

5 | Background on Interstate Compacts

An interstate compact is a contractual agreement between two or more states.

This chapter covers the

- constitutional basis for interstate compacts (section 5.1),
- legal standing of compacts (section 5.2),
- history of compacts (section 5.3),
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5.1 CONSTITUTIONAL BASIS FOR INTERSTATE COMPACTS

Interstate compacts predate the U.S. Constitution. The Articles of Confederation¹ provided:

“No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.”²

The Continental Congress consented to four interstate compacts under the Articles of Confederation. An interstate compact regulating fishing and navigation on the Chesapeake Bay and the Potomac River received congressional consent under the Articles of Confederation in 1785 and remained in force until 1958.

Article I, section 10, clause³ of the U.S. Constitution provides:

“No state shall, without the consent of Congress, ... enter into any agreement or compact with another state....”⁴

The terms “compact” and “agreement” are generally used interchangeably. As the U.S. Supreme Court wrote in the 1893 case of *Virginia v. Tennessee*:

“Compacts or agreements ... we do not perceive any difference in the meaning....”⁵

The Supreme Court also wrote:

“The terms ‘agreement’ or ‘compact,’ taken by themselves, are sufficiently comprehensive to embrace all forms of

¹ The Articles of Confederation were proposed by the Continental Congress in 1777 and ratified by the states by 1781.

² Articles of Confederation. Article VI, clause 2.

³ The U.S. Constitution was proposed by the Constitutional Convention in 1787 and ratified by the requisite number of states by 1789.

⁴ See appendix C for full wording of the compacts clause.

⁵ *Virginia v. Tennessee*. 148 U.S. 503 at 520. 1893.

stipulation, written or verbal, and relating to all kinds of subjects....”⁶

The terms “compact” and “agreement” encompass arrangements that are enacted by statutory law as well as those entered into by a state’s executive officers and commissions.

5.2 LEGAL STANDING OF INTERSTATE COMPACTS

An interstate compact is, first and foremost, a contract. As the Supreme Court wrote in the 1959 case of *Petty v. Tennessee-Missouri Bridge Commission*:

“[a] compact is, after all, a contract.”⁷

As contracts, compacts enjoy strong protection from the U.S. Constitution. Article I, section 10, clause 1 of the Constitution provides:

“No State shall ... pass any ... Law impairing the Obligation of Contracts....”⁸

The Council of State Governments summarizes the nature of interstate compacts as follows:

“Compacts are agreements between two or more states that bind them to the compacts’ provisions, just as a contract binds two or more parties in a business deal. As such, compacts are subject to the substantive principles of contract law and are protected by the constitutional prohibition against laws that impair the obligations of contracts (U.S. Constitution, Article I, Section 10).

“That means that compacting states are bound to observe the terms of their agreements, even if those terms are inconsistent with other state laws. In short, compacts between states are somewhat like treaties between nations. Compacts have the force and effect of statutory law (whether enacted by statute or not) and they take precedence over conflicting state laws, regardless of when those laws are enacted.

⁶ *Id.* at 517–518.

⁷ *Petty v. Tennessee-Missouri Bridge Commission*. 359 U.S. 275 at 285. 1959.

⁸ See appendix C for the full wording of the impairments clause.

“However, unlike treaties, compacts are not dependent solely upon the good will of the parties. Once enacted, compacts may not be unilaterally renounced by a member state, except as provided by the compacts themselves. Moreover, Congress and the courts can compel compliance with the terms of interstate compacts. That’s why compacts are considered the most effective means of ensuring interstate cooperation.”⁹

Once a state enters into an interstate compact, the state—like an individual, corporation, or any other legal entity—is bound by the compact’s terms. The contractual obligations undertaken by a state in an interstate compact bind all state officials. In addition, an interstate compact binds the state legislature because a legislature may not enact any law impairing a contract. Thus, after a state enters into an interstate compact, the state is bound by all the terms of the compact until the state withdraws from the compact in accordance with the compact’s terms for withdrawal, until the compact is terminated in accordance with the compact’s terms for termination, or until the compact ends in accordance with the compact’s stated duration.

States generally enter into interstate compacts in order to obtain some benefit that can only be obtained by cooperative and coordinated action with one or more sister states. In most cases, it would make no sense for a state to agree to the terms of a compact unless certain desired other states simultaneously agreed to abide by the terms of the compact. For example, a state generally would not want to agree to limitations on its use of water in a river basin unless the other states in the basin agreed to limit their water use. When two states are involved in a boundary dispute, neither state would generally want to acknowledge a compromise boundary until the other state accepted the compromise.

When a state enters into an interstate compact (other than a purely advisory compact), it is typically agreeing to a constraint, to one degree or another, on its ability to exercise some power that it otherwise might independently exercise.

5.3 HISTORY OF INTERSTATE COMPACTS

There were four interstate compacts approved under the Articles of Confederation. Three of them were settlements of boundary disputes.

⁹Council of State Governments. 2003. *Interstate Compacts and Agencies 2003*. Lexington, KY: The Council of State Governments. Page 6.

The first regulatory compact was an agreement between Maryland and Virginia concerning fishing and navigation on the Chesapeake Bay and the Potomac River. This compact received congressional consent under the Articles of Confederation in 1785 and remained in force until it was replaced by the Potomac River Compact (which received congressional consent in 1958).

In their seminal 1925 article entitled “The Compact Clause of the Constitution,” Felix Frankfurter (subsequently a Justice of the U.S. Supreme Court) and James Landis reported that the vast majority (25 of the 32) of interstate compacts prior to 1921 were for the purpose of resolving boundary disputes.¹⁰

Prior to 1921, pre-existing agencies of the compacting states administered all interstate compacts.

The modern era of interstate compacts began in 1921. The inadequacies of the port of New York became obvious during World War I. After the war, the states of New York and New Jersey decided that efficient operation and development of the port required closer cooperation and coordination between the two states. The result was the 1921 Port of New York Authority Compact. The 1921 compact broke new ground by establishing a bi-state governmental entity—the Port Authority. Under the compact, the Port Authority is administered by its own governing body—a commission appointed by the governors of the two states.

The compact’s intended purposes are summarized in the compact’s preamble:

“Whereas, In the year eighteen hundred and thirty-four the states of New York and New Jersey did enter into an agreement fixing and determining the rights and obligations of the two states in and about the waters between the two states, especially in and about the bay of New York and the Hudson river; and

“Whereas, Since that time the commerce of the port of New York has greatly developed and increased and the territory in and around the port has become commercially one center or district; and

¹⁰ Frankfurter, Felix and Landis, James. 1925. The compact clause of the constitution—A study in interstate adjustments. 34 *Yale Law Journal* 692–693 and 730–732. May 1925.

“Whereas, It is confidently believed that a better co-ordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey; and

“Whereas, The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money and the cordial co-operation of the states of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans; and

“Whereas, Such result can best be accomplished through the co-operation of the two states by and through a joint or common agency.”

After 1921, the number of compacts and the variety of topics covered by compacts increased dramatically. Nowadays, about one half of all interstate compacts establish a commission to administer the subject matter of the compact.¹¹ Compact commissions are generally composed of a specified number of representatives from each party state. Many modern-day compacts receive annual funding from each member state for the operation of the compact commission and its staff.

5.4 SUBJECT MATTER OF INTERSTATE COMPACTS

There are no constitutional restrictions on the subject matter of interstate compacts other than the implicit limitation that the compact’s subject matter must be among the powers that the states are permitted to exercise. Thus, interstate compacts have been employed for a wide variety of purposes, including those listed below.

An *advisory compact* establishes a commission that is authorized only to conduct studies and to develop recommendations to solve interstate problems.

Examples of *agricultural compacts* include the Compact on Agricultural Grain Marketing and the Northeast Interstate Dairy Compact.

Two states may enter into a *boundary compact*. A freely negotiated settlement of a boundary dispute is often a desirable alternative to a trial

¹¹ Council of State Governments. 2003. *Interstate Compacts and Agencies 2003*. Lexington, KY: The Council of State Governments.

in the U.S. Supreme Court to establish the official boundaries between two states. The South Dakota–Nebraska Boundary Compact (which received congressional consent in 1990) settled a dispute arising from the fact that the Missouri River had changed its course with the passage of time.

Many *civil defense compacts* were adopted during the Cold War period when the Soviet Union was viewed as a potential aggressor nation. The Emergency Management Assistance Compact (found in appendix N), to which Congress consented in 1996, is a broad compact that effectively replaces the earlier Civil Defense Compact.

Crime-control and corrections compacts are traceable to 1910 when Congress gave its consent in advance to four states—Illinois, Indiana, Michigan, and Wisconsin—to enter into an agreement with respect to the exercise of jurisdiction “over offenses arising out of the violation of the laws” of these states on the waters of Lake Michigan.¹² The Interstate Agreement on Detainers is one of the best-known compacts concerning crime. This agreement facilitates speedy and proper disposition of detainees based on indictments, information, or complaints from the jurisdictions that are parties to the compact. The parties to this compact include 48 states, the District of Columbia, Puerto Rico, the Virgin Islands, and the federal government.

In 2000, Congress gave its consent to Kansas and Missouri to enter into the nation’s first *cultural compact*. The compact established a metropolitan cultural district governed by a commission.

The first *education compact* pooled the resources of southern states by means of the Southern Regional Education Compact. The aim of the compact was to reduce each state’s need to maintain expensive post-graduate and professional schools. There are two additional compacts of this nature: the New England Higher Education Compact and the Western Regional Education Compact. The New Hampshire–Vermont Interstate School Compact has been used to establish two interstate school districts, each involving a New Hampshire town and one or more Vermont towns.

Energy Compacts include the Interstate Compact to Conserve Oil and Gas, the Southern States Energy Compact (originally the Southern Interstate Nuclear Compact), the Midwest Energy Compact, and the Western Interstate Energy Compact (originally the Western Interstate Nuclear Compact).

¹² 36 Stat. 882.

Facilities compacts provide for the joint construction and operation of physical facilities—commonly bridges and tunnels. A compact entered into by Maine and New Hampshire dealt with the construction and maintenance of a single bridge over the Piscataqua River.¹³ On the other hand, the Port Authority of New York and New Jersey operates extensive facilities, including the Holland and Lincoln Tunnels, the George Washington Bridge, three airports (Kennedy, LaGuardia, and Newark Liberty), the PATH rail system, ferries, industrial development projects, and marine facilities. The Port Authority's police force alone numbers over 1,600.

The four *fisheries compacts* are the Atlantic States Marine Fisheries Compact of 1942, the Pacific States Marine Fisheries Compact of 1947, the Gulf States Marine Fisheries Compact of 1949, and the Connecticut River Basin Atlantic Salmon Compact of 1983.

Flood-control compacts relate to the construction of projects to prevent flooding. A 1957 compact between Massachusetts and New Hampshire established the Merrimack Valley Flood Control Commission, which determines the annual amount of compensation that Massachusetts must pay New Hampshire for loss of tax revenue resulting from the construction of flood-control projects.

The Interstate Compact on Mental Health and New England Compact on Radiological Health Protection are examples of *health compacts*.

