

## St. John's Law Review

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Volume 60  
Number 1 *Volume 60, Fall 1985, Number 1*

Article 1

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June 2012

### The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements

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#### Recommended Citation

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Available at: <https://scholarship.law.stjohns.edu/lawreview/vol60/iss1/1>

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# ST. JOHN'S LAW REVIEW

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VOLUME 60

FALL 1985

NUMBER 1

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## THE INTERSTATE COMPACT IN TRANSITION: FROM COOPERATIVE STATE ACTION TO CONGRESSIONALLY COERCED AGREEMENTS

BY KEVIN J. HERON\*

### INTRODUCTION

The Constitution of the United States furnishes only two explicit mechanisms for resolving or controlling controversies and concerns among the several states. The first, and least desirable of the two, is embodied in article III, which extends the original jurisdiction of the Supreme Court to controversies between two or more states.<sup>1</sup> The second, a more peaceful and preferred mode, is embraced in what is commonly known as the Compact Clause, which obliquely acknowledges the inherent sovereign power of the states to enter into compacts or agreements with one another subject only to the consent of Congress.<sup>2</sup> This latter method of interstate cooperation and coordination is the subject of the present Article.

As a matter of historical record, the interstate compact device was initially utilized by the pioneers of the original thirteen colonies prior to the adoption of the Constitution.<sup>3</sup> Perhaps as a result

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<sup>1</sup> U.S. CONST. art. III, § 2, cl. 1; *see* *Louisiana v. Texas*, 176 U.S. 1, 14-15 (1900).

<sup>2</sup> U.S. CONST. art. I, § 10, cl. 3; *see* *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900). The Compact Clause provides in pertinent part:

No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . .

U.S. CONST. art I, § 10, cl. 3.

<sup>3</sup> *See* Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in*

of its placement in a section of the Constitution dealing with *limitations* on state powers, the Compact Clause received scarce attention and was seldom used during a long period in our nation's history.<sup>4</sup> Until the twentieth century, the compact mechanism was, for the most part, exclusively employed for the settlement of boundary disputes.<sup>5</sup> With the successful creation of the Port of New York Authority by compact in 1921,<sup>6</sup> however, and the inspiring contribution of Frankfurter and Landis several years later,<sup>7</sup> there emerged a newly exalted nationwide interest in the use of interstate compacts and agreements. At the present time approximately 176 operative compacts exist in this country encompassing a multitude of subject-matter areas from energy conservation, nuclear waste, taxation, and transportation, to fisheries, flood control, corrections, and mass transit.<sup>8</sup>

One of the most interesting, yet constitutionally suspect, attempts to invoke the compact device in recent years was the enactment of the Pacific Northwest Electric Power Planning and Conservation Act (NPPA),<sup>9</sup> which brings to light a previously unconsidered topic in the law of interstate compacts—the extent

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*Interstate Adjustments*, 34 YALE L.J. 685, 694 (1925); *infra* text accompanying notes 34-36. Intercolonial agreements were common before the American Revolution and continued to be used under the Articles of Confederation. R. LEACH & R. SUGG, JR., *THE ADMINISTRATION OF INTERSTATE COMPACTS* 4 (1959). The wording of the compact provision in the Articles of Confederation was carried over into the Constitution substituting only the words "agreement" and "compact" for "treaty, confederation or alliance." *See id.* at 4-5.

<sup>4</sup> *See* R. LEACH & R. SUGG, JR., *supra* note 3, at 5-6. Only 21 interstate compacts were entered into between 1789 and 1900; only 77 were concluded from 1900 to 1956. *Id.*

<sup>5</sup> *Id.*; Engdahl, *Characterization of Interstate Arrangements: When is a Compact not a Compact?*, 64 MICH. L. REV. 63, 63 (1965).

<sup>6</sup> *See* Port of New York Authority Compact, 42 Stat. 174 (1921) (compact established between New York and New Jersey to resolve conflict surrounding development and operation of Port of New York); W. BARTON, *INTERSTATE COMPACTS IN THE POLITICAL PROCESS* 61 (1967); R. LEACH & R. SUGG, JR., *supra* note 3, at 6-7 (popularity of interstate compacts due to success of Port of New York Authority Compact); Engdahl, *supra* note 5, at 63 (increasing recognition of interstate compacts since success of Port of New York Authority Compact).

<sup>7</sup> *See* Frankfurter & Landis, *supra* note 3, at 729. The thoroughly exhaustive treatment of the Compact Clause undertaken by the preeminent legal scholars Frankfurter and Landis reveals through practical illustration the extraordinary potential inherent in the compact device to rectify many interstate problems that exceed the remedial resources of any one state and yet are too small to warrant full scale federal involvement. *See* Engdahl, *supra* note 5, at 63.

<sup>8</sup> B. CRIHFIELD, *INTERSTATE COMPACTS, 1783-1977: AN OVERVIEW*, *THE BOOK OF THE STATES* 1978-79, 580, 581 (1978); COUNCIL OF STATE GOVERNMENTS, *INTERSTATE COMPACTS AND AGENCIES* (1979).

<sup>9</sup> 16 U.S.C. §§ 839-839(h) (1982).

to which Congress may constitutionally participate in the creation of such agreements.<sup>10</sup> Pursuant to the NPPA, Congress authorized the states of Washington, Idaho, Montana, and Oregon to establish a "regional agency" known as the Pacific Northwest Electric Power and Conservation Planning Council (Northwest Power Council or Council).<sup>11</sup> The Council, which is alleged to be an interstate compact,<sup>12</sup> was subsequently created in April, 1981. Each of the participating states has two representatives on the Council who are selected by their governors.<sup>13</sup> The NPPA also meticulously details the functions, responsibilities, and duties to be undertaken by the Council, including the development of a regional conservation and electric power plan and a fish and wildlife program.<sup>14</sup>

The determination of whether the Council is an interstate compact will essentially require an analysis of the respective roles of the states and the federal government with regard to the formation of compacts. In this case, the basic issue is whether Congress exceeded its appropriate constitutional role in designing and creating the Northwest Power Council or, conversely, whether the states' actions with regard to the formation of the Council were sufficient to classify the Council as the product of an interstate agreement. While case law has firmly established that Congress may give its consent in advance to an interstate compact,<sup>15</sup> and may place appropriate conditions on that consent,<sup>16</sup> the question

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<sup>10</sup> See Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, 94 Stat. 2697 (1980).

<sup>11</sup> 16 U.S.C. § 839b(a)(1)-(2) (1982).

<sup>12</sup> It is not entirely clear from the face of the NPPA that Congress was in fact authorizing the establishment of an "interstate compact" since this term never appears in the section setting up the Council. In response to a lawsuit challenging its constitutionality, however, the Council has alleged that it is a validly constituted interstate compact. See *infra* note 110.

<sup>13</sup> 16 U.S.C. § 839b(a)(2), (3) (1982).

<sup>14</sup> See *id.* § 839b(a)(1). The purpose of the NPPA compact was to provide a "mechanism through which the Pacific Northwest can resolve the differing claims over how the Federal resources are to be shared and [to] begin coordinated planning to meet the electric power needs of the region." H.R. REP. NO. 976, 96th Cong., 2d Sess. 27, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 5989, 5993. The legislation particularly emphasizes "conservation and the development of renewable resources." *Id.* It enables participating states and respective communities to "participate in the region's electric power decisionmaking process." *Id.*

<sup>15</sup> E. CORWIN & J. PELTASON, UNDERSTANDING THE CONSTITUTION 82 (1976); F. ZIMMERMANN & M. WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 25 (1976); Donovan, *State Compacts as a Method of Settling Problems Common to Several States*, 80 U. PA. L. REV. 5, 7 (1931); Note, *The Interstate Compact—A Survey*, 27 TEMP. L.Q. 320, 322-23 (1953).

