

ESSAY

Local Officers and Interstate Compacts

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ABSTRACT

The Supreme Court bifurcated its Appointments Clause jurisprudence in Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC by setting aside Buckley v. Valeo and its progeny as inapplicable to “local officers.” A seven-Justice majority in Aurelius approved the Oversight Board’s structure—its leadership appointed by the President alone yet possessing vast powers over financial and budgetary matters—finding that the Board’s members were “local officers” outside the Appointments Clause.

This Essay argues that interstate compact entities’ officials are “local officers,” analogous to the Oversight Board’s members, and that interstate compact agencies should be analyzed under Aurelius. Administrative agencies created by compacts are often led by officials appointed through dispersed methods, reflecting their multistate stakeholders. And under the “law of the Union” doctrine, the Supreme Court treats certain interstate compacts as “transformed” into federal law, which provides an undesirable but plausible mechanism for sweeping the Appointments Clause into regional entities. This Essay’s approach unites historical analysis with modern case law and remedies the incomplete and inconsistent approaches of the existing frameworks.

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INTRODUCTION

The Supreme Court announced in *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*¹ that its “local officers” Appointments Clause test in some contexts is “the test established by the Constitution’s text, as illuminated by historical practice.”² In so doing, the Court concluded that the mainline Appointments Clause case law derived from *Buckley v. Valeo*³ was inapplicable to “local officers.”⁴ Although extensive academic commentary has rightly examined the effects of *Aurelius* on Puerto Rico’s status,⁵ few scholars have noticed the Court’s remarkable pronouncement on Appointments Clause jurisprudence.⁶ Many recent editions of constitutional and administrative law textbooks omit *Aurelius* entirely.⁷

In *Aurelius*, a seven-Justice majority greenlit the structure of the Financial Oversight and Management Board under the Appointments

¹ 590 U.S. 448 (2020).

² *Id.* at 449, 471.

³ 424 U.S. 1 (1976) (per curiam).

⁴ See *Aurelius*, 590 U.S. at 449, 467–69.

⁵ See, e.g., Anthony M. Ciolli, *Territorial Constitutional Law*, 58 IDAHO L. REV. 206, 229–31 (2022); Emmanuel Hiram Arnaud, *Dual Sovereignty in the U.S. Territories*, 91 FORDHAM L. REV. 1645, 1666 n.167 (2023); Maggie Blackhawk, *The Supreme Court, 2022 Term—Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 123–24 (2023).

⁶ For scholarly commentary on the Appointments Clause aspect of *Aurelius*, see Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. TEX. L. REV. 349, 410–12 (2023) (connecting *Aurelius* to the Impeachment Clause); Lucas T. Vebber, *Unconstitutional Federalism: A Call to Reinvigorate the Appointments Clause*, 21 GEO. J.L. & PUB. POL’Y 337, 352–53 (2023) (describing jurisprudential “confusion” from *Aurelius*); James T. Campbell, *Aurelius’s Article III Revisionism: Reimagining Judicial Engagement with the Insular Cases and “The Law of the Territories,”* 131 YALE L.J. 2542, 2561–83 (2022) (criticizing the analogy between the Appointments Clause and Article III); Taylor Nicolas, Note, *Modern Vacancies, Ancient Remedy: How the De Facto Officer Doctrine Applies to Vacancies Act Violations (And How It Should)*, 74 STAN. L. REV. 687, 700–05 (2022) (discussing the de facto officer doctrine issue left undecided in *Aurelius*).

⁷ Compare, e.g., JONATHAN D. VARAT, VIKRAM D. AMAR & EVAN H. CAMINKER, CONSTITUTIONAL LAW 415 (16th ed. 2021) (*Aurelius* included as a note case), and KRISTIN E. HICKMAN & RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE 8–9 (6th ed. Supp. 2023) (similar), with GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW, at xxiv (5th ed. 2021) (*Aurelius* absent from Table of Cases), and MICHAEL STOKES PAULSEN, MICHAEL W. MCCONNELL, SAMUEL L. BRAY & WILLIAM BAUDE, THE CONSTITUTION OF THE UNITED STATES, at xxx (5th ed. 2023) (same).

Clause. The Board's leadership, appointed by the President alone, exercises vast powers over budgetary and financial matters including overriding the elected legislature and governor.⁸ The Court found that the Appointments Clause does not restrict the appointment method of local officers that Congress vests with primarily local duties through the Territory and Seat of Government Clauses,⁹ and that the Board was one such entity with primarily local duties, using a fact-intensive historical and functional analysis.¹⁰

Recognizing the Court's bifurcation of Appointments Clause case law,¹¹ this Essay identifies interstate compact agencies as a relevant and needful area to apply *Aurelius*'s "local officers" reasoning.¹² Thorny federalism issues arise from federal laws that bless interstate compacts and provide for federal appointees on compact agencies—how do the Constitution's structural provisions for the federal government apply to entities that blur the line between federal and state, especially where federal, state, and local appointees sit side by side? These federalism issues are tangible; under the "law of the Union" doctrine,¹³ congressional consent to interstate compacts "transforms" state compacts into federal law,¹⁴ providing a plausible mechanism for applying the Appointments Clause to compact officials.

With the Appointments Clause sword sharper than ever,¹⁵ the Ninth Circuit's policy arguments¹⁶ and the Fourth Circuit's circular reasoning¹⁷ are no longer sufficient for evaluating compact agencies. Today, compacts operate the country's second-busiest seaport,¹⁸ coordinate power management in the Northwest,¹⁹ and apportion water rights in

⁸ See *Aurelius*, 590 U.S. at 453, 465–66.

⁹ See *id.* at 464, 468.

¹⁰ See *id.* at 467.

¹¹ The Court's rejection of *Buckley* in favor of its *Aurelius* approach means there are at least some Appointments Clause cases in which *Buckley* does not initially apply. See *id.* at 468.

¹² *Id.* at 449.

¹³ See *infra* notes 91–101 and accompanying text for further discussion of the law of the Union doctrine.

¹⁴ *E.g.*, *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

¹⁵ See, e.g., *United States ex rel. Zafirov v. Fla. Medical Assocs., LLC*, 751 F. Supp. 3d 1293, 1322 (M.D. Fla. 2024), *rev'd*, 2026 WL 2581886 (11th Cir. Sep. 1, 2026) (finding False Claims Act qui tam relators subject to the Appointments Clause); *United States v. Trump*, 740 F. Supp. 3d 1245, 1308–09 (S.D. Fla. 2024) (dismissing an indictment due to special counsel regulations violating Appointments Clause); *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, 121 F.4th 1314, 1346–47 (D.C. Cir. 2024) (Walker, J., concurring in the judgment in part and dissenting in part) (contending that the Appointments Clause applies to the Financial Industry Regulatory Authority).

¹⁶ See *infra* note 120 and accompanying text.

¹⁷ See *infra* text accompanying notes 155–56.

¹⁸ PORT AUTH. OF N.Y. & N.J., 2023 ANNUAL REPORT 8–9, 72 (2024).

¹⁹ NW. POWER & CONSERVATION COUNCIL, 2024 ANNUAL REPORT TO CONGRESS 3 (2024).

the Southwest,²⁰ to name but three. The weaknesses in existing case law therefore increase the risk to numerous longstanding administrative arrangements.²¹

Part I introduces *Aurelius*. Part II reviews existing Appointments Clause case law on interstate compacts. Part III applies the Court's analysis in *Aurelius* to the Compact Clause, concluding that officers of interstate compact entities are presumptively local officers of the compact entity, which avoids a collision with the Appointments Clause if compact entities are deemed federal law.

