I places this paper's Compact Clause thesis in the context of the broader constitutional argument against multistate litigation. Part II dives into the Compact Clause thesis, examining modern case law to determine the legal standard for finding a constitutional violation under the Compact Clause. Part III applies this standard to multistate litigation, with reference to specific lawsuits involving state AGs. It makes the case that multistate litigation may violate the Compact Clause. Part IV considers ways forward for academics seeking to explore the constitutional argument against multistate litigation, in light of this Compact Clause thesis. All signals indicate that

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[5] *See, e.g.*, Attorney General Bill Pryor, Legal Backgrounder, *Government "Regulation by Litigation" Must Be Terminated*, 16 WASH. L. FOUND. (May 18, 2001) ("Government-sponsored litigation is today's greatest threat to the rule of law."); David J. Morrow, *Transporting Lawsuits Across State Lines*, N.Y. TIMES (Nov. 9, 1997) (featuring a critique of state attorneys general from Senator John McCain in the 1990s).

[6] Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUMBIA L. REV. 1998, 2000 (Dec. 2001) ("The critics thus far have made their claims primarily in speeches, policy papers, remarks during panel discussions at think tanks and conferences, and in newspaper opinion pieces. Their analyses are often framed in overheated terms."). Review of the literature shows that Lynch's claim remains essentially true.

multistate litigation is here to stay. This paper cautiously questions whether this new status quo is in keeping with the rule of law.

I. The Overall Constitutional Problem with Multistate Litigation

From a constitutionalist perspective, the fundamental issue with multistate litigation is that it does not fit neatly into the constitutional design.[7] The Framers assumed certain balances: a horizontal balance that checks the branches of government against each other and a vertical balance that checks the national and state governments.[8] Multistate litigation upsets these two balances. To explain this idea further, this Part provides an overview of this general constitutional disagreement with multistate litigation and shows how this paper's Compact Clause thesis connects to that broader context. That is, academics could argue that multistate litigation contradicts the constitutional order in many ways. In the galaxy of those arguments, the Compact Clause thesis is just one star, but it is connected to the others through a series of constellations. Thus, it is worth understanding them all to an extent. Consider this Part a rudimentary sky chart.

The Constitution empowers Congress exclusively with the discretion to design our nation's laws and policies.[9] Most constitutional attacks on multistate litigation flow from this statement. When a federal body other than the legislature writes national policy, it is a separation

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[7] The same could be said of state AGs. They are, at once, executive, legislative, and judicial actors empowered by their states whose work nonetheless implicates federal interests. NOLETTE, ADVANCING NATIONAL POLICY IN THE COURTS: THE USE OF MULTISTATE LITIGATION BY STATE ATTORNEYS GENERAL at 4. Though not explicitly explored further in this paper, this problem is a background factor throughout the issue of multistate litigation.

[8] *See* THE FEDERALIST NO. 48 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 9 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[9] U.S. Const., art. 1, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States.").

of powers violation. Thus, constitutionalists accuse federal judges who overstep their authority of judicial activism[10] and lambast the ballooning federal agencies as products of unconstitutional delegation.[11] When a state legislature, as opposed to Congress, writes national policy, it is a federalism violation. For example, courts have struck down state laws that limit farmers' ability to transport cantaloupes[12] and cities' ability to dispose of waste[13] across state borders under the Dormant Commerce Clause. Congress's authority over the legislative power is not ironclad; for example, executive agencies may write nationwide regulations without offending the Constitution.[14] But beyond accepted limits, policymaking by a non-legislative or non-federal actor violates the rule that empowers Congress alone to write law, as visualized below.

***Chart A.* What kind of government actor wrote the national law/policy?**

	Legislative	**Non-legislative**
Federal	**U.S. Congress** *Proper under Art. I. No violation.*	**Federal courts, POTUS, agencies, etc.** *Separation of powers violation.*
State	**State legislature** *Federalism violation.*	

[10] *E.g.*, David B. Rivkin Jr. & Andrew M. Grossman, *The Temptation of Judging for 'Common Good*,' WALL ST. J. (Jul. 23, 2021) (lambasting the theory of "common-good constitutionalism" as an elevation of conservatives' preferred policy preferences over "legalistic or procedural questions such as individual rights, limited government and separation of powers").

