Chapter 1
THE HISTORICAL BASIS AND USE OF INTERSTATE COMPACTS

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No State shall, without the Consent of Congress * * * enter into any Agreement or Compact with another State, or with a foreign Power[.]

U.S. Const. art. I, § 10, cl. 3.

1.1 INTERSTATE RELATIONS IN THE U.S. CONSTITUTION

The Framers of the Constitution understood that the federal structure of American government required formal mechanisms to manage interstate relations, and particularly to manage the complex government, political and economic allegiances that states might form between themselves. Consequently, the Constitution provides several mechanisms for “adjusting” interstate relations and addressing regional or national issues, many of which are “supra-state, sub-federal” in nature.¹ Several examples of constitutional control over state action demonstrate that the Framers, though greatly state-oriented, were

¹ The term “supra-state, sub-federal” refers to those matters that are clearly beyond the realm of individual state authority but which, due to their nature, may not be within the immediate purview of the federal government or easily resolved through a purely federal response.
also keenly aware of the need for some semblance of control over multilateral state action. The United States post-1789 was not to be a confederation of largely sovereign states occasionally cooperating but substantially independent of one another. Rather, the Framers opted for a federation comprised of two complementary and quasi-sovereign entities “establishing two orders of government, each with its own privity, its own set of mutual rights and obligations to the people who are governed and sustained by it.” Restrictions on state conduct were intended to preserve the “two orders of government” by ensuring that multistate actions were subject to certain checks and balances.

Through the Constitution’s Full Faith and Credit Clause, for example, the Framers created a system by which the critical actions of one state received recognition and enforcement in other states, providing, in a sense, a national scheme of legal recognition and regulation over the actions of states. Congress’s extensive power in the Commerce Clause provides yet another mechanism for adjusting interstate relationships—often in an economic sense that nevertheless can have great social and political consequences. The Supremacy Clause and federal preemption doctrine provide an additional control over state actions—individual and collective—by ensuring that federal law trumps state law in any legitimate competition between the two. The far-
reaching power of the federal judiciary, and particularly the Supreme Court’s original jurisdiction over state-versus-state disputes, serves as another means of adjusting interstate relations by vesting ultimate authority over state disputes directly in the nation’s highest court.

Of all of the mechanisms available, none is more formal, more state-centered, more adaptable to collective state needs, and perhaps less understood, than interstate compacts. Compacts are fundamentally negotiated agreements among member states that have the status of both contract and statutory law. More important, compacts represent the only mechanism in the Constitution by which the states themselves can alter the fundamental dynamics of their relationships without the intervention of the federal government, be they boundaries, substantive law, or even economic relationships. In short, compacts are the only constitutionally recognized mechanism by which states can reorder their organic relationships without running afoul of the authority of the federal government or reordering the federal structure of American government. Thus, compacts are singularly important because through a compact the states can create a state-based solution to regional or national problems and effectively retain policy control over certain interstate matters for the future. What Justice Brandeis observed in 1938 in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* is equally true today:

> The compact . . . adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations. Adjustment [of interstate controversies] by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies, was practiced by the States before the adoption of the Constitution, and had been extensively practiced in the United States for nearly half a century before this Court first applied the judicial means in settling the boundary dispute in *Rhode Island v. Massachusetts.*

Well before the United States was established under the Articles of Confederation and Perpetual Union (Articles of Confederation), colonial authorities had experience using mechanisms and processes similar to compacts to resolve their disputes; thus the use of interstate compacts spans the full range of U.S. history, which makes compacts the oldest mechanism available to promote formal interstate cooperation. Compacts have their roots in the American colonial era when each colony was related directly to the King (not one another) and, therefore, enjoyed a measure of independence from every other colony. There was no “federal” system of colonial government and no government with national scope and power. While the colonies were clearly “related” to each other through geographic, economic, and cultural interests, there was no recognition of formal governmental relationships separate and apart from their direct accountability to the Crown. For both philosophical and practical reasons, Britain could not allow the colonies to create alternative trans-colonial government structures apart from the Crown. Consequently, no government with “continental” or “national” power and scope existed prior to the Revolution. All inter-colonial disputes were submitted to the Crown for resolution because the colonies lacked the authority to independently resolve their differences or manage their inter-colonial relations.