I. THE APPOINTMENTS CLAUSE

The Appointments Clause is a “significant structural safeguard[] of the constitutional scheme” that “prevents congressional encroachment upon the Executive and Judicial Branches.”²² More than mere “etiquette or protocol,”²³ it provides:

[The President] by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.²⁴

Vital yet enigmatic,²⁵ the Constitution provides no convenient definition for identifying which officials possess sufficient influence to require accountability to the President through selection under the Appointments Clause.²⁶ This uncertainty has led case law to characterize Officers of the United States as those “occupy[ing] a ‘continuing’

²⁰ Colorado River Compact, Nov. 24, 1922, 42 Stat. 171, N.M. STAT. ANN. § 72-15-5 (2025). There is no uniform citation style for interstate compacts, so this Essay cites compacts like treaties as a rhetorical device to emphasize their multijurisdictional aspect.

²¹ For a discussion of policy rationales for using interstate compacts, see, e.g., JEFFREY B. LITWAK, *INTERSTATE COMPACT LAW: CASES & MATERIALS* 18–22 (4th ed. 2020); Hannah J. Wiseman, *Regional Cooperative Federalism and the U.S. Electric Grid*, 90 GEO. WASH. L. REV. 147, 159–70 (2022); Robert G. Dixon Jr., *Constitutional Bases for Regionalism: Centralization; Interstate Compacts; Federal Regional Taxation*, 33 GEO. WASH. L. REV. 47, 55–57 (1964); KATHRYN A. FOSTER, *THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT* 104–14 (1997).

²² *Edmond v. United States*, 520 U.S. 651, 659 (1997).

²³ *Buckley v. Valeo*, 424 U.S. 1, 125 (1976) (per curiam).

²⁴ U.S. CONST. art. II, § 2, cl. 2.

²⁵ Even Chief Justice Marshall recognized the ample ambiguity within the Appointments Clause. See *United States v. Maurice*, 26 F. Cas. 1211, 1213–14 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice).

²⁶ See, e.g., *United States v. Arthrex, Inc.*, 594 U.S. 1, 6 (2021).

position established by law” and “exercis[ing] significant authority pursuant to the laws of the United States.”²⁷ Officers are distinguished from employees, who are “lesser functionaries subordinate to officers.”²⁸ Although Appointments Clause precedent has many facets,²⁹ this Essay focuses on the threshold question of when an official possesses the duties of an Officer of the United States.

With “‘continuing’ position established by law” and “significant authority pursuant to the laws of the United States” in mind,³⁰ the issues with the Financial Oversight and Management Board for Puerto Rico come into view. The Board was created by federal law, the PROMESA Act,³¹ and comprises seven members appointed by the President to three-year terms, without Senate confirmation if selected from lists prepared by congressional leadership.³² These federally appointed Board members are the crux of the problem; Congress had previously authorized the territorial government to use the federal bankruptcy code,³³ and so the issue here is whether these specific offices, created by an Act of Congress and appointed by the President alone, can properly exercise this power.

Both officer factors are arguably present. A fixed, statutory term is a “‘continuing’ position established by law.”³⁴ And the statutory authority granted to the Board is very plausibly “significant authority pursuant to the laws of the United States.”³⁵ Although characterized as an entity within the territorial government, the Board was created by an act of Congress, is expressly autonomous from the popularly elected territorial legislature and governor, and can issue subpoenas and enforce certain laws.³⁶ The Board develops a fiscal plan, reviews the elected legislature’s budget for compliance with the fiscal plan, and can ensure compliance

²⁷ *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (first quoting *United States v. Germaine*, 99 U.S. 508, 511 (1878); and then quoting *Buckley*, 424 U.S. at 126).

²⁸ *Buckley*, 424 U.S. at 126 n.162 (citing *Germaine*, 99 U.S. 508).

²⁹ *E.g.*, *Seila Law LLC v. CFPB*, 591 U.S. 197, 198 (2020) (removal); *NLRB v. Noel Canning*, 573 U.S. 513, 515 (2014) (recess appointments); *Morrison v. Olson*, 487 U.S. 654, 671–73 (1988) (distinction between noninferior and inferior officers); *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 749 (2025) (same); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155–62 (1803) (appointing versus commissioning).

³⁰ *Lucia*, 585 U.S. at 245 (quoting *Buckley*, 424 U.S. at 126).

³¹ Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C. §§ 2101–2241).

³² 48 U.S.C. § 2121(e). Only one of the seven members must reside or have a primary place of business within Puerto Rico. *Id.* § 2121(e)(2)(B)(i). The Governor of Puerto Rico is a non-voting, *ex officio* Board member. *Id.* § 2121(e)(3). The President’s attempt to terminate several Board members without cause is currently being litigated. *Gonzalez v. Gor*, 802 F. Supp. 3d 368, 393 (D.P.R. 2025) (granting a temporary restraining order).

³³ *See Puerto Rico v. Franklin Cal. Tax-Free Trust*, 579 U.S. 115, 118 (2016).

³⁴ *Lucia*, 585 U.S. at 244–45 (quoting *United States v. Germaine*, 99 U.S. 508, 511 (1879)).

³⁵ *Id.* at 245 (quoting *Buckley*, 424 U.S. at 126).

³⁶ 48 U.S.C. §§ 2121(c), 2124(f), 2124(h), 2128.

with the fiscal plan by modifying the budget itself.³⁷ The Board draws its own operating funds from the budget it supervises.³⁸ In sum, there is a colorable argument that the Board members are Officers of the United States.

The Board began bankruptcy-like proceedings in 2017, which were challenged by bondholders on Appointments Clause grounds.³⁹ Lead plaintiff Aurelius Investment contended that the Board members were improperly appointed principal or inferior officers of the United States.⁴⁰ The United States, as intervenor, argued that the Board members were territorial officers not subject to the Appointments Clause.⁴¹

The district court denied the Appointments Clause challenge on grounds that Congress has plenary power under Article IV to create territorial governments, including structures that would not pass muster if applied to the federal government itself.⁴² The district court was highly deferential to Congress's determination that the Board was a territorial entity, and repeatedly noted that Congress is only capable of acting in the territories through legislation, which does not make territories inherently federal.⁴³

The First Circuit reversed, applying an "ancient canon of interpretation" to interrelate the Appointments Clause and Territory Clause: "*generalalia specialibus non derogant* (the 'specific governs the general')." ⁴⁴ The court analogized to presentment: Congress has broad powers over territories, but must present legislation concerning territories to the President for signature or veto.⁴⁵ After determining the Appointments Clause applied, the panel cited the mainline case law of *Buckley v. Valeo*,⁴⁶ *Freytag v. Commissioner*,⁴⁷ and *Lucia v. SEC*,⁴⁸ and found that

³⁷ *Id.* §§ 2141–43.

³⁸ *Id.* § 2127(b).

³⁹ *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 318 F. Supp. 3d 537, 541, 543–45 (D.P.R. 2018). Aurelius Investment owned around 0.5% of outstanding Puerto Rican debt, consistent with its specialization in acquiring distressed sovereign debts at discounted prices and profiting after litigation. See Jesse Barron, *The Curious Case of Aurelius Capital v. Puerto Rico*, N.Y. TIMES MAG. (Nov. 26, 2019), <https://www.nytimes.com/2019/11/26/magazine/aurelius-capital-v-puerto-rico.html> [<https://perma.cc/F4DJ-6QGZ>].

