speaking. A course of conduct surer to drive down bond prices, and obscure a true market reaction, can hardly be imagined.

Thus, the only evidence suggesting that the covenant affected bond prices is the hypothetical testimony of appellant's witnesses as to what they would have done on a state of facts that never existed, and that never could have existed.

Their opinion of the covenant's importance rested not on its merits, for they did not understand it, but on what they had been told about it by Authority spokesmen. Thus, the hypothesis on which they opined that they would have sought a better price included not only the premise that there was no covenant but also the premise that Port Authority spokesmen were advising them that the covenant was vital to their interests and that the bonds could not be sold without it. And this was explicity made a part of the hypothesis on which Mr. Thompson's opinion was given. A 858. The Port Authority's behavior since repeal, and its evident self-interest at all times, demonstrate that the Port Authority would not have damned its own bonds merely because they lacked the 1962 covenant. (The Port Authority's rhetoric in 1962 was part of its effort to obtain the covenant.) When one of the premises of a hypothetical question is unsupported by evidence in the record, the witness' answer is, of course, to be disregarded as irrelevant. In any event, the evidence of what actually happened to Port Authority bond prices refutes the witnesses' unsupported speculations.[57]

The precedents are clear that even if those speculations were taken as true, they would not make unreasonable an otherwise permitted exercise of the reserved powers of sov-

57. No judicial opinion applying the *El Paso* standards has ever given weight to the testimony of a contracting party that he really cared about what was taken away. Courts invariably analyze the abrogated provisions on an objective basis.

ereignty. In *Butchers Union Co.* v. *Crescent City Co.,* 111 U.S. 746 (1884), the Court noted that the slaughterhouse monopoly had spent substantial sums in reliance upon its grant from the State. Repeal of the monopoly was upheld. Similarly, in *Faitoute Iron & Steel Co.* v. *City of Asbury Park,* 316 U.S. 502 (1942), the purchasers of municipal bonds unquestionably relied on the interest and maturity dates in their bonds, and the remedies for enforcing them, and obviously would not have paid the same price for the bonds without those features. Nonetheless, the changes were upheld. In *El Paso* itself, purchasers of installment contracts were using their reinstatement possibilities as a mechanism for speculating on subsequent discovery of minerals. They would not have purchased and paid the inflated prices the contracts commanded but for those possibilities.[58] The general point is worth stating: it will often be true that subsequent legislation modifying some aspect of a contract would have affected the initial bargain had the legislation been anticipated. To make such effect dispositive would emasculate the police power.

4. *Repeal deprived bondholders of an interest of little or no value to further ends of large importance.*

a. *The bondholders' interest.* Bondholders contracted to receive periodic payments of interest, and repayment of principal when due. That is the performance owed them,

58. As Mr. Justice White observed:

> "Hence the land Commissioner noted that the majority of sales and resale . . . were to purchasers buying a 'speculative option,' 'taken for possible profits on the rights of the surface owners to lease the land for oil and gas.' 'Under such conditions lands were bid in at highly inflated prices such as no one who expected to keep the land could afford to offer.' " 379 U.S. at 512.

One can only imagine the statute's catastrophic effect on the "secondary market" for such contracts.

and neither the States nor the Port Authority have in any way questioned that duty. Thus, unlike the great majority of contract impairment cases where wage increases are cancelled,[59] rents rolled back,[60] future interests wiped out,[61] or statutory restrictions on liquidity imposed,[62] nothing of the performance contracted for has been withheld here.

Undoubtedly, the obligation to repay principal and pay interest is the "central undertaking" for purposes of *El Paso* analysis. That was what the court deemed the primary obligation of bonds in *Beaumont* v. *Faubus,* 239 Ark. 801, 394 S.W.2d 478 (1965). In *Jacksonville Port Auth.* v. *State,* 161 So.2d 825, 827 (Fla. 1964), the court held that "[t]he right of a bondholder is to have his principal and interest paid when due; and it should be of little interest to him from what fund his obligation is currently being paid so long as he is being paid from some source sufficient to discharge what is his due." See also *New Bedford* v. *New Bedford, Woods Hole, Martha's Vineyard & Nantucket S.S. Auth.,* 336 Mass. 651, 148 N.E.2d 637, *appeal dismissed for want of substantial federal question,* 358 U.S. 53 (1958); *Opinion of the Justices,* 313 N.E.2d 882 (Mass. 1974). All of these cases upheld

59. *California Teachers Ass'n* v. *Newport Mesa Unified School Dist.,* 333 F. Supp. 436 (C.D. Cal. 1971).

60. *Albigese* v. *Jersey City,* 127 N.J. Super. 101 (Law Div.), *aff'd,* 129 N.J. Super. 567 (App. Div. 1974).

61. *Huddleston* v. *Nebraska Jewish Educ. Society,* 186 N.W. 2d 904 (Neb. 1971).

62. *Veix* v. *Sixth Ward Bldg. & Loan Ass'n of Newark,* 310 U.S. 32 (1940). One disposed to ignore the record and accept appellant's claim of damage at face value could still conclude at most that repeal caused a decline in price in the secondary market and a "thinness" in that market. Since timely payment of interest and principal are not claimed to be in jeopardy, appellant is, in effect, claiming only a loss in liquidity. The Court has frequently permitted States to impose such a loss in pursuit of permissible ends. *E.g., Faitoute Iron & Steel Co.* v. *City of Asbury Park, supra; Home Bldg. & Loan Ass'n* v. *Blaisdell, supra; Veix, supra.*

challenged legislation, treating the primary duty of payment as different from the permissibility of particular expenditures.[63]

Indeed, the Port Authority's Consolidated Bond Resolution itself makes clear what is primary and what is secondary. Under Section 16 of the Resolution, A 802, the obligation of the Port Authority is absolute and unconditional only with respect to payment of principal and interest.

