

COVID-19 Rapid Response Impact Initiative | White Paper 14

# Designing an Interstate Compact for a Pandemic Testing Board

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# Introduction

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Analysts have recently focused their attention on two pathways for the United States to reopen prior to the development of a vaccine for COVID-19. The first is to accept a series of rolling openings and closings: reopening as infection rates decrease, then reclosing as they rise again due to increased interactions. This approach is generally thought to be enormously costly economically and socially, as people will be kept in their homes and commerce restrained for considerable amounts of time. The second approach is to massively ramp up the production of testing, either through a universal testing regime (which would require capacity to test all 300+ million Americans every week or two)<sup>2</sup> or a system of testing, tracing, and supported isolation (which would require testing 5 million Americans a day, plus tracing those who were in contact with the infected and isolating them).<sup>3</sup> The testing pathway would enable the United States to reopen without having to close repeatedly and it would, as a result, save billions of dollars.

The problem is that we do not have the number of tests necessary to pursue a testing pathway to reopening. Scaling up testing presents a variety of challenges -- including supply of the underlying materials within the supply chain;<sup>4</sup> coordination problems that link supply to demand; and personnel and plans for how to deploy millions of tests per day. One solution to these challenges, which the Harvard Roadmap for Pandemic Resilience has outlined, is to establish a single coordinating body—a Pandemic Testing Board—to be tasked with ensuring the necessary supply of tests, deploying those tests, and facilitating a tracing program.<sup>5</sup> There are two ways to design this body. It could be a federal government institution, part of the Executive Branch. Or it could be built through an interstate compact, with federal appropriations but not federal administration. This paper offers a blueprint for how to design a pandemic testing board via an interstate compact.

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<sup>2</sup> Paul Romer, Roadmap to Responsibly Reopen America, <https://roadmap.paulromer.net/paulromer-roadmap-report.pdf>

<sup>3</sup> Danielle S. Allen et al., Roadmap to Pandemic Resilience, <https://ethics.harvard.edu/covid-roadmap>

<sup>4</sup> Danielle S. Allen, E. Glen Weyl & Kevin M. Guthrie, The Mechanics of the Covid-19 Diagnostic Testing Supply Chain 2.0, <https://ethics.harvard.edu/files/center-for-ethics/files/safracenterforethicswhitepaper9v2.pdf>

<sup>5</sup> Julius Krein, Ganesh Sitaraman & E. Glen Weyl, *A War Production Board for Coronavirus Testing*, Boston Globe, April 13, 2020.

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# 01 Interstate Compacts: The Basics

Interstate compacts are legally binding agreements between states, territories, and/or tribal nations that allow them to take collective action to solve shared problems or enact a common agenda. The Compacts Clause of the U.S. Constitution grants states the right to create interstate compacts for their common benefit.<sup>6</sup> The text of the Compacts Clause requires congressional consent to these agreements, and compacts are even allowed to take on powers reserved to the federal government.<sup>7</sup> Compacts that receive congressional approval have the force of federal law and therefore supersede state laws.<sup>8</sup>

## *Creating an Interstate Compact*

The most straightforward way to establish an interstate compact is for Congress to preemptively give its approval by adopting legislation authorizing the creation of a compact. The enacting legislation would outline the compact's nature, purposes, and policies, and establish that the compact goes into effect once a certain number of states have entered into it. As with all federal statutes, the House or Senate would introduce the compact bill, both bodies would approve it, and the president would sign the compact into law. The states who want to participate in the compact would pass identical statutes through their own state legislatures. In doing so, they would assume the conditions attached by Congress. Congress can appropriate funds for the operations of interstate compacts, or states can fund them directly.

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<sup>6</sup> “No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State.” U.S. Const., art. I, § 10, cl. 3.

<sup>7</sup> *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). In the Court's latest handling of interstate compacts, it held that congressional approval served to “prevent any compact...which might affect injuriously the interests of the others” or “check any infringement of the rights of the national government.” *Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018) (internal quotation marks and citations omitted).

<sup>8</sup> *Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018) (“once Congress gives its consent, a compact between States—like any other federal statute—becomes the law of the land.”); *Cuyler v. Adams*, 449 U.S. 433, 440 (1981) (holding that congressional consent “transforms the States’ agreement into federal law under the Compact Clause”).

