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## Essay

# Interstate Cannabis Compacts: The Road to a Regional Legal Cannabis Economy

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## INTRODUCTION

Since the passage of the Controlled Substances Act in 1970, cannabis has been a Schedule I drug.<sup>1</sup> Yet twenty-one states, two territories, and the District of Columbia have legalized recreational cannabis, and even more have legalized it for medical use.<sup>2</sup> Despite Supreme Court precedent holding the conduct of these states to be illegal,<sup>3</sup> the legalization trend is undeniable.<sup>4</sup> Cannabis legalization is popular coast to coast, regardless of differences in political ideology.<sup>5</sup> Nevertheless, federal prohibition

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1. David V. Patton, *A History of United States Cannabis Law*, 34 *J.L. & HEALTH* 1, 15 (2020). Schedule I drugs have a high potential for abuse, have no currently accepted medical use in the United States, and lack an accepted safety for the use of the drug under medical supervision. 21 U.S.C. § 812(b)(1).

2. *State Medical Cannabis*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 9, 2022) [hereinafter *MED. CANNABIS*], <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/3KHK-5BEC>].

3. See *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001).

4. In 2021 and 2022 alone, eight states legalized medical or recreational cannabis. *MED. CANNABIS*, *supra* note 2.

5. For instance, California and Missouri each have legalized recreational cannabis, despite California being a liberal bastion and Missouri being a conservative stronghold. See *State Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES (June 1, 2022) [hereinafter *PARTISANSHIP*], <https://web.archive.org/web/20230104022119/https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx> [<https://perma.cc/S6ZU-3VW5>] (to search for different years, use the archival link to click through lookbacks of

restricts, in theory, interstate cannabis commerce.<sup>6</sup> All cannabis (in all forms) consumed in a state must be produced in the state.<sup>7</sup>

Congressional cannabis legalization is the ideal response to Americans' growing desire for cannabis. This is because the Constitution primarily conceives of the federal government as regulating interstate commerce.<sup>8</sup> However, the Constitution permits interstate commerce regulation by the states via interstate compacts.<sup>9</sup> Today's Congress is inefficient<sup>10</sup> and struggles to pass legislation to keep the government afloat.<sup>11</sup> Despite shifting public opinion on the issue,<sup>12</sup> anyone holding their breath for Congress to legalize cannabis will die waiting. Consequently, this Essay argues that interstate compacts can usher in, at the very least, regional cannabis legalization and all the advantages of interstate commerce that come with it.

There is a desire for interstate collaboration. New York, New Jersey, Connecticut, and Pennsylvania held a summit on cannabis legalization in October 2019 (notably before the COVID-19 pandemic captured government attention).<sup>13</sup> In 2019,

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partisan control of state legislatures) (showing since 2002, California has had a Democratic legislature and Missouri has had a Republican legislature).

6. See 21 U.S.C. § 801(3)–(7) (Congressional findings about controlled substances affecting interstate commerce); 21 U.S.C. § 812(c)(10) (listing “marihuana” as a Schedule I drug).

7. Robert A. Mikos, *Interstate Commerce in Cannabis*, 101 B.U. L. REV. 857, 859 (2021).

8. U.S. CONST. art I, § 8, cl. 3 (Commerce Clause).

9. U.S. CONST. art I, § 10, cl. 3 (Compact Clause).

10. Derek Willis & Paul Kane, *How Congress Stopped Working*, PROPUBLICA (Nov. 5, 2018), <https://www.propublica.org/article/how-congress-stopped-working> [<https://perma.cc/2WVG-DUFK>].

11. Andrew Duehren, *U.S. Could Default as Soon as July if Debt-Ceiling Standoff Isn't Resolved*, WALL ST. J. (Feb. 15, 2023), <https://www.wsj.com/articles/u-s-could-default-as-soon-as-july-if-debt-ceiling-standoff-isnt-resolved-662b6807> [<https://perma.cc/6FSF-9MRT>]; Emily Cochrane, *Spending Bill Survives Senate Test, Staving Off Government Shutdown Threat*, N.Y. TIMES (Sept. 27, 2022), <https://www.nytimes.com/2022/09/27/us/politics/congress-vote-government-shutdown.html> [<https://perma.cc/58P8-SUCX>].

12. Ted Van Green, *Americans Overwhelmingly Say Marijuana Should Be Legal for Medical or Recreational Use*, PEW RSCH. CTR. (Nov. 22, 2022), <https://www.pewresearch.org/fact-tank/2022/11/22/americans-overwhelmingly-say-marijuana-should-be-legal-for-medical-or-recreational-use> [<https://perma.cc/SF4H-VFMU>] (finding only ten percent of Americans oppose cannabis legalization in any form).

13. Fred Mogul, *Governors of NY, NJ, CT, and PA Meet for A Weed Summit*, GOTHAMIST (Oct. 18, 2019), <https://gothamist.com/news/governors-ny-nj-ct-and-pa-meet-weed-summit?br=1> [<https://perma.cc/XAF7-7F5J>].

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Oregon passed Senate Bill 582, authorizing the governor to negotiate interstate cannabis commerce.<sup>14</sup> California passed a similar bill, conditioning the governor’s power to negotiate interstate cannabis commerce on positive guidance from the U.S. Department of Justice.<sup>15</sup> Washington<sup>16</sup> and New Jersey<sup>17</sup> have practically identical bills moving through their legislatures. States that legalized recreational cannabis in 2021—New York, New Jersey, and Connecticut—have also signaled a desire for interstate collaboration, including with Pennsylvania, where recreational cannabis remains illegal.

In this Essay, Part I provides background on interstate compact law and cannabis laws for cannabis-legal states. The latter discussion groups states by political culture and ideology. Part II considers the viability of interstate cannabis compacts. In particular, Part II addresses the upsides for regional banking from interstate cannabis compacts, why interstate cannabis compacts have yet to occur, and why Congress has already implicitly consented to interstate cannabis compacts.

## I. BACKGROUND ON INTERSTATE COMPACT LAW AND CANNABIS LAW

### A. HOW INTERSTATE COMPACTS WORK

The Compact Clause of the U.S. Constitution provides, “[n]o State shall, without the consent of Congress, . . . enter into any agreement or compact with another State or with a foreign power . . . .”<sup>18</sup> Despite referring to “any agreement or compact,” the Supreme Court has concluded that the Compact Clause only applies to 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,” or that encroach on the authority and power of non-compact states.<sup>19</sup> The Constitution fails to outline the mechanism for Congressional consent to interstate

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14. S.B. 582, 80th Legis. Assemb., Reg. Sess. (Or. 2019).