[11] *E.g.*, Joseph Postell, *The Nondelegation Doctrine after Gundy*, 13 N.Y.U. J.L. & LIBERTY 280, 283 (2020) ("Under this theory, the delegation of legislative power is problematic because it leads to a combination of legislative and executive powers, which are constitutionally required to remain separate.").

[12] Pike v. Bruce Church, 397 U.S. 137 (1970).

[13] C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).

[14] *See* Schechter Poultry Co. v. U.S., 295 U.S. 495 (1935).

Multistate litigation occupies the empty lower-right quadrant of the previous chart. That is, it is a double whammy. It enables non-legislative *and* non-federal actors, state AGs, to design nationwide policy discretionarily (e.g., through corporate settlements that have the same policing effect on multinational companies as federal regulations). As such, it implicates federalism and separation of powers problems at once, which is the crux of the constitutional problem. There are some specific constitutional provisions that help to substantiate this argument. For instance, it could be claimed that the U.S. Constitution requires that states have distinct executive, legislative, and judicial authorities[15] and that state AGs blur that distinction when they bring suits in multistate litigation. From there, it could be argued further that state AGs operate as judicial actors when they enter into multistate litigation[16] yet impermissibly seek to redesign national laws and policies like legislators. The chart below is intended to provide an instructive, rather than exhaustive, list of the doctrines that could help illustrate the potentially unconstitutional foundations of multistate litigation.

***Chart B.* Multistate litigation and examples of constitutional violations**

	Non-legislative actor
State actor	**State AG (multistate litigation)** *Federalism violation: Compact Clause.* *Federalism violation: Supremacy Clause.* *Federalism violation: Dormant Commerce Clause.* *Federalism violation: Federal preemption.* *Federalism violation: National security.* *SOP violation: AGs as executive actors.* *SOP violation: AGs as judicial actors.* *SOP violation: courts as judicial actors.* *SOP violation: state constitution's SOP clause.* *SOP violation: U.S. constitution presumes state SOP.*

[15] *See* Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 Roger Williams Univ. L. Rev. 51, 52 (1998) (showing that "several provisions of the federal Constitution assume a significant difference between the branches of government," such as the Seventeenth Amendment's separate procedural requirements of states' executives and legislatures and Article III's implicit premise that states will have their own trial courts).

[16] *Cf.* Van De Kamp v. Goldstein, 555 U.S. 335, 344 (2009) (holding that prosecutors act in judicial capacity when performing functions "directly connected with the conduct of a trial").

The scope of this paper is intentionally limited to just one of these arguments, the Compact Clause thesis premised on the federalist balance. It aims to lend weight to one facet of the academic argument against multistate litigation, in the hopes of contributing to a larger constitutional legal discussion. That said, scholars have rightly observed that "many elements of [the constitutional] design remain poorly understood even after more than two centuries, and [any] brief discussion [premised on that design] is unlikely to be satisfying."[17] In an effort at overcoming this inherent challenge, this paper focuses on outlining the contours of the Compact Clause argument at a high level, rather than getting bogged down in fringe cases or questions of unusual types of multistate litigation, the resolution of which would perhaps hinge on a clearer elucidation of federalism's ill-defined borders than the legal academy has yet been able to put forward. A discussion of such cases would make a good candidate for future separate study.

II. Compact Clause Law

State AGs who bring suits in multistate litigation may run afoul of the Compact Clause. This Part explains this oft-ignored doctrine of constitutional law. The Compact Clause is a constitutional provision that undergirds the federalist balance by limiting the ability of the states to act in unity without federal permission. It provides that "[n]o State shall, without the consent of Congress,…enter into any Agreement or Compact with another State."[18] On its face, this provision seems to demand a lot. For instance, was it unconstitutional for regional groups of states to coordinate their COVID-19 responses at the start of the pandemic?[19] Do Missouri and

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[17] Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1232 (1994).

[18] U.S. Const., art. 1, § 10.

[19] *E.g.*, David Eggert, *7 Midwest states say they'll partner on reopening their economies*, PBS (Apr. 16, 2020), https://www.pbs.org/newshour/nation/7-midwest-states-to-partner-on-reopening-the-economy (Midwest Governors Regional Pact); *Governors of California, Oregon,*

Illinois violate the Constitution every time the greater St. Louis metropolitan area adopts a standardized policy? Read literally, the answer appears to be yes, as the Compact Clause would seem to bar all interstate agreements.

