COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE GILLETTE COMPANY & SUBSIDIARIES,

Plaintiffs and Appellants,

v.

CALIFORNIA FRANCHISE TAX BOARD, an Agency of the State of California,

Defendant and Respondent.

Case No. S206587

SUPREME COURT
FILED

JAN 22 2014

Frank A. McGuire Clerk

Deputy

Consolidated with the following cases:

1) The Procter & Gamble Manufacturing Co. v. Franchise Tax Board, CGC-10-495912
2) Kimberly-Clark Worldwide, Inc. & Subsidiaries et al. v. Franchise Tax Board, CGC-10-495916
3) Sigma-Aldrich, Inc. v. Franchise Tax Board, CGC-10-496437
4) RB Holdings (USA) Inc. v. Franchise Tax Board, CGC-10-496438
5) Jones Apparel Group v. Franchise Tax Board, CGC-10-499083

First Appellate District, Division Four, Case No. A130803
San Francisco County Superior Court, Honorable Richard A. Kramer
Case No. CGC-10-495911 (and consolidated cases listed above)

PLAINTIFFS/APPELLANTS' SECOND MOTION FOR JUDICIAL NOTICE

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of California:

Please take notice that, pursuant to California Rules of Court 8.520 and 8.252 and California Evidence Code sections 452(c) & (h), and 459, Plaintiffs and Appellants The Gillette Company & Subsidiaries, *et al.*, hereby move this Court to take judicial notice for the purposes of this appeal, of the following documents, true and correct copies of which are attached as Exhibits T and U to this Motion for Judicial Notice:

1. Excerpts from Caroline Broun, et al., *The Evolving Use and Changing Role of Interstate Compacts*, (ABA 2006). A true and correct copy of the excerpted pages is attached as Ex. T.

2. Document prepared by the Council on State Governments -- National Center for Interstate Compacts, *Interstate Compacts vs. Uniform Laws*. A true and correct copy of this document is attached as Ex. U; it is also available online at http://www.cglg.org/projects/water/compacteducation/compacts_vs_uniform_laws--csgncic.pdf.

These documents are attached to this motion as required by Rule 8.252 of the California Rules of Court. These matters do not relate to proceedings occurring after the judgment that is the subject of this appeal.

The motion is based on the following memorandum.

MEMORANDUM

Under Evidence Code Section 459, subdivision (a), a reviewing court may take judicial notice of any matter specified in Evidence Code Section 452. Evidence Code Section 452 provides that judicial notice may be taken of "official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States," and of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Evid. Code § 452(c) and (h). The documents described above and attached hereto fall into these categories; therefore, judicial notice is proper as to each of these documents. These documents were not submitted in the proceedings below.

Each document is relevant to this appeal in that they are sources cited by the parties and/or amici in the briefing. The Broun book is a treatise on interstate compact law which has been cited extensively by the parties and amici. Plaintiffs have attached copies of all pages cited in the briefing by the parties and amici in this appeal.

Similarly, the document prepared by the Council of State Governments – National Center for Interstate Compacts is a brief paper comparing interstate compacts and uniform laws. This document has been cited by the Multistate Tax Commission. Commission's Br. at 8 n. 26.

Because these documents may not be readily available, Plaintiffs are providing the copies of the cited documents for the convenience of this Court.

Both of these documents are proper subjects of judicial notice as "facts and propositions that are not reasonably subject to dispute and are

capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Evid. Code § 452(h); *see also* Judicial Council Comment ("Subdivision (h) provides for judicial notice of indisputable facts immediately ascertainable by reference to sources of reasonably indisputable accuracy. In other words, the facts need not be actually known if they are readily ascertainable and indisputable. Sources of "reasonably indisputable accuracy" include not only treatises, encyclopedias, almanacs, and the like, but also persons learned in the subject matter.").

In addition, the Council of State Government document is a proper subject of judicial notice as public records and official acts of the legislative departments of any state of the United States and/or official acts of a public agency. Evid. Code § 452(c). The Council of State Governments is a non-profit organization that supports state governments, is funded by state governments and headed by a state governor. Therefore, documents produced by the Council on State Governments are proper subjects for judicial notice under California law. *In re Crockett*, 159 Cal. App. 4th 751, 762 n. 6 (2008) (taking judicial notice of actions of Council of State Governments); *People v. Brooks*, 189 Cal. App. 3d 866, 873-874 (1987) (referring to Council on State Governments legislative history to interpret the Interstate Agreement on Detainers).

For the reasons stated above, Plaintiffs respectfully requests that this Court take judicial notice of the foregoing documents pursuant to Evidence Code sections 452 and 459.

DATED: January 22, 2014

Respectfully submitted,

Silverstein & Pomerantz LLP

By 

Amy L. Silverstein

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Jones Apparel Group

[Proposed]

ORDER TAKING JUDICIAL NOTICE OF TREATISE AND DOCUMENT PRODUCED BY THE COUNCIL OF STATE GOVERNMENTS

Good cause appearing, IT IS HEREBY ORDERED that the Motion Requesting Judicial Notice is granted. IT IS ORDERED that this Court shall take judicial notice of the following:

1. Excerpts from Caroline Broun, et al., *The Evolving Use and Changing Role of Interstate Compacts*, (ABA 2006).

2. Document prepared by the Council on State Governments -- National Center for Interstate Compacts, *Interstate Compacts vs. Uniform Laws.*

Dated: _____

_____

Chief Justice

The Evolving Use and the Changing Role of Interstate Compacts

A Practitioner's Guide

Caroline N. Broun
Michael L. Buenger
Michael H. McCabe
Richard L. Masters

ABA SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

AMERICAN BAR ASSOCIATION
Defending Liberty
Pursuing Justice

ABOUT THE AUTHORS

Michael L. Buenger currently serves as the state courts administrator for Missouri. He received his B.A., cum laude, from the University of Dayton in 1983 and his J.D., cum laude, from St. Louis University School of Law in 1989, where he was a White Fellow for Law and Public Policy. Mr. Buenger has also served as the state court administrator of South Dakota, as an adjunct professor of political science at the University of Dayton, an instructor for the Ohio Judicial College, a law clerk for the Court of Appeals of Ohio, and as the administrator and legal counsel for a court of appeals district in Ohio. He was a member of the teams that wrote the Interstate Compact for Adult Offender Supervision, the new Interstate Compact for Juveniles, which is currently under consideration by state legislatures; and, most recently, the proposed revised Interstate Compact for the Placement of Children. He has worked extensively with the Interstate Commission for Adult Offender Supervision, providing training and legal consulting services on variety of matters related to their compact. He has served as president of the national Conference of State Court Administrators and vice-chairperson of the Board of Directors of the National Center for State Courts. In addition, he serves on the board of advisors for the National Center for Interstate Compacts and the editorial board of the *Justice System Journal*. He also served on the American Bar Association's 2004 Commission on State Court Funding. Mr. Buenger has written and published in the areas of appellate practice and procedure, court management, the law of interstate compacts, federalism, judicial independence, and court funding.