15. S.B. 1326 (Cal. 2022).

16. S.B. 5069, 68th Legis., 2023 Reg. Sess. (Wash. 2023).

17. Bill S3012, 220th Legis., Reg. Sess. (N.J. 2022).

18. U.S. CONST., art. I, § 10, cl. 3.

19. *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 468 (1978) (citing *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)).

compacts; the Court has held that consent may be explicit or inferred from the circumstances.<sup>20</sup> Beyond post-facto consent, Congress can approve a compact before states enact it by passing legislation encouraging compacts for a given objective.<sup>21</sup> The key distinction between compacts with express congressional consent and those without, is that the former makes the compact federal law and insulates it from constitutional attack, a protection not enjoyed in the latter situation.<sup>22</sup>

In *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*, the Court discussed four “classic indicia of a[n] interstate] compact”: (1) creation of a joint compact administering organization; (2) statutes conditioning one state’s action on the actions of other states; (3) restricting states’ power to modify or repeal their laws unilaterally; and (4) a requirement for reciprocal constraints among member states.<sup>23</sup> Across Supreme Court case law, a two-part test emerges for determining whether congressional consent is necessary: (1) is the arrangement at issue an agreement or compact for constitutional purposes, and (2) if so, does it belong in that class of compacts described in *Virginia v. Tennessee*—the seminal interstate compact case since the nineteenth century—that require congressional approval because it affects federal supremacy?<sup>24</sup>

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20. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 85 (1823); Stephen P. Mulligan, *Interstate Compacts: An Overview*, CONG. RSCH. SERV. 3 (Aug. 15, 2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10807> [<https://perma.cc/MBT7-HXTC>].

21. *Petty v. Tennessee-Missouri Bridge Comm’n*, 359 U.S. 275, 281–82 (1959); 33 U.S.C. § 525 (“The consent of Congress is granted for the construction, maintenance, and operation of bridges and approaches thereto over the navigable waters of the United States.”); 4 U.S.C. § 112 (“The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.”).

22. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981) (holding that congressional consent “transforms the States’ agreement into federal law under the Compact Clause”).

23. 472 U.S. 159, 175 (1985).

24. Mulligan, *supra* note 20 (citing *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)). The *Tennessee* Court gave three examples of agreements between states where no congressional consent (express or implied) was necessary. First, a sale of lands owned by State A to State B, with the lands in State B’s jurisdiction, needs no congressional consent. Second, State A could contract with State B to ship its goods across State B’s toll waterway. Third, and timely given the COVID-19 pandemic, if States A and B border each other and a cross-border

Today, interstate compacts regulate various legal areas, including land and water administration, interstate transportation, tax enforcement, healthcare licensing, and the rolling back of COVID-19 restrictions.<sup>25</sup> Some interstate compacts have conditions precedent required for them to go into effect.<sup>26</sup>

Interstate compacts are like treaties among the states, so they follow development structures like those used by the President for international treaties. For interstate compacts, governors negotiate compact terms. In this way, interstate compacts are like contracts and, thus, fall under contract law to a degree.<sup>27</sup> After negotiations, state legislatures pass statutes enacting the negotiated compact under certain conditions, like a threshold number of states passing similar statutes.<sup>28</sup> Like treaties, this junction can result in governors who lead interstate compact development being left out of interstate compact execution.<sup>29</sup>

States may seek Congressional approval for interstate compacts before or after state legislatures approve them. Although there is no formal process for seeking Congressional approval, congresspeople from the involved states usually propose a bill supporting the interstate compact. These bills can be specific to an interstate compact, or broad, approving a category of inter-

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endemic of a disease like cholera occurs, no congressional consent is required for State A and B to unite in combatting the disease. To require consent in this latter example is absurd, particularly because there is no guarantee Congress would be in session when such an endemic strikes. *Tennessee*, 148 U.S. at 518.

25. Mulligan, *supra* note 20, at 2.

26. *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE (Jan. 3, 2022), <https://www.nationalpopularvote.com/sites/default/files/one-page-description.pdf> [<https://perma.cc/4YF3-CYFY>] (requiring passage by states of majority of electors for compact to go into effect, with thirty-six percent of electors agreeing to compact today).

27. *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013) (internal citation omitted) (stating that when interpreting interstate compacts, they “are construed as contracts under the principles of contract law,” meaning the goal is to uphold the intent of the parties).

28. Lisa Hansmann, *Interstate Compacts: A Primer*, EDMOND J. SAFRA CTR. FOR ETHICS 5 (Apr. 30, 2020), <https://ethics.harvard.edu/files/center-for-ethics/files/interstatecompactsprimer.pdf> [<https://perma.cc/8CCN-JXN5>].

29. *Cf.* Arthur S. Link, *Woodrow Wilson: A Cautionary Tale*, 30 WAKE FOREST L. REV. 585, 588 (1995) (discussing Wilson’s strong hand in development of League of Nations, only to have the Senate reject the treaty for America to join the League).

state compacts. For example, Congress has given broad preemptive approval to interstate compacts involving interstate bridge construction<sup>30</sup> and crime prevention.<sup>31</sup>

Alternatively, the Court has held that congressional consent may also be inferred.<sup>32</sup> The leading cases supporting the implied congressional consent principle are *Virginia v. West Virginia* and *Virginia v. Tennessee*. In *West Virginia*, as most of Virginia prepared to secede from the Union in 1861, the Virginia legislature passed a bill allowing a certain number of counties in what is today mostly West Virginia, to petition Congress for admission to the U.S. as a new state.<sup>33</sup> Notably, the Act provided that Berkeley and Jefferson Counties were eligible to join West Virginia conditioned on election results assenting to such action.<sup>34</sup> In 1862, Congress admitted West Virginia to the Union.<sup>35</sup> West Virginia passed legislation admitting Berkeley and Jefferson Counties in 1863; in response, Virginia, in December 1865—being a member of the Confederacy that surrendered to the Union in April 1865—repealed all acts concerning West Virginia’s establishment.<sup>36</sup> The Court held that (1) Virginia and West Virginia had all elements of a compact or contract that established West Virginia, and, as such, contract law required the compact be upheld; and (2) Congress had implicitly consented to the admission of Berkeley and Jefferson Counties to West Virginia in

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30. 33 U.S.C. § 525 (“The consent of Congress is granted for the construction, maintenance, and operation of bridges . . . over the navigable waters of the United States . . .”).

31. 4 U.S.C. § 112.

32. *Virginia v. West Virginia*, 78 U.S. 39, 42 (1870) (“The consent required by the Constitution to make valid agreements between the States need not necessarily be by an express assent to every proposition of the agreement. In the present case the assent is an irresistible inference from the legislation of Congress on the subject.”); *Virginia v. Tennessee*, 148 U.S. 503, 521–22 (1893) (“The approval by Congress of the compact entered into between the States upon their ratification of the action of their commissioners is fairly implied from its subsequent legislation and proceedings.”).

33. *West Virginia*, 78 U.S. at 42–43.

34. *Id.*

35. *Id.* at 43–44.

36. *Id.* at 48. Interestingly, Virginia did not fulfill the Reconstruction Acts requirements—requirements necessary for Confederate states to rejoin the Union—until 1869 and was readmitted to the Union in 1870: the same year it sued West Virginia. “Letter Announcing Virginia’s Readmission to the United States, 1870,” DOCUMENT BANK OF VA., <https://edu.lva.virginia.gov/dbva/items/show/150> [<https://perma.cc/2KFU-XTUK>].

admitting the state, as it was aware that the counties might choose such action.<sup>37</sup>

About twenty years after losing *West Virginia*, Virginia challenged Tennessee in a border dispute.<sup>38</sup> Virginia claimed Tennessee was carved out of North Carolina's territory, originally set by royal English charters; thus, Virginia's pre-independence borders with the Tennessee region of former North Carolina remained unchanged.<sup>39</sup> In contrast, Tennessee claimed that immediately before seeking admission to the United States, Tennessee and Virginia had agreed to convene a surveying commission to delineate the border and that the border mapped by the commission had been adopted by the respective state legislatures in 1803—after Virginia had been admitted to the Union in 1801 and Tennessee in 1803.<sup>40</sup> The critical question before the Court was whether Virginia and Tennessee's failure to obtain congressional consent before agreeing to the surveying commission was fatal to the compact.<sup>41</sup> It was not.<sup>42</sup> Each state was free to pursue a border distinct from what was mapped by the commission, and thus, the borders offered by each state when seeking admission to the United States were not governed by a compact. Moreover, Congress's approval of the borders during statehood admissions implied consent over the border-setting process. Lastly, congressional consent could be inferred by its silence about Virginia and Tennessee using these borders for everything from federal elections to tax collection, for nearly a century.<sup>43</sup>

#### B. WESTERN STATES WITH LEGALIZED CANNABIS

Today, Western states with legalized cannabis include California, Oregon, Colorado, and Washington.<sup>44</sup> As the first states to legalize cannabis, these states have some of America's most developed commercial cannabis cultivation and distribution infrastructure. Oregon's cultivation economy is so thriving that it

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37. *West Virginia*, 78 U.S. at 59–61.