⁴⁰ *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 318 F. Supp. 3d at 544–45. Although "principal officer" is the Supreme Court's prevailing terminology, "principal" officers are more properly labeled "noninferior" officers. See Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87, 98 n.51, 135–36 (2019).

⁴¹ *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 318 F. Supp. 3d at 545.

⁴² See *id.* at 549–57.

⁴³ See *id.* at 551, 553, 555.

⁴⁴ *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 851, 863 (1st Cir. 2019).

⁴⁵ See *id.* at 851–52.

⁴⁶ 424 U.S. 1 (1976) (per curiam).

⁴⁷ 501 U.S. 868 (1991).

⁴⁸ 585 U.S. 237 (2018).

the Board members were Officers of the United States subject to the Appointments Clause.⁴⁹ The court stated that the Board “plainly exercise[s] ‘significant authority,’” with the court’s first example being the magnitude of the Board-managed bankruptcy filings.⁵⁰ The court further characterized oversight and veto authority over the territorial government and the Board’s investigatory powers as examples of significant authority.⁵¹

The Supreme Court reversed the First Circuit, with Justice Breyer writing for a seven-Justice majority.⁵² The Court made three key conclusions about how the Appointments Clause interacts with entities outside of the federal government. First, the Court found that the Appointments Clause governs the appointment method of all Officers of the United States, including those exercising power in or related to the territories.⁵³ Second, the Court found that the Appointments Clause does not restrict the appointment method of local officers that Congress vests with primarily local duties through the Territory and Seat of Government Clauses, and that the traditional Appointments Clause case law derived from *Buckley v. Valeo* does not apply in these circumstances.⁵⁴ Third, the Court found that the Board was one such entity with primarily local duties, using a fact-intensive analysis including the legislation’s purpose, the entity’s operational scope, and the analogous history of the territories.⁵⁵

The Court first analyzed the Appointments Clause itself, agreeing with the First Circuit’s analogy to bicameralism, presentment, and judicial review.⁵⁶ The Court reviewed historical legislation that required Senate confirmation for territorial officials who exercised both local and federal duties.⁵⁷ Because territorial officers exercised different types of responsibilities, the Court identified binding the United States to contracts, mitigating punishment for federal offenses, and managing affairs with Native Americans as federal duties exercised alongside local territorial duties.⁵⁸ This led to the Court’s first conclusion—the

⁴⁹ See *Aurelius Inv.*, 915 F.3d at 856–59.

⁵⁰ *Id.* at 856 (quoting *Buckley*, 424 U.S. at 126).

⁵¹ *Id.* at 856–57.

⁵² *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 590 U.S. 448, 451 (2020). All nine Justices agreed that the Board was not subject to the Appointments Clause. *Id.* at 473 (Thomas, J., concurring in judgment); *id.* at 503 (Sotomayor, J., concurring in judgment).

⁵³ See *id.* at 459 (majority opinion).

⁵⁴ See *id.* at 464, 467–68.

⁵⁵ See *id.* at 467.

⁵⁶ See *id.* at 457–58.

⁵⁷ See *id.* at 457–59.

⁵⁸ See *id.* at 458–59.

Appointments Clause applies to all Officers of the United States who “exercise power in or related to Puerto Rico.”⁵⁹

The Court then analyzed whether the Board members constituted Officers of the United States or “some other type of officer.”⁶⁰ Here, the Court’s approach diverged from the lower courts. Unlike the First Circuit, which quickly concluded that the “significant authority” test from *Buckley* and its progeny was both appropriate and met by the Board,⁶¹ the seven-Justice majority described the inquiry as “whether the Board members have primarily local powers and duties.”⁶² The Court observed that the text of the Appointments Clause “suggests a distinction between federal officers—officers exercising power of the National Government—and nonfederal officers—officers exercising power of some other government.”⁶³ The Court surveyed historical examples of Congress exercising local governmental authority when no state government was present, creating local law and local officers with “unique” powers under the Territory and Seat of Government Clauses.⁶⁴ This led to the Court’s second conclusion—the Appointments Clause “does not restrict the appointment of local officers that Congress vests with primarily local duties” through the Territory and Seat of Government Clauses.⁶⁵

After finding that Congress could create local officers vested with primarily local duties unrestrained by the Appointments Clause, the Court analyzed specifically whether the Board members exercised “primarily local powers and duties.”⁶⁶ The Court recognized Congress’s assertion of its Article IV powers in creating the Board but independently analyzed the statute to “prove that, insofar as the Constitution is concerned, they succeeded.”⁶⁷ Conceding that the Board possessed broad investigatory powers, the Court identified these powers as enforceable through Puerto Rican law and courts.⁶⁸ The Court also emphasized that many state and local officials can take actions with nationwide effects, but that impact is not dispositive in determining whether an officer is local or federal.⁶⁹ The Court described the Board

⁵⁹ See *id.* at 459.

⁶⁰ See *id.* at 459–60.

⁶¹ See *Aurelius Inv. v. Puerto Rico*, 915 F.3d 838, 856–59 (1st Cir. 2019).

⁶² See *Aurelius*, 590 U.S. at 459–60.

⁶³ *Id.* at 460.

⁶⁴ *Id.* at 460–64.

⁶⁵ *Id.* at 464.

⁶⁶ *Id.* at 465.

⁶⁷ See *id.*

⁶⁸ See *id.* at 465–66.

⁶⁹ See *id.* at 467. This contrasts with the First Circuit’s decision, in which the bankruptcy’s magnitude was the panel’s first example of significant authority. See *Aurelius Inv. v. Puerto Rico*, 915 F.3d 838, 856 (1st Cir. 2019).

as filing for bankruptcy “on behalf of, and in the interests of, Puerto Rico” rather than for the federal government.⁷⁰ This led to the Court’s third conclusion—that the local focus of the Board’s powers and duties, combined with the history of the territories, made Board members local officers not subject to the Appointments Clause.⁷¹

After so concluding, the Court addressed its existing Appointments Clause case law. The Court expressly declined to apply *Buckley v. Valeo* and its progeny, describing the test synthesized therein as failing to account for whether the Board’s duties are “primarily local versus primarily federal.”⁷² In lieu of *Buckley*, the Court looked to two cases involving Article III tenure protections for courts in the District of Columbia⁷³: *O’Donoghue v. United States*⁷⁴ and *Palmore v. United States*.⁷⁵

Although *O’Donoghue* and *Palmore* nominally reached different conclusions,⁷⁶ the *Aurelius* majority reconciled these cases by emphasizing that the District of Columbia courts were initially federal courts that also adjudicated local issues but were later bifurcated, leaving the later-established Superior Court as a “strictly local” court.⁷⁷ Conceding that it was a “rough analogy,” the Court viewed this interaction between the Seat of Government Clause and Article III as transferable to the interaction between the Territory Clause and the Appointments Clause.⁷⁸ The Court concluded by describing its local-officers inquiry as “the test established by the Constitution’s text, as illuminated by historical practice,” and expressed doubt that Congress could avoid the Appointments Clause by diluting a federal officer’s regular authorities with numerous local duties.⁷⁹

II. THE COMPACT CLAUSE

This Part introduces the Compact Clause, reviews existing case law applying the Appointments Clause to interstate compact entities, and illustrates its shortcomings. This Essay then resolves the case law’s shortcomings by extending *Aurelius* to compact entities.