<https://ethics.harvard.edu/designing-interstate-compacts>

## Interstate Compacts: The Basics

### Examples of Interstate Compacts

## Examples of Interstate Compacts

Today, over two hundred interstate compacts are in operation. Many compacts are regional, and roughly two dozen are national. The average state is a party to twenty-five of these interstate agreements.<sup>9</sup>

Up until the 1922 creation of the Port Authority of New York and New Jersey—one of the most famous examples of interstate compacts—states mostly used compacts to address boundary issues rather than complex interstate challenges.<sup>10</sup> But since the 1970s, the majority of compacts have emerged to serve regulatory purposes, including creating regulatory agencies to manage complex interstate problems.<sup>11</sup> The 2008 Regional Greenhouse Gas Initiative (RGGI) created a nine-member cap-and-trade program to limit CO2 emissions in response to federal inaction to curb rising emissions.<sup>12</sup> All fifty state and federal territories have entered into the congressionally approved Emergency Management Assistance Compact (EMAC). EMAC enables states (usually through the state equivalents of FEMA) to deploy personnel to assist in times of crisis, such as wildfires or hurricanes.<sup>13</sup>

While some reports have called newly formed regional COVID-19 agreements “[compacts](#),” these do not appear to be interstate compacts. The current state regional agreements more closely resemble voluntary actions: they establish shared “priorities” and suggest that states will consult one another and work together, but they don’t bind the participants, each of whom will establish “state-specific” plans. These agreements don’t have any force of law, state or federal, and do not take on federal powers.

<sup>9</sup> Council of State Governments - National Center for Interstate Compacts, Understanding Interstate Compacts, [https://www.gsgp.org/media/1313/understanding\\_interstate\\_compacts-csgncic.pdf](https://www.gsgp.org/media/1313/understanding_interstate_compacts-csgncic.pdf) (accessed April 28, 2020).

<sup>10</sup> Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments*, 34 Yale L.J. 685 (1925).

<sup>11</sup> Patricia S. Florestano, *Past and Present Utilization of Interstate Compacts in the United States*, 24 Publius 13, 21 (1994).

<sup>12</sup> The Regional Greenhouse Gas Initiative, “Welcome,” <https://www.rggi.org/> (accessed April 23, 2020).

<sup>13</sup> Daniel C. Vock, *The Pact Changing How Governments Respond to Disaster*, *Governing*, March 2018, <https://www.governing.com/topics/transportation-infrastructure/gov-emergency-management-local-federal-fema-states.html>



# 02 How to Design a Pandemic Testing Board through an Interstate Compact

A Pandemic Testing Board can be created via interstate compact. Congress would pass a law creating the interstate compact; states would then pass legislation joining the compact. Alternatively, the states could create an interstate compact, and Congress could approve of it and appropriate funds for its operation. In this section, we offer a blueprint for the design of an interstate compact that creates a PTB, whether the states or Congress is the first mover.

## *Structure*

The PTB would be structured as a nine-person board that reports to the states in the compact. Any state, territory, or tribal nation would be permitted to join and participate in the interstate testing compact (ITC), and the compact would take effect upon three states' passing legislation to join the compact. Governors of two states, ideally one from each political party, would be identified in advance of passing legislation and would co-chair the compact.

- **PTB Composition.** The PTB would be made up of nine members. The chair should be a former government official with experience in public health, such as a former surgeon general or head of the CDC. Four members should come from industry and philanthropy, including persons with experience in supply chains related to drug and medical device production. The remaining four members should include one person with experience in each of the following categories: public health research, labor, civil liberties, and regulatory or consumer affairs. This combination will not only ensure a diverse set of perspectives on the PTB, but also guarantee that the board is not dominated by industry interests or their allies. This should give the public confidence in the board's actions and decisions.

## How to Design a Pandemic Testing Board through an Interstate Compact Structure

- Appointments and Removals. Members would be appointed by the co-chairs to serve for the duration of the PTB's existence. Members can be removed at will by the co-chairs and replaced by the co-chairs. Because the PTB would operate as an interstate compact, rather than a federal agency, the appointment of members can be vested in the governors who co-chair the commission; appointments would not require Senate confirmation, and the co-chairs can direct their removal.<sup>14</sup> The PTB's authorities should expire on December 31, 2021, unless extended by Congress. Any funding left over on that date should be remitted back to the United States Treasury.