38. *Virginia v. Tennessee*, 148 U.S. 503 (1893).

39. *Id.* at 504.

40. *Id.* at 505.

41. *Id.* at 516.

42. *Id.*

43. *Id.* at 522.

44. These states legalized cannabis at the following times: California medicinal (2003) and recreational (2016); Oregon medicinal (2007) and recreational (2014); Colorado medicinal (2000) and recreational (2012); and Washington medicinal (2011) and recreational (2012). MED. CANNABIS, *supra* note 2.

wants to engage in interstate cannabis commerce.<sup>45</sup> In California, legislators worry that its cannabis surplus flowing to other states—like Texas and Tennessee, where cannabis remains illegal—will incur the wrath of the federal government.<sup>46</sup> However, although these Western states may be united by their embrace of cannabis, they have varying laws and regulations.<sup>47</sup>

But why limit analysis to this group of states? Why not include other Western states that have legalized cannabis or are on the verge? The answer: shared political ideology.<sup>48</sup>

State responses to the COVID-19 pandemic are salient examples of the impact of political ideology on differences in state governance within a region. In April 2020, California, Oregon, Washington, Colorado, and Nevada, entered into the Western States Compact; in practice, a working group on how to roll back lockdown measures and implement community spread mitigation strategies.<sup>49</sup> The compact did not bind members to any obligations, yet, it resulted in joint lobbying of Congress,<sup>50</sup> a joint

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45. S.B. 582, 80th Legis. Assemb., Reg. Sess. (Or. 2019).

46. Patrick McGreevy, *As the Top Pot-Producing State in the Nation, California Could Be on Thin Ice with the Federal Government*, L.A. TIMES (Oct. 1, 2017), <https://www.latimes.com/politics/la-pol-ca-marijuana-surplus-export-20171001-story.html> [<https://perma.cc/GW6U-YYFX>].

47. For example, Californians over 21 can possess up to 28.5 grams of cannabis and 8 grams of extract, but Oregonians over 21 can only possess 28 grams of cannabis and 28 grams of extract, and Coloradans over 21 can possess 56 grams of cannabis, regardless of form. See *What's the Maximum Amount of Marijuana a Person Can Legally Purchase in California?*, LESSEM, NEWSTAT & TOOSON, LLP BLOG (Feb. 17, 2020), <https://www.lnlegal.com/blog/2020/february/whats-the-maximum-amount-of-marijuana-a-person-c/> [<https://perma.cc/L7HS-KN3F>]; *Educate Before You Recreate*, WHAT'S LEGAL OREGON <https://whatslegaloregon.com/#/> [<https://perma.cc/YC2T-BCED>]; *Colorado Law Doubles Amount of Legally Possessed Marijuana*, ASSOCIATED PRESS NEWS (May 21, 2021), <https://apnews.com/article/colorado-laws-marijuana-government-and-politics-business-066f8552eacdf37f55c4077ceac0d8d> [<https://perma.cc/8PGJ-ZD49>].

48. See PARTISANSHIP, *supra* note 5.

49. Zack Burdyk, *West Coast Governors Announce They Will Create Joint Plan for Reopening Economies*, HILL (Apr. 13, 2020), <https://thehill.com/homenews/campaign/492562-west-coast-governors-announce-joint-plan-for-reopening-economies> [<https://perma.cc/CT6M-KQRL>]; Rebecca Klar, *Colorado and Nevada Join Western States Cooperating on Reopening*, HILL (Apr. 27, 2020), <https://thehill.com/policy/healthcare/494890-colorado-and-nevada-join-western-states-cooperating-on-reopening-after> [<https://perma.cc/J9GY-6UU9>].

50. Cheri Mossburg & Caroline Kelly, *Western States Pact Asks Federal Government for \$1 Trillion in Relief*, CNN (May 11, 2020), <https://www.cnn>



pilot project to test the COVID-19 Exposure Notification system designed by Apple and Google,<sup>51</sup> issued joint travel advisories and quarantine recommendations,<sup>52</sup> and collectively recommended usage of the Pfizer and Moderna COVID-19 vaccines and boosters.<sup>53</sup> Despite the widespread and significant impacts of decisions jointly made by Western States Compact members, they never sought Congressional consent. There are three potential reasons why Congressional consent was not sought: (1) compact member states relied on the regional disease spreading example and exception discussed in *Virginia v. Tennessee*;<sup>54</sup> (2) Congress had implicitly provided consent; or (3) member states did not think they needed Congressional consent because the compact only governed powers already held by the states under the Tenth Amendment.<sup>55</sup>

Beyond shared geography, Western States Compact members also share political ideology. Today, except for Nevada,<sup>56</sup> all

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.com/2020/05/11/politics/western-states-relief/index.html [https://perma.cc/A277-HFSK].

51. Press Release, Office of Governor Gavin Newsom, Washington and Oregon Join California in Pilot Project Using Google and Apple Exposure Notification Technology to Slow the Spread of COVID-19 (Sept. 16, 2020).

52. Mackenzie Hawkins, *West Coast States Issue Travel Advisory Ahead of Thanksgiving Week*, POLITICO (Nov. 13, 2020), <https://www.politico.com/states/california/story/2020/11/13/west-coast-states-issue-travel-advisory-ahead-of-thanksgiving-week-1336371> [https://perma.cc/K9HF-BWR9].

53. Kaia Hubbard, *Western States Group Affirms Pfizer's Coronavirus Vaccine Is Based on Health – Not Politics*, U.S. NEWS (Dec. 14, 2020), <https://www.usnews.com/news/national-news/articles/2020-12-14/western-states-group-affirms-pfizers-coronavirus-vaccine-is-based-on-health-not-politics> [https://perma.cc/7HHZ-PKLT]; Michael Rietmulder, *Gov. Jay Inslee Announces Western States' Approval of Moderna COVID-19 Vaccine*, SEATTLE TIMES (Dec. 20, 2020), <https://www.seattletimes.com/seattle-news/gov-jay-inslee-announces-western-states-approval-of-moderna-covid-19-vaccine> [https://perma.cc/PB2X-N9G6]; *Western States Group Signs Off on COVID Boosters, Become Available in Oregon*, KATU (Sept. 2, 2022), <https://katu.com/news/coronavirus/western-states-group-signs-off-on-covid-boosters-become-available-in-oregon> [https://perma.cc/P5ZT-5FEZ].

