INTRODUCTION

Unlike the few other contemporary works that address interstate compacts, this manuscript was developed with a bias toward a range of practitioners—attorneys who advise compact agencies and private clients regulated by interstate compacts; policymakers who are involved in the drafting, management, and implementation of compacts; individuals and businesses who find themselves dealing with matters controlled by compacts; the states and interstate agencies charged with administering compacts; and academics who need an introduction to compacts, compact policy, and law. Perhaps one of the most unrecognized developments in American government over the last century is the degree to which states have used the compact mechanism, including the creation of powerful supra-state, sub-federal administrative agencies, to manage their various interstate relationships and shape daily life in the United States. This book explains this development; the legal principles applicable to interstate compacts; and the wide range in which states have used compacts to achieve their policy objectives.

A concise definition of an interstate compact is appropriate here. An interstate compact is a formal binding contract, authorized by or enacted as legislation, between two or more states in their capacity as states. Interstate compacts are one of the rare exceptions to the largely held view that one state legislature cannot bind its successors in long-term or irrevocable agreements pertaining to state affairs.\(^1\) Compacts are uniquely neither purely state nor purely federal. Because of their supra-state, sub-federal nature, compacts create much confusion in the legislative, administrative, and judicial arms of local, state, and federal government, each of which often tries to treat compacts and compact agencies as any other traditional local, state, or federal legislation and agency. While complete clarity about the position of compacts in our federalist system may be elusive, many of the legal and administrative principles will make more sense if you remember this simple definition.

In the United States, the creation of government structures is a dynamic process, a function largely of managing a vast array of federal and state relationships that are ever changing. Managing these relationships is an inherently complicated process given the federal structure of government in which, at a theoretical and practical level, two sovereign entities cooperate,

\(^1\) Chapter 2 discusses the binding nature of compacts.
compete, complement, and at times conflict with one another in fashioning and implementing public policy. Over the years, many scholarly and practical works have been devoted to exploring the vertical relationship between the states and the federal government. Seemingly little has been dedicated to exploring the management of formal horizontal relationships between the states. The growth of federal power and the emergence of large national institutions of government in the last century have eclipsed discussions on state relations, and particularly how states manage their formal relationships concerning matters that are multilateral in nature. How states and the federal government manage these interstate relations can have significant, long-term consequences. Take, for example, the Interstate Agreement on Detainers, the Washington Metropolitan Area Transit Regulation Compact, the Interstate Compact for Adult Offender Supervision, the Interstate Compact on the Placement of Children, the Tahoe Regional Planning Compact, the Columbia River Gorge Compact, and the Great Lakes-St. Lawrence River Basin Water Resources Compact (and corresponding agreement also involving two Canadian provinces). Each of these compacts, these formal state-to-state agreements, governs not only state relationships but—equally important—provides services to and controls the actions of individual citizens, and some govern specific elements of local government and the federal government. Also notable, the Central Arizona Project, one of the largest aqueduct systems in the United States, would not have been possible but for the Colorado River Compact allocating water rights between upper basin and lower basin states.

Throughout the history of the United States, interstate compacts have served an important—albeit largely unnoticed—role in shaping relationships between the states and, at times, between the states and the federal government. In the strictest sense, interstate compacts are an exception to traditional norms of federalism by enabling states to create supra-state, sub-federal agreements and agencies that are as binding on the states as if the states were acting as true independent sovereigns adopting a treaty. The U.S. Constitution is