Did repeal of the covenant materially affect the probability that the Port Authority's bonds would be paid? The answer is no, and appellant has never alleged or offered to prove otherwise. The covenant does not provide "security" in the classic sense of a lien on a particular piece of property that can be sold in the event a debt is not repaid; the covenant does not effect a pledge of particular funds, whether now in hand or after acquired; the covenant does not even assure that the Port Authority's net revenues will be higher with it than without it.

It simply is not true that the consequence of upholding the covenant is that the sum of money available to pay bonds will be greater than if the covenant is repealed. The linkage of repeal to toll increases for mass transit support has increased the total sums available for repayment of bonds. Moreover, even with the covenant the States could have required the Port Authority to run whatever deficit facilities other than passenger railroads the Commissioners could certify under the 1.3 and Section 7 tests. Deficit operations ranging from the Staten Island ferries and all

63. In *Ruano* v. *Spellman*, 81 Wash. 2d 820, 505 P.2d 447 (1973), which appellant cites at A.B. 54, the legislation called into question the legality of performing the primary duty of repaying the bonds as scheduled and no exercise of the police power was involved. Similarly, *First Nat'l. Bank* v. *Maine Turnpike Auth.*, 156 Me. 131 (1957), also cited at A.B. 54, involved no exercise of the police power—the legislation attempted to confer private benefits by making the Authority pay utility costs.

bus lines in the area to handling harbor waste disposal fall within the scope of the Port Authority Compact given the Compact's allowance for additional duties. These duties could be assigned to the Port Authority and the public tax money now spent on them applied to railroad purposes. It makes no difference to bondholders whether money goes to buses or trains—but the covenant applied only to the latter.

b. *The public ends.* On the other side of the balance, the interests of the States are of a character and intensity far surpassing any presented in the *Blaisdell-El Paso* line of cases. Even in *El Paso,* the principal harm to the State from its ill-advised land policy was that it had contracted itself into a mess and sold its lands too cheaply when it wanted to encourage settlement. The "imbroglio" over land titles could obviously have been solved without resort to breach of contract.

In this case, the States' interests are those core problems of health and public safety that led the courts to develop the police power exception to impairment doctrine. They are "fundamental interests" falling well within the meaning of the principle that, "[T]he Court has sought to prevent the perversion of the [contract] clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests," *Home Building & Loan Ass'n* v. *Blaisdell, supra,* 290 U.S. at 443-444.

In the fourteen years since the covenant's enactment, it has become clear that the fumes that emanate from motor vehicles are a deadly danger. They have left the air in the region so polluted that it is far below the minima required to protect the public health. 42 U.S.C. section 1857C-4(b)(1). The import of that finding cannot be stressed too strongly. People's life expectancy and physical well-being are being affected by the transit problems to which the Port Authority's bridges and tunnels have so heavily contributed. Indeed, the State has been subjected to federal

pressure and plans, which would, in effect, shut down the northern part of the State because of its inability to bring pollution levels down to the level required to protect the public health.

The State has openly opposed such plans. A 567. That opposition reflects a dreadful reality. At some point even serious encroachments on the health of our citizens must be tolerated if the alternative is outright economic collapse. But the State is surely privileged to see to it that the alternatives are not put that way. If government is not organized for carrying out purposes of that magnitude, then we do not know what it is organized for.

Moreover, as was seen just two years ago and may be seen again, the State can be thrown into total havoc at any time by the actions of foreign oil suppliers. It is not hyperbole to claim that conserving this precious resource, and providing for alternatives if its flow is shut off or its expense made prohibitive, is a matter of political survival. It should not be forgotten that the oil embargo led to near-violent confrontations over access to gasoline in New Jersey, and outright gun battles over truck fuel allocations in other States.

One may argue about the gravity of our energy and environmental difficulties. But reasonable people may surely believe that they should be attended to, and that is the test governing the Court. When physical, political or economic survival is at stake, the power of the Legislature is at its zenith.

c. *The insufficiency of other means.* Appellant suggests that the States should pursue their fundamental interests without repeal because the covenant itself permits increased Port Authority participation in rail mass transit. A.B. 14. As a legal matter, this judgment about means is

precisely the sort that is within the wide ambit of legislative discretion. But appellant's argument should be analyzed on its merits. At A.B. 14, it says:

> "[T]he Covenant by its terms permits Port Authority construction of rail facilities on its bridges; it permits Port Authority involvement in freight rail facilities; it permits any mass transit involvement of the agency of which bondholders approve; it permits the agency to undertake passenger rail mass transit operations which, by federal or state financial assistance or otherwise, together with user charges, can be made self-supporting within the meaning of the Covenant."

Appellant goes on to claim that the States' rail mass transit plans could have been accomplished if the Authority "had been permitted by the States to raise PATH fares to competitive levels." Appellant concludes:

> "no one disputes that anything which the States wish to accomplish through repeal of the Covenant can *to the same extent* be accomplished within the Covenant if either of the States are willing, through direct subsidies, guarantees or otherwise, to stand behind the necessary financing." A.B. 14; emphasis added.