Congress encouraged the formation of *low-level radioactive waste compacts* to construct regional waste storage facilities as an alternative to the development of individual storage sites in each state. In particular, the federal Low Level Radioactive Waste Policy Act of 1980¹⁴ (as amended in 1985) encourages the use of interstate compacts to establish and operate regional facilities for management of low-level radioactive waste. A total of 44 states have entered into 10 such compacts. One example is the Southwestern Low-Level Radioactive Waste Disposal Compact in which California agreed to serve, for 35 years, as the host state for the storage of radioactive waste for the states of Arizona, North Dakota, South Dakota, and California (and such other states to which the compact commission might later decide to grant membership).

Because of the sensitive subject matter, radioactive-waste compacts generally attract considerable public attention and generate fierce debate

¹³ 50 Stat. 536.

¹⁴ 94 Stat. 3347.

in state legislatures. Voters have often become directly involved in radioactive waste compacts by means of the citizen-initiative process, the protest-referendum process, and the legislative referral process.¹⁵

Marketing and development compacts address a variety of subjects and include the Agricultural Grain Marketing Compact, the Midwest Nuclear Compact promoting the use of nuclear energy, and the Mississippi River Parkway Compact.

The objective of each *metropolitan problems compact* is generally conveyed by in its title. For example, the Washington Metropolitan Area Transit Regulation Compact was entered into by the District of Columbia, Maryland, and Virginia and was granted congressional consent in 1960.¹⁶

The only *military compact* is the National Guard Mutual Assistance Compact. It provides for the sharing of military personnel and equipment among its member states.

There are 12 *motor vehicle compacts*, including ones that relate to driver's licenses, nonresident violators, equipment safety, and uniform vehicle registration prorogation.

Natural resources compacts are designed to settle disputes and to promote the conservation and development of resources. For example, in 1963, Maryland and Virginia established the Potomac River Fisheries Commission to settle a dispute that had originated during the colonial period. Ever since a royal charter made the river a part of Maryland, Maryland oyster fishermen have resented Virginia oyster fishermen intruding in Maryland's waters. The more recent Connecticut River Basin Atlantic Salmon Restoration Compact involves the return of salmon to the river.¹⁷

The Columbia River Gorge Compact and the 1900 Palisades Interstate Park Compact are two of the five *parks and recreation compacts*.

Economic interest groups often encourage the establishment of *regulatory compacts*. Such groups typically lobby Congress not to exercise its preemption powers in a particular area by arguing that coordinated action by the states, by means of an interstate compact, is sufficient to solve a problem.

¹⁵ See sections 5.7 and 5.13 for discussion of the political controversies, spanning a 20-year period, concerning Nebraska's participation in the Central Interstate Low-Level Radioactive Waste Compact.

¹⁶ 74 Stat. 1031.

¹⁷ 97 Stat. 1983.

The Interstate Sanitation Compact, entered into by New Jersey and New York in 1935 and by Connecticut in 1941, created a commission with the power to abate and prevent pollution in tidal waters of the New York City metropolitan area. Subsequently, the compact was amended to allow the commission to monitor, but not to regulate, air quality. The commission (renamed the Interstate Environmental Commission) shares concurrent regulatory authority with the environmental protection departments of the member states.

The Atlantic States Marine Fisheries Compact does not grant its commission regulatory enforcement powers; however, the commission obtained indirect regulatory authority by a congressional act. In 1986, the Atlantic Striped Bass Conservation Act was amended to offer each concerned state the choice of complying with the management plan developed by the commission or being subject to a fishing moratorium on striped bass imposed by the U.S. Fish and Wildlife Service in the state's coastal waters.¹⁸

One of the greatest problems in southwestern states—the shortage of water—led to the filing of numerous lawsuits between states in the U.S. Supreme Court. *River basin compacts* provide an alternative to litigation. The first such compact was the Colorado River Compact apportioning waters of the river among various western states. More recently, various mid-Atlantic states have entered into river basin compacts.

A *federal-interstate compact* is an interstate compact to which the federal government is one of the parties.

A *service compact* seeks to eliminate social problems by committing each member state to provide services to legal residents of other member states. The Interstate Compact on the Placement of Children in Interstate Adoption, for example, facilitates the adoption of children by qualified foster parents in other compact states if there are too few families willing to adopt children in the home state. This compact has 50 members—49 states and the Virgin Islands.

In 1934, Congress enacted the Crime Control Consent Act authorizing states to enter into crime-control compacts.¹⁹ The Interstate Compact for Supervision of Parolees and Probationers is based on this statute and is the first interstate compact to have been joined by all states. Puerto Rico

¹⁸ 100 Stat. 989, 16 U.S.C. §1857.

¹⁹ *Crime Control Consent Act of 1934*. 48 Stat. 909. 4 U.S.C. §112.

and the Virgin Island also are members. The importance of this compact is illustrated by the fact that more than 300,000 persons are on parole or probation in states other than those in which they committed their crimes.

The Interstate Compact on Juveniles and the Interstate Corrections Compact authorize the return of delinquents and convicts, respectively, to their states of domicile to serve their sentences. Supporters of these compacts believe that rehabilitation of delinquents and convicts will be promoted if they are incarcerated in close proximity to their families.

The levying of state income and sales taxes and the growth of interstate commerce has encouraged states to enter into *tax compacts*. The Great Lakes Interstate Sales Compact was the first multi-state compact to focus on enforcement of state sales and use taxes. New Jersey and New York belong to an agreement providing for a mutual exchange of information relative to purchases by residents of the other state from in-state vendors. The states have also entered into numerous administrative agreements concerning taxation.

Twenty-three states and the District of Columbia are parties to the Multistate Tax Compact. Twenty-one additional states are associate members of the compact by virtue of their participation in, and their providing funding for, various programs established by the compact's commission. The impetus for the Multistate Tax Compact was the 1966 decision of the U.S. Supreme Court in *Northwestern States Portland Cement Company v. Minnesota*. The Court ruled that a state may tax the net income of a foreign corporation (i.e., one chartered in a sister state) if the tax is nondiscriminatory and is apportioned equitably on the basis of the corporation's activities with a nexus to the taxing state.²⁰

Felix Frankfurter and James Landis anticipated the possibility of *federal-interstate compacts* in 1925 and wrote:

“[T]he combined legislative powers of Congress and of the several states permit a wide range of permutations and combinations for governmental action. Until very recently these potentialities have been left largely unexplored.... Creativeness is called for to devise a great variety of legal alternatives to cope with the diverse forms of interstate interests.”²¹

²⁰ *Northwestern States Portland Cement Company v. Minnesota*. 358 U.S. 450. 1966.

Frankfurter and Landis's call for creativity led to the first *federal-interstate compact* in 1961. After a prolonged drought in the 1950s made the careful management of Delaware River waters essential, four states and the federal government entered into the Delaware River Basin Compact. Congress enacted the compact into federal law with a provision that the United States be a member of the compact. That law created a commission with a national co-chairman and a state co-chairman. The commission also has additional members from the national and member state governments.

Additionally, the federal government, Maryland, New York, and Pennsylvania entered into the Susquehanna River Basin Compact, which became effective in 1971. This is another example of a federal-interstate compact. It is modeled on the Delaware River Basin Compact.

Federal-interstate compacts have also been employed to promote economic development in large regions of the nation. The Appalachian Regional Compact was the first such compact. It was enacted by Congress and thirteen states in 1965. This compact has a commission with a state co-chairman appointed by the governors involved and a federal co-chairman appointed by the President with the Senate's advice and consent.²²

A unique federal-interstate agreement resulted from a 1980 congressional statute granting consent to an agreement entered into by the Bonneville Power Administration, a federal entity, with Idaho, Montana, Oregon, and Washington.²³ The term "interstate compact" does not appear in the act, and the agreement was not negotiated by the member states. Instead, the proposed compact was drafted by the Pacific Northwest Electric Power and Conservation Planning Council, which sent the proposal to the states. If the states had not enacted the proposed compact, a federal council would have been appointed by the U.S. Secretary of the Interior to perform the functions of the proposed federal-interstate council, namely preparing of a conservation and electric power plan and implementing a program to protect fish and wildlife. A second unique

²¹ Frankfurter, Felix and Landis, James. 1925. The compact clause of the constitution—A study in interstate adjustments. 34 *Yale Law Journal* 692–693 and 730–732. May 1925.

²² *Appalachian Regional Development Act of 1966*, 79 Stat. 5, 40 U.S.C. app. §1.

²³ *Pacific Northwest Electric Power and Conservation Planning Act of 1980*. 94 Stat. 2697. 16 U.S.C. §839b.

feature of this legislation was the provision for membership by a federal agency, rather than the federal government.²⁴

In 1990, Congress created a similar temporary body—the Northern Forest Lands Council. The Northern Forest Lands Council Act²⁵ authorized each of the governors of Maine, New Hampshire, New York, and Vermont to appoint four council members charged with developing plans to maintain the “traditional patterns of land ownership and use” of the northern forest. The council was disbanded in 1994.

The National Criminal Prevention and Privacy Compact Act, enacted by Congress in 1998, established what may be termed a federal-interstate compact that

“organizes an electronic information sharing system among the Federal Government and the States to exchange criminal history records for non-criminal justice purposes authorized by Federal or State law, such as background checks for governmental licensing and employment.”²⁶

Federal and state law enforcement officers were not involved in the negotiations leading to this compact. The compact is activated when entered into by two or more states. Article VI of the compact established a Compact Council with authority to promulgate rules and procedures pertaining to use of the Interstate Identification Index System for non-criminal justice purposes. The council is composed of fifteen members appointed by the Attorney General of the United States, including nine members selected from among the law enforcement officers of member states, two at-large members nominated by the Chairman of the Compact Council, two other at-large members, a member of the FBI’s advisory policy board, and an FBI employee appointed by the FBI director. The Director of the FBI designates the federal “Compact Officer.”

Indian tribe gaming compacts are a new type of compact. The origin of such compacts is the U.S. Supreme Court’s 1987 decision in the case of *Cabazon Band of Mission Indians v. California*, which held that

²⁴ Olsen, Darryll and Butcher, Walter R. The Regional Power Act: A model for the nation? *Washington State Policy Notes* 35. Winter 1984. Pages 1–6.

²⁵ *Northern Forest Lands Council Act of 1990*, 104 Stat. 3359, 16 U.S.C. §2101.

²⁶ *National Crime Prevention and Privacy Compact Act of 1998*. 112 Stat. 1874. 42 U.S.C. §14611.

a state may not unduly restrict gaming on Indian lands.²⁷ This decision led to a sharp increase in gaming on Indian lands. Congress became concerned that tribal governments and their members were not actually profiting from the gaming and that organized crime might acquire a stake in such activity. The Indian Gaming Regulatory Act of 1988²⁸ therefore authorized tribe–state gaming compacts. The 1988 act established three classes of Indian gaming. Class I gaming—primarily social gaming for small prizes—is regulated totally by Indian tribes. Class II gaming—bingo and bingo-type games and non-banking card games—is regulated by tribes, but is subject to limited oversight by the National Indian Gaming Commission. Class III contains all other types of gaming. Class III gaming is prohibited in the absence of a tribal-state compact approved by the U.S. Secretary of the Interior. The compact device permits states to exercise their reserved powers without the need for direct congressional action.

Appendix M contains a listing of 196 active interstate compacts compiled by the National Center for Interstate Compacts (NCIC) of the Council of State Governments (CSG). The Center has also identified 62 defunct or inactive interstate compacts.²⁹

5.5 PARTIES TO INTERSTATE COMPACTS

Although most early interstate compacts usually involved only two states, modern-day interstate compacts frequently involve numerous parties.