⁷⁰ *Aurelius*, 590 U.S. at 466.

⁷¹ *See id.* at 467.

⁷² *Id.* at 467–68 (emphasis omitted).

⁷³ *Id.* at 469–71.

⁷⁴ 289 U.S. 516 (1933).

⁷⁵ 411 U.S. 389 (1973).

⁷⁶ The Supreme Court and the Court of Appeals of the District of Columbia were Article III courts under *O’Donoghue* (with corresponding removal and salary protections), 289 U.S. at 551, unlike the Superior Court of the District of Columbia under *Palmore*, 411 U.S. at 410.

⁷⁷ *See Aurelius*, 590 U.S. at 470.

⁷⁸ *Id.* at 471.

⁷⁹ *See id.*

The Compact Clause appears among provisions restricting state sovereignty,⁸⁰ providing that “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power.”⁸¹ The Compact Clause predates the Constitution and first appeared in similar form in the Articles of Confederation.⁸² Courts construe the consent requirement liberally; congressional consent can be implied,⁸³ preauthorized,⁸⁴ or express.⁸⁵ Some compacts do not require consent at all; the Compact Clause only restricts agreements that increase state power at the expense of federal authority⁸⁶ or of other states.⁸⁷ Although there is great diversity in the structure and functions of compacts, from adjusting state borders⁸⁸ to creating consultative committees,⁸⁹ this Essay focuses only on compacts creating administrative agencies.

Compacts are contracts,⁹⁰ but certain compacts are simultaneously treated as federal law under the “law of the Union” doctrine.⁹¹ The Supreme Court stated the modern two-part formulation in *Cuyler v. Adams*⁹²: When a compact (1) receives congressional consent and (2) “is an appropriate subject for congressional legislation,” congressional consent then “transforms the States’ agreement into federal law under the Compact Clause.”⁹³

⁸⁰ *E.g.*, THE FEDERALIST NO. 44, at 280–81 (James Madison) (Clinton Rossiter ed., 1961); Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 691 n.25 (1925).

⁸¹ U.S. CONST. art. I, § 10, cl. 3.

⁸² *See* ARTICLES OF CONFEDERATION of 1781, art. VI (similar to the Constitution but with additional requirements); Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?*, 3 U. CHI. L. REV. 453, 453–55 (1936) (discussing the drafting history and sources available to the Framers).

⁸³ *Virginia v. Tennessee*, 148 U.S. 503, 522 (1893).

⁸⁴ *See, e.g.*, Act of June 6, 1934, Pub. L. No. 73-293, 48 Stat. 909 (codified at 4 U.S.C. § 112) (preauthorizing crime prevention compacts and compact agencies).

⁸⁵ *E.g.*, Act of Nov. 6, 1966, Pub. L. No. 89-774, 80 Stat. 1324 (consenting to the WMATA compact).

⁸⁶ *Virginia*, 148 U.S. at 519–20.

⁸⁷ *Ne. Bancorp. Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 472 U.S. 159, 176 (1985).

⁸⁸ *See* Frankfurter & Landis, *supra* note 80, at 692–94, app. at 730–34 (discussing examples at the Founding).

⁸⁹ *E.g.*, Great Lakes Basin Compact, Dec. 12, 1955, 82 Stat. 414, IND. CODE § 14-25-13-1 (2025).

⁹⁰ *E.g.*, *New York v. New Jersey*, 598 U.S. 218, 224 (2023).

⁹¹ For a comprehensive discussion of the law of the Union doctrine, see LITWAK, *supra* note 21, at 147–61; MICHAEL L. BUENGER, JEFFREY B. LITWAK, RICHARD L. MASTERS & MICHAEL H. MCCABE, *THE EVOLVING LAW AND USE OF INTERSTATE COMPACTS* 93–101 (2d ed. 2016).

⁹² 449 U.S. 433 (1981).

⁹³ *See id.* at 438–40; *see also id.* at 440 n.8 (discussing the history of the law of the Union doctrine).

The scope of the law of the Union doctrine has not been fully delimited. Compact interpretation is a federal question,⁹⁴ and compact terms are enforceable in federal court through the Privileges and Immunities Clause.⁹⁵ Substantively, compacts displace contrary state law through the Supremacy Clause,⁹⁶ and can even displace contrary provisions in state constitutions.⁹⁷ Other areas in which the law of the Union doctrine has been substantively applied include foreclosing Dormant Commerce Clause challenges and ensuring uniform judicial interpretation of compact terms.⁹⁸

The Supreme Court, however, has largely referenced the law of the Union doctrine using sweeping language⁹⁹ with only hints of limiting principles.¹⁰⁰ As scholars have recognized, taking the broad formulation of the law of the Union doctrine to its logical extreme would work significant mischief on interstate compact agencies.¹⁰¹ Perhaps accordingly, lower federal courts have thus far avoided discussing the law of the Union doctrine with respect to the Appointments Clause. The remainder of this Part discusses two very different yet comparably flawed analytical frameworks used by the courts of appeals for reviewing interstate compact agencies under the Appointments Clause, both of which evade discussion of the law of the Union doctrine and its implications.

⁹⁴ *New York*, 598 U.S. at 223.

⁹⁵ *See* *Del. River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 427–28 (1940).

⁹⁶ *See, e.g., Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 627 n.8 (2013).

⁹⁷ *See, e.g., Wash. Metro. Area Transit Auth. v. One Parcel of Land*, 706 F.2d 1312, 1319 (4th Cir. 1984).

⁹⁸ *See* Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105, 153–56 (2003) (categorizing “federalism-related substantive functions” of the law of the Union doctrine); BUENGER ET AL., *supra* note 91, at 96–101 (similar).

⁹⁹ *See* *Cuyler v. Adams*, 449 U.S. 433, 438–39 (1981); *Texas v. New Mexico*, 462 U.S. 554, 564, 567 (1983); *Carchman v. Nash*, 473 U.S. 716, 719 (1985); *Reed v. Farley*, 512 U.S. 339, 347 (1994); *New York v. Hill*, 528 U.S. 110, 111 (2000); *Alabama v. Bozeman*, 533 U.S. 146, 149 (2001); *Alabama v. North Carolina*, 560 U.S. 330, 351 (2010) (stated without citing *Cuyler*); *Kansas v. Nebraska*, 574 U.S. 445, 455–56, 456 n.5 (2015) (“[T]he Constitution turns the agreement into a federal law like any other.”).

¹⁰⁰ *See* *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (suggesting a distinction between a “law of the United States” under *Cuyler* and an Act of Congress); *Virginia v. Maryland*, 540 U.S. 56, 66 (2003) (similar); *New York v. New Jersey*, 598 U.S. 218, 223 (2023) (citing *Cuyler* only to establish federal question jurisdiction).

¹⁰¹ *See* David E. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987, 1023–25 (1965) (“[T]he logical effect of the law of the Union doctrine is to make compact agencies instrumentalities of the federal government”); Dale D. Goble, *The Council and the Constitution: An Article on the Constitutionality of the Northwest Power Planning Council*, 1 J. ENV'T L. & LITIG. 11, 50–53 (1986); L. Mark Eichorn, Note, *Cuyler v. Adams and the Characterization of Compact Law*, 77 VA. L. REV. 1387, 1405–10 (1991); Grant, *supra* note 98, at 160–67.