54. 148 U.S. 503, 519 (1893).

55. Cf. Alana Wise, *Trump Falsely Claimed 'Total' Authority Over States — Now He's Backpedaling*, NPR (Apr. 14, 2020) (responding to President Trump's comments about having total authority of lockdown rollbacks, not the Western States Compact or its members).

56. Nevada's Democratic incumbent governor was defeated in the 2022 midterm elections. Jennifer Medina, *Lombardo Ousts Sisolak in Nevada Governor's Race*, N.Y. TIMES (Nov. 11, 2022), <https://www.nytimes.com/2022/11/11/us/politics/nevada-governor-sisolak-lombardo.html> [https://perma.cc/L6KC-SKQA].

compact members have total Democratic control of state government. Accordingly, this Essay's analysis does not incorporate Nevada into this potential partnership. All these Western states have elected Democratic governors since 2007 and have predominately had Democratic-controlled governments.<sup>57</sup> Notably, conservative dominant Western states like Arizona, Utah, Idaho, Wyoming, and Montana did not join the Western States Compact, despite having a significant cross-border flow of commerce and people, and relevant here, legalized cannabis in the case of Arizona, Utah, and Montana.<sup>58</sup> In essence, the partisanship of Western States Compact membership is a product of the partisan-based regionalism that has flourished since Barack Obama's presidency.<sup>59</sup> Any interstate cannabis compact would also likely face similar partisan-based regionalism.

### C. NORTHEASTERN STATES OPEN TO LEGALIZED CANNABIS

The northeastern states present an interesting environment for interstate cannabis compacts. These states represent one of the most populous urban regions, with a significant cross-border flow of commerce and people.<sup>60</sup> For example, New York and New Jersey share authority over each other's sea and air ports—including the largest port on the Eastern Seaboard<sup>61</sup>—via a congressionally approved interstate compact.<sup>62</sup> Before the COVID-19 pandemic, New York, New Jersey, Connecticut, and Pennsylvania were making progress toward similar, if not uniform, legalization regimes.<sup>63</sup> Although the COVID-19 pandemic did not end interstate cooperation,<sup>64</sup> it did stymie collaboration on legal

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57. PARTISANSHIP, *supra* note 5.

58. MED. CANNABIS, *supra* note 2.

59. Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 433–40 (2018).

60. Cameron Gordon, Richard Flanagan, & Jonathan Peters, *Projects Not Systems: Why New York Doesn't Have a RIGO*, URB. AFF. F. (Oct. 3, 2022), <https://urbanaffairsreview.com/2022/10/03/projects-not-systems-why-new-york-doesnt-have-a-rigo> [<https://perma.cc/2WFV-JXTZ>] (RIGO is a regional inter-governmental organization).

61. What is it?

62. *By-Laws of The Port Authority of New York and New Jersey*, PORT AUTH. OF N.Y. AND N.J., <https://www.panynj.gov/corporate/en/government-ethics/by-laws.html> [<https://perma.cc/D85L-PVM6>].

63. Mogul, *supra* note 13.

64. New York, New Jersey, Pennsylvania, Massachusetts, Rhode Island, Connecticut, and Delaware joined together in the Eastern States Multi-State

cannabis. Further, as Eastern States Multi-State Council members that are decidedly liberal and have legalized cannabis, Massachusetts<sup>65</sup> and Rhode Island<sup>66</sup> would likely join a northeastern interstate cannabis compact.

Despite the states signaling the intent to legalize together, New York, New Jersey, and Connecticut legalized recreational cannabis in 2021,<sup>67</sup> each with varying regulations.<sup>68</sup> Pennsylvania may soon join its northeastern peer states, as Democrats gained control of the lower legislative chamber and the governorship in the 2022 midterm elections.<sup>69</sup> Moreover, although Pennsylvania may be coming to the party late, regulatory and commercial infrastructures in New York, New Jersey, and Connecticut remain fledgling, leaving an opportunity for uniformity via an interstate cannabis compact.

#### D. CONSERVATIVE STATES WITH LEGALIZED CANNABIS

Support for cannabis legalization appears to be agnostic of political ideology. But the same cannot be said for interstate co-

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Council on the same day as the Western States Compact was announced. The Eastern States Multi-State Council had similar goals and results as the Western States Compact. *But see* Gordon, *supra* note 60 (discussing how heated political contests and collective parochialism prevent regional state governance to address what are, at their heart, regional problems, like transportation).

65. Massachusetts legalized recreational cannabis in 2016. MED. CANNABIS, *supra* note 2.

66. Rhode Island legalized recreational cannabis in 2022. *Id.*

67. *Id.*

68. For example, in Connecticut, an adult 21 or older can possess 1.5 ounces of cannabis, whereas in New York, that same person can possess 3 ounces of cannabis flower and 24 grams of concentrate. But if that same person goes to Hoboken, New Jersey, they would be in gross violation of the law that only permits possession of 4 grams of concentrate. Connecticut's Legalized Recreational Marijuana (Cannabis) Law, UNITED WAY OF CONN. (July 2022), <https://uwc.211ct.org/connecticuts-legalized-recreational-marijuana-cannabis-law> [<https://perma.cc/7BCE-RJ9W>]; Cannabis (Marijuana), N.Y.C. HEALTH <https://www.nyc.gov/site/doh/health/health-topics/marijuana.page> [<https://perma.cc/Q7WA-6YFP>]; Recreational Use, N.J. CANNABIS REGUL. COMM'N, <https://www.nj.gov/cannabis/adult-personal> [<https://perma.cc/DA5L-PRA6>].

69. Kyle Jager, Pennsylvania Marijuana Legalization Prospects Increase as Democrats Claim Majority in House, With Incoming Pro-Reform Governor, MARIJUANA MOMENT (Nov. 11, 2022), <https://www.marijuanamoment.net/pennsylvania-marijuana-legalization-prospects-increase-as-democrats-claim-majority-in-house-with-incoming-pro-reform-governor> [<https://perma.cc/RJ4G-4WLM>].

operation. From the states that band together to enjoin the federal government from enforcing policy<sup>70</sup> to the states that have near simultaneously passed laws that ease book banning, prevent transgender girls from competing on girls' sports teams, and end abortion access, political ideology has become the lynchpin to state collaboration.<sup>71</sup> Moreover, geographic isolation from other compact states is not indicative of an aversion to compact participation.<sup>72</sup> In other words, states have no aversion to entering compacts with states from around the country, not just their neighbors. Interstate cooperation on cannabis regulation is likely to be no different and this Essay proposes that conservative states are likely to cooperate, regardless of region, to improve cannabis commerce.

Alaska was one of the first states to legalize medical cannabis in 1998 and legalized recreational cannabis in 2014.<sup>73</sup> Nevada has had legal recreational cannabis since 2016.<sup>74</sup> Arizona and Montana have had recreational cannabis since 2020.<sup>75</sup> The political ideologies of Alaska and Montana are relatively easy to discern. Republicans have controlled the legislatures of these states since at least 2014;<sup>76</sup> Montana and Alaska have had non-Republican governors, but each state has voted for the Republican presidential candidate since 1996.<sup>77</sup>

Nevada and Arizona's political ideology presents a more complex inquiry. First addressing Nevada, since 2002, state gov-

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70. Seung Min Kim, *GOP States Sue Biden Administration over Student Loan Plan*, ASSOCIATED PRESS NEWS (Sept. 29, 2022), <https://apnews.com/article/biden-health-lawsuits-covid-missouri-862d783188de45b698c54b00820d3616> [<https://perma.cc/4BJH-G8VZ>]; John E. McDonough, *Republicans Have Stopped Trying to Kill Obamacare. Here's What They're Planning Instead.*, POLITICO (Apr. 26, 2022), <https://www.politico.com/news/magazine/2022/04/26/gop-obamacare-aca-health-care-00027585> [<https://perma.cc/TP5J-MZB6>].