The parties to an interstate compact are often determined by geography (e.g., the Colorado River Compact and the Great Lakes Basin Compact). Membership in many compacts is defined by the activities in which the states engage. For example, the Interstate Oil Compact encompasses the 22 oil-producing states. The Multistate Lottery Agreement operates a quasi-national lotto game in geographically scattered states. In some cases, compacts are open to all states, and their actual membership is simply determined by whichever states decide to enact the compact. Examples include the Interstate Compact for Adult Offender Supervision (enacted by 38 states) and the Agreement on Detainers (enacted by 47 states).

²⁷ *Cabazon Band of Mission Indians v. California*. 480 U.S. 202. 1987.

²⁸ *Indian Gaming Regulatory Act of 1988*. 108 Stat. 2467. 25 U.S.C. §2701.

²⁹ Council of State Governments. 2003. *Interstate Compacts and Agencies 2003*. Lexington, KY: The Council of State Governments.

Today, there are interstate compacts that include as few as two states and compacts that involve all 50 states. Certain interstate compacts include the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, and provinces of Canada. The Interstate Compact for Education, for example, encompasses 48 states, the District of Columbia, American Samoa, Puerto Rico, and the Virgin Islands. In 1949, the Northeastern Interstate Forest Fire Compact became the first interstate compact to include a Canadian province. The Great Lakes Basin Compact (appendix K) includes Ontario and Quebec.

The federal government may be a party to an interstate compact. For example, the membership of the Agreement on Detainers (appendix L) includes 47 states, the District of Columbia, and the federal government as parties.

The Interstate Compact on the Placement of Children and the Interstate Compact on Juveniles are examples of compacts adhered to by all 50 states and the District of Columbia.

States belong to an average of 25.4 interstate compacts.³⁰ The numbers of compacts entered into range from a low of 16 for Hawaii and Wisconsin to a high of 32 for Colorado and Maryland.

5.6 FORMULATION OF INTERSTATE COMPACTS

Prior to 1930, gubernatorially appointed commissioners negotiated and drafted all interstate compacts. This method is especially appropriate when the contemplated compact requires lengthy negotiations among the prospective parties and frequent consultation with the governors and legislative leaders of the states involved.

Since the 1930s, some interstate compacts (e.g., the Interstate Compact on Parolees and Probationers) have been drafted by non-governmental organizations. Over the years, the National Conference of State Legislatures (NCSL) and the Council of State Governments (CSG) have proposed numerous interstate compacts to the states.³¹ Compacts have occasionally been initiated by private citizens. As Marian E. Ridgeway describes in *Interstate Compacts: A Question of Federalism*:

³⁰ Bowman, Ann O'M. 2004. Trends and issues in interstate cooperation. In *The Book of the States 2004 Edition*. Chicago, IL: The Council of State Governments. Page 36.

³¹ Hardy, Paul T. 1982. *Interstate Compacts: The Ties That Bind*. Athens, GA: Institute of Government, University of Georgia.

“The Compact on Education is largely the product of the zeal and energy of former governor Terry Sanford of North Carolina, acting on a suggestion of James B. Conant in his [1964 book] *Shaping Education Policy*.”³²

Interstate compacts may also originate in state legislatures. A legislature may unilaterally enact a statute that serves as a prospective compact and invitation to other states to join by enacting identical statutes.

In recent years, various industry groups have promoted interstate regulatory compacts in attempts to discourage Congress from exercising its preemption powers over the subject matter involved. These groups argue that a compact obviates the need for federal regulation and that cooperative action by the states can adequately address the problem at hand.

Representatives of the federal government occasionally participate in the negotiation of interstate compacts. Such federal participation is usually at the invitation of the states themselves. Federal participation is, however, sometimes necessary, given the nature of the compact. For example, federal representatives participated from the beginning in the negotiation of the Potomac River Compact. Both the federal government and the District of Columbia are represented on the commission established by the compact.

In the case of the Colorado River Compact, Congress passed legislation³³ in 1921 calling on the seven western states in the Colorado River basin (Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming) to enter negotiations to resolve their long-standing water dispute and to provide for the use of the water for agriculture and power generation. Under the terms of the federal legislation, the negotiations were headed by Secretary of Commerce Herbert Hoover. These negotiations led to the Colorado River Compact of 1922.^{34,35}

There are no constitutional or statutory restrictions on the length of time for the negotiation of interstate compacts.

³² Ridgeway, Marian E. 1971. *Interstate Compacts: A Question of Federalism*. Carbondale, IL: Southern Illinois University Press. Page 41.

³³ 42 Stat. 171.

³⁴ Barton, Weldon V. 1967. *Interstate Compacts in the Political Process*. Chapel Hill, NC: University of North Carolina Press.

³⁵ Zimmerman, Joseph F. 2002. *Interstate Cooperation: Compacts and Administrative Agreements*. Westport, CT: Praeger.

5.7 METHODS BY WHICH A STATE ENACTS AN INTERSTATE COMPACT

A state may enter an interstate compact in several ways. In certain circumstances, the Governor, the head of an administrative department, or a commission may have sufficient legal authority to enter into a compact on a particular subject on behalf of the state. For example, the Multi-State Lottery Agreement was adopted in many states merely by the action of state lottery commissions. The focus of this book is, however, on compacts that require explicit legislative action in order to come into effect.

Enactment of an interstate compact is generally accomplished in the same way that ordinary state laws are enacted. Enactment of a state statute typically requires a majority vote of the state legislature and submission of the legislative bill to the state's Governor for approval or disapproval. If the Governor approves a bill that has been passed by the legislature, then the bill becomes law. All Governors have the power to veto legislation passed by their state legislatures. If a Governor vetoes a bill, the bill may nonetheless become law if the legislature overrides the veto in the manner provided by the state's constitution. Overriding a gubernatorial veto typically requires a super-majority (e.g., a two-thirds vote of all houses of the state legislature). See *The Book of the States* for general information about vetoes in particular states.³⁶ The veto by the Governor of Vermont of the bill enacting the New England Water Pollution Compact is an example of a gubernatorial veto of a legislative bill enacting an interstate compact.

If a state allows the citizen-initiative process, an interstate compact may be enacted in that fashion. Each state constitution specifies the legislature's role, if any, in the initiative process. For example, in some states, the legislature has the option (sometimes the obligation) of voting on an initiative petition before the proposition is submitted to the voters. See *The Initiative: Citizen Law-Making*³⁷ for additional information on the citizen-initiative process. The citizen-initiative process may, in general, be used to repeal a state law. Thus, a state law enacting an interstate compact can be subjected to review and possible repeal by the voters. For example, an initiative petition was used in Nebraska in 1988 to force

³⁶ Council of State Governments. 2005. *The Book of the States*. Lexington, KY: The Council of State Governments. 2005 Edition. Volume 37. Pages 161–162.

³⁷ Zimmerman, Joseph F. 1999. *The Initiative: Citizen Law-Making*. Westport, CT: Praeger. See pages 24–25 for citations to the constitutional and statutory provisions governing the initiative processes in various states.

a statewide vote on the question of Nebraska's continued participation in the Central Interstate Low-Level Radioactive Waste Compact. The compact (which had been passed several years earlier by the Nebraska legislature) provided for the building of a nuclear waste site in Nebraska. In the statewide vote on Proposition 402 in 1988, Nebraska voters rejected the opportunity to repeal the state's participation in the compact. The compact nonetheless remained controversial, and, in 1999, the Nebraska legislature enacted a law withdrawing the state from the compact.³⁸

The protest-referendum process, if available in a given state, provides another way to subject a law enacted by the legislature (including a law enacting an interstate compact) to review by the voters. The protest-referendum process usually must be invoked within a short and limited time after the law was originally passed by the legislature. See *The Referendum: The People Decide Public Policy*³⁹ for additional information on the protest-referendum process.

In some cases, the state legislature has referred enactment of an interstate compact to the state's voters. For example, the Maine legislature referred the question of enactment of the Texas Low-Level Radioactive Waste Disposal Compact to its voters in 1993. The question on the ballot was:

“Do you approve of the interstate compact to be made with Texas, Maine and Vermont for the disposal of the State's low-level radioactive waste at a proposed facility in the State of Texas?”

The proposition received 170,411 “yes” votes and 63,672 “no” votes.

The statutory language required to enact an interstate compact at the state level is not complex. For example, the legislation by which the state of Ohio entered into the Great Lakes Basin Compact in 1963 consists of two parts. The first part consists of the following 43-word enacting clause:

“The ‘great lakes basin compact’ is hereby ratified, enacted into law, and entered into by this state as a party thereto with

³⁸ See section 5.13 for additional discussion of the political controversies, spanning a 20-year period, concerning Nebraska's participation in the Central Interstate Low-Level Radioactive Waste Compact.

³⁹ Zimmerman, Joseph F. 1997. *The Referendum: The People Decide Public Policy*. Westport, CT: Praeger.

any other state or province which, pursuant to Article II of said compact, has legally joined in the compact as follows: ...”

The second part consists of the text of the compact (placed inside quotation marks). Appendix K contains the entire text of the Ohio legislation.

Statutory language for enacting an interstate compact at the state level may, or may not, be self-executing. The above Ohio legislation is an example of self-executing legislation—that is, no further action is required by any official or body in Ohio with respect to the process of adopting the compact in Ohio. On the other hand, the statutory language enacting an interstate compact may require that the compact be subsequently executed by the state’s Governor, Attorney General, or other official—perhaps at the discretion of the official involved, perhaps after some specified condition is satisfied, or perhaps merely after a certain number of other states have joined the compact. The Interstate Compact for the Supervision of Parolees and Probationers is an example of a non-self-executing compact. That particular compact was enacted in 1936 by the New York Legislature. Because of the opposition of Governor Herbert H. Lehman, the compact remained unexecuted for eight years.

An interstate compact may sometimes be adopted on a temporary basis by executive or administrative action. For example, the Compact for Education stipulates that it may be adopted

“either by enactment thereof or by adherence thereto by the Governor; provided that in the absence of enactment, adherence by the Governor shall be sufficient to make his state a party only until December 31, 1967.”

The governor authorized participation by Kansas in the Interstate Compact for Supervision of Parolees and Probationers for a period of time prior to enactment of the compact by the legislature.

There are no constitutional or statutory restrictions on the length of time that potential parties to an interstate compact may take in deciding whether to join the compact.⁴⁰ Indeed, history is replete with examples of long delays prior to the enactment of interstate compacts. In 1955, the Great Lakes Basin Compact (appendix K) was enacted by the state legislatures in Illinois, Indiana, Michigan, Minnesota, and Wisconsin. It was

⁴⁰ Of course, a particular compact could explicitly contain a time limitation for its adoption by its prospective members.

enacted in 1956 by the Pennsylvania General Assembly. However, the New York Legislature did not enact the compact until 1960, and the Ohio General Assembly did not enact the compact until 1963. It took twelve years to gain approval from the California and Nevada legislatures for the California-Nevada Water Apportionment Interstate Compact. It took five years to secure the necessary enactments of the Atlantic States Marine Fisheries Compact (which became effective in 1942).