A. *The Ninth Circuit and Buckley v. Valeo*

In *Seattle Master Builders Ass'n v. Pacific Northwest Electric Power & Conservation Planning Council*,¹⁰² a divided Ninth Circuit panel denied an Appointments Clause challenge to the structure of the Council, a compact agency authorized by federal law and created by the states of Oregon, Montana, Washington, and Idaho.¹⁰³ The Council devises regional energy policy, which a federal agency then implements.¹⁰⁴ The nature of the federal government's involvement with the interstate compact scheme was at issue; Congress could have, and did, consider devising regional energy policy federally through a traditional administrative agency, but selected the interstate compact agency form for various policy reasons at the insistence of Western senators.¹⁰⁵ The issue, then, is whether the interstate compact agency may properly exercise the federal powers otherwise wielded by a federal agency. Despite the issues discussed below, the case remains relevant—the Second Circuit favorably cited *Seattle Master Builders* in 2023,¹⁰⁶ and district courts both within¹⁰⁷ and without¹⁰⁸ the Ninth Circuit have favorably cited the 1986 case in the twenty-first century.

The Ninth Circuit panel began with the then-recent case *Buckley v. Valeo*. The court described *Buckley* as having three prongs, with the Appointments Clause applying to (1) executive branch officers, who (2) serve pursuant to federal law, and who (3) exercise significant authority over the federal government.¹⁰⁹ The panel held that the Council's members cleared the second prong because they served pursuant to state law, not federal law.¹¹⁰ The panel analogized to several other areas of environmental law in which the federal government consented to following state law, such as federal reclamation projects being subject to state water laws.¹¹¹

¹⁰² 786 F.2d 1359 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987) (mem.).

¹⁰³ *Id.* at 1362–66; Pacific Northwest Electric Power and Conservation Planning Act, Dec. 5, 1980, 94 Stat. 2697, WASH. REV. CODE § 43.52A.010 (2025).

¹⁰⁴ See *Seattle Master Builders*, 786 F.2d at 1362.

¹⁰⁵ See *id.* at 1363. The statute includes a savings clause requiring the Secretary of Energy to constitute the Council as a traditional administrative agency in the event of a successful judicial challenge. 94 Stat. at 2702, 16 U.S.C. § 839b(4)(b)(1).

¹⁰⁶ *New York v. Atl. States Marine Fisheries Comm'n*, 609 F.3d 524, 535–36 (2d Cir. 2010).

¹⁰⁷ *E.g.*, *United States v. California*, 444 F. Supp. 3d 1181, 1195–96 (E.D. Cal. 2020).

¹⁰⁸ *E.g.*, *Campaign for Buffalo Hist., Architecture & Culture, Inc. v. Buffalo & Fort Erie Pub. Bridge Auth.*, No. 12-00605, 2013 WL 672323, at *7 (W.D.N.Y. Feb. 22, 2013); *Corr v. Metro. Wash. Airports Auth.*, 800 F. Supp. 2d 743, 758 (E.D. Va. 2011); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 259 F. Supp. 2d 783, 796–97 (W.D. Wis. 2003).

¹⁰⁹ See *Seattle Master Builders*, 786 F.2d at 1365.

¹¹⁰ See *id.*

¹¹¹ See *id.* at 1364.

In *Buckley*, the Supreme Court reasoned that postmasters and clerks had more significant authority than employees and “lesser functionaries,” and that the powerful commissioners of the Federal Election Commission in turn had greater authority than postmasters and clerks.¹¹² The Ninth Circuit identified this scale of authority in *Buckley* but added a federal-state dimension concerning the level of government that granted the authority.¹¹³ The court did not neatly categorize exactly what the Council members were, describing them as “perform[ing] their duties pursuant to a compact which requires both state legislation and congressional approval,” but that “the states ultimately empower the Council members to carry out their duties.”¹¹⁴ The majority found it significant that state legislation established the compact entity’s offices, salaries, and goals.¹¹⁵ Judge Beezer penned a widely panned dissent.¹¹⁶

There are several problems with the emphasis *Seattle Master Builders* placed on state law. To start, the extension of *Buckley v. Valeo* is strained in this context because *Buckley* is primarily about congressional encroachment into presidential appointment power rather than federalism issues,¹¹⁷ which the *Seattle Master Builders* majority expressly acknowledged.¹¹⁸ Procedurally, the Appointments Clause issue may not have been properly before the Ninth Circuit,¹¹⁹ and in any event began with a policy argument,¹²⁰ an approach disfavored in the twenty-first century.¹²¹

Furthermore, the panel evaded discussion of the law of the Union doctrine. The Council meets both *Cuyler* elements, as the statute’s backup plan of creating a traditional administrative agency if the

¹¹² *Buckley v. Valeo*, 424 U.S. 1, 126 & n.162 (1976) (per curiam). *But see* John M. Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 WAYNE L. REV. 1335, 1361–63 (1976) (criticizing this reasoning).

¹¹³ *See Seattle Master Builders*, 786 F.2d at 1365; Dave Frohnmayer, *The Compact Clause, the Appointments Clause and the New Cooperative Federalism: The Accommodation of Constitutional Values in the Northwest Power Act*, 17 ENV’T L. 767, 779–83 (1987).

¹¹⁴ *Seattle Master Builders*, 786 F.2d at 1365.

¹¹⁵ *See id.*

¹¹⁶ *See Frohnmayer, supra* note 113, at 777–78 (categorizing the legal and factual issues from the dissent); Goble, *supra* note 101, at 36 n.108 (similar); Maryhelen Sherrett, Note, *Seattle Master Builders Association v. Pacific Northwest Electric Power and Conservation Planning Council: The Constitutionality of the Northwest Experiment in “Cooperative Federalism,”* 17 ENV’T L. 971, 989–91 (1987) (similar).

¹¹⁷ *See Buckley*, 424 U.S. at 127–32, 138; Michael C. Blumm, *The Appointments Clause, Innovative Federalism, and the Constitutionality of the Northwest Power Planning Council*, 8 J. ENERGY L. & POL’Y 1, 19 (1987).

¹¹⁸ *Seattle Master Builders*, 786 F.2d at 1365.

¹¹⁹ *See* L. Randall Weisberg, *Seattle Master Builders: The Rush to Judgment*, 17 ENV’T L. 815, 823–24, 829–30 (1987) (highlighting standing issues).

¹²⁰ *See id.* at 823.

¹²¹ *See* David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 746 & n.73 (2021).

compact was struck down demonstrates both the congressional consent and subject matter appropriateness elements.¹²² If the Council is treated as federal law under *Cuyler*, it is unclear why federal structural safeguards such as the Appointments Clause would not also apply. More broadly, the panel's focus on state law is difficult to square with the federal statute preauthorizing the compact, which specifies numerous details of the Council appointees, including default term duration, salary maximums, and financial disclosures.¹²³

Two prudential reasons also caution against the continued use of *Seattle Master Builders* for compact Appointments Clause challenges. First, the case is quite old, predating the modern articulation of "continuing position established by law" and of "significant authority pursuant to the laws of the United States."¹²⁴ A less deferential court would have little difficulty concluding that *Seattle Master Builders* was abrogated or simply unpersuasive.¹²⁵

The second prudential problem is that *Seattle Master Builders* only concerned compacts composed of state-appointed officials.¹²⁶ The majority rested their decision on the fact that Council members did not serve pursuant to federal law.¹²⁷ Even without the law of the Union doctrine applying, a compact agency with a member appointed by the President¹²⁸ would require an additional analytical step to explain why a presidential appointment was not pursuant to federal law.¹²⁹ The majority passively listed other interstate compacts in which the federal government participated as a member alongside the states but took these compacts for granted rather than factoring them into the analysis.¹³⁰

¹²² See *supra* notes 93, 105 and accompanying text.