<sup>16</sup> *Tobin v. United States*, 306 F.2d 270, 272-74 (D.C. Cir.), cert. denied, 371 U.S. 902

remains whether Congress may design and develop every detail of an interstate compact as it did in the case of the Council.

This Article will explore the various elements and uses of the interstate compact, and will specifically address the issue of how far Congress may constitutionally wander in the formation of compacts and in the direction of their activities.

## I.

### THE SOURCE AND SUBSTANCE OF INTERSTATE COMPACTS

An interstate compact is an agreement between two or more states established for the purpose of remedying a particular problem of multistate concern.<sup>17</sup> The roots of the interstate compact stretch far back into our colonial history.<sup>18</sup> Both the compact device and the congressional consent requirement had been incorporated into the Articles of Confederation by colonial statesmen who wanted to protect the newly established Union from "the destructive political combination of two or more states."<sup>19</sup> The precise reasons which led to the inclusion of a compact provision into the Articles of Confederation likewise induced the incorporation of the Compact Clause into the Constitution.<sup>20</sup> Apparently without debate, and with only modest revision, the framers retained the interstate compact provision under article I, section 10, clause 3, which, in part, provides that "no state shall, without the Consent

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(1962); see Frankfurter & Landis, *supra* note 3, at 695.

<sup>17</sup> BLACK'S LAW DICTIONARY 736 (5th ed. 1979); Dodd, *Interstate Compacts*, 70 U.S.L. REV. 557, 558 (1936).

<sup>18</sup> See Dodd, *supra* note 17, at 557; Frankfurter & Landis, *supra* note 3, at 692; *supra* note 3 and accompanying text. There were at least nine boundary disputes settled by interstate compacts during the colonial period, including the Connecticut and New Netherlands Boundary Agreements (1656), the Rhode Island and Connecticut Boundary Agreement (1663), the Massachusetts and Rhode Island Boundary Agreement (1710), and the North Carolina and South Carolina Boundary Agreement (1735). *Hinderlider v. La Plata Co.*, 304 U.S. 92, 104 (1938); Frankfurter & Landis, *supra* note 3, at 730-32.

<sup>19</sup> Frankfurter & Landis, *supra* note 3, at 693. Article VI of the Articles of Confederation provides in pertinent part:

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 purpose for which the same is to be entered into, and how long it shall continue.

*Id.*

<sup>20</sup> See R. LEACH & R. SUGG, JR., *supra* note 3, at 4-5 (provisions of Articles of Confederation carried over to Constitution); Frankfurter & Landis, *supra* note 3, at 694 ("curb upon political combinations by the States was retained almost *in haec verba* by the Constitution").

of Congress . . . enter into any Agreement or Compact with another State or with a foreign Power."<sup>21</sup> The Constitution thus expressly recognizes the inherent sovereign power of the states to enter into compacts or agreements, subject only to the consent of Congress.<sup>22</sup> As indicated previously, the primary reason for this consent requirement was to safeguard the newly created national government from destructive state alliances.<sup>23</sup> A second purpose, however, was "to prevent undue injury to the interests of non-compacting states."<sup>24</sup>

Interstate compacts or agreements<sup>25</sup> are, in effect, contractual arrangements between the participating states.<sup>26</sup> Fundamental elements of contract formation, such as offer and acceptance, are therefore invariably present in all compact arrangements.<sup>27</sup> As contracts, interstate compacts are protected by the "contract impairment clause" of the Constitution, which provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."<sup>28</sup> Once entered into, the terms of a compact may not be altered by any one of the party states without consent of the other member states. Likewise, the compact normally may not be re-

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<sup>21</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>22</sup> *State ex rel. Dyer v. Sims*, 341 U.S. 22, 35 (1951) (Jackson, J., concurring) (authority of states to enter into compacts "is a power inherent in sovereignty limited only to the extent that congressional consent is required"). Congressional consent to interstate compacts has been required specifically where the agreement increases the political power of the states in such a way that the compact may encroach on the sovereignty of other states or of the federal government. *New Hampshire v. Maine*, 426 U.S. 363 (1976); *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) (dictum); E. CORWIN & J. PELTASON, *supra* note 15, at 82; H. RORTSCHAEFER, *CONSTITUTIONAL LAW* 149 (1939); F. ZIMMERMANN & M. WENDELL, *supra* note 15, at 23. Higher education, mental health, and juvenile compacts are a few examples of interstate agreements that do not require the consent of Congress. F. ZIMMERMANN & M. WENDELL, *supra* note 15, at 24.

<sup>23</sup> See Frankfurter & Landis, *supra* note 3, at 694-95.

<sup>24</sup> *United States v. Tobin*, 195 F. Supp. 588, 606 (D.D.C. 1961), *rev'd*, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962).

<sup>25</sup> The Supreme Court, in *Virginia v. Tennessee*, 148 U.S. 503 (1893), stated that interstate compacts and agreements are one and the same: "Compacts or agreements— . . . we do not perceive any difference in the meaning, except that the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement' . . . ." *Id.* at 520. See generally Engdahl, *supra* note 5, at 84 (distinctions between "treaty," "compact," "agreement," and "convention" done away with by courts at end of nineteenth century).

<sup>26</sup> See F. ZIMMERMANN & M. WENDELL, *supra* note 15, at 7-11.

<sup>27</sup> *Id.* at 8.

<sup>28</sup> U.S. CONST. art. I, § 10, cl. 1; S. Doc. No. 39, 88th Cong., 1st Sess. 419 (1964) ("[v]alid interstate compacts are within the protection of the obligation of contracts clause").

voked unless all of the participants agree to such an action.<sup>29</sup>

Since interstate compacts are part of the statutory law of the member states, they will supersede all other conflicting state statutes.<sup>30</sup> In view of their contractual nature, compacts will also take precedence over subsequent state statutory law.<sup>31</sup>

The design of the interstate compact will necessarily depend on the particular objective to be achieved by the compact arrangement and on the individual desires and expectations of the negotiating states. Nevertheless, past practice has reflected a certain degree of commonality. The essential characteristics of such an arrangement may be stated as follows:

- (1) It is formal and contractual;
- (2) It is an agreement between the states themselves, similar in content, form, and wording to an international treaty, and usually embodied in state law in an identifiable and separate document called the 'compact';
- (3) It is enacted in substantially identical words by the legislature of each compacting state;
- (4) At least in certain cases, consent of Congress must be obtained; in all cases, Congress may forbid the compact by specific enactment;
- (5) It can be enforced by suit in the Supreme Court of the United States if necessary;
- (6) It takes precedence over an ordinary state statute.<sup>32</sup>

Although our system of government maintains various devices for interstate cooperation, such as reciprocal laws, administrative agreements,<sup>33</sup> and membership on state-federal advisory commissions, the interstate compact, as both a contract and a statute, has become the most forceful and binding method for states to resolve concerns and controversies among themselves.

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<sup>29</sup> *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951); see S. Doc. No. 39, 88th Cong., 1st Sess. 419 (1964); F. ZIMMERMANN & M. WENDELL, *supra* note 15, at 10-11.