## Funding and Spending Guidance

Congress would appropriate funds for the PTB. States would be free to contribute to the PTB as well, though given how strapped state budgets are, we do not expect they will have the finances to do so.<sup>15</sup> The PTB should be directed by statute to allocate those resources that go to the states (rather than those for procurement of testing supply) based on need, taking into account the population of the states, the prevalence of the virus, and any other factors essential to addressing the public health emergency.

<sup>14</sup> The Ninth Circuit rejected an appointments clause attack on gubernatorial appointment of commissioners who exercised substantial authority over a federal program. The threatened compact, a congressionally-authorized regional electric power planning agreement, gave appointments authority for commissioners to governors of the affected states. The court rejected the petitioner's theory because it "would outlaw all interstate compacts because all or most of them impact federal activities and all or most of them have members appointed by the participating states." *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d 1359, 1365 (9th Cir. 1986). See also 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'tl. L.* 767 (1987).

<sup>15</sup> Emily Steward, *States Need Significantly More Fiscal Relief to Slow the Emerging Deep Recession*, *Vox*, April 17, 2020, <https://www.cbpp.org/research/state-budget-and-tax/states-need-significantly-more-fiscal-relief-to-slow-the-emerging-deep>.

## How to Design a Pandemic Testing Board through an Interstate Compact

### Power

### Power

The PTB would have information gathering, testing supply and production, testing deployment, tracing, and statistical powers.

- **Information Gathering.** The PTB would have the power to compel information from industry to identify supply chain components and bottlenecks, determine production levels and shortfalls, analyze logistical issues, or gather information for any other purposes related to the production, supply, and deployment of tests. While the PTB would respect trade secrets that predated its contracts, the PTB would reserve the right to share with the public information that it deemed essential to public health or oversight.
- **Supply and Production.** The PTB would have the power to ensure the supply and production of tests in quantities needed to ensure the full reopening of the ITC states, and after having secured that supply, to ensure additional supply and production for export to non-ITC states and foreign countries facing shortages of tests. This level of capacity is essential not only to reopen the United States but to reopen channels of global tourism, travel, and commerce.
  - *Office of Testing Supply and Production.* The PTB would establish an office of testing supply, which would be responsible for ensuring the necessary supply of tests for ITC member states and, after reaching that supply, for export beyond the ITC member states.
  - *Contracting and Production.* The PTB would have the power to make contracts for goods and services related to testing supply and deployment. This power should include authorities akin to those under the Defense Production Act to guarantee production of goods and services that the PTB deems necessary.



## How to Design a Pandemic Testing Board through an Interstate Compact Power

- *Public Production.* Under existing laws, the federal government has the power to produce or license a patented product or use a patented process, as long as it provides reasonable compensation to the patent-holder.<sup>16</sup> The PTB should be given this same authority, to exercise in case the PTB finds it necessary to expand production of tests or supplies and processes involved in testing.
- *Testing Innovation Prizes:* The PTB should create a COVID-19 Testing Innovation Prize fund that would offer modest monetary prizes to inventions that bring down the cost, improve the speed, or enable greater access to testing.
- *Anti-Profiteering Provisions and Enforcement:* The PTB should be required to follow a variety of anti-profiteering provisions. To ensure that profit-motivated mark-ups do not inflate taxpayer costs, contracts for goods and services would be based on the lower of current prices or prices of those goods and services as of a date prior to the virus. To ensure profiteering does not take place, an excess profits tax should also be imposed. The PTB and the PTB inspector general would also have the power to refer any possible corruption, hoarding, profiteering, fraud, or other unlawful activities to the relevant state attorney(s) general.
- **Deployment.** The PTB would coordinate with states, territories, local governments, tribal nations, businesses, universities, non-profits, and other entities to ensure the distribution and deployment of testing.
  - *Office of Testing Deployment.* The PTB would establish an office of testing deployment in order to develop plans and best practices on how to distribute and deploy tests through the ITC's member states. The office would work in conjunction with state testing coordinators to deploy these tests.

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<sup>16</sup> 28 U.S.C. § 1498 (2019).