The argument shows the weakness of appellant's case. To build a passenger railroad that began at one end of the George Washington Bridge and ended at the other would be a very expensive joke: the covenant would prevent it from going any further. That the covenant "permits Port Authority involvement in freight rail facilities" is undisputed and irrelevant; the covenant does not permit further involvement in passenger rail facilities, which is what this case is about. Obtaining bondholder approval would be impossibly burdensome: appellant's counsel has sworn that the owners of more than 95 percent of the Authority's Consolidated Bonds are "unknown to the Port Authority or its

paying agents." A 54. And appellant's chief witness, Mr. Thompson, concluded that an approach to bondholders for their consent "would fail." A 192.

Appellant's suggestion that a self-supporting rail mass transit facility be established ignores the facts that even in 1972 PATH-Plainfield was "barely doable" on a self-supporting basis, A 708-709, and that its costs have escalated sharply since then. Because of its capital requirements, the project will not be "self-supporting" within the meaning of the covenant even though the State has agreed to assume its operating deficits. See A 477, 527.

Nor would raising the fare "to competitive levels" help. Appellant presumably regards the competitive level as a dollar for a one-way trip, since it notes that AMTRAK and Conrail charge that fare for a ride from Newark to Manhattan, A.B. 16 n.12, even though neither AMTRAK nor Conrail is a rapid transit facility like PATH. More importantly, even if the basic PATH fare were increased to a dollar per ride, the revenues would still be insufficient to permit the financing of PATH-Plainfield within the covenant. Statistics derived from Volume I of the Joint Appendix below, pp. 255-70, 73 and 74, indicate that the PATH fare would, at the very least, have to be *quadrupled* to $1.20 per ride, *with no loss of passengers,* to enable the Authority to spend the $12 million per year required for debt service on PATH-Plainfield alone.[64]

Finally, appellant claims that "no one disputes" that anything repeal can do the States can do "to the same extent" by putting up their own money. The claim has two glaring defects. First, the State has, of course, disputed this claim repeatedly and emphatically, and both courts below have agreed with the State. Second, the claim itself is equally defective. Repeal of the covenant has made possible impo-

64. As long as the covenant remained in effect, to raise the PATH fares to any level that would retain ridership would simply have added to the Authority's ample reserves.

sition of a 50 percent increase in vehicular tolls to finance mass transit projects and increase the Port Authority's reserves. The States themselves could not have imposed that toll increase, with its auto-inhibiting potential.[65] Nor, in all probability, could the Port Authority have imposed it without applying the surplus revenues to mass transit.

Thus, repeal permits a balanced, comprehensive approach to the States' transportation, air quality and energy goals, an approach that is not available "to the same extent" without repeal.

It is worth emphasizing that the plan to be implemented as a result of repeal differs from that publicly and privately urged by appellant's chief witness, Mr. Thompson, A 189, 246, only in offering greater protection to bondholders.[66] The plan would, however, have been impossible under Mr. Tobin's interpretation of the 1962 covenant, A 689, for the simple, but indefensible, reason that it precluded any application of Port Authority vehicular tolls, even increased tolls, to any new rail mass transit project that did not cover all of its operating expenses and debt service. The repeal allows more rational and flexible financing, including the increased vehicular tolls, reasonable appropriations and subsidies by the federal government, the States and the Port Authority, appropriate charges to the users of rail mass transit facilities and enhanced security for bondholders.

Appellant also argues, A. B. 73, that the States can achieve their ends without involving the great revenue-producing facilities they helped the Port Authority finance. See pp. 5-6, *supra*. Yet the Port Authority was established because responsible leaders saw then the truth of a

65. See N.J.S.A. 32:1-35.55(a).

66. Under Mr. Thompson's plan, the States would have collected the increased tolls while under the plan to be implemented that money goes to the Authority.

proposition that is equally true now: if a project's realization depends upon the ability to achieve political agreement among a host of competing interests in two different States, it cannot be done. For example, should New Jersey pay the full cost of the PATH extension when one of its principal beneficiaries will be New York City? Faced as it is with declining employment due to industry relocation motivated in part by transportation inadequacies, should the City not pay its share? What about the City of Elizabeth? Should it not pay extra for the new service? Perhaps New York State should pay as it taxes the income earned in that State by New Jersey commuters.

To come at the question another way, is it fair to ask a citizen of southern New Jersey to increase the tax support he already provides for State mass transit subsidies in the Port District? In his region, bridge tolls have to be set to provide adequate protection for bondholders and support mass transit; and surplus revenues are in fact used for a rapid transit system. See page 53, n.35, *supra,* A 725-726. If his region can manage its affairs, why can't the Port District with the huge surpluses generated by its bridges and tunnels?

The Port District is not a State. The interests of its residents are not coincident with those of voters residing outside its boundaries. Yet appellant's alternative to repeal depends on those voters—in two different States—accepting the following package: we will pay increased taxes to finance those parts of your transportation system that lose money; after you have made ample provision for the protection of bondholders, you may take the surplus revenue from the parts of your transportation system that make money and do whatever you like with it, provided only that you do not use it to lighten our tax burden by supporting a passenger railroad. Appellant's alternative is neither realistic nor fair.

The Port Authority was created to bridge the provincial interests that had prevented efficient utilization of the port. The covenant subverted that objective. It did little or nothing for bondholder security, yet it prevented both the States and the Port Authority from charging the *region's* drivers to fund the *region's* mass transit needs.

The States made a two-fold judgment: (1) the problems to which repeal of the covenant was addressed far outweighed the utterly hypothetical damage done to bondholders; and (2) repeal of the covenant would materially aid in the solution of those problems. That legislative judgment is entitled to maximum respect.