5.8 CONTINGENT NATURE OF COMPACTS

As a general rule, a state enters into an interstate compact in order to obtain some benefit that can only be obtained by mutually agreed coordinated action with its sister state(s). In most cases, it would make no sense for a state to agree to the terms of a compact unless certain desired other states agreed to the compact. Thus, an interstate compact generally does not come into effect until it is approved by a specified number or a specified combination of prospective parties.

A bi-state compact does come into effect until it is adopted by both of the states involved.

A compact involving three or more parties typically contains a specific provision specifying the conditions under which the compact will come into effect. If a compact is silent as to the number of parties necessary to bring it into effect, then, in accordance with standard contract law, it comes into effect only when adopted by all of its named parties.

The Gulf States Marine Fisheries Compact contemplated participation of five states but required only two states to enact the compact in order to bring it into effect.

“This compact shall become operative immediately as to those states ratifying it whenever any two or more of the States of Florida, Alabama, Mississippi, Louisiana and Texas have ratified it.”

The Tri-State Lotto Compact is an example of a multi-state compact that did not come into effect until it was enacted by all of its prospective parties (Maine, New Hampshire, and Vermont).

The Multistate Tax Compact is open to all states and provides:

“This compact shall enter into force when enacted into law by any seven states. Thereafter, this compact shall become

effective as to any other state upon its enactment thereof.”

The Great Lakes Basin Compact was intended to include eight states but came into effect when four states enacted it.

“This compact shall enter into force and become effective and binding when it has been enacted by the legislatures of any four of the states of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin and thereafter shall enter into force and become effective and binding as to any other of said states when enacted by the legislature thereof.”

The Great Lakes Basin Compact is noteworthy because it permitted two Canadian provinces to join the Great Lakes Basin Compact. The Canadian provinces did not, however, count toward the threshold of four states necessary to bring the compact into effect.

“The province of Ontario and the province of Quebec, or either of them, may become states party to this compact by taking such action as their laws and the laws of the government of Canada may prescribe for adherence thereto. For the purpose of this compact the word ‘state’ shall be construed to include a province of Canada.”

The Midwest Interstate Passenger Rail Compact came into effect when it was enacted by three states out of a pool of 12 named prospective members. The membership of this compact may be expanded by action of the commission established by the compact.

“The states of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota and Wisconsin are eligible to join this compact. Upon approval of the Commission, according to its bylaws, other states may also be declared eligible to join the compact. As to any eligible party state, this compact shall become effective when its legislature shall have enacted the same into law; provided that it shall not become initially effective until enacted into law by any three (3) party states incorporating the provisions of this compact into the laws of such states.

Amendments to the compact shall become effective upon their enactment by the legislatures of all compacting states.”⁴¹

The Central Interstate Low-Level Radioactive Waste Compact named 10 states as eligible for membership. It specified that it would become effective when enacted by any three of the 10 prospective parties. The compact enabled the compact’s commission to admit additional states by a unanimous vote.

Sometimes the requirements for bringing a compact into effect are of paramount importance. The original version of the Colorado River Compact was negotiated in 1922 by gubernatorially appointed commissioners from the seven western states involved (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming). The negotiations were headed by Herbert Hoover, and the compact was signed, amid considerable fanfare, on November 24, 1922, in Santa Fe, New Mexico. The 1922 version provided:

“This compact shall become binding and obligatory when it shall have been approved by the legislatures of each of the signatory states.”⁴²

The Arizona legislature, however, did not enact a statute approving the 1922 compact. Congress then initiated a revised version of the compact—the Boulder Canyon Project Act of 1928. The 1928 version specified that the compact would come into effect when enacted by six of the seven western states involved, provided that California was one of the six.⁴³ Arizona, the seventh prospective member, did not approve the 1928 version of compact until 1944.

5.9 CONGRESSIONAL CONSENT AND INVOLVEMENT IN INTERSTATE COMPACTS

Congress may become involved with an interstate compact in one of several different ways:

- consenting to a compact,
- consenting to a compact on behalf of the District of Columbia,

⁴¹ Midwest Interstate Passenger Rail Compact. Section 1 of Article X.

⁴² See <http://ssl.csg.org/compactlaws/coloradoriver.html>

⁴³ 45 Stat.1057.

- making the federal government a party to a compact,
- granting implied consent to a compact,
- consenting in advance to a broad category of compacts, and
- consenting in advance to a particular compact.

The statutory language necessary for congressional consent to an interstate compact is straight-forward.

A joint resolution is generally used if Congress is simply granting its consent. For example, House Joint Resolution 193 (Public Law 104-321)⁴⁴ of the 104th Congress entitled “Joint Resolution Granting the consent of Congress to the Emergency Management Assistance Compact” was used to grant consent to the Emergency Management Assistance Compact in 1996. The joint resolution consists of three major parts. In the first part, Congress grants its consent.

“Resolved by the Senate and House of Representatives of the United States in Congress assembled,

“SECTION 1: CONGRESSIONAL CONSENT.

“The Congress consents to the Emergency Management Assistance Compact entered into by Delaware, Florida, Georgia, Louisiana, Maryland, Mississippi, Missouri, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia and West Virginia. The compact reads substantially as follows ...”

The second part of this joint resolution consists of the entire wording of the Emergency Management Assistance Compact (which is inserted in the joint resolution inside quotation marks).

The third part of a joint resolution consenting to a compact generally contains several sections that qualify the grant of consent.

“SECTION 2. RIGHT TO ALTER, AMEND, OR REPEAL.

“The right to alter, amend, or repeal this joint resolution is hereby expressly reserved. The consent granted by this joint resolution shall

- (1) not be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the subject of the compact;

⁴⁴ Appendix N contains Public Law 104-321 of 1996 entitled “Joint Resolution Granting the consent of Congress to the Emergency Management Assistance Compact.”

- (2) not be construed as consent to the National Guard Mutual Assistance Compact;
- (3) be construed as understanding that the first paragraph of Article II of the compact provides that emergencies will require procedures to provide immediate access to existing resources to make a prompt and effective response;
- (4) not be construed as providing authority in Article IIIA.7 that does not otherwise exist for the suspension of statutes or ordinances;
- (5) be construed as understanding that Article IIIC does not impose any affirmative obligation to exchange information, plans, and resource records on the United States or any party which has not entered into the compact; and
- (6) be construed as understanding that Article XIII does not affect the authority of the President over the National Guard provided by article I of the Constitution and title 10 of the United States Code.

“SECTION 3. CONSTRUCTION AND SEVERABILITY.

“It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate the purposes thereof. If any part or application of this compact, or legislation enabling the compact, is held invalid, the remainder of the compact or its application to other situations or persons shall not be affected.

“SECTION 4. INCONSISTENCY OF LANGUAGE.

“The validity of this compact shall not be affected by any insubstantial difference in its form or language as adopted by the States.”

When the District of Columbia is a party to a compact, Congress may consent to the compact on behalf of the District. When the federal government is a party to a compact, Congress enters into the compact on

behalf of the United States. Thus, when Congress acted on the Interstate Agreement on Detainers, it simultaneously consented to the compact on behalf of the District of Columbia, made the federal government a party to the compact, and enacted some additional permanent statutory language (sections 5 and 6). Appendix L contains Public Law 91-538 of 1970 entitled “An Act to enact the Interstate Agreement on Detainers into law.” This law begins:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

“[Sec. 1.] That this Act may be cited as the ‘Interstate Agreement on Detainers Act.’

“Sec. 2. The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form: ...”

At this point, Public Law 91-538 incorporates the entire Interstate Agreement on Detainers (inside quotation marks).

Public Law 91-538 then concludes with several additional sections:

“Sec. 3. The term ‘Governor’ as used in the agreement on detainers shall mean with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Commissioner of the District of Columbia.

“Sec. 4. The term ‘appropriate court’ as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, in which indictments, informations, or complaints, for which disposition is sought, are pending.

“Sec. 5. All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its purpose.

“Sec. 6. For the United States, the Attorney General, and for the District of Columbia, the Commissioner of the District of Columbia, shall establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act.

“Sec. 7. The right to alter, amend, or repeal this Act is expressly reserved.

“Sec. 8. This Act shall take effect on the ninetieth day after the date of its enactment.”

Congressional consent to an interstate compact need not be explicit. For example, there is nothing in Public Law 91-538 (quoted above) that specifically mentions that Congress is consenting to the Interstate Agreement on Detainers. The reason is that congressional consent is *implied* by its consent to the compact on behalf of the District of Columbia and by its action making the federal government a party to the compact. As the U.S. Supreme Court observed in the 1893 case of *Virginia v. Tennessee*:

“The constitution does not state when the consent of congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement.... But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given. [Justice] Story says that **the consent may be implied, and is always to be implied when congress adopts the particular act by sanctioning its objects and aiding in enforcing them;** and observes that where a state is admitted into the Union, notoriously upon a compact made between it and the state of which it previously composed a part, there the act of congress admitting such state into the Union is an implied consent to the terms of the compact. Knowledge by congress of the boundaries of a state and of its political subdivisions may reasonably be presumed, as much of its legislation is affected by them, such as relate to the territorial jurisdiction of the

courts of the United States, the extent of their collection districts, and of districts in which process, civil and criminal, of their courts may be served and enforced.”⁴⁵ [Emphasis added]

Congressional consent is given in the same way that Congress enacts an ordinary statute. That is, such legislation requires a majority vote of both houses of Congress and approval of the President. As part of the legislative process, the President may veto such legislation. Congress has the power to override a presidential veto by a two-thirds vote in both houses. For example, in 1941, Franklin D. Roosevelt vetoed the bill granting consent to the Republican River Compact (perhaps preferring a Democratic river); however, two years later he signed a bill consenting to a modified version of the compact. Congress’s failure to grant its consent for the Connecticut River and Merrimack River Flood Control Compacts in the 1930s has been attributed to the threat of a presidential veto.

There is no constitutional limitation on the amount of time that Congress may take in considering a compact. Maryland, New York, and Pennsylvania enacted the Susquehanna River Basin Compact in 1967 and 1968, but Congress did not grant its consent until 1970. The Washington Metropolitan Area Transit Regulation Compact was approved by Maryland, Virginia, and the District of Columbia in 1958; however, the compact did not receive the consent of Congress until 1960.

Congress is free to grant its unrestricted consent in advance for all compacts pertaining to a particular subject. For example, Congress consented in advance to interstate crime control compacts in the Crime Control Consent Act of 1934.

“Be it enacted by the Senate and House of Representatives of the United States of America in congress assembled,

“[Sec. 1.] That the consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they deem desirable for making effective such agreement and compacts.

⁴⁵ *Virginia v. Tennessee*. 148 U.S. 503 at 521. 1893.

“Sec. 2. The right to alter, amend, or repeal this Act is hereby expressly reserved.”

In the Weeks Act of 1911, Congress granted unrestricted consent in advance to interstate compacts formed

“for the purpose of conserving the forests and water supply....”⁴⁶

In the Tobacco Control Act of 1936, Congress authorized tobacco-producing states to enter into interstate compacts

“to enable growers to receive a fair price for such tobacco.”⁴⁷

Another example of congressional consent in advance involved the development and operation of airports.⁴⁸

In 1939, President Franklin D. Roosevelt vetoed a bill that would have granted consent in advance to states to enter into compacts relating to fishing in the Atlantic Ocean because he considered the advance authorization to be overly vague.