2. See, e.g., New Jersey v. Delaware, 552 U.S. 597, 615–16 (2008) (“Interstate compacts, like treaties, are presumed to be ‘the subject of careful consideration before they are entered into and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties.’”); Id. at 629 (Scalia dissenting) (“the whole purpose of the 1905 Compact [between New Jersey and Delaware] was precisely to come to a compromise agreement on the exercise of the two States’ sovereign powers.”); see also Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 725 (1838) (“If Congress consented, then the States were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the Constitution.”).
unique among the constitutions of federated nations; few expressly provide a mechanism for states to cooperate.\textsuperscript{3} This is due, in large measure, because, unlike other modern federal states such as Germany, India, or Malaysia, the “states” of the United States existed prior to the adoption of the U.S. Constitution, which only came into force through their ratification rather than by a direct popular referendum approving the entire governmental system of the nation. In this sense, the U.S. Constitution represents a surrendering of the states’ absolute sovereignty in favor of a more cooperative, quasi-sovereign arrangement that preserved some aspects of state sovereignty while establishing a more direct national mechanism to address certain governmental activities, arrangements, and relationships.\textsuperscript{4} Interstate compacts therefore allow for ancillary and alternative governing mechanisms and create regulatory schemes that exist largely independent of individual state control and federal oversight.

Although states originally used compacts to settle land claims between the states and have continued to do so,\textsuperscript{5} currently states use compacts more often to deal with wide-ranging regional and national policy problems. Arguably, any matter between two or more states that is “supra-state, sub-federal” in nature can become the subject of an interstate compact. This, in turn, has led to the creation of interstate administrative and regulatory bodies with specific subject matter control and specific management responsibility. As Justice Felix Frankfurter once observed, “The combined legislative powers of Congress and the several States permit a wide range of permutations and combinations for governmental action. . . . Political energy has been expended on sterile controversy over supposedly exclusive alterna-

\textsuperscript{3} Chapter 1 discusses sub-federal cooperation in the constitutions of other countries.


\textsuperscript{5} See, \textit{e.g.}, Act of Nov. 12, 1999, Pub. L. No. 106-101, 113 Stat. 1333 (1999) (Missouri-Nebraska Boundary Compact). In addition to settling the boundary between the states due to the shifting channel of the Missouri River, the compact also settles issues related to criminal and civil jurisdictions as between the respective state courts, competing claims of state sovereignty over disputed lands, taxes, title to land, and riparian rights. The agreement also allows for renegotiation of the boundary as the channel of the river changes.
tives instead of utilized for fashioning new instruments adapted to new situations.”

Beginning in the 20th century, states employed compacts to fashion “new instruments” to resolve serious multistate matters involving crime control, pollution control, child protection, water, oil, and other natural resource management, regional transportation, land use planning, economic development, insurance regulation, and professional licensing for facilitating practice in multiple states. Many of these new instruments created new interstate regulatory agencies, such as the Interstate Commission on Adult Offender Supervision, the Washington Metropolitan Area Transit Commission, the Ohio River Valley Sanitation Commission, the Columbia River Gorge Commission, and the Tahoe Regional Planning Agency, that promulgate administrative rules, issue permits, and take enforcement actions. Other compact-created entities, such as the Port Authority of New York and New Jersey, the Delaware River Port Authority, and the Metropolitan Washington Airports Authority are much more than regulatory agencies. These agencies encompass within their sphere of authority the development and management of urban infrastructure systems, their own police forces, and inspection of commercial vehicles.

As states have increasingly relied on compacts to manage many pressing national and regional issues, new legal issues have arisen and continue to arise regarding congressional consent requirements, status and administration of compact agencies and related affairs, enforcement of compacts between the party states and by third-party beneficiaries, amendment of compacts, court jurisdiction, and the application of conflicting state law. Additionally, with many compacts creating administrative agencies that are neither federal in nature nor state in scope, an entirely new area of administrative and regulatory law has emerged, albeit in an ad hoc, non-express manner. As a result, there is a need for continuing comprehensive examination and synthesis of the law of interstate compacts, followed by a concerted effort to develop principles to fill gaps and address conflicts.

Although compacts have emerged as effective and vital governing tools, few people have studied compacts. Relative to federal and state government, very little legal or political literature has been dedicated to the subject matter; only one law school offers a course devoted to compacts and compact law; and compacts are simply not taught in either K-12 or, with few exceptions.

---

7. Lewis and Clark Law School offers a seminar in Interstate Compact Law, see http://law.lclark.edu/courses/catalog/law_365.php.
college civics. A common refrain is that there is a dearth of compact law. This is true relative to the vast amount of law involving contracts, statutory construction, constitutional interpretation and application, administrative procedure, and the subject matters of the myriad compacts, but there is also a rich and lengthy history of compact law and use dating back to before the adoption of the U.S. Constitution. This book discusses and cites to just some of that material.