Richard L. (Rick) Masters is general counsel to the Interstate Commission for Adult Offender Supervision, an interstate compact agency composed of all 50 states and territories, which is affiliated with the Council of State Governments (CSG) in Lexington, Kentucky. He received his B.A. degree from Asbury College in 1976 and his J.D. from the Louis D. Brandeis School of Law of the University of Louisville in 1979. He was assistant attorney general for the Commonwealth of Kentucky until 1982, after which he served as general counsel for CSG at its national office in Lexington. Mr. Masters is an adjunct professor of business regulation and commercial law at Asbury College and Northwood University and is a member of a law firm in Louisville, Kentucky. He has written and spoken extensively on the subject of interstate compacts, including the Interstate Compact for Adult Offender Su-

pervision, for which he was the principal draftsman. He worked with CSG and the National Highway Traffic Safety Administration in the early 1980s to amend the Driver License Compact and is currently a CSG legal consultant with the United States Department of Justice/Office of Juvenile Justice and Delinquency Prevention for the purpose of amending the Interstate Compact for Juveniles. In addition, Mr. Masters continues to be involved in consultation, research, and writing concerning interstate compacts and constitutional law issues, most recently supervising the drafting of the new Interstate Compact for the Placement of Children.

Michael H. McCabe currently serves as the director of the Midwestern Office of the Council of State Governments (CSG), a national, nonpartisan association of state officials representing all three branches of state government in all 50 states and the U.S. territories. He received his bachelor's degree from Iowa State University in 1981 and his J.D. from the University of Illinois in 1984. Following a brief stint with a private law firm, Mr. McCabe joined CSG in 1985, serving first as a policy analyst and staff attorney and later as assistant director of CSG's Midwestern Office. In his current role as director, Mr. McCabe oversees the efforts of a 12-member team that provides research and staff support services to several groups of state officials, including the Midwestern Legislative Conference and the Midwestern Governors' Association. He was a charter member of the Policy Consensus Initiative Board of Directors and served as chairman of the Jane Addams Resource Corporation, a community development organization in Chicago. Over the years, Mr. McCabe has provided drafting and consulting assistance in connection with several interstate compacts, including the Interstate Agricultural Grain Marketing Compact, the Midwestern Higher Education Compact, the Interstate Insurance Receivership Compact, the Interstate Compact on Mental Health, and the Midwest Interstate Passenger Rail Compact. More recently, he participated in the development of the Interstate Compact for Adult Offender Supervision and the Interstate Compact for Juveniles.

Caroline N. Broun is an attorney licensed in California, Missouri, and Ohio. She received her B.S. with highest honors ftom the University of Illinois–Urbana and her J.D., magna cum laude, from St. Louis University School of Law. Ms. Broun was environmental inhouse counsel for an international consumer products company. She has practiced law with both large and small law firms and has clerked with the Missouri Supreme Court. She has published in the area of environmental law and wrote the *Toxic Torts Practice Guide, RCRA and Superfund: A Practice Guide* (3rd Edition) and *Superfund Law and Procedure* for West publications.

INTRODUCTION

Unlike the few other works that address interstate compacts, this work was developed with a bias toward the practitioner—not only the attorney who may face litigating matters controlled by a compact but also others who are involved in the drafting, management, and implementation of such agreements. While necessarily theoretical, it seeks also to provide practical guidance to those who find themselves dealing with matters controlled by interstate compacts and particularly the administrative agencies that may be charged with overseeing a compact.

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 inherently complicated given the federal structure of government in which, at a theoretical and practical level, two sovereign entities cooperate, 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 relationship between the states and federal government. Seemingly little has been dedicated to exploring the management of formal relationships between the states, a critical but largely overlooked element of federalism. 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 over matters that are multilateral in nature. How these interstate relations are managed can have significant, long-term consequences. Take, for example, the Interstate Agreement on Detainers, the Washington Metropolitan Area Transit Regulation Compact, the Columbia River Gorge Compact, the Interstate Compact for Adult Offender Supervision, the Tahoe Regional Planning Compact, or the Interstate Compact on the Placement of Children. Each of these formal state-to-state agreements governs not only state relationships but, equally important, provides services to and/or controls the actions of individual citizens. Additionally, interstate compacts are perhaps the only exception to the largely held view that one state legislature cannot bind its successors in long-term, even irrevocable agreements pertaining to state affairs.

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 violate traditional notions of federalism by enabling states to create supra-state, sub-federal agreements that are as binding on the states as if the states were acting as true independent sovereigns adopting a treaty. Interstate compacts allow for ancillary and alternative governing mechanisms and create regulatory schemes that exist largely independent of individual state control and federal oversight. These mechanisms, while created by the member states, are not subject to control by any single state.

Although interstate compacts have long been used in the United States, their use as ongoing governing mechanisms has been a development of the twentieth century, evidenced by the emergence of the so-called "regulatory," "administrative" or "management" compact. Prior to the twentieth century, interstate compacts were used almost exclusively to settle boundary disputes or adjust jurisdictional lines. In more recent times, however, interstate compacts have been used not so much to resolve boundary disputes but rather to manage a wide array of multistate matters. This, in turn, has led to the creation of interstate administrative and regulatory bodies with specific subject matter control and specific management responsibility—for example, the Interstate Commission on Adult Offender Supervision, the Delaware River Port Authority, the Ohio River Valley Sanitation Commission, the Columbia River Gorge Commission, the Tahoe Regional Planning Agency, and, perhaps most notable among interstate compact agencies, the Port Authority of New York–New Jersey. Some compact-created entities such as the Washington Metropolitan Area Transit Commission and the Interstate Commission for Adult Offender Supervision are truly regulatory agencies, promulgating administrative rules and regulations and taking enforcement actions as one of their major functions. Other compact-created entities such as the Port Authority of New York–New Jersey and the Metropolitan Washington Airports Authority are more than regulatory agencies, encompassing within their sphere of authority not only regulation but, more important, the development and management of major governmental operations.

Although compacts have been used to settle land claims between the states as recently as 1999,[1] today they are more often used to deal with wide-

1. *See, e.g.*, Missouri-Nebraska Boundary Compact, Pub. L. No. 106-101, 113 Stat. 1333 (1999). In addition to settling the boundary between the states due to the shifting channel of the Missouri River, the compact also settles issues relating to criminal and civil jurisdictions 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.

ranging regional and national problems. The issues states seek to manage through compacts involve such diverse matters as water-resource management, pollution control, regional economic development, crime control, child welfare, education, emergency management, waste disposal, and so forth. Arguably, any matter between two or more states that is "supra-state, sub-federal" in nature can become the subject of an interstate compact. 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 alternatives instead of utilized for fashioning new instruments adapted to new situations."[2] At no time has the use of interstate compacts been employed more in fashioning "new instruments" than in the late twentieth and early twenty-first centuries. The new millennium evidences a growing interest in the use of interstate compacts to resolve serious multistate matters ranging from crime to child protection, to water management, to regional transportation and economic development matters.

Although compacts have emerged in recent years as effective and vital governing tools, the study of compacts has been limited to a relatively small group of people. Very little legal or political literature has been dedicated to the subject matter, notwithstanding the states' increasing reliance on compacts to manage many pressing national and regional issues. 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 may be emerging, albeit in an ad hoc, quiet, non-systematic manner. As a result, there is a need for a reexamination of the law of interstate compacts, and particularly with regard to the development of supra-state administrative and regulatory agencies.

This book seeks to fill the existing void in this emerging area of law by addressing both the theoretical principles behind interstate compacts and the very practical implications of operating in the compact environment. It is intended to serve not only as a reference for lawyers, but also as a practical guide for legislators, drafters, compact administrators, students, and other

2. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 688 (1925).

parties interested in the development of, or subject to, interstate compacts. Thus, some chapters provide a theoretical basis for compacts. Other chapters seek to provide a very practical perspective on compacts and the potential issues one may face in working with interstate compacts or litigating under such agreements. Finally, the book also seeks to provide both practitioners of the law and others with a perspective on the complexity of compacts and their interaction with other agreements, state laws, and federal laws.