On rare occasions, Congress has combined consent and advance permission in the same statute. For example, in 1921, it granted its consent to a Minnesota–South Dakota compact relating to criminal jurisdiction over boundary waters and simultaneously granted its consent in advance for a similar compact among Iowa, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin.⁴⁹

In 1951, Congress authorized states to enter into interstate civil defense compacts that, upon enactment, were required to be filed with the U.S. House of Representatives and Senate. These compacts were all deemed to have the consent of Congress unless disapproved by a concurrent resolution within 60 days of filing.⁵⁰

Generally, a congressional grant of consent to an interstate compact is for an indefinite period of time. However, Congress originally subjected the Interstate Oil and Gas Compact of 1935 and the Atlantic States Marine Fisheries Compact to sunset provisions. Later, Congress removed the time restrictions on its consent.⁵¹ The 10 compacts (involving a total

⁴⁶ 36 Stat. 961.

⁴⁷ 49 Stat. 1239.

⁴⁸ 73 Stat. 333.

⁴⁹ 41 Stat. 1447.

⁵⁰ 64 Stat. 1249.

⁵¹ 86 Stat. 383 and 64 Stat. 467.

of 44 states) authorized by the Low Level Radioactive Waste Policy Act of 1980 were each approved for a period of five years.⁵²

Of course, Congress is not obligated to renew its consent. The controversial Northeast Interstate Dairy Compact established a commission with authority to fix the price of fluid or drinking milk above the minimum prices set by the New England federal milk-marketing order. This compact was enacted by each state legislature in New England. Congress granted its consent to this particular compact for a limited period of time. In the meantime, the compact attracted considerable opposition from consumer groups and mid-western and western dairy states. Consumer advocates opposed the compact because it would increase the retail price of milk, thereby adversely impacting low-income citizens. Representatives of mid-western and western dairy states argued that their farmers suffered from low milk prices because of the compact. Wisconsin dairy farmers, in particular, argued that the compact prevented them from selling their products in New England. The compact became inactive in 2001 when Congress failed to grant an extension of its consent.

Congress may impose conditions in granting its consent. For example, Congress granted its consent to the Wabash Valley Compact in 1959⁵³ and the Washington Metropolitan Area Transit Regulation Compact in 1960⁵⁴ with the proviso that each compact authority was to publish specified data and information. Congress always reserves its authority over navigable waters. It almost always reserves its right to “alter, amend, or repeal” its consent. The Boulder Canyon Project Act of 1928⁵⁵ granted congressional consent to the Colorado River Compact subject to several stipulated conditions, including approval of the modified compact by California and five of the other six states involved (it being understood, at the time, that Arizona was unlikely to join immediately).

In the 1962 case of *Tobin v. United States*, the United States Court of Appeals for the District of Columbia Circuit upheld the authority of Congress to attach conditions to a compact.⁵⁶ The U.S. Supreme Court declined to review the decision.

⁵² 94 Stat. 3347.

⁵³ 73 Stat. 694.

⁵⁴ 74 Stat. 1031.

⁵⁵ 45 Stat. 1057.

⁵⁶ *Tobin v. United States*. 306 F.2d 270 at 272–74. 1962.

The Constitution does not detail the specific form or manner by which congressional consent is to be granted. In 1823, the U.S. Supreme Court in *Green v. Biddle* noted this fact in a case involving a congressional statute that granted consent to the admission of Kentucky to the Union and simultaneously referred to the Virginia–Kentucky Interstate Compact of 1789.⁵⁷ Kentucky unsuccessfully challenged the compact on the ground that Congress had not explicitly consented to the compact.

The Central Interstate Low-Level Radioactive Waste Compact enabled the commission established by the compact to accept additional states as members by a unanimous vote. The compact (which was submitted to Congress for its consent) contained a provision granting advance congressional consent to any additional new states:

“The consent given to this compact by the Congress shall extend to any future admittance of new party states under subsections B and C of Article VII of the compact.”

5.10 EFFECT OF CONGRESSIONAL CONSENT

The question arises as to whether an interstate compact is converted into federal law when Congress grants its consent. This question is important because it may determine which court has the power to interpret the compact and whether the compact is interpreted under the state or federal law.

The Supreme Court’s answer to this question has changed over the years. In 1938, the Court held in the case of *Hinderlider v. La Plata River and Cherry Creek Ditch Company* that congressional consent does not make a compact the equivalent of a United States statute or treaty.⁵⁸ The Court modified its *Hinderlider* ruling in *Delaware River Joint Toll Bridge Commission v. Colburn*. The Court expanded the authority of a compact that had been granted consent by Congress and involved

“a federal ‘title, right, privilege, or immunity’ which when explicitly identified and claimed in a state court may be reviewed here on certiorari....”⁵⁹

⁵⁷ *Green v. Biddle*. 21 U.S. 1. 1823.

⁵⁸ *Hinderlider v. La Plata River and Cherry Creek Ditch Company*. 304 U.S. 92. 1938.

⁵⁹ *Delaware River Joint Toll Bridge Commission v. Colburn*. 320 U.S. 419. 1940.

In 1874, the Supreme Court held in *Murdock v. City of Memphis* that federal courts are required to apply the interpretation of state law by the highest state court in the state.⁶⁰

In 1981, however, the Court overturned *Murdock* in *Cuyler v. Adams*. The Court held that congressional consent converts an interstate compact into federal law provided that the compact's subject matter was

“an appropriate subject for congressional legislation.”⁶¹

By overturning *Murdock*, the Court was free to reject the interpretation provided by the Pennsylvania Supreme Court and to interpret the statute on its own.^{62,63}

The question repeatedly arises as to whether the grant of congressional consent to an interstate compact invalidates other federal statutes containing inconsistent provisions. Courts could interpret congressional consent as repealing, relative to the interstate compact, conflicting federal statutes. The question also arises as to the effect of a new federal statute whose provisions conflict with an interstate compact previously approved by Congress. Apparently, the consent would be repealed relative to the conflicting provisions with the exception of any vested rights protected by the Fifth Amendment to the Constitution.

5.11 COMPACTS CONTINGENT ON ENACTMENT OF FEDERAL LEGISLATION

An interstate compact may contain terms specifying that it is contingent on the enactment of federal legislation at the time Congress grants its consent to the compact.

For example, the Belle Fourche River Compact between South Dakota and Wyoming stipulated that it would not become effective unless congressional consent were accompanied by congressional legislation satisfactorily addressing three enumerated points that the compact's parties desired. The compact provided:

⁶⁰ *Murdock v. City of Memphis*. 87 U.S. 590. 1874.

⁶¹ *Cuyler v. Adams*. 449 U.S. 433. 1981.

⁶² Hardy, Paul T. 1982. *Interstate Compacts: The Ties That Bind*. Athens, GA: Institute of Government, University of Georgia.

⁶³ Zimmerman, Joseph F. 2002. *Interstate Cooperation: Compacts and Administrative Agreements*. Westport, CT: Praeger.

“This compact shall become operative when approved by the legislature of each of the states, and when consented to by the congress of the United States by legislation providing, among other things, that:

- “(i) Any beneficial uses hereafter made by the United States, or those acting by or under its authority, within a state, of the waters allocated by this compact, shall be within the allocations hereinabove made for use in that state and shall be taken into account in determining the extent of use within that state;
- “(ii) The United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over and to the waters of the Belle Fourche River and all its tributaries, shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial use of the waters within the basin is of paramount importance to development of the basin, and no exercise of such power or right thereby that would interfere with the full beneficial use of the waters shall be made except upon a determination, giving due consideration to the objectives of this compact and after consultation with all interested federal agencies and the state officials charged with the administration of this compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes;
- “(iii) The United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the apportioned waters which may be impaired by the exercise of federal jurisdiction in, over, and to such waters; provided, that such use is being exercised beneficially, is valid under the laws of the appropriate state and in conformity with this compact at the time of the impairment thereof, and was validly initiated under state law prior to the initiation or authorization of the federal program or project which causes such impairment.”

Congress agreed to the states' request in its legislation granting consent to the Belle Fourche River Compact.

Similarly, the Republican River Compact contained a description of congressional legislation desired by the compact's parties. Again, Congress agreed to the states' request at the time of granting its consent to the compact.

5.12 COMPACTS NOT REQUIRING CONGRESSIONAL CONSENT

Two reasons are generally given as to why the U.S. Constitution requires congressional consent for interstate compacts.

First, congressional consent provides a means of protecting the federal government from efforts by the states to encroach upon its delegated powers and federal supremacy.

Second, congressional consent provides a means of safeguarding the interests of states that are not parties to the compact. For example, absent congressional supervision, upstream states in a river basin might enter into a compact to use water to the extreme disadvantage of downstream states that do not belong to the compact.

At first glance, the Constitution seems to be unambiguous as to the necessity for congressional consent to interstate compacts. Article I, section 10, clause 3 provides:

“No state shall, without the consent of Congress, ... enter into any agreement or compact with another state....”

The Supreme Court has interpreted this clause to allow states to enter into compacts without Congressional consent. In deciding the 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission*,⁶⁴ the Court wrote:

“Read literally, the Compact Clause would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States. The difficulties with such an interpretation were identified by Mr. Justice Field in his opinion for the Court in *Virginia v. Tennessee*, supra.⁶⁵ His conclusion that the Clause could not be read literally was approved in subsequent dicta, ... but this Court did not have

⁶⁴ *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 452. 1978.

⁶⁵ *Virginia v. Tennessee*. 148 U.S. 503. 1893.

occasion expressly to apply it in a holding until our recent [1976] decision in *New Hampshire v. Maine*⁶⁶”⁶⁷

Litigation started in the early 19th century over whether congressional consent to interstate compacts is necessary in all circumstances.

In the 1833 case of *Barron v. Baltimore*, Chief Justice John Marshall wrote:

“If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the constitution.”⁶⁸

In 1845, the New Hampshire Supreme Court in *Dover v. Portsmouth Bridge* dismissed the contention that an 1819 New Hampshire statute and an 1821 Maine statute that authorized construction of a bridge over navigable waters (the Piscataqua River) without congressional consent violated the U.S. Constitution.⁶⁹ The court held that there is no constitutional provision precluding each of the two states from granting authority for the erection of a bridge to the middle of the river.

In 1854, the U.S. Supreme Court held in *Florida v. Georgia* that a boundary compact enacted by the two states would be invalid unless Congress were to grant its consent.⁷⁰

The seminal case on the issue of the necessity for congressional consent to interstate compacts is the 1893 case of *Virginia v. Tennessee*.⁷¹ The two states involved never obtained congressional consent for a boundary agreement that they had reached earlier in the 19th century. The U.S. Supreme Court framed the issue in the case as follows:

“Is the agreement, made without the consent of congress, between Virginia and Tennessee, to appoint commissioners to run and mark the boundary line between them, within the prohibition of this clause? The terms ‘agreement’ or

⁶⁶ *New Hampshire v. Maine*. 426 U.S. 363. 1976.

⁶⁷ *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 452. at 459. 1978.

⁶⁸ *Barron v. Baltimore*. 32 U.S. 243. 1833.

⁶⁹ *Dover v. Portsmouth Bridge*. 17 N.H. 200. 1845.