II

REPEAL OF THE 1962 COVENANT DID NOT CONSTITUTE A TAKING OF PROPERTY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Private property may not be "taken" without payment of compensation. *Chicago, B. & Q. R. R.* v. *Chicago,* 166 U.S. 226, 241 (1897). But there has been no prohibited taking here. Just as the development of the police power doctrine has limited contract rights, so too has that same police power been held to limit property rights. Unquestionably, the State may, by a proper exercise of the police power, regulate property interests so as to reduce their value, or indeed destroy them. *Mugler* v. *Kansas,* 123 U.S. 623 (1887); *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); *Miller* v. *Schoene,* 276 U.S. 277 (1928); *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962).

The tests to be used in deciding such issues involve the same balancing of public need and private interest that characterizes the modern contract clause cases. It is precisely the tendency to "coalesce" the two standards—to

afford contract rights the same, but no more, constitutional protection than property rights generally, that has marked the modern law on the subject. Hale, *The Supreme Court and the Contract Clause,* 57 Harv. L. Rev. 852, 980 (1944); see *Veix* v. *Sixth Ward Building & Loan Ass'n,* 310 U.S. 32, 41 (1940); *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 447-448 (1934).

Appellant's due process claim is thus untenable if the State's position on the reasonableness of the repeal under contract clause standards is accepted. The "property" right at issue, if appellant's interest is so characterized, has no existence apart from the contract whose permissible alteration is assumed. Appellant's brief argues by reliance upon Justice Black's lone dissent in *El Paso* (as if the other eight Justices did not decide to the contrary), and a student note expressing concern that *El Paso* permitted the State to obtain title to valuable land as a result of its repudiation of its agreement. The claim is baseless.

III

THE 1962 COVENANT WAS VOIDABLE UNDER THE INTERSTATE COMPACT CLAUSE.

The foundation of appellant's case is the hypothesis that the 1962 legislation created a binding contract. That foundation is faulty. The covenant has been voidable from its inception.[67]

67. The question whether an enforceable contract exists would seem logically to precede the question whether the alleged contract has been unconstitutionally impaired. Although the State raised both issues below, neither the trial court nor the Supreme Court of New Jersey chose to address them in this order. Having resolved the impairment question in favor of the State, they found it unnecessary to decide whether an enforceable contract ever existed. Both issues are constitutional, and this Court's contract clause precedents, and the result they dictate in this litigation, are far clearer than the principles governing the alternative claim, which arises under the infrequently litigated interstate compact clause, U.S. Const. Art. 1

(*Footnote continued*)

Without an enforceable contract, there can be no contract clause violation. *Long Sault Development Co.* v. *Call,* 242 U.S. 272 (1916); *Illinois Central R. R.* v. *Illinois,* 146 U.S. 387 (1892); *Municipal Investors Ass'n* v. *City of Birmingham,* 316 U.S. 153, 155 (1942); *American Toll Bridge Co.* v. *Railroad Comm'n,* 307 U.S. 486 (1939).

Though the Port Authority is an agency of the States of New Jersey and New York, an interstate compact approved by Congress creates it, defines the powers it shall have, and provides the States with continuing authority to infuse it with new powers. The Port Authority Compact, 42 Stat. 174 (1921). Congressional approval of an in-

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(*Footnote continued*)
§ 10 cl. 3. This case comes before the Court on appeal, and it is settled that the lower court's judgment must be affirmed if there is a basis for it. "Appellee may urge in support of a decree any matter appearing in the record . . . . although his argument may involve . . . . an insistence upon matter overlooked or ignored by [the lower court]." *United States* v. *American Railway Express Co.,* 265 U.S. 425, 435 (1924). *Municipal Investors Ass'n* v. *City of Birmingham,* 316 U.S. 153 (1942), is dispositive. The appeal there was from a Michigan judgment upholding the constitutionality of State legislation extinguishing unmatured special assessments, tax liens, or other encumbrances on land sold for tax delinquency. This Court said, 316 U.S. at 157:

> "The Michigan Supreme Court assumed, without deciding, that these various provisions did include in the bondholders contract a right to additional assessments after a tax sale for the payment of deficiencies attributable to non-payment of valid prior assessments. 298 Mich. 314, 319, 299 N.W. 90, 92. As a contract must exist before it can be impaired, and as our conclusion against existence of the contract right settles this case, we feel it proper to consider only whether there was a contract between the bondholders and the Village for an additional assessment on the district property to meet deficiencies, instead of undertaking the resolution of the constitutional issue presented by the challenged statutes of Michigan. While this approach forces us to decide the meaning of Michigan legislation without the assistance of the courts of that State, it is necessary to do so because of the obligation of this Court to determine for itself the basic assumptions upon which interpretations of the Federal Constitution rest."

Here, of course, the unresolved issue is one of federal, not State, law.

terstate compact is not a *carte blanche.* The States are limited by the compact terms to which Congress has given its assent. *Henderson* v. *Delaware River Joint Bridge Comm'n,* 362 Pa. 475, 66 A.2d 843, 848, *cert. denied,* 338 U.S. 850 (1949) ("an amendment [of the compact] would be a matter for the contracting States subject, of course, to the congressional consent required by Article I, Section 10, cl. 3 of the Constitution.") The issue is thus whether the restrictions the covenant imposed are consistent with the terms of the Port Authority Compact.

A. Federal Law Governs the Interpretation of a Congressionally Approved Interstate Compact.

Under this Court's precedents, the effect of Congressional approval upon an interstate compact is clear. The meaning of the Compact, and the duties it imposes, are settled as a matter of federal law.[68] *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 54 U.S. (13 How.) 518 (1851); *Wedding* v. *Meyler,* 192 U.S. 573 (1904); *Delaware River Joint Toll Bridge Comm'n* v. *Colburn,* 310 U.S. 419 (1940); *League to Save Lake Tahoe* v. *Tahoe Regional Plainning Agency,* 507 F.2d 517 (9th Cir. 1974), *cert. denied,* 420 U.S. 974 (1975).