## How to Design a Pandemic Testing Board through an Interstate Compact Power

- *State Testing Coordinator.* Each governor would appoint a state testing coordinator, who would be responsible for working with the PTB and with entities within the state, including state agencies, the private sector, and nonprofit organizations, to ensure the distribution and deployment of testing throughout the state. The coordinator would develop plans for deployment, in coordination with the office of testing deployment and with the approval of the PTB.
- *Pandemic Response Corps.* The PTB would have the power to develop and fund a Pandemic Response Corps, in conjunction with state testing coordinators and as part of their state testing plans. The PTB would develop guidance and materials based on best practices to support states in training Corps members. The Corps would consist of persons who would assist with testing, tracing, and supported isolation, ideally from within the communities in which they work, and would also staff social support specialists who would connect patients and their contacts with the social services necessary. The PTB would compensate Corps members at least at the same rate as US Census takers and provide them with benefits. Corps members would be provided with the necessary protective equipment and protected by strong labor standards, including the right to organize.
- **Contact Tracing.** The PTB would coordinate with states, local governments, tribal nations, businesses, universities, non-profits, and other entities to implement a program of contact tracing.
  - *Office of Contact Tracing.* The PTB would establish an office of contact tracing that would develop a plan for contact tracing throughout the ITC's member states. The office would work in conjunction with state tracing coordinators to implement the plan.

## How to Design a Pandemic Testing Board through an Interstate Compact Power

- *State Tracing Coordinator.* Each governor would appoint a state tracing coordinator, who would be responsible for working with the PTB and with entities within the state, including state agencies, the private sector, and nonprofit organizations, to ensure that persons who have been in contact with someone infected with the virus are identified and informed so that appropriate actions can be taken. The coordinator would develop plans for tracing, in coordination with the office of contact tracing and with the approval of the PTB.
- *In-Person Tracing.* The PTB would create an in-person contact tracing mechanism, and would have the power to assign members of the Pandemic Response Corps to tracing operations.
- *Electronic Tracing.* The PTB would also have the power to approve of an electronic tracing mechanism (ETM) (such as a smartphone app), if it deems electronic tracing necessary and appropriate. Electronic testing shall not be mandatory, and the PTB would be required to consider and develop alternatives to electronic testing. Any electronic tracing mechanism would be required to be operated and run by a non-profit entity, and the non-profit must not transfer, share, sell, or otherwise release to any other entity any data from the ETM, except for de-identified aggregate data for public information purposes in conjunction with the office of data and statistics. The ETM must also not store data beyond two months. Any ETM must be designed to maximize equity, and the PTB should work with the private sector and other entities to develop or distribute technologies for free to those who need access. The PTB would also appoint a deputy inspector general for civil liberties, who would report to the inspector general, to oversee any ETM program.

## How to Design a Pandemic Testing Board through an Interstate Compact Power

- **Data and Statistics.** The PTB would open an office of data and statistics, which would ensure the collection and public availability of statistics on data relevant to the virus and testing, including but not limited to the number, location, and frequency of tests; and virus prevalence, including by age, race, gender, other demographic characteristics, and geography. The PTB would publish a report on state-by-state metrics relevant to testing and tracing on a monthly basis to help the public understand the virus's progression.

### *Travel Restrictions from Outside the ITC.*

The ITC states may be inclined to restrict entry from non-ITC states, potentially interfering with the constitutional right to travel.<sup>17</sup> The Court has made it clear that efforts to restrict movement between states will be subject to strict scrutiny: that is, the government will need to show that the restriction of the constitutional right serves a compelling interest and is narrowly tailored towards that end.<sup>18</sup> In this context, the compelling interest is in states' power to protect their citizens, which is at its zenith during a public health emergency.<sup>19</sup> In *Jacobson v. Massachusetts*, for example, the Supreme Court held that a mandatory vaccination law was a valid exercise of Massachusetts' police power to protect its

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<sup>17</sup> In *Saenz v. Roe*, the Supreme Court identified a constitutional right to travel between states but did not identify a specific textual source for it. , 526 U.S. 489, 501 (1999) (“For the purposes of this case, we need not identify the source of [the right to travel] in the text of the Constitution. The right of ‘free ingress and regress to and from neighboring states which was expressly mentioned in the text of the Article of Confederation, may simply have been ‘conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.’”).