⁷⁰ *Florida v. Georgia*. 55 U.S. 478. 1854.

⁷¹ *Virginia v. Tennessee*. 148 U.S. 503. 1893.

‘compact,’ taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States, or interfere with their rightful management of particular subjects placed under their entire control.”⁷²

The Court observed:

“There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York, which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of congress before it could make a valid agreement with Virginia for the purchase of the land.”⁷³
[Emphasis added]

The Court continued:

“If Massachusetts, in forwarding its exhibits to the World’s Fair at Chicago, should desire to transport them a part of the distance over the Erie canal, it would hardly be deemed essential for that state to obtain the consent of congress before it could contract with New York for the transportation of the exhibits through that state in that way.”⁷⁴

Further, the Court stated:

“If the bordering line of two states should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of congress for the bordering states to agree to unite

⁷² *Id.* at 517–518.

⁷³ *Id.* at 518.

⁷⁴ *Id.*

in draining the district, and thus removing the cause of disease. So, in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of congress, which might not be at the time in session.”⁷⁵

Having established that the requirement for congressional consent is not universal, the Court then recast the issue in the case:

“If, then, the terms ‘compact’ or ‘agreement’ in the constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of congress must be obtained, to what compacts or agreements does the constitution apply?”⁷⁶

The Court then answered the question as follows:

“We can only reply by looking at the object of the constitutional provision, and construing the terms ‘agreement’ and ‘compact’ by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. ‘Noscitur a sociis’ is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words; and the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.

“Looking at the clause in which the terms ‘compact’ or ‘agreement’ appear, it is evident that **the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.**”⁷⁷ [Emphasis added]

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 519.

The Court continued:

“[Justice] Story, in his Commentaries, (section 1403,) referring to a previous part of the same section of the constitution in which the clause in question appears, observes that its language

‘may be more plausibly interpreted from the terms used, ‘treaty, alliance, or confederation,’ and upon the ground that the sense of each is best known by its association (*‘noscitur a sociis’*) to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war, and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges;’

“and that

‘the latter clause, ‘compacts and agreement,’ might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other.’

“And he [Story] adds:

‘In such cases the consent of congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief.’ ”⁷⁸

The Court continued:

“Compacts or agreements—and we do not perceive any difference in the meaning, except that the word ‘compact’ is

⁷⁸ *Id.* at 520–521.

generally used with reference to more formal and serious engagements than is usually implied in the term ‘agreement’—cover all stipulations affecting the conduct or claims of the parties. The mere selection of parties to run and designate the boundary line between two states, or to designate what line should be run, of itself imports no agreement to accept the line run by them, and such action of itself does not come within the prohibition. Nor does a legislative declaration, following such line, that is correct, and shall thereafter be deemed the true and established line, import by itself a contract or agreement with the adjoining state. It is a legislative declaration which the state and individuals affected by the recognized boundary line may invoke against the state as an admission, but not as a compact or agreement. The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it; for example, as made upon a similar declaration of the border or contracting state. The mutual declarations may then be reasonably treated as made upon mutual considerations. The compact or agreement will then be within the prohibition of the constitution, or without it, according as the establishment of the boundary line **may lead or not to the increase of the political power or influence of the states affected, and thus encroach or not upon the full and free exercise of federal authority.**⁷⁹ [Emphasis added]

The Court continued:

“If the boundary established is so run as to cut off an important and valuable portion of a state, the political power of the state enlarged would be affected by the settlement of the boundary; and to an agreement for the running of such a boundary, or rather for its adoption afterwards, the consent of congress may well be required. But the running of a boundary may have no effect upon the political influence of either state; it may simply serve to mark and define that which actually existed before, but was undefined and unmarked. In that

⁷⁹ *Id.*

case the agreement for the running of the line, or its actual survey, would in no respect displace the relation of either of the states to the general government. There was, therefore, no compact or agreement between the states in this case which required, for its validity, the consent of congress, within the meaning of the constitution, until they had passed upon the report of the commissioners, ratified their action, and mutually declared the boundary established by them to be the true and real boundary between the states. Such ratification was mutually made by each state in consideration of the ratification of the other.

“The constitution does not state when the consent of congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement, as where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given. [Justice] Story says that the consent may be implied, and is always to be implied when congress adopts the particular act by sanctioning its objects and aiding in enforcing them; and observes that where a state is admitted into the Union, notoriously upon a compact made between it and the state of which it previously composed a part, there the act of congress admitting such state into the Union is an implied consent to the terms of the compact. Knowledge by congress of the boundaries of a state and of its political subdivisions may reasonably be presumed, as much of its legislation is affected by them, such as relate to the territorial jurisdiction of the courts of the United States, the extent of their collection districts, and of districts in which process, civil and criminal, of their courts may be served and enforced.

“In the present case the consent of congress could not have preceded the execution of the compact, for until the line was run it could not be known where it would lie, and whether or

not it would receive the approval of the states. The preliminary agreement was not to accept a line run, whatever it might be, but to receive from the commissioners designated a report as to the line which might be run and established by them. After its consideration each state was free to take such action as it might judge expedient upon their report. The approval by congress of the compact entered into between the states upon their ratification of the action of their commissioners is fairly implied from its subsequent legislation and proceedings. The line established was treated by that body as the true boundary between the states in the assignment of territory north of it as a portion of districts set apart for judicial and revenue purposes in Virginia, and as included in territory in which federal elections were to be held, and for which appointments were to be made by federal authority in that state, and in the assignment of territory south of it as a portion of districts set apart for judicial and revenue purposes in Tennessee, and as included in territory in which federal elections were to be held, and for which federal appointments were to be made for that state. Such use of the territory on different sides of the boundary designated in a single instance would not, perhaps, be considered as absolute proof of the assent or approval of congress to the boundary line; but the exercise of jurisdiction by congress over the country as a part of Tennessee on one side, and as a part of Virginia on the other, for a long succession of years, without question or dispute from any quarter, furnishes as conclusive proof of assent to it by that body as can usually be obtained from its most formal proceedings.”⁸⁰

In summary, despite the absence of congressional consent, the U.S. Supreme Court upheld the interstate compact between Virginia and Tennessee because the compact did not

- increase “the political power of influence” of the party states, or

⁸⁰ *Id.*

- encroach “upon the full and free exercise of federal authority.”

In deciding *Virginia v. Tennessee*, the Court also noted that Congress had relied, over the years, upon the compact’s terms for judicial and revenue purposes, thereby implying the grant of consent.

Relying on *Virginia v. Tennessee*, the legislatures of New York and New Jersey did not submit the Palisades Interstate Park Agreement of 1900 to Congress for its consent.

In the same vein, the legislatures of New Jersey and New York initially had no intention of submitting the 1921 Port of New York Authority Compact to Congress, despite the compact’s many novel and unique features. The compact simply specified that it would become effective

“when signed and sealed by the Commissioners of each State as hereinbefore provided and the Attorney General of the State of New York and the Attorney General of New Jersey....”⁸¹

After the newly created Authority’s bankers and bond counsels advised the Authority that potential investors might be hesitant to purchase bonds of such an unusual governmental entity in the absence of congressional consent, the two states sought, and quickly obtained, congressional consent for the compact.⁸²

Note that, as a matter of convention, many compacts do not explicitly mention congressional consent, even when it is the intent of the compacting parties to seek it.

In the 1976 case of *New Hampshire v. Maine*, the U.S. Supreme Court reaffirmed the 1893 case of *Virginia v. Tennessee* and decided that an interstate agreement locating an ancient boundary did not require congressional consent.⁸³

The 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission*⁸⁴ is the most important recent case on the issue of whether

⁸¹ *New York Laws of 1921*. Chapter 154.

⁸² Zimmerman, Joseph F. 1996. *Interstate Relations: The Neglected Dimension of Federalism*. Westport, CT: Praeger.

⁸³ *New Hampshire v. Maine*. 426 U.S. 363. 1976.

⁸⁴ *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 454. 1978. Justice Powell wrote the opinion of the Court, joined by Chief Justice Burger and Justices Brennan, Stewart, Marshall, Rehnquist, and Stevens.

congressional consent is necessary for interstate compacts. In that case, the U.S. Supreme Court reaffirmed its 1893 holding in *Virginia v. Tennessee*.⁸⁵ The Multistate Tax Compact addresses issues relating to multistate taxpayers and uniformity among state tax systems. Like many compacts, the compact itself is silent as to congressional consent, saying only:

“This compact shall enter into force when enacted into law by any seven states.”⁸⁶

The Multistate Tax Compact was submitted to Congress for its consent. However, the compact languished there because of fierce political opposition from various business interests that were concerned about multi-million-dollar tax audits. The compacting states decided to proceed with the implementation of the compact without congressional consent. Predictably, the opponents of the compact, led by U.S. Steel, challenged the constitutionality of their action.

In upholding the constitutionality of the Multistate Tax Compact, despite the lack of congressional consent, the Supreme Court noted that the compact did not

“authorize the member states to exercise any powers they could not exercise in its absence....”⁸⁷

The Court again applied the interpretation of the Compact Clause from its 1893 holding in *Virginia v. Tennessee*, writing that:

“the test is whether the Compact enhances state power *quaod* the National Government.”⁸⁸

The dissent of Justice Byron White (joined by Justice Harry Blackmun) in *U.S. Steel Corporation v. Multistate Tax Commission* is noteworthy because it suggests that the Court’s majority opinion may have implicitly recognized a second test, namely whether a compact possibly encroaches on non-party states.

“A proper understanding of what would encroach upon federal authority, however, must also incorporate encroach-

⁸⁵ *Virginia v. Tennessee*. 148 U.S. 503. 1893.

⁸⁶ Multistate Tax Compact. Section 1 of Article X.

⁸⁷ *U.S. Steel Corporation v. Multistate Tax Commission*. 434 U.S. 454 at 473. 1978. Justice Powell wrote the opinion of the Court, joined by Chief Justice Burger and Justices Brennan, Stewart, Marshall, Rehnquist and Stevens.

⁸⁸ *Id.* at 473. 1978.

ments on the authority and power of non-Compact States.”⁸⁹

Accordingly, it might be necessary to analyze the impact of a disputed compact on the power of the federal government and on the power of non-member states in order to determine whether Congressional consent is required for a particular compact.

As the Supreme Court noted in *U.S. Steel Corporation v. Multistate Tax Commission*:

“most multilateral compacts have been submitted for Congressional approval.”⁹⁰

Recognizing the historical precedent of submitting compacts to Congress for approval, we have been unable to locate a single case where a court invalidated a compact for lack of consent on the grounds that it impermissibly encroached on federal supremacy.⁹¹

In analyzing the diverse range of issues on which courts have allowed states to enter into interstate compacts, it is hard to predict circumstances under which a court will invalidate an interstate compact that has not received Congressional approval, except in the rare cases where the compact clearly encroaches on federal supremacy.⁹² As Michael S. Greve wrote in 2003:

“After *U.S. Steel* one can hardly imagine a state compact that would run afoul of the Compact Clause without first, or at

⁸⁹ *Id.* at 494.

⁹⁰ *Id.* at 471.