71. Ronald Brownstein, *Red States Are Building a Nation Within a Nation*, CNN (July 26, 2022), <https://www.cnn.com/2022/07/26/politics/red-states-blue-states-control-of-national-policy-fault-lines> [<https://perma.cc/Z38P-G4R9>].

72. Ann O'M. Bowman & Neal D. Woods, *Strength in Numbers: Why States Join Interstate Compacts*, STATE POL. & POL'Y Q., Winter 2007, at 347, 363.

73. MED. CANNABIS, *supra* note 2.

74. *Id.*

75. *Id.*

76. PARTISANSHIP, *supra* note 5.

77. *Id.*

ernment control has fluctuated between Democrats and Republicans;<sup>78</sup> after the 2022 midterms, Nevada has a Republican governor and a Democratic legislature.<sup>79</sup> More confusing is that Nevada has voted for the Democratic presidential nominee consistently since 2008.<sup>80</sup> Nevertheless, the defeat of an incumbent Democrat governor, with an expected incumbency rate of almost eighty percent,<sup>81</sup> suggests that Nevada's political ideology may be leaning conservative.

In contrast to Nevada, Arizona's support for Democrats in state and federal elections is more recent and dramatic considering past elections.<sup>82</sup> Except for 2000–02, Republicans have controlled the state legislature since 1978.<sup>83</sup> To explain this shift, commentators have cited migration from California to Arizona—also to Nevada—and a backlash against extremism in the Republican party since the rise of Donald Trump.<sup>84</sup> Nonetheless, given the split government and Arizona's electoral history, it is too soon to conclude that Arizona has bucked nearly half a century of conservative political ideology. This is especially true given Republican efforts to root out Trump-level extremism from the party in a state where registered Independents outnumber Democrats.<sup>85</sup>

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78. *Id.*

79. *Id.*

80. *Nevada*, 270 TO WIN, <https://www.270towin.com/states/Nevada> [<https://perma.cc/N742-TNGA>].

81. *When Governors Seek Re-Election*, RUTGERS CTR. ON AM. GOVERNOR, <https://governors.rutgers.edu/when-governors-seek-re-election> [<https://perma.cc/D35Z-HNBD>].

82. Greg Moore, Opinion, *Swing State, No More. Moderate Democrats Have Already Turned Arizona Blue*, AZCENTRAL (Nov. 17, 2022), <https://www.azcentral.com/story/opinion/op-ed/greg-moore/2022/11/17/arizona-election-blue-state-despite-its-red-reputation/10719234002> [<https://perma.cc/93Z8-7NGG>] (discussing the wins in Arizona for Biden in 2020, and for the Democratic candidates for governor, attorney general, and secretary of state in 2022). However, the Democratic candidates for governor and attorney general won by only 0.6 percent and 0.01 percent of the vote, respectively. Fernanda Galan Martinez, *Arizona Votes Are Now Counted, but Election Drama Will Go on*, CRONKITE NEWS (Nov. 21, 2022), <https://cronkitenews.azpbs.org/2022/11/21/arizona-election-votes-count-complete-three-races-get-recounts> [<https://perma.cc/EBA8-AA2C>].

83. PARTISANSHIP, *supra* note 5.

84. Moore, *supra* note 82.

85. Natasha Korecki, *Arizona Plots to Eradicate 'Extremists'*, NBC NEWS (Jan. 12, 2023), <https://www.nbcnews.com/politics/politics-news/arizona-plots-eradicate-extremists-rcna64957> [<https://perma.cc/M7DF-K3V9>]; Arit John, *Is*

Though conservative states may share political ideology, cannabis regulations vary. For example, Alaska permits possessing 7 grams of cannabis concentrate, Arizona permits 5 grams, Nevada permits 3.5 grams, and Montana does not distinguish concentrate from flower in its 1 ounce possession limit.<sup>86</sup> As these states do not border each other (except for Arizona and Nevada), the fact that citizens and goods are likely to flow across cannot justify interstate cannabis compacts.<sup>87</sup> Yet, growing conditions and commercial cannabis infrastructure support cooperation. Alaska and Montana are not good places to grow outdoor cannabis; Arizona and Nevada are.<sup>88</sup> Alaska and Nevada have had medical cannabis since the turn of the century, meaning they have extensive commercial infrastructure to produce cannabis products, ranging from flower to concentrate; in comparison, Arizona and Montana are neophytes. In essence, these conservative states have potential for collaboration, guided by shared conservative values (like support for strict law enforcement and less business regulation) and economic interests.<sup>89</sup>

In closing, though states are capable of bipartisan cooperation when economic and geographic interests align, it is more common and likely for states to collaborate along partisan lines. Accordingly, if states buy into the advantages of interstate cannabis commerce, then they will likely develop regional cannabis economies where state partner choice is driven by political ideology, regardless of geography.

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*Arizona Really Becoming More Purple? What the 2024 Senate Race Could Tell Us*, L.A. TIMES (Feb. 1, 2023), <https://www.latimes.com/politics/story/2023-02-01/arizona-purple-senate-race> [<https://perma.cc/L84J-A6F6>] (discussing voter registration makeup and the inconclusiveness of Arizona's political ideology).

86. See *Alaska Marijuana Laws*, MARIJUANA AND THE L., <https://marijuanaandthelaw.com/state-laws/Alaska> [<https://perma.cc/W7LV-WBRJ>]; *Adult Use Marijuana*, ARIZ. DEPT OF REVENUE, <https://azdor.gov/transaction-privilege-taxadult-use-marijuana> [<https://perma.cc/ZGX4-FY8J>]; *Possession & Consumption*, NEV. CANNABIS COMPLIANCE BD., <https://ccb.nv.gov/laws-regulations/#item-1> [<https://perma.cc/TU7C-LRCB>]; *Adult-Use Marijuana Laws in Montana*, MONT. DEP'T OF PUB. HEALTH & HUM. SERVS., <https://dphhs.mt.gov/prevention/AdultUseMarijuanaLawsMT.pdf> [<https://perma.cc/N6JH-MMPC>].

87. See Bowman, et al., *supra* note 72, at 363 (discussing that sharing borders increases the probability states will engage in an interstate compact).

88. *Infra* notes 99–102.

89. Joshua Tait, *Conservatives Love Limited Government — And Aggressive Policing*, WASH. POST (June 3, 2020), <https://www.washingtonpost.com/outlook/2020/06/03/conservative-police-limited-government> [<https://perma.cc/JAP8-W4EB>].

## II. WHY INTERSTATE COMPACTS ARE A VIABLE SOLUTION

Interstate compacts are not a cure-all for national or regional problems. They have advantages and disadvantages in general, as well as ones specific to cannabis regulation. Nevertheless, because states can charter banks largely outside of federal oversight, interstate banking compacts present a novel way to create a regional legal cannabis economy. This part outlines all of these claims. Finally, this part concludes that the action and inaction of Congress and the President suggest that the federal government has implicitly approved interstate cannabis compacts.