Most inter-colonial disputes generally involved boundary controversies that arose from the various royal land charters under which the colonies were founded. These charters were by definition and operation vague and expansive, applying to lands that lacked adequate surveys and for which formal possession was questionable. For example, the U.S. Supreme Court noted in 2003 in a dispute involving Virginia’s claim that it had a right to withdraw water from the Potomac River and construct improvements attached to the Virginia shore free from Maryland regulation, that “Control of the [Potomac] River has been disputed for nearly 400 years. In the 17th century, both Maryland and Virginia laid claim to the River pursuant to conflicting royal charters issued by different British Monarchs.”

10. See, e.g., WILLIAM BLACKSTONE, COMMENTARIES, 93 § 4 (discussing application of English law to various countries and colonies in Britain’s possession and the fact that the American Colonies were linked to the Crown by function of royal charter).

11. Virginia v. Maryland, 540 U.S. 56, 60 (2003). This decision did not resolve all of the boundary issues. In 2014, the Maryland Court of Special Appeals noted that the Supreme Court had not decided whether the boundary along the non-tidal portion of the Potomac River shifts over time through accretion and reliction. Potomac Shores, Inc. v. River Riders, Inc., 98 A.3d 1048 (Md. Ct. Spec. App. 2014) (concluding that the boundary did shift through such natural processes).
Charter of 1628 gave to Sir Henry Rosewell land of which the true territorial definition was left open to wildly varying interpretations. That charter and subsequent amendments formed part of the basis for a territorial dispute that led to the Supreme Court’s intervention in Rhode Island v. Massachusetts, a dispute that had been previously resolved by the Privy Council of England nearly 100 years earlier.

Matters became more complicated with the expansion of the colonies geographically and with their migrating populations. As populations moved further west, Atlantic coast colonies made extravagant claims to portions of the interior continent based in part on broad Royal land charters and in part on the principle that possession was nine-tenths of the law. Consequently, boundary disputes between the colonies broke out and the Crown, through the Privy Council, was required to settle a number of border disputes, which, similar to today’s disputes arising in the U.S. Supreme Court’s original jurisdiction, took several years to resolve. The Privy Council’s first American colonial boundary dispute was between Rhode Island and Connecticut (initiated in 1721, resolved in 1727). This was followed by cases between New Hampshire and Massachusetts (initiated in 1734, resolved in 1746) and between Rhode Island and Massachusetts (initiated in 1738, resolved in 1746). The need for a method to continually address boundary disputes and territorial claims contributed to the evolution of the “compact” process first expressed in the Articles of Confederation and later carried forward and formalized in Article I, Section 10, of the U.S. Constitution.

Although frequently thought of in terms of empowering states to enter into compacts, the Articles of Confederation and later the Constitution speak to interstate compacts in restrictive or limiting terms; that is, not authorizing their creation but restraining their creation. Beginning with the Articles of Confederation, the Founders restricted the ability of the states to join in formal, common enterprises or allegiances. Although they recognized that each state retained “its sovereignty, freedom and independence,” the Articles of Confederation placed limitations on multilateral state action by providing that no state could enter “any treaty, confederation or alliance whatever be-

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between them, without the consent . . . of Congress[.].”17 This provision regarding interstate compacts was meant primarily as a preventative measure. The provision’s purpose was to limit the ability of the states to act collectively through compacts or other formal arrangement absent congressional consent.

The reasons behind the restrictive nature of the compact clauses of the Articles of Confederation and the Constitution rested in concern for what today is sometimes referred to as the “collective action” problem of federalism.18 Collective action occurs when two or more states seek to maximize their sovereignty and political power through collective, joint, or cooperative efforts at the expense of other states or regions, or the federal government.19 The concern over collective action was so compelling that the drafters of the Articles of Confederation provided that Congress alone was to be the “last resort on appeal in all disputes and differences . . . between two or more States concerning boundary, jurisdiction or any other cause whatever[.].”20 The Articles of Confederation created an elaborate procedural mechanism by which the “legislative or executive authority or lawful agent of any State in controversy with another” would petition Congress.21 In large part, the process conceived in the Articles of Confederation closely mirrored the process used by the Crown during the colonial era. Colonial disputes were either (1) negotiated then submitted to the Crown for approval (a process similar to the compact method) or (2) appealed directly to the Crown through the Privy Council (a process similar to submitting state disputes directly to the Continental Congress).