Chapter 1

THE GENERAL LAW AND PRINCIPLES GOVERNING INTERSTATE COMPACTS

No State shall, without the Consent of Congress * * * enter into any Agreement or Compact with another State, or with a foreign Power[.][1]

1.1 THE HISTORICAL BASIS OF INTERSTATE COMPACTS

The Framers of the Constitution understood that the federal structure of American government required formal mechanisms for managing interstate relations, and particularly for managing the complex government, political and economic allegiances that states might form between themselves. Consequently, the Constitution provides several mechanisms for "adjusting" interstate relations and addressing regional or national issues, many of which are "supra-state, sub-federal" in nature.[2] Several examples of constitutional control over state action demonstrate that the Framers, though greatly state oriented, were also keenly aware of the need for some semblance of control over

1. U.S. CONST. art. I, § 10, cl. 3.
2. The term "supra-state, sub-federal" refers to those matters that are clearly beyond the realm of individual state authority but which, due to their nature, may not be within the immediate purview of the federal government or easily resolved through a purely federal response.

multilateral state action. Through the Full Faith and Credit Clause of the Constitution, for example, the Framers created a system by which the critical actions of one state received not only recognition but also enforcement in sister states, providing, in a sense, a national scheme of legal regulation over the actions of states.[3] Congress's extensive power over interstate commerce provides yet another mechanism for adjusting interstate relationships—often in an economic sense that nevertheless can have great social and political consequences.[4] The Supremacy Clause and federal preemption doctrine provide an additional control over state actions—individual and collective—by ensuring that federal law will trump state law in any legitimate competition between the two. The far-reaching power of the federal judiciary, and particularly the Supreme Court's original jurisdiction over state disputes, serves as another means of adjusting interstate relations by vesting ultimate authority over state disputes directly in the nation's highest court.[5]

Of all of the mechanisms available, none is more formal, more state-focused, more adaptable to collective *state* needs, and perhaps less understood than interstate compacts. Compacts are fundamentally negotiated agreements among member states that have the status of both contract and statutory law. Interstate compacts represent one of a limited number of processes provided in the Constitution for adjusting and regulating formal state relations, be they boundaries, substantive law, or even economic relationships. More important, compacts represent the only mechanism in the Constitution by which the states themselves can alter the dynamics of their

3. U.S. CONST. art. IV, § 1.

4. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971) (upholding under the Commerce Clause application of the Consumer Credit Protection Act to purely intrastate loan-sharking activities); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding the application of the Agricultural Adjustment Act to the consumption of homegrown wheat by a small wheat farmer); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (sustaining the validity of the National Labor Relations Act, and holding that activities having such a close and substantial relation to interstate commerce that their control is essential to protection of that commerce from burdens are subject to congressional regulation). *But see* United States v. Lopez, 514 U.S. 549 (1995) (Congress went beyond its Commerce Clause authority in adopting Gun-Free School Zones Act of 1990, as the act had nothing to do with commerce or any economic activity and, therefore, could not be sustained as a regulation of activity arising out of or connected with a commercial transaction, which, when viewed in the aggregate, substantially affected interstate commerce).

5. U.S. CONST. art. III, § 2.

relationships without running afoul of the authority of the federal government or reordering the federal structure of government. Thus, compacts are singularly important because through a compact, the states can create a state-based solution to regional or national problems and effectively retain policy control for the future. What Justice Brandeis observed in 1938 in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* is equally true today:

> It ignores the history and order of development of the two means provided by the Constitution for adjusting interstate controversies. The compact—the legislative means—adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies, was practiced by the States before the adoption of the Constitution, and had been extensively practiced in the United States for nearly half a century before this Court first applied the judicial means in settling the boundary dispute in *Rhode Island* v. *Massachusetts*.[6]

The history of interstate compacts spans a broad range of time, extending well before the drafting of the U.S. Constitution or even the Articles of Confederation. Compacts are, therefore, the oldest mechanism available to promote formal interstate cooperation, having their roots in the American colonial era, when each colony was related directly to the King and, therefore, enjoyed a measure of independence from every other colony. There was no "federal" system of colonial government and no government with national scope and power. While the colonies were clearly "related" to one another through geography, economy, and culture, there was no recognition of formal governmental relationships existing separate and apart from their direct accountability to the Crown. For both philosophical and practical reasons, Britain could not allow the colonies to create alternative government structures separate from the Crown, and, consequently, no intracontinental government with national power and scope existed prior to the Revolution. As a result, all intercolonial disputes were submitted to the Crown for resolution because the colonies lacked the authority to independently resolve their differences or manage their intercolonial relations.

6. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104 (1938).

Well before the United States was established under the Articles of Confederation and Perpetual Union ("Articles of Confederation"), colonial authorities had experience using mechanisms and processes similar to compacts to resolve their disputes. Most intercolonial disputes generally involved boundary controversies that arose from the various royal land charters under which the colonies were founded. These charters were by definition and operation vague and expansive, applying to lands that lacked adequate surveys and for which formal possession was questionable. For example, the U.S. Supreme Court recently noted in *Virginia v. Maryland* that "Control of the [Potomac] River has been disputed for nearly 400 years. In the 17th century, both Maryland and Virginia laid claim to the River pursuant to conflicting royal charters issued by different British Monarchs."[7] Moreover, the Plymouth Charter of 1628 gave to Sir Henry Rosewell land whose true territorial definition was left open to wildly varying interpretations. That charter and subsequent amendments formed part of the basis for a land dispute that led to the Supreme Court's intervention in *Rhode Island v. Massachusetts.*[8]

Matters became more complicated with the expansion of the colonies geographically and in terms of their migrating populations. As populations moved further west, Atlantic Coast colonies made extravagant claims to portions of the interior continent based in part on their broad land charters and in part on the principle that possession was nine-tenths of the law. Consequently, boundary disputes between the colonies were inevitable and the Crown, through the Privy Council, was required to settle a number of border disputes. In 1727, for example, the Privy Council resolved a dispute between Rhode Island and Connecticut. This was followed by cases between New Hampshire and Massachusetts in 1740 and between Rhode Island and Massachusetts in 1746. The need for a method to continually address boundary disputes contributed to the evolution of the "compact" process first expressed in the Articles of Confederation and later carried forward and formalized in Article I, Section 10 of the U.S. Constitution.

Although frequently thought of in terms of allowing states to enter compacts, the Articles of Confederation and later the Constitution speak to interstate compacts in restrictive or limiting language, not authorizing their creation but restraining their creation. Beginning with the Articles of Confederation, the Founders restricted the ability of the states to join in formal, common enterprises or allegiances. Although they recognized that each state retained "its sovereignty, freedom and independence," the Articles of Confederation

7. Virginia v. Maryland, 540 U.S. 56, 60 (2003).
8. Rhode Island v. Massachusetts, 37 U.S. 657, 659-60 (1838).

placed limitations on multilateral state action by providing that no state could enter "any treaty, confederation or alliance whatever between them, without the consent . . . of Congress[.]"[9] This provision regarding interstate compacts was meant primarily as a preventive measure; that is, the provision's purpose was to limit the ability of the states to act collectively through compacts or other formal arrangements absent congressional consent.