¹²³ Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, § 4(a), 94 Stat. 2697, 2701 (1980).

¹²⁴ See *supra* notes 23–29 and accompanying text.

¹²⁵ See, e.g., Alan B. Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States–Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1299, 1305–07 (1992) (“[I]t is not at all clear that the majority opinion in *Seattle Master Builders* is valid now, if it ever was.”); Sherrett, *supra* note 116, at 988 (criticizing the majority’s “shallow” and “far from thorough” reasoning).

¹²⁶ See *Seattle Master Builders*, 786 F.2d at 1362; see also The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 145–46 & nn.61–63 (1996) (favorably citing *Seattle Master Builders* and advising that state officials receiving delegated federal authority do not create improperly appointed federal offices).

¹²⁷ See *Seattle Master Builders*, 786 F.2d at 1365.

¹²⁸ E.g., Delaware River Basin Compact, Sep. 27, 1961, 75 Stat. 688, DEL. CODE ANN. tit. 7, § 6501 (2025).

¹²⁹ E.g., Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., 590 U.S. 448, 471 (2020).

¹³⁰ See *Seattle Master Builders*, 786 F.2d at 1364.

In summary, although the Ninth Circuit articulated similar factors to the Supreme Court's reasoning in *Aurelius*,¹³¹ the case's conclusory reasoning and minimal discussion of compacts with participation from the federal government make *Seattle Master Builders* a suboptimal approach for analyzing Appointments Clause challenges to compact agencies.

B. The Fourth Circuit and Lebron v. National Railroad Passenger Corp.

In *Kerpen v. Metropolitan Washington Airports Authority*,¹³² a unanimous Fourth Circuit panel rejected an Appointments Clause challenge against the Metropolitan Washington Airports Authority ("MWAA") brought by toll road users.¹³³ The MWAA is a compact between Virginia and the District of Columbia, which operates two of the three major commercial airports in the National Capital Region.¹³⁴ The nature of the federal government's involvement in the interstate compact scheme was at issue; the federal government previously operated the facilities itself.¹³⁵ The issue, then, was whether this interstate compact agency may properly exercise the authority and duties previously exercised by a federal agency.

The MWAA's Board has three members appointed by the President with Senate confirmation and fourteen members appointed by the two signatories and non-signatory Maryland.¹³⁶ The MWAA can operate a sworn police force, establish a foreign trade zone, condemn property, and issue bonds.¹³⁷ These powers plausibly constitute "significant authority" under the mainline Appointments Clause cases.¹³⁸ Although *Kerpen* was recently decided, it has several favorable citations outside of the Fourth Circuit.¹³⁹

¹³¹ Compare *id.* at 1365–66 (emphasizing that salaries and administrative operations derived from member states' laws), with *Aurelius*, 590 U.S. at 465 (emphasizing that salaries and investigatory powers were administered pursuant to territorial law).

¹³² 907 F.3d 152 (4th Cir. 2018), *cert. denied*, 589 U.S. 916 (2019) (mem.).

¹³³ *Id.* at 156–58.

¹³⁴ Metropolitan Washington Airports Authority Compact, Oct. 18, 1986, 100 Stat. 1783–373, D.C. CODE § 9-901 (2025), VA. CODE ANN. § 5.1-152 (2025) [hereinafter MWAA Compact].

¹³⁵ *Kerpen*, 907 F.3d at 157–58.

¹³⁶ MWAA Compact, D.C. CODE § 9-904 (2025), VA. CODE ANN. § 5.1-155 (2025).

¹³⁷ *Id.*, D.C. CODE §§ 9-907 to -914 (2025), VA. CODE ANN. §§ 5.1-158 to -165 (2025).

¹³⁸ See *supra* notes 23–29 and accompanying text.

¹³⁹ See *Schindler Elevator Corp. v. Wash. Metro. Area Transit Auth.*, 16 F.4th 294, 302 (D.C. Cir. 2021); *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 438 n.24 (5th Cir. 2024); *The Test for Determining "Officer" Status Under the Appointments Clause*, 49 Op. O.L.C. (Jan 16, 2025) (slip op. at 8).

Judge Wilkinson's opinion applied *Lebron v. National Railroad Passenger Corp.*¹⁴⁰ and held that the MWAA is not subject to the Appointments Clause because it is not a federal entity.¹⁴¹ The court described *Lebron* as having two prongs: (1) creation by a special statute in furtherance of federal governmental goals, and (2) control of the entity by federal government appointees.¹⁴²

The Fourth Circuit held that the MWAA satisfied neither prong of *Lebron*.¹⁴³ In its two-paragraph discussion, the panel first found that Virginia and the District of Columbia created the MWAA, with no special federal statute involved.¹⁴⁴ The court characterized the federal statute transferring the airports to the MWAA as a property transfer that did not substantively create the compact agency.¹⁴⁵ The panel only briefly observed Congress's preauthorization of regional airport compacts but did not discuss it further.¹⁴⁶ Analyzing the second prong, the panel found that the federal government did not control the MWAA because it appointed only three of seventeen Board members.¹⁴⁷ The court emphasized that although the federal appointees could influence debate within the Board, the correct inquiry was control, not influence.¹⁴⁸

The Fourth Circuit's two-part *Lebron* test presents several issues. To start, *Lebron* concerned whether Amtrak was a public or private entity, a distinction also noted in *Aurelius*.¹⁴⁹ The MWAA is unambiguously not a private entity because all Board members are appointed by various governments.¹⁵⁰ Even if *Lebron* was appropriate in this context, however, Congress's preapproval of the interstate compact is at least arguably a "special law" creating the entity because the MWAA could not exist without congressional approval.¹⁵¹ The panel briefly mentioned preauthorization as historical context but not in its analysis.¹⁵² The law of the Union doctrine is also met: Congressional preauthorization satisfies the first *Cuyler* element, and the compact's subject

¹⁴⁰ 513 U.S. 374, 400 (1995) (finding that Amtrak was a federal government entity for First Amendment purposes).

¹⁴¹ *Kerpen v. Metro. Wash. Airports Auth.*, 907 F.3d 158, 160 (4th Cir. 2018).

¹⁴² *Id.* at 158.

¹⁴³ *Id.* at 159.

¹⁴⁴ *Id.*

¹⁴⁵ *See id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv.*, 590 U.S. 448, 469 (2020).

¹⁵⁰ *See* Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-500, § 6002(4), 100 Stat. 1783, 1783-374 (1986) (establishing the MWAA as an "independent local agency").

¹⁵¹ *Contra Kerpen*, 907 F.3d at 159.