### A. ADVANTAGES AND DISADVANTAGES OF INTERSTATE COMPACTS

#### 1. In General: Economies of Scale versus Risks of Cheating without Accountability

Interstate compacts tend to usher in advantages common in organizational collaboration. In particular, interstate compacts leverage economies of scale to: 1) reduce administrative costs when regulatory authority is vested in the interstate compact body;<sup>90</sup> 2) allow states to have direct control over solutions to national and regional issues (in contrast to indirect control when Congress is the decisionmaker);<sup>91</sup> 3) maintain collective sovereignty;<sup>92</sup> and 4) allow for more flexibility than Congressional regulatory regimes administrated by executive rulemaking agencies.<sup>93</sup> A major disadvantage of interstate compacts is that, generally, they have little enforcement authority on misbehaving compact members.<sup>94</sup> For example, the Multistate Tax Commission includes forty-nine states and the District of Columbia,

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90. Daniel Logsdon, *Multistate Problem Solving with Interstate Compacts*, COUNCIL OF STATE GOV'T (2020), <https://compacts.csg.org/wp-content/uploads/2020/11/Compact-Resource-Guide-1-1.pdf> [<https://perma.cc/D424-AGDZ>].

91. *Id.*

92. Crady deGolian, *Interstate Compacts: Background and History*, NAT'L CTR. FOR INTERSTATE COMPACTS (Mar. 2015), <https://www.fsbpt.org/Portals/0/documents/free-resources/InterstateCompactsHistoryBackground.pdf> [<https://perma.cc/544C-B5CR>].

93. *Id.*

94. Michael Osborn, *Enforcing Interstate Compacts in Federal Systems*, IND. J. CONST. DESIGN, Mar. 2022, at 1. *But see Original Model Multistate Tax Compact*, MULTISTATE TAX COMM'N 11–12 (1966), <https://www.mtc.gov/getattachment/The-Commission/Multistate-Tax-Compact/Original-Model>

to ensure appropriate state tax collection and transfers; yet, the commission is relatively powerless, with only the ability to make recommendations and conduct audits.<sup>95</sup> If a member state misbehaves, the worst it gets is an audit.<sup>96</sup> Finally, interstate agriculture compacts have not been successful. The last major agricultural interstate agricultural compact, the Interstate Grain Marketing Compact, aspired to be a clearinghouse of grain marketing and production while also potentially acting as a grain broker;<sup>97</sup> yet, by 1998, nineteen years after its inception, the compact failed due to member state withdrawal.<sup>98</sup>

## 2. Cannabis-Specific Considerations

There are two practical considerations for interstate cannabis collaboration. First are the growing conditions necessary for outdoor cannabis and the related economic benefits of specialization within the cannabis supply. The second, and most important consideration, is that banking is primarily regulated federally, leaving cannabis businesses with few options for lending and revenue protection. Interstate compacts can be the solution to the banking problems of cannabis businesses.

### *a. Growing Climate and Economic Benefits from Specialization*

Outdoor cannabis grows best in Mediterranean climates.<sup>99</sup> The ideal growing temperature ranges between 59–77 °F.<sup>100</sup> Moreover, cannabis requires ranges of 40–70 percent humidity

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-Multistate-Tax-Compact.pdf.aspx [https://perma.cc/P89U-UYRB] (discussing audit powers of commission).

95. MULTISTATE TAX COMM'N, *supra* note 94.

96. *Id.*

97. Anne Noris & Steven Cyril Frol, *The Interstate Grain Marketing Compact—Should Washington Be a Partner?*, 15 GONZ. L. REV. 797, 813 (1980).

98. *Interstate Compact on Agricultural Grain Marketing*, NAT'L CTR. FOR INTERSTATE COMPACTS, <https://apps.csg.org/ncic/Compact.aspx?id=74> [https://perma.cc/ZX6X-L6SA].

99. General Hydroponics, *Your Regional Guide to Growing Healthy Cannabis Plants Outdoors*, LEAFLY (Dec. 28, 2017), <https://www.leafly.com/news/growing/regional-guide-to-growing-cannabis-outdoors> [https://perma.cc/2MZ9-L25N].

100. *10 Key Parameters to Create the Optimum Growing Conditions for Your Outdoor Plants*, HUMBOLDT SEED ORG. (June 23, 2020), <https://www.humboldtseeds.net/en/blog/parameters-growing-conditions-outdoor-plants> [https://perma.cc/LU7P-4MG7].



in post-seedling phases.<sup>101</sup> If these conditions cannot be met outdoors, cannabis must be grown in greenhouses or indoors, significantly increasing costs.<sup>102</sup> Essentially, if a state experiences harsh winters or has expensive electricity, then it cannot have a thriving cannabis economy without interstate trade.

It is well-settled that specialization leads to economies of scale for firms, increased gross domestic product, and, eventually, higher standards of living for all those involved in economic exchanges.<sup>103</sup> For example, there are many good reasons why cattle ranchers do not get into meat packing, focusing on how to be more efficient ranchers instead of learning how to package meat in a way that best suits retailer needs. These lessons are true for individual firms and states.<sup>104</sup> Consequently, all states involved in the cannabis supply chain would see increased economic gains from specialization instead of holding steadfast to the idea that each state must hermetically seal its cannabis economy within its borders.

*b. Multi-State State Nonmember Banks: A Path Forward for Regional Cannabis Banking*

Major U.S. banks are federally chartered and members of the Federal Reserve System, thus subject to many federal regulations.<sup>105</sup> Alternatively, banks can be state chartered and members of the Federal Reserve, called “state member banks,” meaning that these banks are subject to federal and state

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101. *Id.*

102. A rough estimate of the cost difference is that indoor grown cannabis can cost nearly twelve times as much as outdoor grown cannabis, with prices increasing from \$0.45/gram to \$5.80/gram. See Pat Goggins, *Buying Weed vs. Growing Your Own: Which Is Cheaper?*, LEAFLY (Oct. 5, 2022), <https://www.leafly.com/learn/growing/buying-weed-vs-growing-your-own-which-is-cheaper> [<https://perma.cc/M89P-BRC6>].

103. Thomas Brock, *How Does Specialization Help Companies Achieve Economies of Scale?*, INVESTOPEDIA (May 3, 2021), <https://www.investopedia.com/ask/answers/051115/how-does-specialization-help-companies-achieve-economies-scale.asp> [<https://perma.cc/Y5KS-HUUR>]; Sean Ross, *What Are the Economic Impacts of Specialization?*, INVESTOPEDIA (Sept. 29, 2021), <https://www.investopedia.com/ask/answers/040615/what-are-economic-impacts-specialization.asp> [<https://perma.cc/32V7-XD7F>].

104. Cf. Dany Bahar, *Diversification or Specialization: What Is the Path to Growth and Development?*, BROOKINGS (Nov. 4, 2016), <https://www.brookings.edu/research/diversification-or-specialization-what-is-the-path-to-growth-and-development> [<https://perma.cc/3END-45EL>].