The reasons behind the restrictive nature of the compact clauses contained in the Articles of Confederation and the Constitution rested in concern for what today is sometimes referred to as the "collective action" problem of federalism.[10] Collective action occurs when two or more states seek to maximize their sovereignty and political power through collective, joint or cooperative efforts at the expense of other states or regions, or even the federal government. The concern over collective action was so compelling that the drafters of the Articles provided that Congress alone was to be the "last resort on appeal in all disputes and differences . . . between two or more States concerning boundary, jurisdiction or any other cause whatever[.]"[11] Article IX of the Articles of Confederation created an elaborate procedural mechanism by which the "legislative or executive authority or lawful agent of any State in controversy with another" would petition Congress. In large part, the process conceived in the Articles of Confederation closely mirrored the process used by the Crown during the colonial era. Colonial disputes were either (1) negotiated, then submitted to the Crown for approval (a process similar to the compact method), or (2) appealed directly to the Crown through the Privy Council (a process similar to submitting state disputes directly to Congress).

Nevertheless, even the power the national government possessed under the Articles of Confederation regarding foreign relations was sometimes subject to the vagaries of the states, acting individually or collectively. Although the restrictions contained in the Articles of Confederation were meant to protect what little power the national government enjoyed from state encroachment, the restrictions did not prove effective with the passage of time. Concern over

9. Articles of Confederation, art. VI (U.S. 1781) ("No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.").
10. *See, e.g.*, Note, *To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842, 844-47 (1989).
11. Articles of Confederation, art. IX (U.S. 1781).

collective state action continued to be a focus of the evolving government. The "consent" requirement set out in Article I, Section 10 of the Constitution was a carryover from the Articles of Confederation. It was intended to continue the principle that through its consent powers, the Congress would be a counterweight against potentially harmful collective state action that could erode the viability and sovereignty of the national government.

Comparisons have been made between Article I, Section 10, Clause 1 of the Constitution—the Treaty Clause—and Article I, Section 10, Clause 3—the Compact Clause. The Treaty Clause declares that "No State, shall enter into Any Treaty, Alliance or Confederation."[12] By contrast, the Compact Clause declares that "No State shall, without the Consent of Congress * * * enter into any Agreement or Compact with another State[.]"[13] The history of interstate agreements under the Articles of Confederation suggests a distinction between "treaties, alliances, and confederations" and "agreements and compacts." Congressional consent clearly was required before a state could enter into an arrangement with a foreign state or power, or before two or more states could enter into "treaties, alliances, or confederations."[14] Apparently, however, under the Articles of Confederation consent was not required for mere "agreements" between states. As the Supreme Court observed in *Wharton v. Wise,* "[t]he articles inhibiting any treaty, confederation, or alliance between the States without the consent of Congress . . . were not designed to prevent arrangements between adjoining States to facilitate the free intercourse of their citizens, or remove barriers to their peace and prosperity[.]"[15] Yet the records of the Constitutional Convention reveal no clues as to the contours of agreements governed by the Compact Clause. The lack of definition flowing from convention records suggests that the Framers employed the words "treaty," "compact," and "agreement" as terms of art, for which no explanation was required.[16] The Framers apparently perceived compacts and agreements as differing from treaties.

As a result, compacts between states have always been treated differently than treaties between states and foreign nations. Courts have been far more lenient to defining exceptions to the restrictions of the Compact Clause than they have been relative to defining the contours of the Treaty Clause. For example, the Virginia-Maryland Compact of 1785, which governed navigation and fishing rights in the Potomac River, the Pocomoke River, and the Chesapeake Bay, did not receive congressional consent. Yet no question of its validity under the Articles of Confederation ever arose. In referring to this 1785 compact in *Wharton v. Wise,* the Supreme Court noted:

> [L]ooking at the object evidently intended by the prohibition of the Articles of Confederation, we are clear they were not directed against agreements of the character expressed by the compact under consideration. Its execution could in no respect encroach upon or weaken the general authority of Congress under those articles. Various compacts were entered into between Pennsylvania and New Jersey and between Pennsylvania and Virginia, during the Confederation, in reference to boundaries between them, and to rights of fishery in their waters, and to titles to land in their respective States, without the consent of Congress, which indicated that such consent was not deemed essential to their validity.[17]

Whatever explicit understanding the Framers had behind the intent of Article I, Section 10 has been lost. In trying to reconcile competing provisions, Justice Story developed a theory that treaties, alliances, and confederations generally connote military and political accords forbidden to states. Compacts and agreements, by contrast, embraced "mere private rights of sovereignty, such as questions of boundary; interests in land situated in the territory of each other; and other internal regulations for the mutual comfort and convenience of States bordering on each other."[18] In the latter situations, congressional consent was required "in order to check any infringement of the rights of the national government."[19] Although for many years the Supreme Court's compact jurisprudence was at best inconclusive and at worst convoluted, the principles articulated by Justice Story have dominated. Courts faced with the task of applying the Compact Clause were reluctant to strike down emerging forms of interstate cooperation. The need to reconcile interstate cooperation with the broad restrictive language of the Constitution dictated a more discriminating jurisprudence. For example, in *Union Branch R. Co. v. East Tennessee & G.R. Co.*,[20] the Supreme Court of Georgia rejected a

12. U.S. CONST. art. I, § 10, cl. 1.
13. U.S. CONST. art. I, § 10, cl. 3.
14. Articles of Confederation, art. VI (U.S. 1781).
15. Wharton v. Wise, 153 U.S. 155, 167 (1894).
16. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978).
17. Wharton v. Wise, 153 U.S. 155, 170-71 (1894).
18. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1403, p. 264 (T. Cooley ed. 1873).
19. *Id.*
20. Union Branch R.R. Co. v. East Tenn. & G.R.R. Co., 14 Ga. 327 (Ga. 1853).

Compact Clause challenge to an agreement between Tennessee and Georgia concerning the construction of an interstate railroad, concluding that the Compact Clause restrained the power of the states only with respect to agreements "which might limit, or infringe upon a full and complete execution by the General Government, of the powers intended to be delegated by the Federal Constitution[.]"[21]

Courts, therefore, acknowledged early in the development of compact jurisprudence two important principles: (1) that the federal structure of the nation required a "state-based" approach for joint action to resolve interstate disputes; and (2) that some form of national control was necessary to maintaining the integrity of the newly established union.[22] The Compact Clause of the Constitution was and is viewed as a continued expression of the Framers' intent to maintain some semblance of national control over interstate relations, and particularly the amalgamation of political power in the states collectively or in more politically powerful states and regions. When the Framers spoke of congressional consent, it is clear that they sought to vindicate the legislative power of Congress *and* protect the power of the entire federal government.[23] James Madison in particular was concerned with the tendency of states and regions to "partition the Union into several Confederacies."[24] The Supreme Court has repeatedly observed that the purpose of the constitutional restriction is to limit agreements that are directed to the formation of *any* combinations tending to increase power in the states that encroach upon or interfere with the supremacy of the national government.[25] In *Port Authority Trans-Hudson Corp. v. Feeney,* the Supreme Court noted that "[t]he Interstate Compact Clause and the State Treaty Clause ensure that whatever sovereignty a State possesses within its own sphere of authority ends at its political border."[26] As one observer has stated, "[t]he basic purpose of the constitutional requirement of Congressional consent is to make certain that no such agreements [those affecting the balance of power in the federal structure] can stand against the will of Congress."[27] Without the restrictive nature of the Compact Clause, there would be no prohibition against the creation of state allegiances and confederacies, potentially resulting in the erosion of federal power and ultimately the deconstruction of the Union.