The first edition of this book took its name from the seminal Council of State Governments’ publication, *The Law and Use of Interstate Compacts*, first published in 1961 and updated in 1976. Much happened in the 30 years between 1976 and the first edition of this book in 2006. This second edition builds on the first edition in examining this long-standing, yet still emerging area of law. This edition includes more explanation of both the theoretical principles behind interstate compacts and the very practical implications of operating in a compact-regulated environment; more discussion of gaps, conflicts and trends in the law; and suggestions for filling those gaps and resolving conflicts. Like the first edition, this second edition is intended to serve not only as a reference for lawyers, but also as a practical guide for legislators, drafters, compact administrators, students, and others interested in the development of, or interaction with interstate compacts. Thus, Chapter 1 provides a historical and theoretical basis for compacts; Chapters 2 through 6 provide common legal principles; and Chapters 7 through 9 provide a practical perspective on compacts and the potential issues states may discover in creating, maintaining, interpreting, enforcing, and terminating their agreements, and potential issues that regulated persons may face in interacting with compacts and compact agencies. As a whole, the book also seeks to provide both lawyers and others with a perspective on the complexity of compacts and their interaction with other agreements, state laws, and federal laws.

When we decided to do a second edition of this book, we were surprised to discover that many courts and scholars cited the first edition of this book.

---

8. See Jeffrey B. Litwak, *Interstate Compact Law: Cases and Materials v.2.0* (Semaphore Press 2014); see also David E. Engdahl, *Interstate Urban Areas and Interstate “Agreements” and “Compacts”: Unclear Possibilities*, 58 Geo. L.J. 799, 803 (1970) (noting a “paucity of significant interstate compact law,” and that “the imperfect state of compact law has not been widely lamented; in fact, it even has not been generally recognized.”).

In this second edition, we have been more attentive to discussing prevailing legal principles and deviations from those principles, and careful to avoid short-hand descriptive terms that we believe legal practitioners and courts have used in ways that we did not intend. The first edition of this book was the most comprehensive book on compacts and compact law to date, and the first such book in nearly 30 years.\(^\text{10}\) In this second edition, we have consolidated and reorganized much of the material as we continue to learn how to best present it. We have expanded footnotes to give more citations to cases and other materials in accord with and in contrast to the principles we discuss, and we have included additional material on vexing problems that litigants and courts have struggled with since the first edition, including the extent to which compacts are binding on the states, the inconsistent administrative procedure and transparency laws applicable to compact agencies, principles for interpreting compacts, and resolving different interpretations of compacts in the courts. We have also borrowed some of the material contained in a compact law textbook written in the traditional casebook style and published after the first edition of this book,\(^\text{11}\) but we present that material in the reference style of this book rather than the Socratic notes and questions style of law school texts.

We have updated the summaries of existing compacts, but eliminated some of the deep detail, time-sensitive, and readily available information in those summaries, and we have eliminated all of the contact information for compact agencies that were in the first edition. Much of the contact information for compacts is more readily available on the internet now than at the time of the first edition.\(^\text{12}\) We have expanded and updated our discussion of trends in compacts and best practices with developing and drafting compacts.

\(^{10}\) Other books published during that 30-year period provided a political science perspective into compacts (and necessarily included some law). See Joseph F. Zimmerman, Interstate Cooperation: Compacts and Administrative Agreements (2002); Paul T. Hardy, Interstate Compacts: The Ties that Bind (1982). Professor Zimmerman’s book is now in its second edition (published in 2012) and we recommend it as a current resource.

\(^{11}\) Litwak, supra note 8. We acknowledge that Mr. Litwak is a co-author of this book, we have not cited every instance where we borrowed material, and we recognize some of the language in this book is substantially similar to the language in Mr. Litwak’s textbook. We use this material with permission.