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68. As the States recognized, the Port Authority Compact required Congressional consent, although whether it did or not, once Congress acts, federal law governs. The compact in *Petty* v. *Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275 (1959), discussed *infra,* concerned an interstate bridge, a matter having no political significance within the federal system. *Ham* v. *Maine-New Hampshire Interstate Bridge Auth.,* 92 N.H. 268 (1943). Nonetheless, this Court, in holding in *Petty* that the compact's meaning was set by Congress' understanding of the terms the draftsmen employed, did not deem it material that the agreement was one for which no consent was required.

The Port Authority Compact required Congressional consent because of its political significance within the federal system. See, *e.g., Virginia* v. *Tennessee,* 148 U.S. 503 (1893); *New Hampshire* v. *Maine,* U.S. (1976). Despite the compact clause's sweeping prohibition on a State's forming "any Agreement or Compact with another State" without Congressional consent, it is the need for safe-

(*Footnote continued*)

The best and most recent illustration of this principle is *Petty* v. *Tennessee-Mississippi Bridge Comm'n,* 359 U.S. 275 (1959). Pursuant to the interstate compact clause, Tennessee and Missouri obtained Congress' consent to an interstate compact creating a Commission and authorizing it to operate ferries and to build a bridge across the Mississippi. 63 Stat. 930 (1949). The compact empowered the Commission "to contract, to sue and be sued in its own name." Plaintiff's decedent was killed while employed on a Commission-operated ferry on navigable waters. The widow sued the Commission under the Jones Act, claiming negligence. The lower court held that the words used in the compact, "sue and be sued," did not give rise to tort liability on the part of a government agency under the laws of either Missouri or Tennessee. Liability was therefore precluded by sovereign immunity.

This Court reversed, saying, 359 U.S. at 279:

> "[T]he Court is called on to interpret not unilateral state action but the terms of a consensual agreement, *the meaning of which, because made by different States acting under the Constitution and with con-*

(*Footnote continued*)

guarding national interests that determines whether an agreement is subject to the clause. The Port Authority Compact implicated national interests in several ways. First, it promised to benefit New York and New Jersey at considerable expense to States with competing ports. Exploitation of New York harbor, one of the world's great natural harbors, had been seriously impaired by a century of disputes between New York and New Jersey, both of which had jurisdiction over the harbor. The Compact ended the squabbling and improved the Port's advantage relative to the nation's other ports, a subject of vital concern to the States. *Cf.* the Constitution's Port Preference Clause, Art. 1, § 9. Agreements of substantial concern to non-compacting States are the sort of agreements for which Congressional consent is required. *Rhode Island* v. *Massachusetts,* 37 U.S. (12 Pet.) 464, 513-514 (1838).

The Compact's draftsmen also realized that the activities of the Port Authority would impinge upon federal interests in regulating commerce. Indeed, the overlap of the Port Authority's power with Congress' commerce power was so clear that the Compact seeks to avoid conflict by expressly permitting the agency to receive and exercise a delegation of federal powers.

> *gressional approval, is a question of federal law. . . .* In making that interpretation we must treat the compact as a living interstate agreement which performs high functions in our federalism, including the operation of vast interstate enterprises." (Emphasis added.)

The next issue was what Congress had understood the "sue and be sued" clause to mean. The Court reasoned:

> "This compact, approved by Congress in 1949, was made in an era when the immunity of corporations performing governmental functions was not in favor in the federal field. . . .
>
> "In view of the federal climate of opinion which by that time had grown up around the sue-and-be-sued clause, *we cannot believe that Congress intended to confine it more narrowly here than in the Keifer Case.*" (359 U.S. at 280-281; emphasis added.)

The doctrine that a Congressionally-approved interstate compact is to be construed as a matter of federal law and on the basis of Congress' understanding is soundly based. Without such a rule, a compact could mean whatever its adhering States said it did.

B. *The 1962 Covenant is not Authorized by the Port Authority Compact or Comprehensive Plan Legislation.*

The Port Authority Compact was the first interstate compact to create a continuing bi-State agency. Its draftsmen faced several problems. One was to secure for the new agency sufficient powers to solve the problems that would confront it. That was the central concern in the ratification process within the States, as municipalities and local interests struggled against ceding real power. New Jersey's Governor Edwards vetoed the first version of the Compact

because: "Either the Port Authority should be created with full and complete powers in the premises—organized and authorized to function as a vigorous and virile body, or not at all." BARD at 31. In New York, resolutions of the Democratic and Republican Parties expressly called for adequate powers, and those resolutions were read to Congress.[69]

Even as they wrote provisions assuring that the Port Authority would have sufficient powers to meet the foreseeable challenges, the draftsmen sought to enable the States to enlarge the Authority's powers to meet the unforeseeable, without repeated recourse to Congress, and without opening up the possibility that one or more of the adequate powers so carefully conferred might later be taken away. To achieve these ends, the Compact empowered the two States jointly to enact a great variety of legislation without returning to Congress for additional approval. It did not, however, authorize them to enact legislation withdrawing power from the Authority to act in fields the Compact contemplated. Thus, though any particular session of the Legislature may decide to authorize or not to authorize new Port Authority projects, none may legislate to deny future legislatures that same power.

Article III of the Compact creates the Port Authority and states that it shall have the powers the Compact

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69. The Republican Party resolution declared:

> "We therefore favor a compact or agreement with our sister State which will provide for the creation of a *port authority with adequate powers* to develop this port comprehensively." 61 Cong. Rec. 4920 (1921); emphasis added.