21. *Id.* at 339.
22. Michael L. Buenger & Richard L. Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 ROGER WILLIAMS U. L. REV. 71, 81 (2003).
23. Milk Indus. Found. v. Glickman, 132 F.3d 1467 (D.C. Cir. 1998).
24. Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), in 10 THE PAPERS OF JAMES MADISON 310, 312 (Robert A. Rutland et al. eds., 1977).
25. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978).
26. Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 314-15 (1990).

The restrictive language of the Compact Clause would seem to prohibit any states from entering into any agreements or compacts absent the consent of Congress. This was the general understanding of the Compact Clause throughout much of the eighteenth and nineteenth centuries. James Madison found the restriction so straightforward that he observed in *The Federalist 44* that "[the] remaining particulars of this clause fall within reasons which are either so obvious, or have been so fully developed, that they may be passed over without remark."[28] For part of the nation's history, therefore, the Compact Clause was seen as sufficiently broad and restrictive to render any interstate compacts void absent consent by Congress. The importance of the restrictive nature of the Compact Clause cannot be underestimated. The restrictiveness of the provision and the judiciary's application of that restrictiveness may be one of the reasons so few compacts were entered into for most of the nation's early history. Compacts were generally viewed by most legal scholars of the age as limited primarily to addressing state boundary disputes, as in the cases of *Rhode Island v. Massachusetts*[29] and *Virginia v. Tennessee*.[30] At least this was the practical effect, since all but one of some 36 compacts entered into before 1921 addressed state boundary disputes.

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

1.2 THE NATURE OF INTERSTATE COMPACTS

1.2.1 General Considerations

Compacts hold a unique place in American law in part because of their growing reach and in part because of the status of the parties to such agree-

27. FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 22 (Council of State Governments 1976).
28. THE FEDERALIST No. 44 (James Madison).
29. Rhode Island v. Massachusetts, 37 U.S. 657, 729 (1838).
30. Virginia v. Tennessee, 148 U.S. 503 (1893).

ments. Within the federal system of American government, states occupy a quasi-sovereign status. The function and purposes of interstate compacts can only be understood and appreciated by accepting that states are not mere political subdivisions of the national government. Rather, they exist in a coterminous relationship with the federal government, enjoying within the realm of their authority a level of sovereignty that is not dependent upon or a simple byproduct of the federal government's national sovereignty. As the Supreme Court noted in *Alden v. Maine*:

> The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The states "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."
>
> Second, even as to matters within the competence of the national government, the constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon the States" in favor of "a system in which the State and Federal Governments would exercise concurrent authority over the people."[31]

The status of states as possessing "primary sovereignty" impacts interstate agreements and particularly interstate compacts. Rather than acting as mere political subdivisions or agents of the federal government, states have full authority within the realm of their responsibilities and powers to make limited, self-determinative agreements with sister states, each state acting in a "sovereign capacity." Moreover, because states possess sovereignty relative to each other, interstate problems can be resolved only through either the judicial process, entailing a litigation-based solution, or through a legislative process that embraces negotiation and self-determinative agreements. Absent judicial endorsement, one state cannot unilaterally impose its will on other states, for to do so would violate fundamental principles of sovereignty and independence, undermining the status of states as *equal* members in a union. However, only to the extent that multilateral agreements among states invade federal interests do the agreements become a concern for Congress acting to protect its interests. The ability to negotiate and enter interstate agreements that are binding is a far different power from that possessed by true political

31. Alden v. Maine, 527 U.S. 706, 714 (1999).

subdivisions of government, such as counties or municipalities, whose powers and authority are subject to expansion or contraction depending upon the will of central state authority. States can, therefore, through individual and collective action, enter into agreements with other states that control current and future state action. Here lies both the beauty and difficulty of interstate compacts.

One reason so few compacts have been entered into throughout the history of the nation may have to do with their oddity within the federal structure of American government. Arguably, interstate compacts violate the pure principles of federalism because they bring into formal contact independent government units and allow those units (the states) in some circumstances to create sub-federal, supra-state administrative agencies: a third tier of governing authority created by the collective action of the member states but not subject to the single authority of any one state. The use of interstate compacts as governing mechanisms addressing interstate matters beyond common boundary disputes is largely a development of the twentieth century, compelled by the explosion in interstate issues and the continuing development of government institutions in response to the economic, political, and social integration of the nation. Therefore, the use of interstate compacts to create ongoing administrative and regulatory agencies is a natural outgrowth of modern government and a necessity if states intend to manage their multilateral relationships short of federal preemption. For example, the creation of the Washington Metropolitan Area Transit Authority (WMATA) by an interstate compact[32] was arguably inevitable given the growing infrastructure needs of the Washington, D.C. metropolitan area. Absent federal intervention, an interstate compact between the District of Columbia, Maryland, and Virginia offered the only *fully binding* mechanism to resolve a complex multistate issue of exceeding importance to that region: the creation, integration and management of mass transit systems in an urban area spanning several independent and sovereign governmental units. Likewise, the air transportation needs of that area resulted in the adoption of an interstate compact between the District of Columbia and the Commonwealth of Virginia creating the Metropolitan Washington Airport Authority to administer Reagan National Airport and Dulles International Airport. Both of these compacts illustrate the need to take a regional approach to multistate regulation, an approach that recognizes that many affairs, and particularly those of large multistate metropolitan areas, ignore state boundaries and therefore can only be addressed on a regional basis with quasi-regional governments not directly answerable to any particular state.

32. Washington Metropolitan Area Transit Regulation Compact (1981).

The modern use of interstate compacts has raised new issues regarding congressional consent requirements, administration of compact affairs, and the breadth of topics subject to resolution through the compact mechanism. Compacts come in various natures, the subject matter of which is limited only by the creativity of the drafters, the readiness of state legislatures to adopt a compact, and the willingness of Congress to give its consent, if necessary. An unusual feature of an interstate compact does not make it invalid; the combined legislative powers of Congress and of the several states permit a wide range of permutations and combinations for governmental action.[33] Consequently, Congress and the states can construct alternative regional governments with particularized powers notwithstanding any specific constitutional principles authorizing such government units. The subject matter of an interstate compact is not, therefore, limited by any specific constitutional restrictions; rather, as with any "contract," the subject matter is largely left to the discretion of the parties, in this case the member states and Congress in the exercise of its consent authority, if applicable. As will be discussed in greater detail, when it approves a compact, Congress exercises the legislative power that the compact threatens to encroach upon, and declares that the compact is consistent with Congress's supreme power in that area. This is, in effect, the only restriction on either the compacting process or specific subject matter of the agreement short of finding the compact itself unconstitutional. Accordingly, just as Congress may itself enact a law that interferes with interstate commerce, for example, it may also give approval to a multi-state compact interfering with interstate commerce.[34] Compacts can, therefore, affect national interests, but generally only in those cases where Congress consents.

Because of the broad nature of the compact instrument, it is difficult to categorize neatly or with great specificity the types of compacts now in effect. Some have tried to categorize compacts along very fine lines of delineation, such as facilities (bridges and tunnels), marketing and development (promoting sale of agricultural products), or lottery (to administer interstate lotteries), to name just a few examples. In fact, some broader generalizations or characterizations can be made that essentially divide compacts into three categories. Perhaps the most familiar compacts are boundary compacts, which establish official borders between states. Examples of such compacts include the Virginia-Tennessee Boundary Agreement of 1803, the Arizona-California

33. Seattle Master Builders Ass'n v. Pac. N.W. Elec. Power & Conservation Planning Council, 786 F.2d 1359 (9th Cir. 1986).
34. Intake Water Co. v. Yellowstone River Compact Comm'n, 590 F. Supp. 293 (D. Mont. 1983).