But common sense, history, and the case law prove otherwise.[20] Precedent is illustrative here. In its leading case on the subject, *U.S. Steel Corporation v. Multistate Tax Commission*, the Supreme Court held that the Compact Clause was not violated where twenty-one states formed a Multistate Tax Commission to promote tax law uniformity and support multistate taxpayers, even though the Commission was never congressionally approved.[21] Per the Court, a textual reading of the Compact Clause would implicate too many interstate agreements. Instead, the Clause must be read to control only agreements "tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[22] That is, the Compact Clause prohibits only the multistate usurpation of federal power. Because the Multistate Tax Commission merely allocated the tax power already afforded to the states, instead of intruding into the federal tax domain, it was not the type of state agreement that implicated the Compact Clause. In this way, the Supreme Court placed the vast majority of interstate agreements outside the ambit of the Compact Clause.[23]

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and Washington make deal to reopen economies, REUTERS (Apr. 13, 2020), https://www.reuters.com/article/health-coronavirus-west-coast/governors-of-california-oregon-and-washington-make-deal-to-reopen-economies-idUSL2N2C11BC (Western States Pact).

[20] *See, e.g.*, Virginia v. Tennessee, 148 U.S. 503 (1893) ("[It] would be the height of absurdity to hold that…the terms 'compact' or 'agreement' [in Article 1, § 10] apply to every possible compact or agreement between one state and another.")

[21] U.S. Steel Corp. v. Multistate Tax Commission, 434 U.S. 452 (1978).

[22] *Id.* at 471.

[23] Additionally, the legal establishment has historically minimized the Compact Clause's importance. As one scholar noted drily, "The Compact Clause…always has been [] ignored by

As a result of the case law evolving from *U.S. Steel Corporation* and other cases, courts implement a multi-step test to determine whether a particular interstate agreement violates the Compact Clause.[24] The first step asks whether a joint state action is a compact, meaning a real agreement among at least two states.[25] This inquiry draws on factors the Court has called the "classic indicia" of an interstate compact,[26] including the level of coordination, the formal establishment of a joint entity, the ability of the states to disregard or modify the joint action, reciprocation among the states, and more. The second step asks whether the compact increased the states' power at the expense of federal power, as in *U.S. Steel Corporation.* In the alternative, a third step asks whether the interstate compact encroached on the powers of states not party to the compact.[27] If an interstate compact impinges on either of the protected powers in steps two

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all relevant constitutional actors." Roderick M. Hills, *Keeping the Compact Clause Irrelevant*, 44 HARV. J.L. & PUB. POL'Y 30, 30 (2021). This disregard is partly rooted in the provision's history. At the dawn of the country, the Framers worried that states would band together and ally with foreign countries to oppose the new U.S. government, especially European powers that, at the time, controlled territory throughout the North American continent. *See* THE FEDERALIST NO. 5 (John Jay) (Clinton Rossiter ed., 1961); *see also* Hills, *Keeping the Compact Clause Irrelevant,* at 32 (noting particular concern that western states would contract with Spain for access to the Mississippi River).The Compact Clause was their response. As that fear receded, so too did the legal establishment's focus on the Compact Clause. Additionally, as the federal government expanded dramatically over the course of the 20th century, most constitutional legal scholars concerned about federalism focused their ire on protecting the states from federal encroachment, not the reverse. *See, e.g.*, Lawson, *The Rise and Rise of the Administrative State*, at 1233. The Compact Clause, designed to protect the federal government, fell out of favor. As a result, the Clause has been under-studied and rarely utilized.

[24] *See generally* Jeffrey B. Litwak and John Mayer, Feature, *Developments in Interstate Compact Law and Practice 2020*, AM. BAR ASS'N (Jul. 7, 2021).

[25] *See* Arizona v. California, 373 U.S. 546, 550-51 (1963) ("By definition, a state compact is an agreement, treaty, or contract among two or more states.").

[26] Northeast Bancorp v. Bd. of Governors of Federal Research System, 472 U.S. 159, 175 (1985).

[27] *Id.* at 176.

and three, then it violates the Compact Clause, unless Congress has given statutory consent to the compact either formally or implicitly. While some scholars have attached additional prongs to this test,[28] the steps listed here comprise the basic inquiry in every Compact Clause case in modern judicial history.