<sup>30</sup> F. ZIMMERMANN & M. WENDELL, *INTERSTATE COMPACTS SINCE 1925*, at 42 (1976).

<sup>31</sup> See F. ZIMMERMANN & M. WENDELL, *supra* note 15, at 3.

<sup>32</sup> F. ZIMMERMANN & M. WENDELL, *supra* note 30, at 42.

<sup>33</sup> Administrative agreements are usually formal or informal arrangements between administrative departments or officers of two or more states which do not require congressional consent and are normally not legally binding. See *id.* at 37.

## II.

## THE HISTORICAL PROGRESSION OF THE INTERSTATE COMPACT

Traditionally, interstate compacts or agreements were used to resolve disputes between neighboring states, particularly controversies concerning state boundaries.<sup>34</sup> The earliest compacts, which predated the American Revolution, were usually established through negotiations between the colonies and were then submitted to the Crown for approval.<sup>35</sup> The incorporation of the consent requirement into the Constitution, therefore, appears at least historically to be "the republican transformation of the needed approval by the Crown."<sup>36</sup>

Despite their usefulness in helping to control interstate conflicts, compacts were employed sparsely until the twentieth century. In fact, between 1783 and 1920, only thirty-six interstate compacts came into existence.<sup>37</sup> The need to extend and diversify the uses of the compact device arose shortly after the first World War in response to the rapid development of our nation. With this expansion there arose complex regional problems, wholly unsuited to federal control, which required regional solutions.<sup>38</sup> Perhaps the most significant event in the advancement of interstate compacts was the creation of the New York-New Jersey Port Authority Compact in 1921.<sup>39</sup> Pursuant to this arrangement, New York and New Jersey established the first interstate compact agency, which was authorized to develop, construct, and operate transportation facilities in the bi-state port area.<sup>40</sup>

Another major accomplishment in the use of interstate compacts in the 1920's was the formation of the Colorado River Compact.<sup>41</sup> This agreement, entered into by seven western states, was primarily designed to allocate the waters of the Colorado River among its members.<sup>42</sup> The Colorado River Compact was significant because of both its expansive geographical reach in the resolution

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<sup>34</sup> See B. CRIHFIELD, *supra* note 8, at 580; *supra* note 5 and accompanying text.

<sup>35</sup> Frankfurter & Landis, *supra* note 3, at 692.

<sup>36</sup> *Id.* at 694.

<sup>37</sup> See B. CRIHFIELD, *supra* note 8, at 580.

<sup>38</sup> See Frankfurter & Landis, *supra* note 3, at 707.

<sup>39</sup> 42 Stat. 174 (1921); see W. BARTON, *supra* note 6, at 61; R. LEACH & R. SUGG, JR., *supra* note 3, at 6-7.

<sup>40</sup> See 42 Stat. 174, 174 (1921).

<sup>41</sup> Boulder Canyon Project Act, 45 Stat. 1057 (1928).

<sup>42</sup> *Id.*



of a regional problem and the multitude of states that agreed to participate. It has set a precedent for a number of other agreements in the West concerning water apportionment.<sup>43</sup>

During the 1930's, interstate compacts continued to emerge with relative frequency. Simultaneously, compacts began to assume national, rather than merely regional, significance. The Interstate Compact for the Supervision of Parolees and Probationers,<sup>44</sup> for instance, had a nationwide membership. Similarly, the Interstate Oil and Gas Compact,<sup>45</sup> essentially the precursor to contemporary energy conservation efforts, also permitted participation by all states involved in the production of gas and oil.<sup>46</sup> Since 1935, this compact has expanded from the original six states (New Mexico, Colorado, Illinois, Kansas, Oklahoma, and Texas) to a membership of thirty states. Each state either produces gas and oil or is integrally connected with its production and conservation.<sup>47</sup>

Other compacts established during the 1930's included the Tri-State Pollution Compact, ratified by the states of Connecticut, New Jersey, and New York, to deal with pollution in New York Harbor; the Ohio River Valley Sanitation Compact (eight states), designed to control and reduce the pollution of the Ohio River drainage basin and its tributaries; the Pennsylvania-New Jersey Toll Bridge Compact, established to control interstate toll bridges on the Delaware River; and the Palisades Interstate Park Agreement, created for the purpose of establishing park and recreational systems in New York and New Jersey.<sup>48</sup> In total, approximately eighteen new interstate compacts were formed in this country during the 1920's and 1930's.

From 1940 until the early 1970's the interstate compact was used with more frequency and variety than at any other time in history. During this thirty-year period, over 100 agreements and compacts were enacted—almost twice as many as were established during the previous 167 years.<sup>49</sup> A brief listing of some of the areas covered by compacts created between 1940 and 1970 would include fisheries conservation, land and water resources, forest fire protec-

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<sup>43</sup> See generally Stinson, *Western Interstate Water Compacts*, 45 CALIF. L. REV. 655 (1957).

<sup>44</sup> See *infra* note 56 and accompanying text.

<sup>45</sup> 49 Stat. 939 (1935).

<sup>46</sup> See *id.*

<sup>47</sup> M. RIDGEWAY, *INTERSTATE COMPACTS: A QUESTION OF FEDERALISM* 262 (1971).

<sup>48</sup> *THE BOOK OF THE STATES 1950-51*, at 26-27 (1950).

<sup>49</sup> B. CRIHFIELD, *supra* note 8, at 580.

tion, mining practices, corrections, taxation, nuclear energy, educational facilities, civil defense, mass transit, health services and facilities, economic growth research, waste disposal, and flood control.<sup>50</sup>

For no apparent reason, the pace of interstate compact development has diminished since the beginning of the 1970's. Activity in the compact area still abounds, however, primarily in the form of state ratification of existing compacts and alterations to existing arrangements.<sup>51</sup>

### III.

#### THE PROCESS OF INTERSTATE COMPACT FORMATION

The Compact Clause contains no procedural requirements to which states must adhere in establishing an interstate agreement. Therefore, "practice seems largely to have developed from usage."<sup>52</sup> Past experience demonstrates that interstate compacts were usually derived through negotiations between the party states, which formed "joint compact commissions" to discuss, develop, and draft the terms of a compact.<sup>53</sup> While this method is still utilized to devise boundary and water allocation compacts, the use of such commissions has declined since the 1930's largely because they were often slow in formulating compact agreements.

In contemporary practice, joint commissions have been replaced with extra-legal organizations composed of various state officials who share a common desire to rectify a particular problem of interstate concern.<sup>54</sup> Under this process, the state officials develop a "compact," which is then enacted by a state as a statute. This essentially constitutes an offer by that state to enter into a compact, the acceptance of which is indicated by the enactment of an identical statute by other states.<sup>55</sup> This method of compact formulation tends to expedite the entire compacting process. Additionally, by giving *all* states the opportunity to participate in an arrangement, this process allows the compact device to be used for

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<sup>50</sup> See *id.*; COUNCIL OF STATE GOVERNMENTS, INTERSTATE COMPACTS AND AGENCIES (1979).

<sup>51</sup> See Jones, *Interstate Compacts and Agreements: 1978-79*, in THE BOOK OF THE STATES 1980-81, at 596, 597-600 (1980).

<sup>52</sup> F. ZIMMERMANN & M. WENDELL, *supra* note 30, at 85.