¹⁵² *See id.*

matter—operations and policymaking for two major international airports—implicates interstate and foreign commerce and thereby meets the second element.¹⁵³ The panel, however, did not reference this doctrine, or explain why it did or did not apply and sweep in other federal law restrictions such as the Appointments Clause.¹⁵⁴

Furthermore, the Fourth Circuit's Appointments Clause analysis is circular. The panel found that the Appointments Clause did not apply because the federal government only appointed three of the seventeen MWAA Board members.¹⁵⁵ However, this means that the Appointments Clause did not apply to the MWAA because the MWAA Board members were not appointed pursuant to the Appointments Clause.¹⁵⁶ Adding the middle step—that an appointment outside the Appointments Clause means the MWAA is not a federal entity and is therefore not subject to the Appointments Clause—expands the circumference of the circle but does not change the underlying conclusion.

From a 37,000-foot view, the Fourth Circuit's approach identifies several key considerations: The MWAA's substantive powers arise from Virginia and the District of Columbia, and the degree of control exercised by the federal government is relevant. The upshot of the Fourth Circuit's reasoning, that the presence of federally appointed officers on a multijurisdictional body is not a reagent that transforms the entire group into federal officers, is surely correct.

On closer inspection, however, the Fourth Circuit applied *Lebron* in a structurally problematic context. Interstate compacts' congressional consent requirement,¹⁵⁷ and the law of the Union doctrine in particular,¹⁵⁸ are difficult to consistently apply to the *Lebron* factor involving the presence of a "special law,"¹⁵⁹ especially when the federal government elects to participate as a compact member for various policy reasons. And the question of federal control is highly formalistic in an era when Appointments Clause analysis evaluates the substantive authority of government officials.¹⁶⁰ *Kerpen* is therefore an inappropriate vehicle

¹⁵³ See *supra* notes 93, 137 and accompanying text.

¹⁵⁴ *Kerpen*, 907 F.3d at 160.

¹⁵⁵ *Id.* at 159–60.

¹⁵⁶ The Fourth Circuit's circular reasoning, however, would fit neatly alongside the Supreme Court's nineteenth century Appointments Clause jurisprudence. See Burkoff, *supra* note 112, at 1342–69; Andrew Owen, Note, *Toward a New Functional Methodology in Appointments Clause Analysis*, 60 GEO. WASH. L. REV. 536, 539–43 (1992).

¹⁵⁷ See *supra* notes 80–89 and accompanying text.

¹⁵⁸ See *supra* notes 90–97 and accompanying text.

¹⁵⁹ *Kerpen*, 907 F.3d at 158–59.

¹⁶⁰ See *supra* notes 23–29 and accompanying text; see also *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 761–62 (2025) (explaining that task force members were “officers” because, although they were initially advisory, they exercised significant authority after the Affordable Care Act granted them additional duties).

for evaluating Appointments Clause challenges to interstate compact entities.

III. INTERSTATE COMPACT ENTITIES AND LOCAL OFFICERS

Seattle Master Builders and *Kerpen* each have part of the answer yet are incomplete on their own. *Seattle Master Builders* correctly identifies state-level operational details, such as salary and enforcement powers, as relevant considerations in determining whether an interstate compact is subject to the Appointments Clause.¹⁶¹ *Kerpen* correctly identifies federal creation and control as relevant considerations.¹⁶² *Aurelius* combines the benefits of these two decisions by considering both operations and federal control more generally when evaluating whether an entity's leadership comprises local officers.¹⁶³ Furthermore, just as the federal PROMESA Act created local officers in *Aurelius*,¹⁶⁴ the "federal" status of interstate compact statutes under a broad interpretation of the law of the Union doctrine would still permit the appointment of local officers to compact agencies using an *Aurelius* framework. Finally, *Aurelius* has the added prudential benefit of being derived from a recent Supreme Court case with considerable agreement among the Justices.¹⁶⁵

Justice Breyer's seven-Justice majority embarked on a structural and historical survey to establish the Territory and Seat of Government Clauses as sources of authority to establish local officers.¹⁶⁶ This Part argues that the Compact Clause recognizes an analogous source of authority to establish local officers. Just as there is no Article IV exception to the Appointments Clause,¹⁶⁷ there is no Compact Clause exception to the Appointments Clause. Several structural considerations, however, belie the applicability of the Appointments Clause to the Compact Clause.

First, the Compact Clause itself is phrased in the negative: States may not enter into agreements or compacts unless a unitary condition—congressional consent—is satisfied.¹⁶⁸ Congressional consent lifts this restriction, but the Compact Clause presupposes that states otherwise retain authority to enter into agreements or compacts and structure them accordingly.¹⁶⁹ This singular condition was simplified from the

¹⁶¹ *Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conservation Plan. Council*, 786 F.2d 1359, 1365 (9th Cir. 1986).

¹⁶² *Kerpen*, 907 F.3d at 158–59.

¹⁶³ *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 590 U.S. 448, 467 (2020).

¹⁶⁴ *Id.* at 453.

¹⁶⁵ *Id.* at 451.

¹⁶⁶ *See id.* at 460–64.

¹⁶⁷ *Id.* at 458.

¹⁶⁸ U.S. CONST. art. I, § 10, cl. 3.

¹⁶⁹ *See id.*

three compact conditions in the Articles of Confederation, with the purpose and duration requirements excluded from the Constitution.¹⁷⁰

The limited references to the Compact Clause around Ratification correlate with a deferential view of compacts that receive congressional consent. Alexander Hamilton detailed that “the most pointed care” had been taken to describe the restrictions on state powers, a short list that includes the Compact Clause.¹⁷¹ James Madison likewise described the restrictions on state powers, again including the Compact Clause by implication, as “fall[ing] within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark.”¹⁷² These remarks suggest that the restrictions on the Compact Clause are narrowly tailored and are unlikely to include an implied cross-reference to the Appointments Clause.

Second, the Constitution provides for state appointments in several different contexts which involve federal-state relations. Article I reserves the appointment power over officers in the militia to the states.¹⁷³ State executives make temporary appointments of senators during vacancies.¹⁷⁴ Finally, states (and the District of Columbia) appoint electors to the Electoral College.¹⁷⁵ Whether these state appointments are exceptions to the Appointments Clause or outside its ambit altogether,¹⁷⁶ the Constitution does expressly provide for state appointment power for enumerated types of offices in areas affecting the federal government.

The Constitution’s structure therefore provides two guideposts for interrelating the Appointments Clause and Compact Clause. The Constitution has a narrowly tailored restriction on interstate compacts. The Constitution also expressly anticipates state appointments in certain contexts of federal concern. Because congressional consent to interstate compacts “restore[s] [states] to their original inherent sovereignty,”¹⁷⁷ appointments to interstate compacts are likely exempted from the Appointments Clause as an extension of the authority recognized by the Compact Clause, in a similar manner to the express grants of state appointments power over aspects of the federal system provided throughout the Constitution.

¹⁷⁰ See ARTICLES OF CONFEDERATION of 1781, art. VI.

¹⁷¹ THE FEDERALIST NO. 32 (Alexander Hamilton).

¹⁷² THE FEDERALIST NO. 44 (James Madison).

¹⁷³ U.S. CONST. art. I, § 8, cl. 16.

¹⁷⁴ *Id.* art. I, § 3, cl. 2, *amended* by U.S. CONST. amend. XVII; *id.* amend. XVII, § 1 (if authorized by the state legislature).

¹⁷⁵ U.S. CONST. art. II, § 1, cl. 2; *id.* amend. XXIII (establishing seat of government electors).

¹⁷⁶ See Tillman & Blackman, *supra* note 6, at 442–43 (suggesting that state militia appointments are outside the Appointments Clause rather than falling under the Clause’s “herein otherwise provided for” language).