Boundary Compact of 1963, the Missouri-Nebraska Boundary Compact of 1999, and the Virginia-West Virginia Boundary Compact of 1998. Such compacts are intended to resolve outstanding jurisdictional questions between the member states and provide the only means for adjusting borders given the sovereign status of states. Boundary compacts are truly "one-shot" agreements in the sense that they do not call for the creation of ongoing administrative agencies but nevertheless resolve an interstate dispute with a high degree of finality. Such compacts are, in the end, the simplest compacts to implement because of the immediate permanency of the outcome, although the negotiations to reach consensus can be quite contentious.

It is important to note that boundary compacts can have far-reaching effects. While perhaps simple in their immediate implementation, boundary compacts can implicate a wide array of matters extending to such issues as fishing rights, taxing authority, law enforcement, transportation, and the like. For example, the Coastal Zone Management Act of 1972[35] relied upon existing or amended interstate compacts and the principle of delimination to determine whether offshore resource development was "adjacent" to a state. This determination was important because under the Coastal Energy Impact Program (CEIP), federal financial assistance was available to those coastal states off whose shores resource development was being conducted on the outer continental shelf.[36] As a result, the geographical description of the areas "adjacent" to each coastal state and the use of interstate compacts or judicial determinations had a direct impact on the amount of funds a state could realize from the program. Boundary compacts are not inconsequential.

A second category of compacts is "advisory" compacts. Such compacts are more akin to administrative agreements between states, primarily because they lack formal enforcement mechanisms and are designed not to actually resolve an interstate matter, but simply to study such matters. An example of such a compact is the Delmarva Peninsula Advisory Council Compact between Delaware, Maryland, and Virginia.[37] While creating a formal interstate body, this compact limits the council to identifying the perceived regional problems; finding solutions that improve economic conditions, quality of

35. 16 U.S.C. § 1456a(b)(4)(B) (1976).
36. The Coastal Energy Impact Program (CEIP) was established under the Coastal Zone Management Act of 1972, Pub. L. No. 92-583, § 308, 86 Stat. 1280, as amended by Coastal Zone Management Act Amendments of 1976, Pub. L. No. 94-370, § 7, 90 Stat. 1013 (codified at 16 U.S.C. § 1451 (1979)).
37. DEL. CODE ANN. tit. 29, § 11101 (2003); VA. CODE ANN. § 2.2-5800 (2003).

life, and environmental concerns of the Delmarva Peninsula; and reporting the findings to the states' leaders.

By their very terms, advisory compacts cede no state sovereignty nor delegate any governing power to a compact-created agency. As such, advisory compacts generally do not require congressional consent because they do not contribute to political combinations that would be detrimental to the supremacy of the federal government. However, states may seek federal participation in advisory compacts out of concern that the end result of the study may lead to agreements that impact federal interests—for example, studies that may lead to agreements on management of navigable rivers or riparian rights. Seeking federal participation in this context may be precautionary and prudent; it is not, however, *legally* required or absolutely necessary if the end result is merely advisory to the member states. Congress may even promote such advisory compacts, as it arguably did by creating the Northern Great Plains Regional Authority, charging that body with developing and coordinating economic development plans and making appropriate recommendations to the states and federal government.[38] However, one must distinguish between federal participation in an advisory compact and the need to obtain congressional consent to such compacts. While the federal government may be a participant, it is questionable whether congressional consent, even if granted, would have any legal impact because of the nonbinding advisory nature of the agreement.

Finally, the broadest and largest category of interstate compact may be called "regulatory" or "administrative" compacts. Such compacts, which are largely a development of the twentieth century, embrace wide-ranging topics, including regional planning and development, crime control, agriculture, flood control, water-resource management, education, mental health, juvenile delinquency, child support, and so forth. Examples of such compacts include the Southern Dairy Compact[39] (regulate and provide regional price support for dairies); the Interstate Compact for Adult Offender Supervision (regulate the movement of adult offenders across state lines); the Midwest Radioactive Waste

38. 7 U.S.C. § 2009bb-1 (2003).

39. The implementation of the federally funded farm bill program—the Milk Income Loss Contract (MILC), 7 C.F.R. § 1430.202 (2004)—by the U.S. Department of Agriculture on August 13, 2002, superseded state price support and marketing legislation, including several dairy compacts. Consequently, state dairy compacts may be listed as dormant. However, this federal program runs through September 30, 2005, at which time state dairy compacts may be reactivated.

Disposal Compact (regulate radioactive waste disposal); the Columbia River Gorge Compact (zoning regulation, planning and development); the Interstate Mining Compact (establish a commission to promote conservation and standards for land restoration, and promote natural resource development); the Tahoe Regional Planning Compact (creates an administrative agency and regulates land use, development, and riparian rights in the Lake Tahoe Basin); and the Washington Metropolitan Area Transit Regulation Compact (regulates passenger transportation by private carrier). Perhaps the best-known and first truly "regulatory" compact is the 1921 Port Authority of New York–New Jersey Compact, which provides joint agency regulation of transportation, terminal, commerce, and trade facilities in the New York City metropolitan area. The New York–New Jersey Port Authority Compact represents the beginning of a shift in the use of compacts away from making border adjustments and toward regulating a broad class of interstate activities through the creation of supra-state, sub-federal administrative agencies.

Although boundary and advisory compacts continue to exist, and boundary compacts continue to be used on an irregular basis, it is the administrative compact that has become the subject of great interest in recent years.[40] Administrative compacts empower the member states, acting in their joint and collective capacity, to provide coordinated regulation on a broad range of activities largely without regard to state borders. Most important, many administrative compacts have given rise to independent and ongoing administrative agencies, such as the New York–New Jersey Port Authority, that occupy a unique space in the design of American government. Such commissions are neither federal in nature nor state in scope. Administrative compacts have created powerful governing commissions appropriately described as a "third tier" of government, a tier that occupies that space between the sphere of federal authority and the sphere of individual state authority.

1.2.2 Contracts Between States

In defining the nature of compacts, it is perhaps more useful to define what they are not. While enacted virtually identically by every party state's legislative body, compacts are not uniform laws or model laws as those terms are typically understood in the legal community. Uniform laws—such as the

40. One of the most recent boundary compacts is the Missouri-Nebraska Boundary Compact, which sought to address state-line issues as a result of changes in the channel of the Missouri River. *See* Pub. L. No. 106-101, 113 Stat. 1333 (1999). *See also* Red River Boundary Compact, Pub. L. No. 106-288,114 Stat. 919 (2000).

Uniform Commercial Code, the Uniform Probate Code, and the Gifts to Minors Act—are enacted largely verbatim in each state. Model acts are designed to serve as guideline legislation that states can borrow from or adapt to suit their individual needs and conditions. Promulgated by the National Conference of Commissioners on Uniform State Laws, uniform acts represent the outcome of an effort to study and review the laws of the states and determine which areas should be uniform between the states. Legislatures are urged to adopt uniform acts exactly as written to promote such uniformity.