<sup>18</sup> *Id.* at 499 (1999) (holding that a federal restriction on the right to travel between states that leads to unequal treatment of citizens can still be upheld if it is “shown to be necessary to promote a compelling governmental interest”); see also *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (“It is not sufficient for the State to show that durational residency requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with ‘precision.’”).

<sup>19</sup> Anthony Michael Kreis, *Contagion and the Right to Travel*, Harvard Law Review Blog, March 27, 2020, <https://blog.harvardlawreview.org/contagion-and-the-right-to-travel/>.

## How to Design a Pandemic Testing Board through an Interstate Compact Travel Restrictions from Outside the ITC.

public health.<sup>20</sup> At the same time, restrictions cannot be “arbitrary, oppressive, and unreasonable.”<sup>21</sup> For example, in *Jew Ho v. Williamson*, the Court struck down racially discriminatory quarantine, in which San Francisco had targeted Chinatown residents on the belief that rice-based diets increased susceptibility to plague.<sup>22</sup>

- Treatment of Out-of-ITC persons. To prevent states in the ITC from overreaching constitutional bounds, a Pandemic Testing Board should be restricted in its authority to prevent out-of-ITC persons from entering into the ITC states. The PTB and states in the ITC would be allowed to require persons coming into an ITC state from a high-risk state to be tested and quarantined until the test results return. Those who object to testing can choose instead to be quarantined for a safe number of days. And the PTB could establish a fine for those who violate these rules. A high-risk state would be defined as any state that is either testing its population at a rate of below a certain percentage or that is testing above a certain percentage and has an infection rate of above a specified percentage. The particular number of days for isolation and thresholds for determining a high-risk state should initially be set by statute, with a provision to require the PTB to revise those thresholds based on the latest evidence-backed scientific findings on infection prevention and containment. Once inside the ITC area, persons would be subject to the same testing and tracing rules as everyone else. This structure serves the government’s compelling interest in preventing spread of the virus, while being narrowly tailored to achieve that end.

<sup>20</sup> *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27, (1905). (“Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”). See also *Oregon-Washington R. & Nav. Co. v. State of Washington*, 270 U.S. 87, 93 (1926); *O’Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975) (Burger, J., concurring) (“There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.”).

<sup>21</sup> *People ex. rel. Barmore v. Robertson*, 134 N.E. 815, 817 (Ill.1922).

<sup>22</sup> *Jew Ho v. Williamson*, 103 F. 10, 26 (C.C.N.D. Cal. 1900).

## How to Design a Pandemic Testing Board through an Interstate Compact *Oversight and Ethics*

### ***Oversight and Ethics***

Any public-private funding or production structure comes with considerable dangers in the form of corruption, conflicts of interest, profiteering, and self-dealing. These behaviors can destroy public trust in institutions and in their recommendations - in addition to wasting hard-earned taxpayer dollars. To ensure that the PTB's activities are not marred by these practices, there should be the following protections:

- **Transparency Requirements.** The PTB's data and statistics office should update statistics on an ongoing basis, in order to keep the public fully updated on the prevalence of the virus, testing rates, and other actions taken to address it. Contracts with suppliers and producers, including all terms and conditions, should be made public immediately upon being concluded. Actual output and production rates should also be reported on an ongoing basis, including broken down by firm and factory. The PTB's office of data and statistics would also produce a final report on the Board, detailing its operations and activities.
- **Anti-Corruption and Ethics Requirements.** To prevent conflicts of interest, corruption, or the appearance thereof, members of the PTB and heads of departments within the PTB would be required to sell any individual stocks and invest only in total market or broad market index funds. Members and heads of departments would also be prohibited from purchasing stock in any company doing business with the PTB for an additional year after their time of service. Firms contracting with the PTB should be prohibited from raising CEO pay, offering bonuses to executives, paying out dividends, or buying back stock during the contracting years and for two years thereafter.
- **Oversight.** The ITC co-chairs would also be required to appoint an inspector general who would monitor transparency, anti-corruption, and ethics provisions, and conduct oversight of the PTB's operations and activities. A deputy inspector general for civil liberties would be dedicated to ensuring civil liberties are protected in all of the PTB's activities, with particular focus on any ETM that is created. The inspector general and deputy would refer possible corruption, hoarding, profiteering, fraud, or other unlawful activities to the relevant state attorney(s) general.