<sup>53</sup> *Id.*

<sup>54</sup> See F. ZIMMERMANN & M. WENDELL, *supra* note 15, at 17-18.

<sup>55</sup> *Id.*

the resolution of national as well as regional concerns.

An interesting illustration of a compact formed by the offer-acceptance process is the Interstate Compact for the Supervision of Parolees and Probationers. The congressional authorization for this compact had been provided in the Crime Compact Act of 1934, which encouraged states to enter into agreements or compacts for cooperative effort in the prevention of crime and in the enforcement of their criminal laws and policies, and to establish agencies, joint or otherwise, to effectuate such agreements and compacts.<sup>56</sup> The Compact on Parolees and Probationers, which claims a membership of all fifty states as well as the Virgin Islands and Puerto Rico, provides for the interstate transfer of parolees and probationers to secure better employment opportunities for such individuals and to facilitate their rehabilitation.

Unlike the Port of New York Authority Compact, which was negotiated by a joint commission authorized by both states, the Compact on Parolees and Probationers was created by an extra-legal organization composed of attorneys general and other state officials who had not received express approval from their respective states to negotiate a compact.<sup>57</sup> The organization nonetheless prepared the terms of an agreement that was then recommended to and accepted by the states. Because of the favorable results of the Interstate Compact for the Supervision of Parolees and Probationers, this method of compact formation has subsequently been used quite frequently.

This procedure has been employed most recently by the National Conference of State Legislators, whose goal was to encourage states to adopt compact legislation to control low-level nuclear waste.<sup>58</sup> The federal legislative framework for the creation of such compacts is the Low-Level Radioactive Waste Policy Act of 1980,<sup>59</sup> pursuant to which, states are authorized to establish interstate compacts for the purpose of disposing of all low-level radioactive waste generated within the member states. Waste that results through federal defense, research, and development activities is ex-

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<sup>56</sup> 48 Stat. 909 (1934), 4 U.S.C. § 112 (1982) (compact for cooperative effort and assistance in crime prevention).

<sup>57</sup> F. ZIMMERMANN & M. WENDELL, *supra* note 30, at 85-86.

<sup>58</sup> NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERSTATE COMPACTS: LOW LEVEL NUCLEAR WASTE, Issue Brief, April 15, 1981.

<sup>59</sup> 42 U.S.C. §§ 2021- 2021d (1982) (commission authorized to enter into compacts with governor of any state).

empted from such compacts. At the present time, thirty-seven states have ratified low-level radioactive waste compacts through state legislation.<sup>60</sup>

While the procedures for creating interstate compacts may vary from the very rigid, formal methods of intensive and lengthy interstate discussions to the more simplified, informal negotiations of an interested group of state officials, all interstate compact scenarios include negotiation, preparation of the compact document, and ratification by potential party states. The compact itself will usually contain the purpose of the agreement, the establishment of an administrative agency, a description of the powers, functions, and duties of the agency, and termination and withdrawal provisions.<sup>61</sup> Depending on the nature of a particular compact, this list of factors may be lengthened or shortened in accordance with the demands of the compacting parties.

Once the purpose of the interstate compact has been determined, the states must decide how best to effectuate that purpose. In some cases, the existing agencies of the member states may be fully equipped to carry out the compact plan. Pursuant to the Colorado River Compact, for example, the party states use their own administrative agencies to carry out the appropriation of water according to the terms of the compact.<sup>62</sup> In other instances, however, the complexity of the arrangement and the absence of intrastate resources necessitates the formation of a special interstate agency.<sup>63</sup> When such an agency is created, the compact should clearly specify the participants in its operation and should sufficiently detail its powers and duties.

Since all interstate compacts are contractual arrangements between the member states, the compact should contain a provision for modification of the agreement as well as a provision for state withdrawal from and termination of the compact. A typical provision for termination is contained in the Colorado River Compact, which provides that the compact can be terminated only by the

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<sup>60</sup> Jordon, *Low-Level Radioactive Waste Management: An Update*, in NATIONAL CONFERENCE OF STATE LEGISLATURES, 1984, 58-59 (1984).

<sup>61</sup> See F. ZIMMERMANN & M. WENDELL, *supra* note 15, at 28.

<sup>62</sup> See *id.* at 29.

<sup>63</sup> The Port of New York Authority Compact, 42 Stat. 174 (1921), the Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969), and the Pacific Marine Fisheries Compact, 61 Stat. 419 (1947), are examples of compacts that have established special administrative agencies.

unanimous agreement of the signatory states.<sup>64</sup>

After the essential terms and provisions of the compact have been drafted, the agreement must then be ratified by each of the party states.<sup>65</sup> The ratification process essentially consists of the passage of a statute by the state legislature which contains the full text of the compact agreement. Since the compact is a contract, it must be enacted in identical fashion in each member state. After the state legislature has enacted the appropriate statutory legislation, it is submitted to the governor for approval or disapproval. Once the compact is fully ratified by the state, the terms of the compact may not thereafter be altered or amended without the consent of the other party states.

#### IV.

##### CONGRESS' ROLE REGARDING INTERSTATE COMPACTS

The Compact Clause provides that a state may not enter into an agreement or compact with another state *without* the consent of Congress. This sole limitation on the states' ability to enter into compacts or agreements provides Congress with its substantive source of power with respect to such arrangements. The requirement of congressional consent is designed primarily to ensure that agreements or compacts between the states do not encroach upon areas of federal authority or federal laws or areas in which the national interest is at stake.<sup>66</sup> The judiciary has determined, therefore, that the only agreements requiring congressional consent are those which might affect the political balance within the federal system or affect power delegated to the national government.<sup>67</sup>

In *Virginia v. Tennessee*<sup>68</sup> the Supreme Court was confronted with a boundary dispute between the states of Virginia and Tennessee.<sup>69</sup> Virginia asserted that the boundary line had been conclu-

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<sup>64</sup> See Colorado River Compact, art. X, 45 Stat. 1057 (reproduced in F. ZIMMERMANN & M. WENDELL, *supra* note 15, at 83). Article X of the Colorado River Compact provides: This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

*Id.*

<sup>65</sup> F. ZIMMERMANN & M. WENDELL, *supra* note 15, at 19.

<sup>66</sup> *Id.* at 10.

<sup>67</sup> See *Cuyler v. Adams*, 449 U.S. 433 (1981); *New Hampshire v. Maine*, 426 U.S. 363 (1976); *Wharton v. Wise*, 153 U.S. 155 (1894); *Virginia v. Tennessee*, 148 U.S. 503 (1893).

<sup>68</sup> 148 U.S. 503 (1893).

<sup>69</sup> *Id.* at 504.

sively established by the English Charters and that the compact entered into between the states some 85 years earlier, for the purpose of re-establishing such a line, was invalid because it had not received the consent of Congress. The Court first addressed the issue of whether the Tennessee-Virginia Compact was within the ambit of the Compact Clause, noting that agreements that are outside the scope of the clause do not require the consent of Congress. The Court determined that the requirement of congressional consent applied only to those arrangements that would tend to increase "the political power or influence" of the compacting states "and thus encroach . . . upon the full and free exercise of Federal authority."<sup>70</sup> Having concluded that the compact in question fell within the foregoing category, the Court then considered whether

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<sup>70</sup> *Id.* at 520; see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 402 (1978) (suggesting that if either "presence" onto federal system or alteration of state's basic sphere of authority are present, congressional consent is necessary); Dutton, *Compacts and Trade Barrier Controversies*, 16 *IND. L.J.* 204, 209 (1940) (suggesting that conflict with federal power over commerce, impairment of contractual obligations, attempt to achieve extraterritoriality, assumption of treaty power, and "unlawful delegation of power" as basis for finding compacts unconstitutional).