Although legislatures are urged to adopt uniform acts as written, they are not required to do so and may make changes to fit individual state needs. Uniform acts do not constitute a contract between the states, even if adopted by all states in the same form, and thus, unlike contracts, are not binding upon or enforceable *against* the states. Each state retains complete authority to unilaterally amend or change such codes to meet its unique circumstances. There is no prohibition in uniform acts limiting the ability of state legislatures to alter particular provisions as times change or to address the peculiar domestic political circumstances in a state. A state may, in the exercise of its authority over intrastate matters, amend or repeal a uniform law in total. Although there may be a common understanding among state legislatures that uniform acts require uniformity to be effective on a national basis, there is no legal consequence to a state ignoring the desire or need for such uniformity. The failure of a state to enact or maintain "uniformity" carries no legal consequence; one state cannot sue another state in the U.S. Supreme Court for damages or enforcement of a uniformity requirement. Consequently, there exist variations between states in their respective versions of the Uniform Commercial Code. It is not uncommon, therefore, to find many "uniform" laws distinctly non-uniform when compared on a state-to-state basis.

Neither are compacts administrative agreements between state agencies entered into to ease the flow of commerce, information, or the like across state lines. Such agreements, frequently created by comparable state executive agencies, usually subject to some prior legislative approval, have limited application and effect. For example, the Pennsylvania state legislature has specifically authorized the execution of administrative agreements between its state agencies and those of other states for the purpose of air pollution control.[41] A reciprocity provision of an act that empowers a secretary of state to ascertain which states grant reciprocity to other residents and to embody the findings in the official form of a "reciprocity agreement" does not rise to

41. One example of a legislatively authorized administrative agreement can be found at, 35 PA. CONS. STAT. § 4103 (2003).

the level of a formal interstate compact such as to fall within the domain of the Compact Clause.[42] Statutes creating an executive department may also enable such departments to enter into reciprocal agreements with other states' agencies without further action by a state legislature.[43] Such agreements are subject to amendment through the administrative process and are clearly subject to unilateral change by individual member states, mainly because administrative agreements, even when authorized by a state legislature, cannot bind the hands of the legislature as to changing the substantive law at some future point.

Interstate compacts have qualities similar to both uniform laws and administrative agreements. They are clearly uniform between member states as evidenced by the enactment of virtually identical statutes by the legislatures of each member state. Likewise, many modern compacts address administrative matters and frequently create ongoing agencies. Compacts may even authorize the creation of "sub-compact" reciprocal agreements between member states.[44] However, compacts are a fundamental departure from the more common mechanisms of state-based adjustments to interstate relations or the creation of uniformity between states because they are fundamentally instruments for contractually allocating collective state governing authority. This in turn may require the member states to cede a portion of their individual sovereignty for the collective good of the member states. Therefore, compacts, when properly enacted, are fully enforceable contracts between the members in addition to possessing legal standing within each state. Unlike administrative agreements or uniform laws, interstate compacts are the sole example of the power of one state legislature to bind all future legislatures to certain principles governing the subject matter of the agreement. The Contracts Clause of the U.S. Constitution prohibits the impairment of contracts, and that prohibition extends to interstate compacts.

For example, in the case of the Interstate Compact for Adult Offender Supervision, all member states are bound in an enforceable agreement governing the controlled movement of adult offenders across state lines. Any subsequent legislative act by a member state, short of outright repeal pursuant to the terms of the compact, cannot substantively change the nature of the relationship between the member states nor the governing principles outlined in the compact. In effect, by agreeing to enter into a compact, member states

42. Bode v. Barrett, 106 N.E.2d 521 (Ill. 1952).
43. Roberts Tobacco Co. v. Michigan Dep't of Revenue, 34 N.W.2d 54 (Mich. 1948).
44. State v. Manning, 532 N.W.2d 244 (Minn. 1995).

contractually cede a portion of their individual jurisdiction, sovereignty, and authority over the subject matter of the compact in favor of certain governing principles that apply collectively to all member states. As observed in *Hellmuth v. WMATA*: "Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties. It, therefore, appears settled that one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories."[45] This ceding of sovereign authority is a vital consideration in determining whether an interstate agreement rises to the level of an enforceable interstate compact. It is a concession to all member states that an individual state cannot subsequently alter absent an outright repeal of the agreement (if permitted) or the consent of all other member states.

The contractual nature of compacts is evidenced by the principles underlying their adoption. Interstate compacts are initiated when member states adopt enabling statutes. The act of adoption of such statutes creates contractual obligations between the states. There is an offer (a proposal to enact virtually verbatim statutes by each member state), an acceptance (enactment of the statutes by the member states), and consideration (the settlement of a dispute, creation of an association, or some mechanism to address an issue of mutual interest). Many compacts also contain provisions for withdrawal or termination.[46] Compacts are most often entered by state legislatures adopting virtually identical statutes. However, compacts can also be activated by legislative acts authorizing entry into force by administrative action. For example, the Nonresident Violator Compact of 1977 specifically provides that the compact may be entered into force "by resolution of ratification, executed by authorized officials of the applying jurisdiction."[47] However, the language of the compact must specifically provide a mechanism for entry into force by administrative action for the compact to be valid and binding. If a state uses an administrative act without specific compact authorization, the compact may be null and void as to that state. For example, the Drivers License Compact of 1961 specifically provided that the compact "enter[s] into force and becomes effective as to any state when it has enacted the [Compact] into law."[48] The Pennsylvania Supreme Court held in *Sullivan v. Department of Transportation* that the compact was not in effect in that state because the legislature enacted a statute empowering the secretary of the department of transportation to enter into the compact rather than enact the specific language of the compact as required.[49] In reaching its conclusion, the court held that since the compact was a contract, Pennsylvania law required the court to interpret the compact within the four-corners of the instrument and nowhere in the instrument was administrative action authorized as a means of adoption.

It is important, therefore, to appreciate that compacts are more than mere intergovernmental agreements or informal administrative alliances. Although passed by state legislatures in essentially the same form, compacts are not "uniform laws" as that term is commonly understood. While uniform acts unify state laws as to those states adopting them, compacts provide the enforcement tools uniform laws lack, not only as to the populace but also as to the states themselves. Compacts are, therefore, a more powerful—albeit complex—tool for promoting *uniform state behavior* as to the subject matter of the compact. Compacts are binding legal contracts with their terms and conditions controlling—even trumping—the actions and conduct of the member states concerning the subject matter of the compact.[50] As one court has noted:

45. Hellmuth v. Wash. Metro. Area Transit Auth., 414 F. Supp. 408, 409 (D. Md. 1976).
46. For example, Article XII, Section A of the Interstate Compact for Adult Offender Supervision ("ICAOS") provides, "Once effective, the Compact shall continue in force and remain binding upon each and every Compacting State; PROVIDED, that a Compacting State may withdraw from the Compact ("Withdrawing State") by enacting a statute specifically repealing the statute which enacted the Compact into law." The provision goes on to describe the procedure by which a state actually withdraws including notice requirements, the effective date of withdraw, and state's post-withdrawal responsibilities regarding assessments, liabilities, and obligations.
47. Nonresident Violator Compact, art. XII (1994).
48. Drivers License Compact, art. XII(a) (1994).
49. Sullivan v. Dep't of Transp., 708 A.2d 481 (Pa. 1998).
50. *See, e.g.*, Missouri v. Illinois, 200 U.S. 496, 519 (1906) ("The compact, by the sanction of Congress, had become a law of the Union. A state law which violated it was unconstitutional."). *See also* Nebraska v. Central Interstate Low-Level Radioactive Waste Comm'n, 207 F.3d 1021 (8th Cir. 2000) (State cannot unilaterally exercise a veto when such is not authorized by the compact.); Rhode Island v. Massachusetts, 37 U.S. 657, 725 (1838) ("By this surrender of the power, which before the adoption of the constitution was vested in every state * * * as in the plenitude of their sovereignty they might; they could settle them neither by war, or in peace, by treaty, compact or