The Democratic Party resolution was similar:

> "We owe it to the nation to organize and develop the port of New York. To that end, we favor a compact or agreement with our sister State, New Jersey, which shall provide for creation of a port district and *a port authority with adequate powers to develop the port comprehensively.*" *Id.;* emphasis added.

enumerates. While it permits the States, or Congress, to give new powers to the Authority, it does not permit removal of old ones. Article VI grants the Port Authority

> *"full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility in [the Port] district."* (Emphasis added.)

The definitional section of the Compact, Article XXII, makes plain that "transportation facility" includes "railroads . . . for use for the transportation of persons or property." See also Stip., p. 236.

Thus, the 1962 covenant was in derogation of Article VI's grant of "full power and authority." It imposed discriminatory financing limits that effectively barred the Port Authority from further passenger railroad responsibilities. Application of those limits to other Authority projects would virtually have barred the Port Authority from ever doing anything. As of 1962, the Port Authority had had experience of ten years or more with only 14 of its facilities. A 691. Eight of those had operated at deficits for more than ten years. Three more had run deficits for seven or eight years. They too would have failed under the covenant's definition of "self-supporting"—having over the ten-year period net revenues sufficient to cover debt service for that period. By that definition, at least 11, and perhaps all, of the 14 facilities would have failed. This was the test a rail mass transit project was uniquely required to pass.

The motive for accepting such a restriction on Authority power is irrevelant. If someone offered the Authority a billion dollars to be used for airport development, on condition that it close its marine and railroad freight terminals and never re-open them without the permission of the grantor, legislation promising adherence to that bargain would violate the Compact.

Under Article VII of the Compact, "the port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either State concurred in by the legislature of the other." The Compact grants no authority whatsoever, either here or elsewhere, that would permit a legislature to contract away a future legislature's opportunity to utilize Article VII to impose additional duties on the Authority.

Article XI authorized the Port Authority to formulate and the States to approve "plans for the development of said district, *supplementary to or amendatory of any plan theretofore adopted.*" Once the States formulated a plan, they were not locked into it, if mutually agreeable alterations were desired. But no privilege to amend Article VI or VII of the Compact is granted to the States, acting either alone or together. "Amendatory" applies only to plans, not to the Compact itself.[70]

To amend their Compact, New York and New Jersey would need Congressional consent, either in the form of advance consent included in the Compact or in the form of special legislation at some later time. Suppose, for example, that after the decision in *Petty* v. *Tennessee-Missouri Bridge Comm'n, supra,* 359 U.S. 275 (1959), the two States involved each passed a law mutually agreeing

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70. Thus, the 1962 covenant has no infirmity if viewed solely as a revocable directive. Any given legislature may choose to direct the Authority to undertake or not to undertake a new mass transit project. What that legislature may not do is take away that same power from future legislatures. To take away that power would be to delete it from the Compact, an impermissible step without new Congressional assent.

Nor is the degree to which the draftsmen of the Comprehensive Plan were concerned with mass transit pertinent to the State's analysis. The Compact plainly authorizes the Port Authority to undertake rail mass transit projects, and for many years now, both the Port Authority and the States have regarded the carriage of people—by air, car, train and bus—as an important Port Authority responsibility.

that the Bridge Commission could not in the future sue or be sued. Those laws would obviously be invalid because Congress consented to the compact creating the Commission with a different understanding. The Court need not speculate whether those laws would by themselves constitute an interstate compact requiring Congressional consent in the absence of the Bridge Commission Compact and Congressional consent to it. The Bridge Commission Compact does exist, Congress did consent to it, and our hypothetical laws would effectively amend it; that they cannot do without new Congressional consent.

In summary, the Port Authority Compact draws a clear distinction among four categories of State implementing legislation: (1) adding powers (granted); (2) revoking powers (not granted); (3) supplementing plans (granted); and (4) amending plans once they are made (granted). The failure of the Compact to authorize legislation revoking the Port Authority's powers was, the evidence suggests, deliberate.

The 1962 covenant violated representations made to Congress—upon which consent to the whole enterprise was granted—that the Authority would have the broad powers necessary for the rational, coordinated organization of the Port. As a consequence of the covenant, the Authority did not have those powers, causing transportation plans to be shaped not by a comprehensive view of the Port's needs but by a warped view, distorted by the combination of the Port Authority's power to build new facilities for automobiles and its impotence to provide new passenger rail service. It was precisely such irrationalities that the States of New Jersey and New York promised Congress the Port Authority would be empowered to remedy in return for the competitive advantages bestowed. That the powers were granted did not mean that they had to be used; the States were entitled to operate on a first-things-first basis. But the States could not and cannot disable the Authority by selling away its power.

The covenant put the States in this position vis-a-vis the federal government. They desperately need mass transit support from the national treasury; without it, the economic viability of the nation's leading population and work center is threatened. The need would be less severe if the States made rational use of the revenue potential of the Port's facilities, revenue derived largely from automotive traffic which it is desired to discourage in any event. If asked why that is not done, the States can only answer that in 1962 the legislatures sold the power necessary to do the job, a power that was sought for "the benefit of the Nation," and that was to be held "in high trust." See Compact Preamble, Article I.

These contentions were met on two principal grounds in the courts below. First, it was argued that *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority,* 12 N.Y.2d 379, 240 N.Y.S.2d 1, *appeal dismissed for want of a substantial federal question,* 375 U.S. 78 (1973), upheld the validity of the covenant as a matter of *stare decisis.* Plainly it did not. The portion of the 1962 legislation adjudicated in *Courtesy* had to do with the World Trade Center. The covenant's validity was neither briefed, argued, nor mentioned in the New York courts or this Court. *Cf. Hicks* v. *Miranda,* 422 U.S. 332 (1975).