\(^{12}\) The website for the National Center for Interstate Compacts, a policy program of The Council of State Governments is the most comprehensive resource for current contact information, state membership, and citations to compact statutes.
based on more recent court decisions and the experience of the states’ enactment of many compacts since the first edition.

In the ten years since the first edition, states have enacted new compacts as varied as the emerging needs of the states and the nation. These newer compacts include the Interstate Insurance Product Regulation Compact (enhancing the way insurance products are filed, reviewed, and approved);\textsuperscript{13} the Great Lakes-St. Lawrence River Basin Water Resources Compact (managing the waters of the Great Lakes);\textsuperscript{14} a revised Interstate Compact for Juveniles (governing transfer of supervision of juvenile offenders);\textsuperscript{15} the Interstate Compact on Educational Opportunity for Military Children (establishing standards for enrollment, transfer of educational records, placement, and extracurricular participation for children of deployed military service members);\textsuperscript{16} the Surplus Lines Insurance Multi-State Compliance Compact (SLIMPACT) (adopting uniform requirements, forms, and procedures to facilitate the reporting, payment, collection, and allocation of premium taxes for nonadmitted insurance);\textsuperscript{17} the State Authorization Reciprocity Agreement (coordinating accreditation of on-line higher education courses);\textsuperscript{18} the Prescription Monitoring Program Compact (promoting interstate uniformity between state prescription drug monitoring programs);\textsuperscript{19} and the Interstate Medical Licensure Compact (allowing for multistate licensing of physicians).\textsuperscript{20}

In addition, at the time of publication, compacts under development (i.e., still being drafted) or ready for state adoption, but not yet effective, include a Transmission Line Siting Compact (coordinating siting of interstate electric transmission lines);\textsuperscript{21} the Physical Therapists Licensure Compact;\textsuperscript{22} the revised Nurse Licensure Compact and a new Advanced Practice Registered Nurse Compact;\textsuperscript{23} the Recognition of EMS Personnel Licensure Interstate Compact (REPLICA);\textsuperscript{24} the Psychology Interjurisdictional Comp-

\textsuperscript{13} See http://www.insurancecompact.org/about.htm.
\textsuperscript{14} See http://www.juvenilecompact.org.
\textsuperscript{15} See http://www.glslcompactcouncil.org/Agreements.aspx.
\textsuperscript{16} See http://www.mic3.net.
\textsuperscript{17} See http://www.csg.org/NCIC/SLIMPACT.aspx.
\textsuperscript{18} See http://www.nc-sara.org.
\textsuperscript{19} See http://www.csg.org/NCIC/PrescriptionMonitoringProgramCompact.aspx.
\textsuperscript{20} See http://www.licenseportability.org.
\textsuperscript{22} See https://www.fsbpt.org/FreeResources/PhysicalTherapyLicensureCompact.aspx.
\textsuperscript{23} See https://www.ncsbn.org/nurse-licensure-compact.htm.
\textsuperscript{24} See https://www.nasemso.org/Projects/InterstateCompacts/.
pact (PSYPACT); 25 the Interstate Compact on Thoroughbred Horse Racing (coordinating thoroughbred horse racing regulations); 26 the National Popular Vote Compact (providing that member states’ electoral college votes would go to the winner of the popular vote nationwide); 27 and the new Driver License Agreement (replacing the existing Driver License Compact and existing Nonresident Violator Compact). 28

We have learned through our collective experience with interstate compacts and the disputes that arise under compacts that states may not always fully understand the compact mechanism and its impact on state operations. We believe that the long-term viability and usefulness of compacts depends on state executive and legislative leaders, agency officials, and other practitioners knowing more about compacts, their benefits, and their long-term implications, and that such knowledge will enhance states’ commitments to the compacts they enact. Creating a compact is easy compared to maintaining it over a long period of time and making it a meaningful part of the governance system of multiple states and the United States. To this end, we have added new material on why states sometimes act as if a compact is nothing unique and why some compacts have failed. We believe many issues arise from states simply wanting to go in a different policy direction but not quite willing to withdraw from or terminate a compact arrangement; from misunderstanding basic principles of compact law; or from past practices administering compacts that became entrenched notwithstanding the rapid development in recent decades of more assertive compact law principles. We hope this second edition helps state leaders, officials, and practitioners understand the unique administrative and legal issues inherent in interstate compacts, and inspires states to critically evaluate existing compacts, make needed updates to existing compacts, and harmonize related state law with emerging principles and practices. We hope this book helps states and others understand the unique nature of compacts as “independently functioning parts of a regional polity and of a national union” 29 rather than as something to force into the