17. Articles of Confederation of 1781, art. VI (“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.”).
20. Articles of Confederation of 1781, art. IX.
21. Id.
Nevertheless, even the power the national government possessed under the Articles of Confederation over foreign relations was sometimes subject to the vagaries of the states, acting individually or collectively.22 Although the restrictions contained in the Articles of Confederation were meant to protect what little power the national government enjoyed from state encroachment, the restrictions did not prove effective with the passage of time. Concern over collective state action continued to be a focus of the evolving national government. The “consent” requirement set out in Article I, Section 10 of the Constitution was a carryover from the Articles of Confederation. It was intended to continue the principle that through its consent powers the Congress would be a counterweight against potentially harmful collective state action that could erode the viability and sovereignty of the national government or jeopardize the authority of other states.

The Compact Clause, which declares that “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign power,”23 differs from Article I, Section 10, Clause 1, which declares that “No State, shall enter into Any Treaty, Alliance or Confederation . . . “ in that the latter is an absolute prohibition to which Congress cannot consent. In contrast, the Articles of Confederation required congressional consent before a state could enter into a “conference, agreement, alliance, or treaty” with any King, Prince or State, and before two or more states could enter into any treaty, confederation or alliance between them.24 Apparently, however, under the Articles of Confederation consent was not required for mere “agreements” or “compacts” between states. As the Supreme Court observed in Wharton v. Wise, “[t]he articles inhibiting any treaty, confederation, or alliance between the States without the consent of Congress . . . were not designed to prevent arrangements between adjoining States to facilitate the free intercourse of their citizens, or remove barriers to their peace and prosperity[.]”25 Yet, subsequently, the Court observed, “[t]he records of the Constitutional Convention . . . are barren of any clue as to the precise contours of the agreements and compacts governed by the Compact Clause. This suggests that the Framers used the words ‘treaty,’ ‘compact,’ and ‘agreement’

24. Compare ARTICLES OF CONFEDERATION of 1781, art. VI, clauses 1 and 2.
as terms of art, for which no explanation was required and with which we are unfamiliar.”26 The Framers apparently perceived compacts and agreements as differing from treaties.27

For example, the Virginia-Maryland Compact of 1785, which governed navigation and fishing rights in the Potomac River, the Pocomoke River, and the Chesapeake Bay, did not receive congressional consent. Yet no question of its validity under the Articles of Confederation ever arose. In referring to this 1785 compact in *Wharton v. Wise*, the Supreme Court noted:

> [L]ooking at the object evidently intended by the prohibition of the Articles of Confederation, we are clear they were not directed against agreements of the character expressed by the compact under consideration. Its execution could in no respect encroach upon or weaken the general authority of Congress under those articles. Various compacts were entered into between Pennsylvania and New Jersey and between Pennsylvania and Virginia, during the Confederation, in reference to boundaries between them, and to rights of fishery in their waters, and to titles to land in their respective States, without the consent of Congress, which indicated that such consent was not deemed essential to their validity.28

Whatever explicit understanding the Framers had of the intent of Article I, Section 10, has been lost to history.29 In trying to reconcile competing

provisions, Justice Story developed a theory that treaties, alliances, and confederations generally connote military and political accords forbidden to states. Compacts and agreements, by contrast, embrace “mere private rights of sovereignty; such as questions of boundary; interests in land situated in the territory of each other; and other internal regulations for the mutual comfort and convenience of States bordering on each other.” In the latter situations, congressional consent was required, “in order to check any infringement of the rights of the national government.” It is unlikely that the Framers imagined that interstate compacts would grow to have the national scope they enjoy today as now seen in the emergence of compacts between more than two states and compacts that create powerful administrative agencies. Although for many years the Supreme Court’s compact jurisprudence was at best inconclusive and at worst convoluted, the principles articulated by Justice Story have dominated. Courts faced with the task of applying the Compact Clause were reluctant to strike down emerging forms of interstate cooperation. The need to reconcile interstate cooperation with the broad restrictive language of the Constitution dictated a more discriminating or nuanced jurisprudence. For example, in *Union Branch R.R. Co. v. E. Tenn. & Ga. R.R. Co.*, the Supreme Court of Georgia rejected a Compact Clause challenge to an agreement between Tennessee and Georgia concerning the construction of an interstate railroad, concluding that the Compact Clause restrained the power of the states only with respect to agreements, “which might limit, or infringe upon a full and complete execution by the General Government, of the powers intended to be delegated by the Federal Constitution[.]”