Alternatively, it was claimed that the *Courtesy* case set forth a rationale that bi-State legislation affecting the Port Authority is permissible so long as it serves a "port purpose," and that the covenant furthered such a purpose by facilitating the acquisition of the Hudson & Manhattan Railroad. That misconstrues the case. In *Courtesy Sandwhich,* the principal challenge was to the use of eminent domain in support of the World Trade Center. Plaintiffs also claimed that operation of a real estate venture was beyond the scope of the transportation and terminal functions provided for by the Compact. The Court of Appeals

properly rejected the claim because the Compact itself contemplates "the grant to the Port Authority of *additional powers within the framework of the compact.*" (12 N.Y. 2d at 391; emphasis added). The power to run a real estate venture is an "additional power" within the literal meaning of Articles III, VI, VII and XI of the Compact. But under the broad language of those articles, the States could authorize the Port Authority to do anything—even run a medical school. Thus, the port purpose doctrine; the States can grant additional powers only if they are port-related.

The Court of Appeals never said that any and all bi-State cooperative legislation pertaining to the Port Authority is permissible so long as it serves a "port purpose." On the contrary, the "port purpose" doctrine *limits* the legislative power under the extraordinarily broad language of the Compact; it is not a source of authority.

IV

THE COVENANT BECAME INCONSISTENT WITH SUPERSEDING FEDERAL LAW.

Between 1962, when the covenant was enacted, and 1974, when it was repealed, federal policy underwent a change of revolutionary proportions. In 1962, the federal government had no plans for urban rail mass transit: transportation policy was dedicated to the completion of the massive interstate highway system begun under the Highway Act of 1956. See Stip., p. 273.

In July 1964, Congress enacted the Urban Mass Transportation Act, 49 U.S.C. sections 1601 *et seq.*, expressing for the first time a federal legislative interest in urban mass transportation systems. Congress found that "the welfare and vitality of urban areas" and the effectiveness of federally aided programs were being jeopardized by inadequately

coordinated mass transit systems. The Act included among its purposes federal assistance in the development, planning, and establishment of mass transit systems in cooperation with State governments and their instrumentalities. A 717-718.

The scope of the 1964 Act was expanded by the Urban Mass Transportation Assistance Act of 1970 and the National Mass Transportation Assistance Act of 1974. The 1974 legislation contained detailed findings on the role of transportation as "the lifeblood of an urbanized society." A 718-720.

The highway program legislation was also amended: the Federal-Aid Highway Act of 1973 increased the authorization under the Urban Mass Transportation Act of 1964 and authorized the Secretary of Transportation to approve rail projects as part of the Federal-Aid Highway System. A portion of the highway trust fund was made available for this purpose. Stip., p. 273.

Between 1962 and 1974, insolvency forced many of the railroads serving the northeastern United States into extensive court-supervised reorganizations. On January 2, 1974, Congress enacted the Regional Rail Reorganization Act of 1973, 45 U.S.C. sections 701 *et seq.* A 547-549. In this Act, Congress found that rail service is "essential" and necessary "to meet the needs of commerce, the national defense, the environment and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers." By this time, legislative attention had focused on the fact that railroads provide a relatively pollution-free and fuel-conserving means of transportation. By this time too, it had become clear that the covenant stood in derogation of the explicit policy of Congress to support rail mass transit and to encourage the States and their agencies to participate in this "essential" national program.

Congress' approach to air pollution also changed radically in the years following 1962. Mr. Justice Rehnquist summarized the history in *Train* v. *Natural Resources Defense Council,* 421 U.S. 60, 62 (1975), concluding:

> "Even by 1970, state planning and implementation under the Air Quality Act of 1967 had made little progress. Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970. . . . These Amendments sharply increased federal authority and responsibility in the continuing effort to combat air pollution. . . ."

In November 1973, the federal Environmental Protection Administrator promulgated stringent air quality standards for northern New Jersey and said that, "The development of large-scale mass transit facilities and the expansion and modification of existing mass transit facilities is essential to any effort to reduce automotive pollution through reductions in vehicle use." See pp. 51-52, *supra.* Similarly, in December 1973, the Federal Highway Administrator stressed "the urgent need to structure toll rates for crossings in major metropolitan areas to encourage use of mass transit and carpools." Page 53, n.35, *supra.* See also the United States Department of Transportation report to Congress, commenting favorably on the diversion of vehicular tolls to mass transit and concluding that "it would appear to be in the Federal interest to permit the imposition of tolls which would promote a more efficient utilization of the urban transportation system." *Id.*[71]

71. For the relevance of federal administrative determinations to the question of federal preemption, see, *e.g., Pennsylvania* v. *Nelson,* 350 U.S. 497 (1956), in which the Court found the statutes of 42 States preempted in light of pronouncements on the subject by the President and the Director of the FBI. See also *N.Y. Dep't of Social Services* v. *Dublino,* 413 U.S. 405, 413 (1973); *Free* v. *Bland,* 369 U.S. 663, 668 (1962).

To Congress' stick and the administrators' calls, the covenant stood as an unresponsive obstacle. As Mr. Tobin explained in 1971, increased Port Authority tolls could not be used to support rail mass transit. A 689.