105. Connie Edwards Josey, *State v. National Banks: The Battle over Examination Fees*, 6 N.C. BANKING INST. 463, 465 (2002).

regulation.<sup>106</sup> Lastly, banks can be state-chartered, but instead of being Federal Reserve members, they are only required to be insured by the Federal Deposit Insurance Corporation (thus only regulated by the FDIC and state regulators).<sup>107</sup> These banks are called “state nonmember banks.”<sup>108</sup>

Cannabis businesses struggle with access to financial products like bank-financed small business loans. They have no protection from bank discrimination, leaving many businesses with no way to deposit revenue, accept non-cash payments, or get traditional business loans.<sup>109</sup> The federal Financial Crimes Enforcement Network requires banks to file suspicious activity reports for transactions with cannabis-related businesses, further discouraging banks from even thinking about servicing cannabis businesses.<sup>110</sup> Yet, there have been no instances where the FDIC or the Federal Reserve revoked a bank’s privileges for servicing cannabis businesses.<sup>111</sup> Instead, cannabis businesses with robust internal controls have generally been able to open bank accounts.<sup>112</sup> But, traditional business loans remain out of reach, primarily because cannabis’s federal status means there is uncertainty around the legality of loan enforcement and loan collateral.<sup>113</sup>

Key to understanding the value of the state nonmember bank distinction for cannabis businesses is the language of 12 U.S.C. § 1831a(j):

**(1) Application of host State law**

The laws of a host State, . . . shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of-State national bank. *To the extent host State law is inapplicable to a branch of an out-of-State State bank in such host State pursuant to the preceding sentence, home State law shall apply to such branch.*

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106. *Id.*

107. Arthur E. Wilmarth, Jr., *The Expansion of State Bank Powers, the Federal Response, and the Case for Preserving the Dual Banking System*, 58 *FORDHAM L. REV.* 1133, 1137 (1990).

108. *Id.*

109. Julie Andersen Hill, *Cannabis Banking: What Marijuana Can Learn from Hemp*, 101 *B.U. L. REV.* 1043, 1045 (2021).

110. *Id.* at 1051–53.

111. *Id.* at 1052.

112. *Id.* at 1053.

113. *Id.* at 1057–60.

**(2) Activities of branches**

An insured State bank that establishes a branch in a host State may conduct *any activity at such branch that is permissible under the laws of the home State of such bank, to the extent such activity is permissible either for a bank chartered by the host State (subject to the restrictions in this section) or for a branch in the host State of an out-of-State national bank.*

(emphasis added). In other words, out-of-state nonmember banks can operate branches in host states that service cannabis-related businesses equal to host state nonmember banks, regardless of the limitations faced by national banks. Consequently, if Montana permitted state nonmember banks to provide cannabis-related businesses with all available services, including business loan originating, then an Arizona state nonmember bank could open a Montana branch (assuming it met all traditional Montana branch opening requirements) and provide the same service as a Montana state nonmember bank. For example, an Arizona cannabis business could expand into Montana, capitalizing on its existing relationship with an Arizona state nonmember bank and reducing transaction costs by maintaining only one set of banking-related accounting records.<sup>114</sup>

Interstate banking compacts were common before the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.<sup>115</sup> In fact, the interstate banking compacts rendered moot by the Riegle-Neal Act were at the center of the Court's most recent major interstate compact case, *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*.<sup>116</sup> Before the Riegle-Neal Act, per the Douglas Amendment of the Bank Holding Company Act of 1956, a bank in State A could not acquire a

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114. The distribution inequities of Paycheck Protection Program (PPP) loans during the COVID-19 Pandemic highlights why prior banking relationships are so important for businesses. A study recently found that a business with a previous lending relationship enjoyed a fifty-seven percent greater chance of obtaining a PPP loan. Jim Tyson, *Prior Business Relationships Influence PPP Coronavirus Lending, Study Finds*, CFO DIVE (Feb. 17, 2021), <https://www.cfodive.com/news/in-paycheck-protection-program-favoratism-study/595163> [<https://perma.cc/ZA3H-C6Y9>] (citing Ran Duchin, Xiumin Martin, Roni Michaely & Hanmeng Wang, *Concierge Treatment from Banks: Evidence from the Paycheck Protection Program*, 72 J. CORP FIN. 102124 (Feb. 2022)).

115. Bill Medley, *Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994*, FED. RSRV. HIST. (Sept. 1994), <https://www.federalreserverehistory.org/essays/riegle-neal-act-of-1994> [<https://perma.cc/3U8C-V7AJ>].

116. 472 U.S. 159, 164–65 (1985).

bank in State B without state law permitting such an acquisition, effectively constraining national banks to the same expansion limitations as state banks. The Riegle-Neal Act removed the Douglas Amendment's restriction so long as a state did not opt out of the Act's regulatory scheme.<sup>117</sup> In the cannabis context, the closest congressional action equivalent to the Douglas Amendment—whose delegation of banking regulatory power to the states was the basis for the *Northeast Bancorp* holding in favor of the states—are the appropriations riders enacted in each budget since 2015. These riders prohibit the Department of Justice from using funds to prevent certain states and territories from “implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”<sup>118</sup> However, unlike the Douglas Amendment, the riders do not return federal regulatory power to the states, like if Congress gave states the power to restrict the acquisition of in-state cannabis businesses by out-of-state businesses. Nevertheless, interstate collaboration to work around the Douglas Amendment shows that states can successfully collaborate on banking issues, and the riders, combined with Congressional inaction since *Gonzales v. Raich*,<sup>119</sup> offers hope that interstate compacts may yield a regional cannabis banking system.

*c. Protectionism: Why States Do Not Want Interstate Cannabis Commerce*

Given the evidence that a regional cannabis economy and banking regime is possible, one should also address why states have not acted. Some would argue that states have isolated their cannabis economies to avoid upsetting the unspoken agreement between cannabis-legal states and the federal government, lest they incur aggressive enforcement.<sup>120</sup> Yet, skeptics claim that interstate cannabis commerce has been limited due to state-focused protectionism, designed to buoy individual state economies instead of the American economy.<sup>121</sup> Taking this logic further, one could contend that interstate cannabis commerce

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117. Medley, *supra* note 115.

118. Joanna R. Lampe, *Funding Limits on Federal Prosecutions of State-Legal Medical Marijuana*, CONG. RSCH. SERV. 2 (Feb. 4, 2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10694> [<https://perma.cc/S379-EVX7>].

119. 545 U.S. 1 (2005).

120. Mikos, *supra* note 7, at 859–61; McGreevy, *supra* note 46 (discussing California officials fear of federal enforcement).

121. Mikos, *supra* note 7, at 860–61.

would usher in industry consolidation among major cannabis corporations, concentrating the nation's cannabis industry in states with the oldest and most developed cannabis infrastructures, i.e., the Western states.<sup>122</sup> However, the key failure of this argument is that it assumes cannabis demand remains constant, despite evidence that demand is consistently growing, with an expected six percent revenue increase from 2021 to 2022.<sup>123</sup>

#### B. INFORMAL INTERSTATE COMPACT REQUIRING NO EXPRESS CONGRESSIONAL APPROVAL

At the outset, formal Congressional approval for interstate cannabis legalization compacts is the ideal path forward. Effectively, it would legalize cannabis and necessary banking-related reforms at the federal level.<sup>124</sup> Although Congress recently passed a bill designed to expand medical cannabis research<sup>125</sup>—notably, by unanimous consent in the Senate—it is folly to expect Congress to legalize cannabis any time soon.<sup>126</sup> Consequently, this Essay argues for citing informal Congressional approval for an interstate cannabis compact.