For some time it was unclear whether the consent of Congress was required for all compacts. See Bruce, *The Compacts and Agreements of States With One Another and With Foreign Powers*, 2 *MINN. L. REV.* 500, 500-01 (1918). This was primarily a result of to the lack of commentary on the Compact Clause at the constitutional convention, see Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts?"* 3 *U. CHI. L. REV.* 453, 457, 464 (1936), and of conflicting indications of the meaning of the clause given by the Supreme Court. For instance, in *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840), Chief Justice Taney indicated that all compacts required consent, *id.* at 570-72, while in *Virginia v. Tennessee*, Justice Fields stated the converse rule in dicta, see 148 U.S. 503, 520 (1893); Dunbar, *Interstate Compacts and Congressional Consent*, 36 *VA. L. REV.* 753, 754 (1950); Note, *A Reconsideration of the Nature of Interstate Compacts*, 35 *COLUM. L. REV.* 76, 78 (1935).

The dicta from the *Tennessee* case, however, was followed *sub silentio* as the rule in later cases. See, e.g., *Stearns v. Minnesota*, 179 U.S. 223, 246-48 (1900) (right of agreement between one another belongs to several states, except as limited by constitutional requirement of congressional intent); *Wharton v. Wise*, 153 U.S. 155, 168-71 (1894) (compact of 1785 between Virginia and Maryland concerning navigation on Potomac River did not violate Articles of Confederation nor was it set aside by Compact Clause). Not until 1975, however, did the Supreme Court officially adopt the dicta of the *Tennessee* case. See *New Hampshire v. Maine*, 426 U.S. 363, 369-70 (1976).

For a discussion of which compacts are "political" in nature and thus require congressional consent, see Note, *Legal Problems Relating to Interstate Compacts*, 23 *IOWA L. REV.* 618, 623 (1938); see also Ladd, *Federal and Interstate Conflicts in Montana Water Law: Support for a State Water Plan*, 42 *MONT. L. REV.* 267, 275 (1981) (pointing out that compacts allocating waters between western states have required consent); Maier, *Cooperative Federalism In International Trade: Its Constitutional Parameters*, 27 *MERCER L. REV.* 391, 417 (1976) (suggesting congressional prerogative to decide when national interest at stake thus necessitating consent).

Congress had consented to the arrangement. Recognizing that consent may either precede or follow the creation of a compact and may be either express or implied, the Court determined that Congress, through its *previous reliance* on the terms of the compact for "judicial and revenues purposes," had impliedly consented to it.<sup>71</sup>

The question of whether an interstate compact might encroach upon federal authority, thereby triggering the consent requirement, is not always easy to answer. In *United States Steel Corporation v. Multistate Tax Commission*,<sup>72</sup> the Supreme Court was asked to review an interstate tax compact to determine whether the agreement, which lacked congressional consent, was valid under the Compact Clause. The purpose of this compact was to facilitate the determination of tax liability for multistate taxpayers and to promote uniformity in state tax systems.<sup>73</sup> The compact established the Multistate Tax Commission, composed of the tax administrators from all of the member states, which, in addition to pursuing the above objectives, was also authorized to audit multistate taxpayers at the request of a party state.<sup>74</sup> Pursuant to the terms of the compact, member states retained complete control over the rate of tax and the tax base and were permitted to withdraw from the compact at any time.<sup>75</sup> Several multistate taxpayers, threatened with audits by the Commission, filed suit alleging that the compact was void under the Compact Clause since it had not received the consent of Congress.<sup>76</sup> Concluding that there was no violation of the Compact Clause, the Court reasoned that since the compact did not "authorize the member [s]tates to exercise any powers they could not exercise in its absence," no "enhancement of state power" in relation to the federal government existed.<sup>77</sup> Thus, the compact did not require the consent of Congress because it fell

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<sup>71</sup> 148 U.S. at 522.

<sup>72</sup> 434 U.S. 452 (1978).

<sup>73</sup> *Id.* at 456.

<sup>74</sup> *Id.* at 457.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 458. The taxpayers' complaint challenged the constitutionality of the tax compact on four grounds: (1) lack of congressional consent; (2) burden on interstate commerce; (3) violation of fourteenth amendment rights; and (4) violation of the fourth amendment by the audit provisions. *Id.* The complaint survived a motion to dismiss but after discovery the district court granted summary judgment to the Tax Commission. *Id.* at 458-59. The court explicitly rejected the taxpayers' contention that the Compact Clause required congressional consent for every agreement between two or more states. *Id.* at 459.

<sup>77</sup> *Id.* at 473.

outside the scope of the Compact Clause.

#### A. Congress May Attach Conditions to Its Consent

In conjunction with its power to grant consent, Congress may also impose conditions on an interstate compact pursuant to its "supervisory power over cooperative state action."<sup>78</sup> "The condition upon which consent is given, [however], cannot be more than a technique for protecting existing federal interests" from encroachment by the interstate agreements.<sup>79</sup>

While case law has clearly established that Congress may condition its consent to interstate compacts,<sup>80</sup> the parameters of congressional power have not been defined. In *United States v. Tobin*,<sup>81</sup> however, the Court of Appeals for the District of Columbia Circuit reviewed a Congressional condition attached to the Port of New York Authority Compact. The provision, one generally contained in consent legislation,<sup>82</sup> reserved to Congress the right to alter, amend, or repeal its consent to the compact. The court made it clear that "the vital condition precedent to the validity of any . . . condition is that it be constitutional," and acknowledged that the Compact Clause did not specifically confer upon Congress the power "to alter, amend, or repeal" compacts.<sup>83</sup> Ultimately, however, the court declined to address the issue of the con-

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<sup>78</sup> *Cuyler v. Adams*, 449 U.S. 433, 440 (1981); see also *Susquehanna River Basin Compact*, Pub. L. No. 91-575, §§ 1.4, 2, 84 Stat. 1509, 1512, 1537-38 (1970) (congressionally imposed conditions to ensure, *inter alia*, federal control over certain navigable waters, application of certain federal statutes, no encroachment or restriction of executive powers); *Petty v. Tennessee-Missouri Comm'n*, 359 U.S. 275, 277-78 (1959) (congressional consent conditioned on states not impairing any federal rights); L. TRIBE, *supra* note 70, at 402 (congressional consent may be conditioned on state acceptance of congressionally mandated modifications). One commentator has stated that congressional imposition of conditions and reservations has presented a "paradox," especially in light of congressional efforts to encourage the states to deal with regional problems through interstate compacts. Hines, *Nor Any Drop To Drink: Public Regulation of Water Quality, Part II: Interstate Arrangements for Pollution Control*, 52 IOWA L. REV. 432, 444 (1966).

<sup>79</sup> Note, *Federal Investigatory Power over Bi-State Agency Through Reservation to Congress Under Compact of Constitution*, 8 VILL. L. REV. 237, 240 (1963). See generally Frankfurter and Landis, *supra* note 3, at 707-08 (discussing federal interests with regard to compacts).

<sup>80</sup> See, e.g., *Cuyler v. Adams*, 449 U.S. 433, 439-44 (1981) (Compact Clause vests power to condition consent in Congress).

<sup>81</sup> 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962).