Under the supremacy clause, a State law must yield if it conflicts with or is otherwise preempted by federal action. See, *e.g., Campbell* v. *Hussey,* 368 U.S. 297 (1961). No explicit determination by Congress is necessary for a Congressional enactment or series of enactments to supersede the exercise of State power in the same area. *Burbank* v. *Lockheed Air Terminal,* 411 U.S. 624 (1973); *Pennsylvania* v. *Nelson,* 350 U.S. 497, 503 (1956); *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148, 156 (1942). The intention to supersede may be manifested explicitly or implicitly. As *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947), said, the State must give way whenever "the state policy may produce a result inconsistent with the objective of the federal statute."

Hines v. *Davidowitz,* 312 U.S. 52 (1941), defines the Court's task:

> "Our primary function is to determine whether under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. at 67-68.

In *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963), both the majority and the minority of a closely divided Court (5-4) reaffirmed the *Hines* test in a case considering the validity of a California avocado law:

> "Whether a State may constitutionally reject commodities which a federal authority has certified to be marketable depends upon whether the state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" 373 U.S. at 141.

For the dissent's agreement with the majority's statement of the governing principle, see 373 U.S. at 165. The Court unanimously (Mr. Justice Stevens not participating) approved the *Hines* test again in *De Canas* v. *Bica,* 424 U.S. , 86 S.Ct. 933, 940 (1976), though it concluded that the record did not permit it to decide whether the test was offended by a disputed provision of the California Labor Code.

The 1962 covenant fell squarely within the *Hines* formula: it stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as expressed in the Urban Mass Transportation Act, the Urban Mass Transportation Assistance Act, the amendments to the National Highway Act, the Clean Air Amendments, the Emergency Petroleum Allocation Act, and related federal legislation.

As *Hines* indicates, to hold that the covenant frustrates federal policy, the Court need not find that it directly prevents the enforcement of federal law. *Perez* v. *Campbell,* 402 U.S. 637 (1971), is also in point. Arizona's Motor Vehicle Safety Responsibility Act, stopping short of mandatory liability insurance, provided for the indefinite suspension of the driver's license of any person who failed to satisfy a judgment arising out of an automobile accident. The individuals in that case had obtained a discharge from such a judgment in a federal bankruptcy proceeding, but their right to drive in Arizona remained suspended. The federal Bankruptcy Act had as one of its purposes to give debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt," and the Court held the State statute so interfered with that purpose as to render the State law unconstitutional under the supremacy clause.

Two prior cases upholding similar State statutes, *Kesler* v. *Department of Public Safety,* 369 U.S. 153 (1962), and

Reitz v. *Mealey,* 314 U.S. 33 (1941), were expressly overruled. The majority in *Kesler* had erroneously "looked to the purpose of the state legislation and upheld it because the purpose was not to circumvent the Bankruptcy Act but to promote highway safety," rather than to its "plain and inevitable" effect:

> "We can no longer adhere to the aberrational doctrine of *Kesler* and *Reitz* that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. . . . Thus, we conclude that *Kesler* and *Reitz* can have no authoritative effect to the extent they are inconsistent with *the controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.*" 402 U.S. at 651-652; emphasis added.[72]

As the precedents make clear, it is not the purpose of the 1962 covenant that controls its constitutionality, but its "plain and inevitable effect." If it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or "frustrates the full effectiveness of federal law," it must fall.

And fall it must. The express purpose of the 1964 Urban Mass Transportation Act was to provide assistance to state and local governments and their instrumentalities in financing such [urban mass transportation] systems. . . ." A 718, 49 U.S.C. section 1601(b). To be sure, this legislation utilized the now-common mechanism of providing federal funds to spur desired activities.

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72. See also *Hill* v. *Florida,* 325 U.S. 538, 541 (1945), in which the Court invalidated State legislation regulating union bargaining agents because it conflicted with "the declared purpose of the Wagner Act . . . *to encourage* collective bargaining." Emphasis added. Similarly, in this case Congress seeks to encourage the cooperation of the States and their instrumentalities in the vital task of improving rail mass transit, and the covenant hinders such cooperation.

But to regard such grant programs as offering carrots alone is misleading. Congress has enacted restrictions on air pollution and in 1973 it enacted standby energy rationing programs whose implementation in the absence of mass transit would cause chaos in the States.

Indeed, Congress itself found "that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, *and the effectiveness of housing, urban renewal, highway and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services....*" A 717, 49 U.S.C. section 1601(a)(2); emphasis added.

The 1962 covenant effectively precluded the Port Authority's participation in passenger railroad operations other than the existing PATH system. Joint federal, State and Port Authority programs announced in 1970, 1971 and 1972 were as far as ever from implementation in 1974 when the covenant was repealed. In the meantime, the States and their major instrument for coordinating transportation had been excluded by the covenant from the very area in which Congress sought State cooperation.[73]

Legislatures have a constitutional duty to ensure that their laws adhere to the requirements of the Constitution. Faced with the explicit findings and declarations of policy contained in the federal enactments, the Legislatures could reasonably strike down the covenant as an obstacle both to the States' obligation to cooperate with the federal government and to the federal government's ability to effectuate its policies. The issue is not only whether a court would have declared the 1962 covenant invalid in 1974. The Legislatures too are bound to follow the Constitution and

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73. Congress had never consented to the covenant or otherwise indicated that the covenant was consistent with the emerging federal legislation. *Compare DeVeau* v. *Braisted,* 363 U.S. 144 (1960), *with Hill* v. *Florida,* 325 U.S. 538 (1945).

they are entitled to legislate in accordance with their interpretations. See *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966).

CONCLUSION

For the foregoing reasons, appellees respectfully submit that the Court should affirm the judgment below.

Respectfully submitted,

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