In practice, the second step of this test is the crux of the modern Compact Clause doctrine. Courts have adjudicated scores of cases based on whether an interstate compact encroaches on federal powers.[29] Presumptive federal powers may include that over water and resources disputes, alliances with foreign countries, agreements that raise political questions, or commercial privileges deals.[30] Under this test, at least 200 interstate compacts are in formal operation now without posing constitutional problems.[31] Given the importance of this second

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[28] For example, Lynch argues for the existence of an unstated additional inquiry, asking if "the subject of the compact [is] such that it is invalid notwithstanding Congressional approval." Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, at 2018. The American Bar Association notes that the interstate compacts tend to be the product of state legislation, rather than of non-statutory action. Litwak and Mayer, *Developments in Interstate Compact Law and Practice 2020*.

[29] *E.g.*, Bimber's Delwood v. New York, 496 F.Supp.3d 760 (W.D.N.Y. 2020) (finding that a COVID-19 agreement among governors did not constitute a compact because it was the domain of the states, not the federal government, to respond to sickness); Texas v. New Mexico, 138 S.Ct. 954 (2018) (observing the existence of a compact where the Rio Grande Compact "could jeopardize the federal interest" and where the federal government was integral to the Compact's operations); Kaul v. Fed'n of State Medical Bd., 2021 WL 1209211 (D.D.C. 2021) (finding that an interstate medical licensing body was not a compact because licensing is "a vital part of a state's police power").

[30] *See* Stearns v. State of Minn., 179 U.S. 223, 247 (1900).

[31] Litwak and Mayer, Developments in Interstate Compact Law and Practice 2020 ("[T]here are more than 200 current compacts that address subjects as varied as social services delivery; child placement; education policy; emergency and disaster assistance; corrections, law enforcement, and supervision; professional licensing; water allocation; land use planning; environmental protection and natural resources management; and transportation and urban infrastructure management.).

step, the question of most Compact Clause cases is essentially this: *Does the interstate compact impermissibly encroach on federal supremacy?* If the answer is yes, then the interstate compact, in the absence of congressional approval, violates the U.S. Constitution. As this paper shows in the next Part, this is the question at the heart of the multistate litigation analysis, too.

III. How Multistate Litigation Violates the Compact Clause

If the lawsuits initiated by state AGs in multistate litigation are interstate compacts that impermissibly encroach on federal power, then they are illicit under the Compact Clause. This Part demonstrates that they often are. It takes as given that multistate litigation suits are indeed compacts, per the first step of the Compact Clause analysis, and that they generally do not get congressional approval.[32] More to the point, this Part argues that multistate litigation represents state encroachment on federal powers when state AGs' intent or effect is to usurp a federally designed nationwide policy, making decisions that should be left to the federal government. While not every multistate lawsuit has this intent or effect, many cases do, raising questions about the practice as a whole. This Part examines the ways in which multistate litigation encroaches on federal power, which the Compact Clause forbids.

The intent of state AGs in multistate litigation is often to bypass the federal government to implement a preferred policy regime. This paper does not accuse state AGs of malice; often,

[32] These assumptions are easily made. First off, in a paradigmatic multistate litigation, Congress does not give "expressed or implied approval" to a multistate lawsuit by means of statute, which is what the Court requires. Virginia v. Tennessee, 148 U.S. at 521. Second, courts tend to be liberal in doling out the compact label. While multistate litigation is admittedly unusual in that agreements are sometimes not highly formalized (especially in parallel state court suits), courts have greatly emphasized characteristics like states' degree of coordination, united purpose, and integrated work—all factors that are typical in multistate litigation. *See* Litwak and Mayer, Developments in Interstate Compact Law and Practice 2020. Moreover, Compact Clause jurisprudence does not tend to concern the substance of these two assumptions. Dwelling on them would take this paper into off-road terrain.

their settlements get at noble ends, like automobile safety[33] or truthful pharmaceutical marketing.[34] But from its inception, multistate litigation has existed in concert with state dissatisfaction with, and attempted circumvention of, federal policy choices. During the Reagan and Bush administrations in the 80s and 90s, the federal government consciously adopted a deregulatory agenda, sharply dialing down its policing of corporations, with particular regard to antitrust and consumer protection violations.[35] Into this void, state AGs strode forth. In the early 90s, then-Mississippi Attorney General Moore united forty-six states, plus territories, in a lawsuit against the four major tobacco companies. As then-Alabama Attorney General Pryor noted at the time, "The states that have sued the tobacco industry are using the courts in an effort to circumvent [] Congress… Liberals do not believe that legislators will raise cigarette taxes."[36] On the other side of the aisle, then-Massachusetts Attorney General Green has said, "[The tobacco industry] clearly had had a very effective lobbying effort in Washington…We were not going to get help from the federal government."[37] In other words, AGs took the fight upon themselves as

[33] Press Release, *Attorney General Letitia James Announces $85 Million Multistate Settlement with Honda Over Airbag Failures*, OFFICE OF ATTORNEY GENERAL LETITIA JAMES (Aug. 25, 2020).