28. See http://www.aamva.org/Drivers-License-Compacts/ (member only portion of web site).
traditional federal or state mold of government. Compacts have been enormously effective and can continue to fill the supra-state, sub-federal realm in the uniquely American federal system. We also note that the study of interstate compacts is relevant for the creation and administration of non-compact intergovernmental agreements of all flavors. Many of the issues that arise with the interpretation of compacts, the relationship between compacts and other law, and administration of compacts also arise with non-compact intergovernmental agreements.

Finally, we note that, although this is a second edition book, there are so few materials on compacts and compact law and so few compact scholars and practitioners relative to other areas of law that we are still learning how to best present the body of compact law. This book reflects our judgment of the basic principles of law, variations on those principles, developing trends in the law, and best practices in working with compacts. We invite those who disagree or believe we have erred to add their perspectives to the written body of compact law. We, of course, own our errors and understand that we may have inaccurately predicted the future of compact law. We will correct these in the third edition.

A Note About Citations to Interstate Compacts: There is no standard form for citing interstate compacts. Neither the Bluebook, nor the ALWD Citation Manual, two principal legal style manuals, discuss interstate compacts or their citation form. In this book, we cite to the name of the compact, the appropriate article or section, and date of enactment. We do not cite to the states’ and federal government statutes enacting compacts or federal statutes or other actions granting consent to compacts because the citations would become unwieldy. We do, however, cite to the appropriate state or federal actions when we discuss those in particular. Copies of the compacts and citations to the states’ enactments and federal actions granting consent are avail-

32. The date of “enactment” is not a precise date. It may refer to the date the states finalized a compact manuscript and made it available for states to enact or the date the compact became effective upon its terms, the date of congressional consent, or the date of an amendment. For compacts that have a complete text, but have not been enacted by a requisite number of states, we note the compact as “proposed” and the date of the completed text. Where states and compacts advertise a specific date, we use that date, even though we might have selected a different date of enactment.
able on the website for The Council of State Governments. The Council of State Governments has tracked, produced scholarly work, and been an innovator in drafting interstate compacts for several decades. In 2003, CSG created the National Center for Interstate Compacts, a policy center to continue and expand its work with compacts. CSG has assured us that it intends to continue to provide the most up-to-date information about compacts on its publicly open website and we recommend that dynamic source to readers rather than include static information here.

Additionally, some compacts do not have a popular name or have a generic name using only by the party states. In these instances, we refer to the interstate agency that the compact creates followed by “compact” in lowercase. For example, we use “Port Authority of New York and New Jersey compact” to refer to the 1921 amendments to the New York-New Jersey Compact of 1834 that created the Port Authority of New York Harbor (now Port Authority of New York and New Jersey). Similarly, we use “Delaware River and Bay Authority compact.” for the Delaware-New Jersey Compact that created the Delaware River and Bay Authority.

A Note about Citations to Federal and State Statutes: We cite to the last hard-published version of the United States Code (U.S.C.). The last hard-published version was 2012. We have verified that all citations to the 2012 edition are also current through 2015. For statutes that are no longer current, we cite to the last hard-published version for the code where those statutes were codified. We verified citations to state statutes using the online code available through links on each state legislature or state court website as of May 1, 2016. We give a 2016 date to state statutes unless the online code specifies a different date or we are citing a state statute that no longer appears in a state’s current code compilation.

A Note About Citations to Internet Sources: We have verified all internet citations as of October 1, 2016. We have chosen not to add “last visited” notations to our internet citations.

33. The website address for CSG’s compacts database is http://apps.csg.org/ncic/.