Courts, therefore, acknowledged early in the development of compact jurisprudence two important principles: (1) that the federal structure of the nation and the principle of delegated powers required a “state-based” approach for joint action to resolve interstate disputes and (2) that some form of national control was necessary to maintain the integrity of the newly established union and prevent state encroachment on federal power and non-compacting states. The Compact Clause of the Constitution is a continuing

31.  Id.
33.  Id. at 339. This state court case seems to be the first case in which any court considered the reach of the Compact Clause.
expression of the Framers’ intent to maintain some semblance of national control over interstate relations, and particularly the amalgamation of political power in all states collectively or in more politically powerful associations of states and regions.\textsuperscript{35} When the Framers spoke of congressional consent it is clear that they sought to vindicate the legislative power of Congress \textit{and} protect the power of the entire federal government.\textsuperscript{36} James Madison in particular was concerned with the tendency of states and regions to “partition the Union into several Confederacies.”\textsuperscript{37} The Supreme Court has, therefore, repeatedly observed that the purpose of the Compact Clause is to limit agreements that are directed at forming any combinations of states that increase state power that encroaches upon or interferes with the supremacy of the national government.\textsuperscript{38} As one observer noted, “[t]he basic purpose of the constitutional requirement of Congressional consent is to make certain that no such agreements [those affecting the balance of power in the federal structure] can stand against the will of Congress.”\textsuperscript{39} Without the restrictive nature of the Compact Clause there would be no prohibition against the creation of state allegiances and confederacies, potentially resulting in the erosion of federal power and ultimately the deconstruction of the Union.

The restrictive language of the Compact Clause would seem to prohibit states from entering into any agreements or compacts absent the consent of Congress. This was the general understanding of the Compact Clause well into the 19th century.\textsuperscript{40} James Madison found the restriction so straightforward that he observed in \textit{The Federalist 44} that “[t]he remaining particulars of this clause fall within reasons which are either so obvious, or have been so fully developed, that they may be passed over without remark.”\textsuperscript{41} For part of the nation’s history, therefore, the Compact Clause was seen as sufficiently broad and restrictive as to render any interstate compact void absent consent

\textsuperscript{35} See, e.g., \textit{The Federalist No. 45} (James Madison) (since states retain “a very extensive portion of active sovereignty” their infringement upon national powers “ought not to be wholly disregarded”).

\textsuperscript{36} Milk Indus. Found. v. Glickman, 132 F.3d 1467 (D.C. Cir. 1998).

\textsuperscript{37} Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), in 10 \textit{The Papers of James Madison} 310, 312 (Robert A. Rutland et al. eds., 1977).

\textsuperscript{38} See \textit{U.S. Steel Corp. v. Multistate Tax Comm’n}, 434 U.S. 452, 471 (1978) (citing historical cases).

\textsuperscript{39} Frederick L. Zimmermann & Mitchell Wendell, \textit{The Law and Use of Interstate Compacts} 22 (Council of State Gov’ts 1976).

\textsuperscript{40} See \textit{U.S. Steel Corp.}, 434 U.S. at 465, 494 (majority citing to 1853 case and dissent citing to 1838 case).

\textsuperscript{41} \textit{The Federalist No. 44} (James Madison).
by Congress. This may generally be attributed to an early concern that, absent a restrictive mechanism such as the Compact Clause, states would be inclined to renegotiate their borders or reach agreements leading to dangerous confederations of politically powerful states. The importance of the restrictive nature of the Compact Clause cannot, therefore, be underestimated. The restrictiveness of the provision and the assumptions of that restrictiveness into the mid-19th century may be one of the reasons so few compacts were entered into for most of the nation’s early history. Compacts were apparently also generally viewed as limited primarily to addressing state boundary disputes as in the cases of Rhode Island v. Massachusetts and Virginia v. Tennessee. At least this was the practical effect since all but one of some 36 compacts entered into before 1921 addressed state boundary disputes.

This colonial and early history is important in understanding the current dynamics associated with the compacting process. Interstate compacts are deeply rooted in the nation’s history. Although the nature and subject matter of interstate compacts has most assuredly become more complex and would likely bewilder the Framers, the basic processes and principles underlying these agreements has not changed remarkably in the last 250 years.

1.2 THE NATURE OF INTERSTATE COMPACTS

1.2.1 Compacts in the Federal System

Compacts hold a unique place in American law in part because of their growing reach, in part because of the status of the parties to such agreements, and in part because they occupy a “space” between what is purely state authority and what is purely federal authority. Many modern compacts challenge conventional notions concerning the duality of American federalism that view the distribution of governing power strictly in terms of the federal government and the states. Within the federal system of American government, states possess all powers not otherwise specifically delegated to the federal government. States enjoy a quasi-sovereign status. The function and

42. Rhode Island v. Massachusetts, 37 U.S. 657 (1838).
44. Columbia River Compact (1918) (regulating the Columbia River fishery).