[34] Press Release, *Attorney General Josh Shapiro and 50 AGs Reach $13.5 Million Settlement with Pharmaceutical Company for Misleading Marketing of Four Drugs*, OFFICE OF ATTORNEY GENERAL JOSH SHAPIRO (Dec. 20, 2017).

[35] Pryor, *Government "Regulation by Litigation" Must Be Terminated*, at 1.

[36] Bill Pryor, *The Law is At Risk in Tobacco Suits*, N.Y. Times (Apr. 27, 1997), https://www.nytimes.com/1997/04/27/opinion/the-law-is-at-risk-in-tobacco-suits.html.

[37] Interview with Tom Green, "The Tobacco Settlement," at 11:27 (commenting on the congressional committees' and the FDA's inaction).

part of a conscious effort to override the federal government's inaction. Four years later, their coalition won, securing a multibillion-dollar settlement.[38]

The precedent was set. Between 2000 and 2019, state AGs successfully cooperated 644 times in lawsuits on corporate misconduct grounds, winning over $100 billion largely through settlements.[39] In roughly a third of these instances, a majority of the fifty-six state AGs joined the multistate suit.[40] When the federal government failed to sufficiently deter or investigate the misconduct of nation-wide players like Citibank, Target, Aetna, Wells Fargo, Bank of America, Uber, Target, Johnson & Johnson, and many, many more, the state AGs began stepping in to do it in the federal government's place.[41]

An example helps illuminate the genre. In 2004, the federal Office of the Comptroller of the Currency (OCC) issued regulations shielding some banks from consumer protection laws.[42] All fifty state AGs objected.[43] Not satisfied with merely submitting comments to the OCC—that is, participating in the prescribed federal process—then-New York Attorney General Spitzer

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[38] *See generally id.*

[39] Philip Mattera & Anthony Kay Baggaley, *Bipartisan Corporate Crime Fighting by the States: How Blue and Red State Attorneys General Cooperate in Addressing Big-Business Misconduct*, GOOD JOBS FIRST, at 2 (Sept. 2019).

[40] *Id.*

[41] *See Multistate Litigation Database*, AttorneysGeneral.org.

[42] Press Release, *Statement By Attorney General Eliot Spitzer Regarding Preemption of State Consumer Protection Laws*, OFFICE OF ATTORNEY GENERAL ELIOT SPITZER (Jan. 7, 2004).

[43] *Id.*

soon organized an attempt to get the regulations thrown out in court.[44] Why accept the status quo when you have the power to unmake it?

The problem with this approach is that the Constitution assigns the power of governing the economy to the U.S. Congress, not the states. The *Spitzer* effort did not work. The Southern District of New York determined that the national banks fell within the longstanding domain of the federal government and that the OCC was well within its power to set the regulations.[45] No AG had the right to overpower the OCC's policy.[46] As one observer concluded, "state attorneys general have begun replacing federal actors as the regulators of the national economy…*Spitzer* presents a rare instance in which a court rebuffed [their] attempt."[47] At first glance, the *Spitzer* outcome seems easy. After all, the national banks have been incontrovertibly under federal purview since at least the days of *McCulloch v. Maryland*.[48] However, the implications of the *Spitzer* view are further-reaching, because the same is true of commerce itself. Just five years after *McCulloch*, the Court held that Congress's "power to regulate commerce extends to every

[44] It is worth nothing that this was a suit against the federal government, not against a corporation. While the Compact Clause thesis holds true in both types of suits, this paper focuses more predominantly on corporate suits (as was the focus in class). Nonetheless, the latter type of suit typically ends in a settlement, with no judge ever making the final call. This paper includes this example of a suit against the federal government to import in at least one federal court's analysis of the state AG multistate litigation issue.