⁹¹ See *Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002) involving the Master Settlement Agreement that resolved the lawsuit between states and major companies in the tobacco industry and established an administrative body to determine compliance with the agreement; *McComb v. Wambaugh*, 934 F.2d 474 (3rd Cir. 1991) involving the Interstate Compact on Placement of Children focusing on adoption and foster care of children; *New York v. Trans World Airlines, Inc.*, 728 F.Supp. 162 (S.D.N.Y. 1990) involving a compact among several states to regulate airline advertising; *Breest v. Moran*, 571 F.Supp. 343 (D.R.I. 1983) involving the New England Interstate Corrections Compact allowing for the transfer of prisoners among detention facilities in the New England states.

⁹² Even where encroachment arguably occurs, Congressional consent might not be required. For example, encroachment on federal powers arguably occurred in both the Multistate Tax Compact involved in *U.S. Steel Corporation v. Multistate Tax Commission* (434 U.S. 454, 1978) which sought to short-circuit a federal statutory solution to the allocation of interstate taxes and the compact involved in *Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002) that resolved the lawsuit between states and major tobacco companies concerning the regulation of national cigarette advertising. Yet, both were held to be valid despite not receiving Congressional consent.

least also, running afoul of other independent constitutional obstacles.”⁹³

Moreover, in the 1991 case of *McComb v. Wambaugh*, the U.S. Court of Appeals for the Third Circuit held that no encroachment occurs where the subject of the compact concerns

“areas of jurisdiction historically retained by the states.”⁹⁴

In *The Law and Use of Interstate Compacts*, Frederick L. Zimmermann⁹⁵ and Mitchell Wendell point out:

“Consent bills for interstate compacts dealing with issues in the realm of state activity, law, and administration, with interstate jurisdictional problems and with the settlement of interstate equities, normally serve only to clutter congressional calendars and complicate and obstruct interstate cooperation.”⁹⁶

A number of compacts involving the concerned states’ constitutionally reserved powers have been submitted to Congress for its consent. On one occasion, one house of Congress declined to grant consent on the grounds that congressional consent was unnecessary. The House of Representatives approved a bill granting consent to the Southern Regional Education Compact; however, the Senate did not concur because it concluded that the subject matter of the compact—education—was entirely a state prerogative.⁹⁷

5.13 ENFORCEMENT OF INTERSTATE COMPACTS

The granting of consent suggests that Congress may enforce compact provisions; however, in practice, enforcement of interstate compacts is usually left to courts.

Party states have, on numerous occasions, filed suits in the U.S. Supreme Court requesting its interpretation of the provisions of interstate compacts. For example, the Court granted a request by Kansas in 2001 to

⁹³ Compacts, Cartels, and Congressional Consent. 68 Mo. L. Rev. 285 at 308. 2003.

⁹⁴ 934 F.2d at 479 (3rd Cir. 1991).

⁹⁵ Not to be confused with Joseph F. Zimmerman, co-author of this book.

⁹⁶ Zimmermann, Frederick. Lloyd and Wendell, Mitchell. 1976. *The Law and Use of Interstate Compacts*. Lexington, KY: Council of State Governments.

⁹⁷ Barton, Weldon V. 1967. *Interstate Compacts in the Political Process*. Chapel Hill, NC: University of North Carolina Press. Pages 132–133.

file a bill of complaint in equity against Colorado in an attempt to resolve disputes pertaining to the Arkansas River Compact. In *Kansas v. Colorado*, the Court rejected Colorado's argument that the 11th Amendment barred a damages award for Colorado's violation of the compact because the damages were losses suffered by individual farmers in Kansas and not by the State of Kansas.⁹⁸

An individual or a state may challenge the validity of a compact in state or federal court. Similarly, an individual or a state may bring suit to have provisions of a compact enforced. In general, the 11th Amendment forbids a federal court from considering a suit in law or equity against a state brought by a citizen of a sister state or a foreign nation. Notwithstanding the 11th Amendment, a citizen can challenge a compact or its execution in a state or federal court in a proceeding to prevent a public officer from enforcing a compact. If brought in a state court, the suit can potentially be removed to a United States District Court under provisions of the Removal of Causes Act of 1920 on the ground the state court

“... might conceivably be interested in the outcome of the case....”⁹⁹

Nebraska's participation in the Central Interstate Low-Level Radioactive Waste Compact created controversy over a 20-year period starting in the 1980s. As discussed in section 5.7, an initiative petition was used in Nebraska in 1988 in an unsuccessful attempt to repeal the law authorizing Nebraska's participation in the compact. Then, in 1999, the legislature decided to withdraw from the compact. Nebraska's change of heart proved costly. The Central Interstate Low-Level Radioactive Waste Commission filed a federal lawsuit resulting from Nebraska's withdrawal from the compact and its alleged refusal to meet its contractual obligations to store the radioactive waste. Waste generators and the compact commission's contractor filed a suit in the U.S. District Court for the District of Nebraska, alleging that the state of Nebraska had deliberately delayed review of their license application for eight years and that it had always intended to deny it. The court ruled in 1999 that Nebraska had waived its 11th Amendment immunity when it joined the

⁹⁸ *Kansas v. Colorado*. 533 U.S. 1. 2001.

⁹⁹ 41 Stat. 554.

compact.¹⁰⁰ In 2001, the U.S. Court of Appeals for the Eighth Circuit affirmed the lower court's decision.¹⁰¹ In 2004, Nebraska agreed to settle the lawsuit for \$141,000,000.¹⁰²

5.14 AMENDMENTS TO INTERSTATE COMPACTS

Party states may amend an interstate compact. Proposed amendments to an interstate compact typically follow the same process employed in the enactment of the original compact by each party (e.g., approval of a bill by the legislature and Governor). For example, the Tri-States Lotto Compact provides:

“Amendments and supplements to this compact may be adopted by concurrent legislation of the party states.”

In addition, the consent of Congress is necessary for an amendment of an interstate compact if the original compact received such consent.

As a matter of practical politics, an objection by a member of Congress who represents an area affected by a compact will often be able to halt congressional consideration of consent. This fact is illustrated by the experience of the New Jersey Legislature and the New York Legislature, which each enacted an amendment to the Port Authority of New York and New Jersey Compact (signed by the two Governors) allowing the Port Authority to initiate industrial development projects. In 1967, Representative Elizabeth Holtzman of New York placed a hold on the consent bill on the grounds that the Port Authority had failed to solve the port's transportation problems. Holtzman argued that the Port Authority should construct a railroad freight tunnel under the Hudson River to obviate the need of trains to travel 125 miles to the north to a rail bridge over the river. She removed the hold upon reaching an agreement with the Authority. The Port Authority agreed that it would finance an independent study of the economic feasibility of constructing such a tunnel. The study ultimately reached the conclusion that a rail freight tunnel would not be economically viable.

The Constitution (section 10 of Article I) authorizes Congress to revise state statutes levying import and export duties; however, it does

¹⁰⁰ *Entergy, Arkansas, Incorporated v. Nebraska*, 68 F.Supp.2d 1093 at 1100 (D.Neb.1999).

¹⁰¹ *Entergy, Arkansas, Incorporated v. Nebraska*, 241 F.3d 979 at 991–992 (8th Cir. 2001).

¹⁰² *Lincoln Journal Star*. July 15, 2005.

not grant similar authority to revise interstate compacts. Congress withdrew its consent to a Kentucky–Pennsylvania Interstate Compact that stipulated that the Ohio River should be kept free of obstructions. In 1855, the U.S. Supreme Court ruled in *Pennsylvania v. Wheeling and Belmont Bridge Company* that the compact was constitutional under the Constitution’s Supremacy Clause (Article VI) and that a compact approved by Congress did not restrict Congress’s power to regulate an interstate compact.¹⁰³ In the 1917 case of *Louisville Bridge Company v. United States*, the Court ruled that Congress may amend a compact even in the absence of a specific provision reserving to Congress the authority to alter, amend, or repeal the compact.¹⁰⁴ A federal statute terminating a compact is not subject to the due process guarantee of the 5th Amendment to the Constitution on the ground that this protection extends only to persons.

5.15 DURATION, TERMINATION, AND WITHDRAWALS

The duration of an interstate compact, the method of terminating a compact, and the method by which a party may withdraw from a compact are generally specified by the compact itself.

5.15.1 DURATION OF AN INTERSTATE COMPACT

The U.S. Constitution does not address the question of the permissible duration of interstate compacts. The 1785 Maryland–Virginia compact regulating fishing and navigation on the Chesapeake Bay and the Potomac was ratified under the Articles of Confederation and remained in effect until 1958 (when it was replaced by the Potomac River Compact).

Some compacts contain a sunset provision specifying the compact’s duration. For example, California agreed to serve, for 35 years, as the host state for the storage of radioactive waste for the states of Arizona, North Dakota, South Dakota, and California in the Southwestern Low-Level Radioactive Waste Disposal Compact.

5.15.2 TERMINATION OF AN INTERSTATE COMPACT

Many compacts contain a termination provision. For example, the Colorado River Compact stipulates that termination may be authorized only by a unanimous vote of all party states.

¹⁰³ *Pennsylvania v. Wheeling and Belmont Bridge Company*. 50 U.S. 647. 1855.

¹⁰⁴ *Louisville Bridge Company v. United States*. 242 U.S. 409. 1917.

The Central Interstate Low-Level Radioactive Waste Compact permits states to withdraw, but that the compact shall not be terminated until all parties leave the compact.

“G. The withdrawal of a party state from this compact under subsection D of Article VII of the compact or the revocation of a state’s membership in this compact under subsection E of Article VII of the compact shall not affect the applicability of this compact to the remaining party states.

“H. This compact shall be terminated when all party states have withdrawn pursuant to subsection D of Article VII of the compact.”

5.15.3 WITHDRAWAL FROM AN INTERSTATE COMPACT

Most compacts (other than those settling boundary disputes) have a provision permitting a party state to withdraw. If a state originally joined a compact by enacting a statute, withdrawal is usually accomplished by enacting a new statute withdrawing from the compact.

Examples of withdrawals include the action of the Maryland General Assembly withdrawing from the Interstate Bus Motor Fuel Tax Compact in 1967 and its action withdrawing from the National Guard Mutual Assistance Compact in 1981. In 1995, the Virginia General Assembly enacted a statute withdrawing from the Atlantic States Marine Fisheries Compact, complaining that Virginia’s fishing quotas were too low.

States may withdraw from a compact and then rejoin it. For example, Florida withdrew from the Atlantic States Marine Fisheries Compact and then subsequently rejoined the compact.

Although some compacts allow instantaneous withdrawal, most require a party to provide a specified amount of advance notice before its withdrawal becomes effective. For example, the Interstate Mining Compact authorizes a party state to withdraw its membership one year after the Governor of the withdrawing state notifies the Governors of all the other compacting states.

The Delaware River Basin Compact requires advance notice of at least 20 years for withdrawal, with such notice being allowed only during a five-year window every 100 years.

Section 8.6 contains a considerably more detailed discussion of withdrawals from interstate compacts.

5.16 ADMINISTRATION OF INTERSTATE COMPACTS

About one half of all modern-day interstate compacts establish a commission to administer the subject matter of the compact. The remaining compacts are generally administered by departments and agencies of the party states.

For example, the Driver License Compact (to which 45 states adhere) requires a party state to report each conviction of a driver from another party state for a motor vehicle violation to the licensing authority of the driver's home state. The compact requires the home state to treat the reported violation as if it had occurred in the home state. The compact also requires the licensing authority of each member state to determine whether an applicant for a driver license has held or currently holds a driver's license issued by another party state.