<sup>82</sup> See, e.g., *The Wabash Valley Compact*, Pub. L. No. 86-375, 73 Stat. 694, 698 (1959) (Congress reserving the right to alter, amend, or repeal the Act).

<sup>83</sup> *Tobin*, 306 F.2d at 272-73.



stitutionality of the condition, and decided the case on non-constitutional grounds.<sup>84</sup>

In addition to retaining the power to "alter, amend, or repeal" a compact, Congress has on occasion limited its consent to a term of years, has provided that states may not terminate an agreement without its approval, and has imposed disclosure requirements upon a compact agency.<sup>85</sup>

### B. *How Congressional Consent is Conferred on an Interstate Compact*

Congressional consent is normally manifested by an act of Congress or by joint resolution setting out the compact document.<sup>86</sup> Once congressional consent has been obtained, the agreement is submitted to the President for approval.<sup>87</sup> It has been a rare instance when either congressional or presidential approval has not been forthcoming.<sup>88</sup>

Congress occasionally has provided consent-in-advance legislation to entice states into forming compacts in particular subject-matter areas. The Interstate Compact for the Supervision of Parolees and Probationers, for example, emanated from consent-in-advance legislation.<sup>89</sup> When Congress does give its consent in advance, however, the statute usually provides that the final compact must be submitted to Congress for approval.<sup>90</sup> Nevertheless, this was not the case with the Parolees and Probationers Compact, which was a "true" consent-in-advance statute.<sup>91</sup>

<sup>84</sup> See *id.* at 273. The *Tobin* court declined to address the constitutional issue as a result, in part, of the implications of such a decision. *Id.* The court commented that "[w]e have no way of knowing what ramifications would result from a holding that Congress has the implied constitutional power to alter, amend, or repeal its consent to an interstate compact." *Id.*

<sup>85</sup> See, e.g., Low-Level Radioactive Waste Policy Act, 42 U.S.C. § 2021d(a)(2)(B) (1982) (providing congressional option to withdraw its consent every five years after compact has taken effect).

<sup>86</sup> See, e.g., Port of New York Authority Compact of 1921, ch. 77, 42 Stat. 174, amended by 42 Stat. 822 (1922); Colorado River Compact, ch. 72, 42 Stat. 171 (1921) and 45 Stat. 1057 (1928) (codified at 33 U.S.C. § 617(b) (1970)); Potomac Compact, ch. 579, 54 Stat. 748 (1940) (codified at 33 U.S.C. § 567(b) (1970)).

<sup>87</sup> F. ZIMMERMANN & M. WENDELL, *supra* note 15, at 24.

<sup>88</sup> *Id.*

<sup>89</sup> See *supra* note 56 and accompanying text.

<sup>90</sup> F. ZIMMERMANN & M. WENDELL, *supra* note 15, at 25.

<sup>91</sup> True consent-in-advance statutes are those in which actual consent exists "without the limiting requirement of subsequent referral previously mentioned." F. ZIMMERMANN & M. WENDELL, *supra* note 15, at 25.

Although it had once been a settled proposition that congressional consent did not transform the compact document into federal law,<sup>92</sup> this proposition has recently been uprooted.<sup>93</sup> In *Cuyler v. Adams*,<sup>94</sup> the Supreme Court was asked to interpret the terms of the Interstate Agreement on Detainers.<sup>95</sup> After noting that not all agreements fall within the ambit of the Compact Clause, the Court stated that "where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause."<sup>96</sup> The Court concluded that the Detainer Agreement was "an appropriate subject for congressional legislation" and therefore its interpretation "present[ed] a question of federal law."<sup>97</sup>

### C. *Federal Participation in Compacts*

Federal involvement with interstate compacts is automatically provided for in the Compact Clause in the form of the consent requirement. The function of Congress is to ensure that interstate agreements do not impermissibly infringe upon federal interests and concerns.<sup>98</sup> While it customarily awaits the submission of a completed compact for its review, Congress has on occasion actively participated in compact negotiations and later in compact

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<sup>92</sup> While disputes arising under interstate compacts constitute federal questions subject to review in federal courts, the interpretation of contract terms had been a matter of state rather than federal construction. See *People v. Central R.R.*, 79 U.S. (12 Wall.) 455, 456 (1870) (congressional consent not a statute of United States within meaning of § 25 of Judiciary Act); accord *Hinderlider v. La Plata River Co.*, 304 U.S. 92 (1938) (Congressional consent held not to create treaty or statute).

<sup>93</sup> See *Cuyler v. Adams*, 449 U.S. 433 (1981); *Petty v. Missouri River Comm'n*, 359 U.S. 275, 278 (1959); *Delaware River Comm'n v. Colburn*, 310 U.S. 419, 427 (1940); *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517, 522 (9th Cir. 1974), cert. denied, 420 U.S. 974 (1975); see also Comment, *Federal Question Jurisdiction to Interpret Interstate Compacts*, 64 Geo. L.J. 87, 111 (1975) (Supreme Court basis of certiorari on law of union doctrine unjustifiable). But see Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987, 1048 (1965) (federal question jurisdiction when interpretation of congressional act essential to plaintiffs cause of action).

<sup>94</sup> 449 U.S. 433 (1981).

<sup>95</sup> *Id.* at 435. The Detainer Agreement was a compact to which Congress consented in advance when it passed the Crime Control Act of 1934. *Id.* at 441.

<sup>96</sup> *Id.* at 440.

<sup>97</sup> *Id.* at 442.

<sup>98</sup> See *supra* note 79 and accompanying text.

operations.<sup>99</sup> From a state's perspective, congressional involvement in negotiations has two distinct advantages. First, federal involvement in the compact drafting early on may enhance the likelihood of obtaining congressional consent. Second, if the operation of the compact will require national assistance, federal representation during the drafting stages is beneficial.<sup>100</sup>

Congressional involvement in compact negotiations has resulted from both state solicitation and congressional imposition. For instance, certain consent-in-advance acts specifically require federal participation in the compact negotiations as a prerequisite to congressional approval of the final agreement.<sup>101</sup> The Boulder Canyon Project Act,<sup>102</sup> an agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming for the development of the Colorado River, is such a statute. Congressional consent, however, "[i]s given upon condition that a representative of the United States, to be appointed by the President, shall participate in the negotiations."<sup>103</sup> The federal government has also participated in an operative compact agency in the Delaware River Basin Commission,<sup>104</sup> established in 1961 by Delaware, Pennsylvania, New York, New Jersey, and the United States,<sup>105</sup> to plan, develop, and manage the River Basin for flood control, water supply, and pollution control.<sup>106</sup> Each of the participating parties has one representative on the Commission.<sup>107</sup> Another compact, comparable to the Delaware River Basin Compact, is the Susquehanna River Basin Compact, ratified by Congress in 1970.<sup>108</sup>

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<sup>99</sup> F. ZIMMERMANN & M. WENDELL, *supra* note 15, at 18; see also Grad, *Federal-State Compact: A New Experiment In Federalism*, 63 COLUM. L. REV. 825, 829 (1963)(discussion of rules of federal and state governments in formulating interstate compacts).

<sup>100</sup> See F. ZIMMERMANN & M. WENDELL, *supra* note 15, at 18-19.

<sup>101</sup> *Id.*

<sup>102</sup> 43 U.S.C. § 617r (1982).

<sup>103</sup> *Id.* § 617r(a).

<sup>104</sup> Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961).