[45] Office of Comptroller of Currency v. Spitzer, 396 F.Supp.2d 383, 404 (S.D.N.Y. 2005).

[46] *Id.*

[47] Recent Cases, *Federal Preemption—State Attorney General Power—Office of the Comptroller of the Currency v. Spitzer, 396 F.Supp.2d 383 (S.D.N.Y. 2005)*, 120 Harv. L. Rev. 627, 629–630 (2006).

[48] McCulloch v. Maryland, 17 U.S. 316 (1819) (finding Congress's Article I powers supreme to the power of state legislatures in a case over Maryland's attempted regulation of the Second Bank of the United States).

species of commercial intercourse…among the several states," a "power that acknowledges no limitations."[49] States may not wield Congress's regulatory commercial power: "[When] a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."[50] But when state AGs bring suits against massive companies, when they band together so that the outcomes of their lawsuits change the way entire national industries must run, their intent, even if indirectly, is to police the instruments of interstate commerce. That AGs do so by uniting in multistate coordination makes their actions arguably a Compact Clause violation as well.

Troublingly, state AGs have also begun to use multistate litigation as a potent weapon in fighting their partisan policy battles, illustrating their intent to make a nationwide political impact. As Professor Nolette noted, early multistate suits were typically premised on nonpartisan state-interest grounds.[51] Recently, however, observers have seen more Democrat and Republican state AG suits. For instance, are we really to believe that the state AGs of Texas and Louisiana sued Planned Parenthood earlier this year primarily to protect the integrity and the coffers of their state Medicaid programs, the subject of the suit?[52] Or that it mere state-interest stewardship

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[49] *Gibbons v. Ogden*, 22 U.S. 1, 193, 196 (1824).

[50] *Id.* at 199–200 ("But when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do.").

[51] *See* PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA (2015) (contrasting the Clinton years' multistate suits with the more partisan suits in the late 2000s and early 2010s).

[52] *See* Complaint, Texas v. Planned Parenthood, Civil Action No. 2-21-CV-022-Z (2022), available at https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Final%20Tex's%20Complaint%20in%20Intervention.pdf.

motivated the Minnesota and DC AGs who filed parallel lawsuits against Exxon (and in Minnesota's case, Koch Industries) over petroleum's carcinogenic climate effects?[53] State AGs often aim to effectuate their own national partisan policy goals via multistate litigation, despite the fact that in doing so, they step into the federal government's policymaking domain.

The effect of these efforts is to upset the constitutional order. As previously stated, the Constitution exclusively assigns the legislative power to Congress, including the power to regulate interstate commerce[54]—a power that has, over and over again, been broadly construed.[55] The decision to regulate, say, the size of the print in DIRECTV's nationwide advertisements thus falls to Congress.[56] If Congress declines to regulate DIRECTV, that itself is an exercise of Congress's regulatory discretion, not an abdication of it. Put another way, the absence of congressional action does not deprive Congress of its exclusive regulatory power in a way that invites the states to regulate companies themselves. The principle of federalism assumes—even enshrines—a balance between the federal and state governments, in which the two work in

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[53] *See* David Hasemyer, *Minnesota and the District of Columbia Allege Climate Change Deception by Big Oil*, INSIDE CLIMATE NEWS (June 25, 2020), https://insideclimatenews.org/news/25062020/minnesota-climate-change-lawsuit-exxon-mobil-api-koch-industries/.

[54] U.S. Const., art. 1, § 8, cl. 3.

[55] *See, e.g.*, U.S. v. Hill, 927 F.3d 188, 195–96 (4th Cir. 2019) (holding that the Commerce Clause gives Congress considerable authority over "three broad categories of interstate activity: (1) 'the use of the channels of interstate commerce,' (2) 'the instrumentalities of interstate commerce, or persons or things in interstate commerce,' and (3) 'activities that substantially affect interstate commerce" and thus extends even to hate crimes).

[56] *See* CJ Staff, *DIRECTV Told to Reform Advertising*, CAROLINA J. (Dec. 22, 2005), https://www.carolinajournal.com/directv-told-to-reform-advertising/.

tandem to cover the field of policy decisions.[57] While it could be argued that most policy decisions are reserved to the states,[58] the federal government nonetheless preempts the states in areas of concurrent authority.[59] The effort by state AGs to preempt Congress via multistate litigation flips this federalist principle on its head.