¹⁷⁷ *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 725 (1835).

Historical practice confirms this structural reading. Compacts originated as colonial-era dispute-resolution procedures appealed to the Crown, expanding in scope after independence and as regional coordination became increasingly important.¹⁷⁸ Particularly notable is the Maryland-Virginia Compact of 1785,¹⁷⁹ which predated the Constitution and apportioned use of the Potomac River, such as in navigation, customs, and fishing rights.¹⁸⁰ This 1785 compact also provided for the states to appoint commissioners for determining the location and logistics of building lighthouses and related navigation infrastructure, subject to the states' approval and funding.¹⁸¹ The Framers therefore would have been well aware that interstate compact commissioners would make policy and ultimately be answerable to their authorizing jurisdictions;¹⁸² George Washington himself helped negotiate the compact.¹⁸³

Likewise, the federal government has long participated in compacts and other contractual agreements with the several states.¹⁸⁴ The Supreme Court has previously upheld federal-state agreements, observing that the federal government's power to enter into contracts allowed states to interact with the federal government in the same way they would with a natural or legal person.¹⁸⁵ Indeed, congressional consent itself is proof that Congress declined to take a particular matter under national advisory and instead allowed states to tackle the issue

¹⁷⁸ See Frankfurter & Landis, *supra* note 80, at 691–95, app. at 730–34 (1925) (discussing historical examples).

¹⁷⁹ Maryland-Virginia Compact of 1785, Jan. 3, 1786, Va. Acts of Assembly 1785 ch. 27.

¹⁸⁰ *Id.*

¹⁸¹ See *id.* art. I, § 9.

¹⁸² Although the commissioners represented their appointing state, they could only convene on a majority basis. *Id.* Through the contractually specified quorum, Maryland officers could exercise the authority of the Commonwealth of Virginia, even if a majority of Virginian officers dissented. This dilutes the border of where Maryland's authority ends and Virginia's authority begins and illustrates why the commissioners, and interstate compact officers more generally, are "local officers" and not "state officers." Cf. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994) (using similar reasoning to deny Eleventh Amendment sovereign immunity to a compact agency).

¹⁸³ *Virginia v. Maryland*, 540 U.S. 56, 61 (2003); see also Alexander Hamilton ("Camillus"), *The Defence No. XXXVII* (Jan. 6, 1796), reprinted by NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-20-02-0006> [<https://perma.cc/ZV3H-2EBH>] (defending the appointment method of bilateral commissioners under the Jay Treaty on grounds that "they are not in a strict sense OFFICERS. They are *arbitrators* between the two Countries. . . . [I]n practice it has not been deemed a violation of the provision to appoint Commissioners or special Agents for special purposes in a different mode").

¹⁸⁴ See Frank P. Grad, *Federal-State Compact: A New Experiment in Co-operative Federalism*, 63 COLUM. L. REV. 825, 837–40 (1963).

¹⁸⁵ See *Searight v. Stokes*, 44 U.S. 151, 166 (1845); see also *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 541 (1885) ("[T]he State and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution.").

themselves.¹⁸⁶ In summary, structure and longstanding historical practice confirm that the Compact Clause has operated in various contexts without strict conformance to the Appointments Clause and therefore represents another source of authority for empowering local officers, alongside Congress's authority under the Territory and Seat of Government Clauses.

This extended local officers test can be illustrated by the Washington Metropolitan Area Transit Authority ("WMATA"). WMATA is an entity created by an interstate compact between Virginia, Maryland, and the District of Columbia, approved by Congress and responsible for operating rapid transit in Washington, D.C., and surrounding localities.¹⁸⁷ WMATA exercises its authority through an eight-member Board of Directors, with the three compact signatories appointing two Directors each.¹⁸⁸ The Secretary of Transportation appoints the final two Directors on behalf of the federal government.¹⁸⁹

WMATA very plausibly exercises significant authority. WMATA can exercise quick-take eminent domain against property owners over a state constitutional prohibition of this power.¹⁹⁰ It can issue revenue bonds, relocate highways and public facilities, operate a sworn police force, and is exempt from taxation and generally exempt from regulation.¹⁹¹ These interstate commerce powers are likely appropriate subject matter for congressional action and, with congressional consent, plausibly implicate the law of the Union doctrine, potentially making the compact federal law.

Here, the federal government exercises one quarter of the delegated police power of consenting states through an interstate compact. Although these directors are appointed by a federal officer and represent the federal government's interests, their powers are quintessentially local in nature and geographically cabined.¹⁹² Furthermore, the Secretary's appointment power is written into the contractual language of the compact,¹⁹³ meaning that the federal directors are empowered by the continued obligations and consent of the participating states. Therefore, the federal directors are "local officers" of the interstate compact entity, "an instrumentality and agency of each of the Signatory

¹⁸⁶ See John M. Volkman, *Testing New Forms of River Basin Governance: Implications of the Seattle Master Builders Case*, 17 ENV'T L. 835, 853 (1987).

¹⁸⁷ Washington Metropolitan Area Transit Authority Compact tit. III, Nov. 6, 1966, 80 Stat. 1324, VA. CODE ANN. § 33.2-3100 (2025) [hereinafter WMATA Compact].

¹⁸⁸ *Id.* § 5(a).

¹⁸⁹ *Id.*

¹⁹⁰ *Wash. Metro. Area Transit Auth. v. One Parcel of Land*, 706 F.2d 1312, 1316, 1319 (4th Cir. 1983).

¹⁹¹ See WMATA Compact, *supra* note 187, §§ 27-45, 67-68, 76-78.

¹⁹² See *id.* §§ 3, 12(d), 76, 82(b).

¹⁹³ See *id.* § 5(a).

parties.”¹⁹⁴ Even if considered federal law under the law of the Union doctrine, the directors would constitute local officers outside the ambit of the Appointments Clause.

CONCLUSION

Interstate compacts and compact agencies are a longstanding and unique policy tool, formed by the combined powers of consenting states.¹⁹⁵ This uniqueness, however, makes compact agencies vulnerable in a legal landscape characterized by vigorous challenges under and enforcement of the Appointments Clause.¹⁹⁶ This risk is heightened by the Supreme Court’s law of the Union doctrine, which categorizes certain compacts as federal law, potentially sweeping in the Appointments Clause.¹⁹⁷ Existing jurisprudence on the interaction between the Compact Clause and the Appointments Clause is conclusory and dispersed, lacking a unified baseline method for evaluating compacts.¹⁹⁸

The Supreme Court’s opinion in *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC* provides the optimal method for evaluating compact agencies under Appointments Clause challenges from both a prudential and jurisprudential standpoint.¹⁹⁹ The Court’s “local officers” reasoning, concerning Congress’s ability to act as a local legislature for the territories, is analogous and transferable to interstate compact agencies—multiple states coordinate solutions for regional problems and create governmental entities accountable to all states involved.²⁰⁰ Extending *Aurelius* to interstate compacts provides an administrable framework for courts that respects both the democratic processes of Congress and the states and the text, structure, and historical practice of the Constitution.

¹⁹⁴ *Id.* §§ 4, 12.

¹⁹⁵ *See supra* notes 80–89 and accompanying text.

¹⁹⁶ *See supra* note 15 and accompanying text.

¹⁹⁷ *See supra* Part II.

¹⁹⁸ *See supra* Part II.

¹⁹⁹ *See supra* Part III.

²⁰⁰ *See supra* Part III.