<sup>105</sup> DEL. CODE ANN. tit. 7, §§ 6501-6511 (1974); N.J. STAT. ANN. §§ 32:11D-1 to 115 (West Supp. 1985); N.Y. ENVTL. CONSERV. LAW § 21-0701 (McKinney 1984); PA. STAT. ANN. tit. 32, § 815.101 (Purdon Supp. 1985), *consented to by Congress*, 75 Stat. 688 (1961).

<sup>106</sup> Delaware River Basin Compact, Pub. L. No. 87-328, § 1.2, 75 Stat. 688, 689-91 (1961).

<sup>107</sup> *Id.* at 691.

<sup>108</sup> Susquehanna River Basin Compact, Pub. L. No. 91-575, 84 Stat. 1509 (1970).

## V.

CONGRESS HAS NO AUTHORITY UNDER ITS CONSENT POWER TO  
WRITE EACH AND EVERY TERM OF AN INTERSTATE COMPACT

The interstate compact device, which once maintained an uneventful and unilluminating existence in our history, has evolved into the foremost method for states to control and resolve problems of an interstate character. The potentialities inherent in the compact device, which were so presciently described some 60 years ago by Frankfurter and Landis, have since come to fruition over the past half-century in diverse forms and fashions. Clearly, the dominant theme that has pervaded the entire interstate compact "movement" since the 1920's has been the expansion of the uses of this device in as many creative and imaginative ways as our system of government would allow. The American system of government is a system rooted in federalism, in which the respective powers of the states and of the federal government can be exercised in simultaneous and complementary fashion to rectify situations that are otherwise ill-suited to solution without such joint action.

Despite the abundant and fruitful gains that have resulted from the creative and expansive application of the compact instrument, great care must be taken to ensure that such creativity does not transgress constitutional proscriptions. For example, the Northwest Power Council scenario, discussed briefly in the introduction,<sup>109</sup> raises serious questions as to how far Congress may go in the establishment of interstate compacts.<sup>110</sup> In the case of the

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<sup>109</sup> See *supra* notes 9-14 and accompanying text.

<sup>110</sup> In 1983, a coalition of homebuilders and wood products manufacturers brought suit against the Council alleging, *inter alia*, that the procedure for selecting Council members violates the Appointments Clause of the Constitution, which requires that all "Officers of the United States" be appointed by the President with the advice and consent of the Senate. See U.S. CONST. art. II, § 2, cl. 2. The suit was brought in the Ninth Circuit Court of Appeals pursuant to the Northwest Power Planning Act, 16 U.S.C. § 839f(c)(5). See *Seattle Master Builders Ass'n v. Northwest Power Planning Council*, No. 83-7583 (9th Cir., filed July 29, 1983). The homebuilders have alleged that the Council members are officers of the United States since they exercise significant federal authority pursuant to the Northwest Power Planning Act. Petitioner's Opening Brief at 52-53, *Seattle Master Builders Ass'n v. Northwest Power Planning Council*, No. 83-7585 (9th Cir., filed July 29, 1983). In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court determined that individuals exercising significant federal authority are deemed to be officers of the United States. *Id.* at 131. Accordingly, the homebuilders argue that the appointment of Council members must be executed by the President with the advice and consent of the Senate. Petitioner's Opening Brief at 52. In addition, the homebuilders allege that the Council is not a Compact Clause Agency.

Council, Congress itself drafted each and every term of the com-

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Petitioner's Reply Brief at 59.

There is some support in the legislative history for Petitioner's view that the Northwest Power Planning Council is an entity violative of the Appointment's Clause. On March 11, 1980, the Department of Energy, pursuant to a request made by the Chairman of the Committee on Interior and Insular Affairs, reported its recommendations on the Northwest Power Planning Act. H.R. REP. No. 976, 96th Cong., 2d Sess. 60, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6058. With regard to the provisions of the Act dealing with the composition and authority of the Northwest Power Planning Council, the Department of Energy commented:

These provisions vest substantive executive powers in individuals who are not appointed by the President or the head of a cabinet department and appear to violate the Appointments Clause of the Constitution, Article II, Section 2, Clause 2. The Department of Justice has taken a similar position as expressed in its letter to you dated January 9, 1980. We defer to the views of the Department of Justice on this matter.

*Id.* at 6059.

On the other hand, portions of the legislative history suggest that the make-up of the Council presents no constitutional difficulties. According to a House Report:

[T]he Appointments Clause of the United States Constitution has been raised as a possible impediment to gubernatorial appointment of these Council members. However, the Committee believes that the Constitution allows the Congress, through the broad powers it possesses under the Commerce and Property Clauses of the Constitution, to share with the States the type of responsibilities granted to the Council by this legislation and that the Appointments Clause does not prevent an interstate arrangement such as this where the Congress expressly consents to share responsibility with the States in an area of mutual, rather than purely Federal, responsibility. Energy planning is interstate in character, particularly in the Pacific Northwest where the four States and the Federal Government are bound together by their shared interest in, and mutual dependence upon, and integrated regional power system.

*Id.* at 6038.

Similarly, Representative Pat Williams commented:

The Appointments Clause of the Constitution (Art. 2, Sec. 2, Cl. 2) has been raised as a possible impediment to State appointment of Council members. Careful constitutional research, however, shows that the Congress may share with the states authorities such as those given to the Council. The Appointments Clause relates to separation of powers between the branches of national government, not to mechanisms such as the Council, in which state officials would be acting pursuant to state authority within the framework of a federal law.

*Id.* at 6063.

Despite the position taken by the Department of Justice during the legislative debates, in the *Seattle Master Builders* action, the United States intervened and ultimately concluded that the Appointments Clause challenge made by Petitioners should be dismissed. *See* Brief of Intervenor United States of America.

In response, the Northwest Power Planning Council contends that it is a validly created interstate compact whose members are state rather than federal officers. *See* Brief of Respondent Northwest Power Planning Council at 64. In addition, the Northwest Power Planning Council has responded to the argument that the Federal government's participation has been too pervasive by pointing out that Congress has merely "followed its standard practice of offering the states a chance to participate in the regulation of a federally

compact document (40 pages of text) and submitted it to the four Pacific Northwest states for their approval.<sup>111</sup> If the states had refused this "offer" by Congress, a federal agency would have automatically been established to perform the Council's functions.<sup>112</sup> Such action by Congress exceeds what is permissible under the terms of the Constitution and, as a matter of federalism, must forthrightly be rejected.

The sole authority afforded to Congress under the Compact Clause is the power to grant or withhold consent to interstate compacts. As a consequence of this power, Congress also has the implied power to attach conditions to such arrangements. Pursuant to its compact authority, Congress essentially exercises a "supervisory role" over state agreements and compacts to ensure that federal interests are not adversely affected. In furtherance of this supervisory role, Congress has on occasion participated in compact negotiations and has taken a seat on various compact agencies.<sup>113</sup> Such behavior by Congress, which is in fact more the exception than the rule, is entirely within the parameters of the power granted to Congress under the Compact Clause. There is nothing in these types of congressional acts that offends either this express constitutional provision or the underlying Founding Fathers' intent. These actions by Congress are simply designed to protect federal interests that might otherwise be affected by particular interstate arrangements. They are entirely consistent, therefore, with

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preemptible field on conditions it felt necessary to ensure harmony with the federal regulatory scheme." Brief of Respondent at 68.