When state AGs occupy the federal government's space through multistate litigation, they do not merely substitute one policymaker for another. They alter the course of our country's law. For example, state AGs have secured corporate settlements that dictated what events companies can sponsor, what speech they could use in their advertising, and the extent of their lobbying.[60] If Congress tried to pass legislation doing the same, it would run afoul of the First Amendment's Free Speech Clause.[61] But because litigation settlements are entered into voluntarily, state AGs can win outcomes more restrictive than what the Constitution would permit—despite the fact that AGs are government actors. The fallout for the rule of law is not limited to Free Speech cases. Per Professor Nolette, "[state AGs] have brought agency-challenging litigation targeting federal administrative agencies, destabilized policy compromises in Congress, and used the enforcement of state statutes as a way to institute nationally applicable

[57] *See* Bond v. United States, 572 U.S. 844, 857–58 (2014) ("Among the background principles . . . that our cases have recognized are those grounded in the relationship between the Federal Government and the States under our Constitution.").

[58] U.S. Const., amend. X.

[59] *See* Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985) (interpreting the Tenth Amendment to afford power preemptively to Congress vis-à-vis the states); *see also* U.S. Const., art. VI, § 2 (Supremacy Clause).

[60] Pryor, *Government "Regulation by Litigation" Must Be Terminated*, at 3.

[61] U.S. Const., amend. I.

regulations stricter than those required by the federal government."[62] AGs can back corporations into accepting settlements that federal law would never require, in any domain. In numerous cases, the effect of multistate litigation is to replace the federal government's intended policy with that of the combined state AGs, empowering them to act as a federally unaccountable, junior-varsity Congress. This stands in direct opposition to what the Compact Clause permits.

Some have attempted to defend against the charges of multistate litigation's unconstitutionality. In his defense of multistate litigation, the aforementioned Jason Lynch submits that state AGs do not usurp national legislation because multistate litigation, like all litigation, must allege a complaint under existing law to move forward.[63] Since state AGs "cannot act unless the legislatures have acted first," they do not overstep their constitutional authority.[64] This argument is reasonable, but it does not bear out in practice. For one thing, most cases are settled out of court. A corporation faces the threat of prolonged, well-resourced litigation and bad publicity regardless of the merit of the AGs' claims, so there is no guarantee that AGs' cases do not advance specious or borderline claims. Furthermore, the fact that a multistate suit with nationwide implications is based on existing law does not mean it is based on existing *federal* law. States often bring parallel lawsuits in their own courts under state law. When these cases' settlements create a *de facto* regulatory standard for an industry, state legislatures effectively determine the course of nationwide, interstate commerce—which, again, seems to be at odds with the constitutional design. While Lynch's argument against this Compact

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[62] NOLETTE, ADVANCING NATIONAL POLICY IN THE COURTS: THE USE OF MULTISTATE LITIGATION BY STATE ATTORNEYS GENERAL at 11–12.

[63] Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, at 9.

[64] *Id.*

Clause thesis addresses some of the separation of powers issues underlying multistate litigation, it is not responsive to the fact that federalism, as expressed through the Compact Clause, still prohibits states from coordinating to step on the federal government's toes.

Moreover, it could be argued that because the Court has not devoted considerable attention to the problem of the Commerce Clause, multistate litigation is implicitly sanctioned by modern constitutional law. Such thinking would be a mistake. More accurately, Compact Clause doctrine is like a drawing that has yet to be colored in all the way. The Supreme Court has not had a compelling reason to pick up its pens, so it "has never taken seriously the task of separating the contracts that fall within and outside Article I, section 10."[65] But the sharp rise of multistate litigation over the past three decades gives it a reason.[66] These suits derive their power from the fact that the "whole" of AGs' cooperation is greater than the "sum" of their states' "parts." Multistate litigation has turned the collective state AGs into a powerful counterweight to the federal government's power, upsetting the nation-state balance that the principle of federalism was meant to protect. The Compact Clause gives courts an inroad to push back against this borderline unconstitutional activity.

IV. Significance

[65] Hills, *Keeping the Compact Clause Irrelevant*, at 35.