Of course, an interstate cannabis compact would incur court challenges. States legalizing cannabis have already faced constitutional challenges. Chief among them are cases from the First Circuit,<sup>127</sup> New York,<sup>128</sup> and California.<sup>129</sup>The respective

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122. *Id.* at 889–94.

123. Andrew DeAngelo, *The Hockey Stick Turns into Bell Curve: A New Report Sheds Light on Cannabis Industry Growth*, FORBES (Oct. 4, 2022), <https://www.forbes.com/sites/andrewdeangelo/2022/10/04/the-hockey-stick-turns-into-bell-curve-a-new-report-from-bdsa-sheds-light-on-cannabis-industry-growth> [<https://perma.cc/SXC8-Z8C8>].

124. *See* *Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

125. Natalie Fertig, *Congress Sends First Weed Bill to Biden*, POLITICO (Nov. 16, 2022), <https://www.politico.com/news/2022/11/16/congress-sends-first-weed-bill-to-biden-00068082> [<https://perma.cc/87WA-MECA>] (discussing passage of H.R. 8454). H.R. 8454 became law on December 2, 2022. *See* Medical Marijuana and Cannabidiol Research Expansion Act, Pub. L. No. 117-215.

126. Willis, et al., *supra* note 10 (discussing Congress's inability to work due to partisanship).

127. *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Maine*, 45 F.4th 542, 556 (1st Cir. 2022).

128. *Variscite NY One, Inc. v. New York*, No. 1:22-CV-1013 9GLS/DJS, 2022 WL 17257900, at \*7 (N.D.N.Y. Nov. 10, 2022).

129. *Variscite, Inc. v. City of Los Angeles*, No. 2:22-CV-08685-SPG-SK, 2022 WL 18397510, at \*11 (C.D. Cal. Dec. 8, 2022); *Peridot Tree, Inc. v. City of Sacramento*, No. 2:22-CV-00289-KJM-DB, 2022 WL 10629241, at \*11 (E.D. Cal. Oct. 18, 2022).

plaintiffs all challenge that the residency and social equity-based licensing schemes of the states violate the dormant Commerce Clause—a negative inference from the Commerce Clause that “prevents States from adopting protectionist measures” against other states.<sup>130</sup> All of these cases either concluded their respective licensing schemes were unconstitutional or abstained from answering the question, and none dealt with the question of interstate compacts. The critical questions for a court adjudicating an interstate cannabis compact would be (1) is the arrangement at issue an agreement or compact for constitutional purposes, and, (2) if so, does it belong in that class of compacts described in *Virginia v. Tennessee* that require congressional approval because it affects federal supremacy?<sup>131</sup>

Like in *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*, states could pass identical statutes with reciprocal state condition precedent requirements that then grant out-of-state entities certain privileges, which likely would not have created a compact in the context of the Compact Clause.<sup>132</sup> What matters is that alleged compact states avoid creating a central administrative body or requiring reciprocation from another state.<sup>133</sup> However, for argument’s sake, this Essay assumes that states enter into a compact under the Compact Clause. Further, such a compact would likely infringe on federal supremacy. So, the remaining question is whether Congress has already consented to such a compact. It has.

To be sure, Congress has not passed dramatic legislation that legalizes interstate or intrastate cannabis, nor has it given that regulatory power back to the states. Yet collectively, Congressional action and inaction since *Gonzales v. Raich* amount to the implicit consent to interstate compacts as recognized in the Virginia border cases.<sup>134</sup> *Raich* affirmed the federal government’s power under the Controlled Substances Act to regulate and ban cannabis commerce, despite California’s laws permitting such commerce.<sup>135</sup> However, the federal government has not

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130. *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

131. Mulligan, *supra* note 20 (citing 148 U.S. 503, 519 (1893)).

132. 472 U.S. 159, 175 (1985).

133. *Id.*

134. *Gonzalez v. Raich*, 545 U.S. 1 (2005); *Virginia v. West Virginia*, 78 U.S. 39, 42 (1870); *Virginia v. Tennessee*, 148 U.S. 503, 521–22 (1893).

135. *Raich*, 545 U.S. at 17–32.

capitalized on the Court's holding. Instead, the federal government has consistently reduced cannabis enforcement, particularly the Executive branch Cole Memorandum signaling no federal prosecution for cannabis operations in strict compliance with state law,<sup>136</sup> the Congressional non-enforcement Department of Justice appropriations rider in place since 2015,<sup>137</sup> and federal banking regulatory agencies' failure to revoke privileges for banks that service cannabis businesses.<sup>138</sup> Moreover, the passage of the Medical Marijuana and Cannabidiol Research Expansion Act further supports Congressional assent to at least interstate medical cannabis commerce.<sup>139</sup> And although it does not hold great weight, President Biden's pardoning of people convicted of marijuana possession suggests the federal government will not be enforcing its cannabis prohibition anytime soon.<sup>140</sup>

One might argue that despite Congress's actions, it has acquiesced to the Court's interpretation of the Controlled Substances Act since *Raich* and, thus, has affirmed that states cannot supersede the federal ban on cannabis commerce.<sup>141</sup> However, such an argument disregards the impactful Congressional action on the subject and fails to recognize that Congress has legislatively acquiesced to more liberal state cannabis laws, even via statute.<sup>142</sup>

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136. Memorandum from James M. Cole, Deputy Att'y Gen., DOJ, to All U.S. Att'ys (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/9FRU-NW4N>].

137. Lampe, *supra* note 118.

138. Hill, *supra* note 109.

139. See Medical Marijuana and Cannabidiol Research Expansion Act, Pub. L. No. 117-215.

140. Proclamation No. 10467, 87 Fed. Reg. 61441 (Oct. 6, 2022); see also Press Release, The White House, Press Briefing by Press Secretary Jen Psaki (Apr. 20, 2021) ("[T]he President supports leaving decisions regarding legalization for recreational use up to the states.").

141. *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988) (discussing legislative acquiescence doctrine).

142. Alan L. Kaufman & Matthew R. Abel, *The Federal Controlled Substances Act Does Not Preempt the Michigan Medical Marijuana Act*, 58 WAYNE L. REV. 1, 43 n.266 (2012) (citing 21 U.S.C. § 903); *c.f.* *Virginia v. Tennessee*, 148 U.S. 503, 522 (1893) (discussing Congressional silence about Virginia and Tennessee's use of borders for federal purposes like tax collection, in a similar way that the federal government still taxes cannabis business income, despite the federal ban).

## CONCLUSION

This Essay has shown the advantages and disadvantages of interstate cannabis compacts and the possible ways in which states may collaborate. Like many things in modern politics, collaboration is likely to follow partisanship and geographic interests, in that order. Further, this Essay has discussed the most significant value of interstate cannabis compacts: creating a regional cannabis economy supported by regional banking outside the strict scope of federal cannabis prohibition. In fact, Congress is responsible for the groundwork laid for such a regime, just as it was responsible for banning cannabis commerce in the first place. All in all, the consent of Congress for an interstate cannabis compact—so long as it complies with the laws of the compact states—“is fairly implied from [Congress’s] subsequent legislation and proceedings.”<sup>143</sup> Consequently, there is a future for regional cannabis economies without overcoming the hurdle of getting Congress to finally agree on something.

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143. *Tennessee*, 148 U.S. at 521–22.