<sup>111</sup> The states themselves were essentially given only one role in the formation of the Council—to acquiesce to Congress' will by appointing their respective members. According to the NPPA, the appointment of at least six members "shall constitute an agreement by the States establishing the Council . . ." 16 U.S.C. § 839b(a)(2) (1982). The Compact Clause, however, specifically refers to *states entering into agreements or compacts with other states*.

In the case of the Council, the States neither negotiated with each other to form an agreement nor individually developed, by statute, a compact arrangement to be accepted by the others. The States themselves do not even refer to the Council as an interstate compact in their state legislation regarding appointment of Council members. See IDAHO CODE § 61-1202 (Supp. 1985); OR. REV. STAT. §§ 469.800-469.845 (1981); WASH. REV. CODE § 43.52A.30 (Supp. 1986).

<sup>112</sup> 16 U.S.C. § 839(b)(b)(1) (1982).

<sup>113</sup> See, e.g., Colorado River Compact, ch. 72, 42 Stat. 171, 172 (1921) (conditioning consent to compact upon participation of United States in compact negotiations for "protection of the interests of the United States"). The United States Bureau of the Budget went so far as to issue "a 'Guide to Federal Participation in Interstate Compact Negotiation' to assist federal representatives participating in interstate negotiations." Hines, *supra* note 78, at 444 n.64.

the purpose underlying the *sole* limitation (consent requirement) on the states' right to enter into compacts under the Compact Clause.

The congressional attempt to establish each element of an interstate arrangement, however, far exceeds the permissible bounds of congressional authority under the Compact Clause. Allowing Congress to use its limited authority in this manner essentially deprives the states of a specific right reserved to them by the Framers of the Constitution. That the limitation on the exercise of the right cannot be used to abrogate it completely has been well articulated by the Supreme Court:

Whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. *The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects.* They must be construed in harmony with each other.<sup>114</sup>

The Founding Fathers fully understood the value of allowing states to resolve disputes among themselves by using the compact device. This "grassroots" process permits "regional wisdom and regional pride" to devise solutions to regional problems.<sup>115</sup> The "essential aspects" of the compact mechanism would surely be lost if Congress were to fabricate such arrangements under its limited power of consent.<sup>116</sup> While Congress indeed plays a critical role in the development and operation of compacts,

questions of joining or not joining an interstate compact, of creating one, renewing or not renewing it, of appropriating money for its support, of sanctioning and implementing activities, are

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<sup>114</sup> *City of El Paso v. Simmons*, 379 U.S. 497, 509 (1965) (emphasis added) (quoting *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 439 (1934)).

<sup>115</sup> Frankfurter & Landis, *supra* note 3, at 708.

<sup>116</sup> In addition to the Compact Clause, the Constitution contains several other provisions that include a "consent" requirement. For instance, article II provides that all treaties are subject to the consent of the Senate. U.S. CONST. art. II, § 2, cl. 2. This certainly does not authorize the Senate to negotiate each and every term of a treaty between the United States and a foreign power. In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), the Court stated: "he [the President] alone negotiates. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to invade it." *Id.* In addition, "the treaty must contain the whole contract between the parties, and *the power of the Senate is limited to a ratification of such terms* as have already been agreed upon between the President" and the foreign power. *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 183 (1901) (Brown, J. concurring) (emphasis added).

*uniquely* the responsibilities of the states and their people, and it is the states and their people which should have an intense concern for what they may be gaining, losing, abandoning, delegating, harming, or benefiting through the path of interstate compacts . . . .<sup>117</sup>

To sanction an arrangement in which Congress negotiates and drafts the terms of an interstate agreement that is then submitted to the states for approval, would completely invert the compacting process and the Compact Clause itself. Without question, this would leave the interstate compact device "formally intact but functionally a gutted shell."<sup>118</sup>

Any suggestion that Congress might use its plenary power under the Commerce Clause, rather than its limited power under the Compact Clause to establish arrangements such as the Northwest Power Council is also without merit. In *United States v. Tobin*, the Court acknowledged that Congress, pursuant to its plenary powers, "has at its disposal abundant authority to *supervise and regulate the activities of operational compacts* in such a way as to insure that no violence is done by these compacts to more compelling federal concerns."<sup>119</sup> A crucial distinction exists, however, between the authority to *supervise* activities and the authority to *designate completely* the nature of the activities.<sup>120</sup> If Congress were permitted to create arrangements like the Council pursuant to its commerce power, the power of the states under the Compact Clause would essentially be nullified and they would be deprived of the element of state sovereignty specifically retained in the Constitution. It must be remembered that "the sovereignty of the States, within the boundaries reserved to them by the Constitution, is one of the keystones upon which our government was founded and is of vital importance to its preservation."<sup>121</sup>

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<sup>117</sup> M. RIDGEWAY, *supra* note 47, at 303 (emphasis added).

<sup>118</sup> L. TRIBE, *supra* note 70, at 310.

<sup>119</sup> *United States v. Tobin*, 306 F.2d 270, 273 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962) (emphasis added).

<sup>120</sup> Congress may not seek to accomplish under one constitutional provision that which would be prohibited by another provision. For example, the Supreme Court in *Railway Labor Executive's Ass'n v. Gibbons*, 455 U.S. 457 (1982), specifically noted that if "Congress had the power to enact *nonuniform* bankruptcy laws pursuant to the Commerce Clause," it would "eradicate from the Constitution" the limitation requiring all bankruptcy laws enacted by Congress to be uniform in nature. *Id.* at 469 (emphasis added).

<sup>121</sup> *NAACP v. Thompson*, 357 F.2d 831, 833 (5th Cir. 1966), *cert. denied*, 385 U.S. 820 (1966).



For well over 200 years, the compact device has operated as a means for states to develop solutions to problems that are interstate in nature. The need to perpetuate this practice and to preserve the power of the states in this regard is reflected still today in the words of Frankfurter and Landis:

With all our unifying processes nothing is clearer than that in the United States there are being built up regional interests, regional cultures and regional interdependencies. [Citation omitted]. These produce regional problems calling for regional solutions. Control by the nation would be ill-conceived and intrusive. . . . As to these regional problems Congress could not legislate effectively. Regional interests, regional wisdom and regional pride must be looked to for solutions. . . .

The inventive powers exacted from modern State legislatures must grapple with problems whose stage is an interstate region. Collective legislative action through the instrumentality of compact by States constituting a region furnishes the answer.<sup>122</sup>

While it is certainly desirable for both Congress and the states to use their collective powers in the resolution of difficult and complex regional problems, Congress must not be permitted to act in a manner that would completely subvert the states' crucial role in the compact process.

#### CONCLUSION

Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.<sup>123</sup>

The Framers' incorporation of the compact mechanism into the Constitution preserved to the states a special power of state sovereignty. Throughout the years, this device has been used in a variety of circumstances, from the settlement of boundary disputes in the 1600's to the disposition of nuclear waste in the 1980's. In all of these instances, however, the interstate compact has remained an instrumentality of the states and has successfully been exercised by the states for their own advancement. While Congress cer-

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<sup>122</sup> Frankfurter & Landis, *supra* note 3, at 708.

<sup>123</sup> L. TRIBE, *supra* note 70, at 302.

tainly plays an important role in the development of interstate arrangements, particularly through consent-in-advance legislation, Congress may not establish the essential elements of an interstate compact. This responsibility is uniquely that of the states and must remain so if we are to prevent the "gutted shell" scenario from becoming an unpalatable reality.