Similarly, the Nonresident Violator Compact (enacted by 44 states) ensures that nonresident drivers answer summonses or appearance tickets for moving violations. This compact (like the Driver License Compact) requires each member state to report each conviction of a driver from another party state for a motor vehicle violation to the licensing authority of the driver's home state. This compact is designed to ensure that nonresident motorists are treated in the same manner as resident motorists and that their due process rights are protected. A driver who fails to respond to an appearance ticket or summons will have his or her license suspended by the issuing state.

5.17 STYLE OF INTERSTATE COMPACTS

As a matter of convention, modern interstate compacts are typically organized into articles, with unnumbered sections. After each member state enacts the compact, the various articles of the compact are given numbers and letters in the state's compiled code in accordance with the state's style. Similarly, after Congress consents to a compact, the various articles of the compact may be assigned different letters and numbers. Thus, compacts (and congressional legislation consenting to compacts) typically make reference to enactment of "substantially" the same agreement by other member states.

5.18 COMPARISON OF TREATIES AND COMPACTS

Although interstate compacts bear many similarities to international treaties among nations, they differ in three important respects.

First, Congress may enact a statute that conflicts with an international treaty, whereas a state legislature lacks the authority to enact a statute conflicting with any provision of an interstate compact.

Second, a compact is a contract that is enforceable by courts. In contrast, the procedure for enforcement of an international treaty is specified within the treaty itself. In practice, many treaties contain no specific provision for enforcement and merely rely on the goodwill of the parties.

Third, under the Constitution, the President is granted the sole authority to negotiate a treaty with another nation. In contrast, no provision in the Constitution stipulates the manner of negotiation of interstate compacts. Moreover, Congress has never enacted any general statute specifying procedures to be followed by a state that is contemplating entry into an interstate compact.

There is no international law provision authorizing citizens of a signatory to a treaty to be involved in its termination. In 1838, the U.S. Supreme Court applied this principle of international law to interstate compacts. The Court ruled, in the case of *Georgetown v. Alexander Canal Company*, that citizens whose rights would be affected adversely by a compact are not parties to a compact and that they consequently can have no direct involvement in a compact's termination.¹⁰⁵

5.19 COMPARISON OF UNIFORM STATE LAWS AND INTERSTATE COMPACTS

The term “uniform state law” usually refers to a law drafted and recommended by the National Conference of Commissioners on Uniform State Laws (NCCUSL), although the term is occasionally used to refer to laws originating elsewhere. The Conference, formed in 1892 upon the recommendation of the American Bar Association, is a non-governmental body. The Conference primarily works on private civil law and is most widely known for its work on the Uniform Commercial Code. Since 1892, the Conference has produced more than 200 recommended laws in areas such as commercial law, family or domestic relations law, estates, probate and trusts, real estate, implementation of full faith and credit, interstate enforcement of judgments, and alternative dispute resolution. There are numerous uniform acts that have been adopted by large

¹⁰⁵ *Georgetown v. Alexander Canal Company*. 37 U.S. 91 at 95–96. 1838.

numbers of states, including the Uniform Anatomical Gift Act, the Uniform Fraudulent Transfer Act, the Uniform Interstate Family Support Act, the Uniform Enforcement of Foreign Judgments Act, and the Uniform Transfers to Minors Act.

There is some resemblance between an interstate compact and a uniform state law. Both, for example, entail enactment of identical statutes by a group of states. An interstate compact encompassing all 50 states and the District of Columbia and a uniform state law enacted by the same 51 jurisdictions each has the effect of establishing national policy. There are, however, a number of important differences.

First, the goal of a uniform state law is, almost always, enactment of the identical statute by all states. Many interstate compacts are inherently limited to particular geographic areas (e.g., the Port of New York Authority Compact, the Arkansas River Compact, and the Great Lakes Basin Compact) or to states that are engaged in particular activities (e.g., the Interstate Oil Compact and the Multistate Lottery Agreement).

Second, the effective date of a uniform state law is typically not contingent on identical legislation being passed in any other state. A uniform state law generally takes effect in each state as soon as each state enacts it. That is, a uniform state law stands alone and is not coordinated with the identical laws that other states may, or may not, pass. If it happens that all 50 states enact a particular uniform state law, then the goal of establishing a uniform policy for the entire country is achieved. If a substantial fraction of the states enact a uniform state law, then the goal of uniformity is partially achieved. If only one state enacts a uniform state law, that particular statute serves as the law of that state on the subject matter involved. In contrast, the effective date of a compact is almost always contingent on the enactment by some specified number or some specified combination of states. The reason for this is that states are apt to enter into interstate compacts in order to obtain some benefit that can be obtained only by cooperative and coordinated action with one or more sister states.

Third, although the goal of the National Conference of Commissioners on Uniform State Laws is that identical laws be adopted in all states, it is very common for individual states to amend the Conference's recommended statute in response to local pressures. If the changes are not major, the Conference's goal of uniformity may

nonetheless be substantially (albeit not perfectly) achieved. In contrast, adoption of a compact requires a meeting of minds. Because an interstate compact is a contract, each party that desires to adhere to an interstate compact must enact identical wording (except for insubstantial differences such as numbering and punctuation). Variations in substance are not allowed.

Fourth, and most importantly, a uniform state law does not establish a contractual relationship among the states involved. When a state enacts a uniform state law, it undertakes no obligations to other states. The enacting state merely seeks the benefits associated with uniform treatment of the subject matter at hand. Each state's legislature may repeal or amend a uniform state law at any time, at its own pleasure and convenience. There is no procedure for withdrawal (or advance notice for withdrawal) in a uniform state law. A uniform state law does not create any new legal entity, and therefore there is no legal entity from which to withdraw. In contrast, an interstate compact establishes a contractual relationship among its party states. Once a state enters into a compact, it is legally bound to the compact's terms, including the compact's specified restrictions and procedures for withdrawal and the compact's specified procedure for termination of the compact as a whole.

5.20 COMPARISON OF FEDERAL MULTI-STATE COMMISSIONS AND INTERSTATE COMPACTS

Federal multi-state commissions bear some resemblance to the commissions that are established by some interstate compacts. There are, however, a number of important differences between federally created multi-state commissions and interstate compacts.

In 1879, Congress first recognized the need for a governmental body in a multi-state region by establishing the Mississippi River Commission. The enabling statute directed the Commission to deepen channels; improve navigation safety; prevent destructive floods; and promote commerce, the postal system, and trade. The Commission's original members were three officers of the U.S. Army Corps of Engineers, one member of the U.S. Coast and Geodetic Survey, and three citizen members, including two civil engineers. Commission members are nominated by the President, subject to the Senate's advice and consent.

In a similar vein, the Water Resources Planning Act of 1965

authorizes the President, at the request of the concerned governors, to establish other river basin commissions. Such commissions have been created for the Ohio River and Upper Mississippi River basin.

The most well-known multi-state commission—the Tennessee Valley Authority—was created by Congress in 1933. The TVA operates in an area encompassing parts of seven states. Its purposes are to promote agricultural and industrial development, control floods, and improve navigation on the Tennessee River. The President appoints, with the Senate’s advice and consent, three TVA commissioners for nine-year terms. The creation of the TVA is credited to populist Senator George Norris of Nebraska, who conducted a crusade for many years against the high rates charged by electric utility companies. Aside from the benefits to the states in the Tennessee Valley, Norris and his supporters argued that the cost of TVA-generated electricity would serve as a yardstick for evaluating the rates charged by private power companies elsewhere in the country.

Although the TVA possesses broad powers to develop the river basin, the authority has largely concentrated its efforts on dams and channels, fertilizer research, and production of electricity. The TVA is generally credited with achieving considerable success in its flood control, land and forest conservation, and river-management activities. At the same time, the TVA has engendered considerable controversy over the years in a number of areas.

There are several differences between federal multi-state commissions and the commissions that are established by interstate compacts.

First, federal multi-state commissions are entirely creatures of the federal government. The states play no official role in enacting the enabling legislation establishing such bodies. In contrast, each state makes its own decision as to whether to enact an interstate compact.

Second, although state officials often provide advice on appointments to federal multi-state commissions, the appointing authority for members of a federal multi-state commissions is entirely federal (i.e., the President). In contrast, the members of a commission established by an interstate compact are typically appointed by the states (e.g., by the Governors).

5.21 FUTURE OF INTERSTATE COMPACTS

In recent years, Congress has, with increasing frequency, exercised its preemption powers to remove regulatory authority totally or partially

from the states. This tendency is responsible for the decrease in the number of new regulatory compacts since the mid 1960s.¹⁰⁶ For example, the Mid-Atlantic States Air Pollution Control Compact was entered into by Connecticut, New Jersey, and New York; however, Congress did not consent to the compact and instead enacted the Air Quality Act of 1967,¹⁰⁷ preempting state regulatory authority over air pollution abatement.

There are countervailing tendencies. Economic interest groups frequently lobby for the establishment of regulatory compacts among states, arguing that coordinated action by the states is sufficient to solve a particular problem.

It is reasonable to predict that increasing urban sprawl may someday lead to an interstate compact that establishes an interstate city encompassing an urban area spread over two or more states. Although no such interstate city has been created to date, the New Hampshire–Vermont Interstate School Compact has been used to establish two interstate school districts, each including a New Hampshire town and one or more Vermont towns. In the same vein, Kansas and Missouri have entered into a compact establishing a metropolitan cultural district governed by a commission. The commission's membership is determined by the number of counties that decide to join the district. Eligible counties include one with a population exceeding 300,000 that is adjacent to the state line, one that contains a part of a city with a population exceeding 400,000, and one that is contiguous to one of these.¹⁰⁸

5.22 PROPOSALS FOR INTERSTATE COMPACTS ON ELECTIONS

There have been suggestions, over the years, for using interstate compacts in the field of elections.

The 1970 U.S. Supreme Court case of *Oregon v. Mitchell* was concerned with congressional legislation to bring about uniformity among state durational residency requirements for voters in presidential elections. In his opinion (partially concurring and partially dissenting), Justice Potter Stewart pointed out that if Congress had not acted, the states could have adopted an interstate compact to accomplish the same

¹⁰⁶ Zimmerman, Joseph F. 2005. *Congressional Preemption: Regulatory Federalism*. Albany, NY: State University of New York Press.

¹⁰⁷ 81 Stat. 485.

¹⁰⁸ 114 Stat. 909.

objective. Justice Stewart pointed out that a compact involving all the states would, in effect, establish a nationwide policy on residency for election purposes.¹⁰⁹

In the 1990s, Senator Charles Schumer of New York proposed a bi-state interstate compact in which New York and Texas would pool their electoral votes in presidential elections. Both states were (and still are) non-competitive in presidential politics. Schumer observed that the two states have almost the same number of electoral votes (currently 34 for Texas and 31 for New York) and regularly produce majorities of approximately the same magnitude in favor of each state's respective dominant political party. The Democrats typically carry New York by about 60%, and the Republicans typically carry Texas by about 60%. The purpose of the proposed compact was to create a large super-state (slightly larger than California) that would attract the attention of the presidential candidates during presidential campaigns.

¹⁰⁹ *Oregon v. Mitchell*, 400 U.S. 112 at 286–287. 1970.