[66] Furthermore, the Court has noted in its Compact Clause jurisprudence that appellants who disliked the reigning Compact Clause standard presented no compelling alternative except a literal, and therefore farcical, interpretation of the Clause's text. *See U.S. Steel Corporation*, 434 U.S. 452. The multistate litigation analysis presents such an alternative: an encompassing understanding of step two of the analysis that brings state attorneys general's actions into the umbrella of impermissible encroachment. The argument could even be premised on step three of the test, because state AGs who bring multistate suits decide policies that impact the states which decide not to join the litigation, too. Overall, these arguments would not change the Compact Clause test; they would give it nuance.

In the years since state AGs began pursuing multistate litigation in earnest, these actions have become normalized in American law. No wonder, when AGs on both sides of the aisle have found them to be such potent tools.[67] Yet the voices who initially sounded the alarm about multistate litigation's constitutionality have seemingly moved on. This Part suggests that the legal academy revisit the topic, because multistate litigation's constitutionality is, at least, questionable. As a starting point, this Part offers two considerations that constitutionalists and legal scholars who review this question may wish to take into account.

First, the legal academy should take seriously the myriad separation of powers and federalism concerns posed by multistate litigation, as listed in part in Chart B. The basic flaw with multistate litigation is that state AGs use these suits to end-run federal legislative policy choices and institute a preferred national policy in their place. The Compact Clause is one example of constitutional support for the illegitimacy of this practice. If this paper's Compact Clause thesis is accepted, litigators should refrain from settling multistate litigation suits and instead challenge their constitutionality under Article I in court. And if this paper's argument is not persuasive, scholars should address other arguments, reconsidering whether multistate litigation violates, for example, Article I's Vesting Clause, the Supremacy Clause, the Tenth Amendment, the Fourteenth Amendment's incorporation doctrine, and more.

Second, even if multistate litigation does not violate any articulable constitutional provision, legal observers should not be too quick to endorse multistate litigation as consistent

[67] *See Multistate Lawsuits vs. the Federal Government – Totals*, AttorneysGeneral.org (October 15, 2021), https://attorneysgeneral.org/multistate-lawsuits-vs-the-federal-government/statistics-and-visualizations-multistate-litigation-vs-the-federal-government/.

with the constitutional order. The rule of law is buttressed by norms, not just written rules.[68] The rise of multistate litigation goes against the long-standing American norm that empowers the federal legislature to decide nationally relevant policies. By way of an analogy (that will perhaps resonate most strongly with constitutionalist conservatives), consider the rise of the administrative state. In the post-New Deal era, federal executive agencies have become stunningly powerful, regulating entire swaths of American life with little direct accountability.[69] While Article I *can* be construed to accommodate such delegation,[70] that does not mean it *should*, because interpreting the Constitution is not a game of "how much can we get away with?" The growth of the administrative state arguably contravenes the constitutional design envisioned by the Framers,[71] despite the modern benefits of expedient federal agencies. So it is with multistate litigation, too. While state AGs have achieved quite a lot through these suits, it is not clear that multistate litigation would survive a rigorous and faithful constitutional analysis. This prospect should animate multistate litigation's proponents and opponents alike.

Conclusion

Multistate litigation has arguably done a lot of substantive good in this country. That doesn't change the fact that, as a mechanism, it possibly contravenes the constitutional principles

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[68] Keith Whittington, *Constitutional Norms Matter*, L. & LIBERTY (Feb. 16, 2017), https://lawliberty.org/constitutional-norms-matter/.

[69] *See generally* Lawson, *The Rise and Rise of the Administrative State.*

[70] *See* Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[71] Gundy v. United States, 139 S.Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (arguing that because the "Constitution promises that

only the people's elected representatives may adopt new federal laws restricting liberty," the Court should revive the nondelegation doctrine).

of federalism and separation of powers. This paper demonstrates that state AGs may violate the Compact Clause by joining together to upset the balance of federalism and substituting federally designed policy with state-designed policies. This is both a descriptive and a normative statement. Descriptively, the ways in which multistate litigation achieves its ends conceivably do not pass the test laid out by current Compact Clause jurisprudence, limited though that jurisprudence is. The normative principle goes further. Courts have yet to address multistate litigation as the game-changing phenomenon that it is. When they do, they should consider the ways in which it implicates the overarching principle of federalism, as enshrined in the yet-to-be-fully-defined Compact Clause, and threatens the rule of law. By making these claims, this paper attempts to add to the academic argument against multistate litigation as constitutionally permissible behavior and to encourage deeper consideration of multistate litigation as it continues to ascend in American law.