> An interstate compact functions as a contract and "takes precedence over statutory law in member states." The law of interstate compacts as interpreted by the U.S. Supreme Court is clear that interstate compacts are the highest form of state statutory law, having precedence over conflicting state statutes [.] Having entered into a contract, a participant state may not unilaterally change its terms.[51]

The fact that compacts are creations and creatures of individual state legislatures in no way alters their status as enforceable contractual obligations between member states. Many compacts constitute an unmistakable surrendering of state authority that is binding on subsequent state legislative action. Such compacts are, therefore, examples of the so-called "unmistakability doctrine" at work. The impetus for the modern unmistakability doctrine is found in Chief Justice Marshall's application of the Contract Clause to public contracts. Although the clause made it possible for state legislatures to bind their successors by entering into contracts, it soon became apparent that such contracts could become a threat to the sovereign responsibilities of state governments. Accordingly, courts became less willing to recognize contractual restraints upon legislative freedom of action, and two distinct limitations developed to protect state regulatory powers. One came to be known as the "reserved powers" doctrine, which held that certain substantive powers of sovereignty could not be contracted away. The other, which surfaced somewhat earlier, was a canon of construction disfavoring implied governmental obligations in public contracts. Under this rule, "all public grants are strictly construed."[52] Consequently, no "power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken."[53] Most administrative compacts constitute an unmistakable surrendering of state power.

agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. 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, when given, left the states as they were before * * * whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers.").

51. Doe v. Ward, 124 F. Supp.2d 900, 914-15 (W.D. Pa. 2000), *citing* McComb v. Wambaugh, 934 F.2d 474, 479 (3d Cir. 1991).
52. The Delaware Railroad Tax, 85 U.S. 206 (1874).
53. Jefferson Branch Bank v. Skelly, 66 U.S. 436 (1862).

As a contract, the terms and conditions of the compact define each party state's responsibility. For example, one term contained in the compact creating the Metropolitan Washington Airport Authority is a requirement that original jurisdiction over compact matters is vested in the courts of Virginia and that the courts "shall in all cases apply the law of the Commonwealth of Virginia."[54] Pursuant to the compact, the party states—in this case Virginia and the District of Columbia— have contractually agreed that Virginia law shall be controlling and that the courts of Virginia will be the choice of forum for resolving litigation matters. Moreover, even if suit is brought in federal court, the party states have agreed that the federal courts will apply Virginia law in any dispute or litigation. In approving this compact, Congress consented to these choice of law provisions as binding elements in the agreement.[55] Therefore, just as a contract between private parties can validly contain choice of law and choice of forum provisions, so too can an interstate compact.

This is not to say, however, that compacts are contracts on par with commercial agreements. Although termed a "contract" and effectuated by offer, acceptance and consideration, interstate compacts represent a political compromise between constituent elements of the Union. Such agreements are made to address interests and problems that do not coincide easily with the national boundaries or state lines—interests that may be badly served or not served at all by the ordinary channels of national or state political action. By entering into a compact, the member states contractually agree on certain principles and rules concerning the exercise of joint governing authority over the subject matter of the compact. As noted in *Hess v. Port Authority Trans-Hudson Corporation*, "[a]n interstate compact, by its very nature, shifts a part of a state's authority to another state or states, or to the agency the several states jointly create to run the compact."[56] For example, in a boundary compact, the member states agree to certain principles dividing their respective governing authority over a disputed boundary. In effect, they contracted away their respective sovereignty relative to certain parcels of land. While one might argue that the consideration for a boundary compact is the land, the actual consideration is the reallocation of governing authority between the two states by settling a dispute over a geographical boundary. Likewise, in the adoption of many administrative compacts, the member states have collectively and contractually agreed to reallocate governing authority away from individual states to a multilateral relationship

54. Va. Code Ann. § 5.1-173(A) (2003); D.C. Code Ann. § 9-901 *et seq.* (2003).
55. Washington-Dulles Transport. Ltd. v. Metro. Wash. Airports Auth., 263 F.3d. 371 (4th Cir. 2001).
56. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 42 (1994).

defined by commonly accepted principles. Depending on the terms of the compact, states may effectively cede a portion of their individual sovereignty over the subject of the agreement.

A perfect example of states ceding their sovereignty through an interstate compact can be found in Article XIV, Sections A and B of the Interstate Compact for Adult Offender Supervision. These two sections of the compact provide, in part, that (1) "[a]ll compacting States' laws conflicting with this Compact are superseded to the extent of the conflict;" and (2) "All lawful actions of the Interstate Commission, including all Rules and By-laws promulgated by the Interstate Commission, are binding upon the Compacting States." The compact further provides that, "All agreements between the Interstate Commission and the Compacting States are binding in accordance with their terms." The drafters of the compact did provide two escape clauses concerning the binding effect of the compact and its rules. First, to the extent that a provision of the compact exceeds the constitutional limitations imposed on the legislature of any compacting state, "the duties, powers or jurisdiction sought to be conferred by such provision upon the Interstate Commission shall be ineffective and such obligations, duties, powers or jurisdiction shall remain in the Compacting State." Second, a rule of the commission may be rejected by a majority vote of the member states' legislatures. These are, however, the only means by which a state's sovereign interests may be protected from the actions of the commission, the states having generally ceded to the commission their sovereignty over the interstate movement of adult offenders.[57]

Once entered, the terms of the compact and any rules and regulations authorized by the compact can, to the extent provided in the agreement, supersede any substantive state laws that may be in conflict, including even state constitutional provisions. Under the Compact Clause, the federal questions are the execution, validity, and meaning of federally approved state compacts. A compact controls over a state's application of its own law through the Supremacy Clause and the Contracts Clause of the Constitution. As observed in *West Virginia ex rel. Dyer v. Sims:*

> It has frequently been held that when a question is suitably raised whether the law of a State has impaired the obligation of a contract, in violation of the constitutional provision, this Court must determine for itself whether a contract exists, what are its obligations, and whether they have been impaired by the legislation of the State. While this Court always examines with appropriate respect the decisions of state courts bearing upon such questions, such decisions do not detract from the responsibility of this Court in reaching its own conclusions as to the contract, its obligations and impairment, for otherwise the constitutional guaranty could not properly be enforced.[58]

57. *See generally* Interstate Compact for Adult Offender Supervision (2002).

The contractual nature of the agreement and its federal standing, where applicable, trumps individual state statutory schemes because, through the compact, the member states cede individual state authority in favor of a multilateral resolution to a dispute or in favor of multilateral regulation of an interstate matter. The member states cannot take unilateral steps, such as the adoption of conflicting legislation or the issuance of executive orders or court rules that violate the terms of a compact.[59] The standing of compacts, as contracts and instruments of national law applicable to the member states, generally nullifies any state action inconsistent with the terms and conditions of the agreement.

Therefore, once adopted, the only means available to change the substance of a compact (and the obligations it imposes on a member state) is through withdrawal and renegotiation of its terms, or through an amendment adopted by all member states in essentially the same form. The contractual nature of compacts controls over unilateral action by a state, including such actions as a state legislature's adoption of a contract under the compact clause, which could itself "impair the obligation of contracts." The "trumping" nature of compacts would extend not only to unilateral action by the state legislatures but also to unilateral actions by executive agencies and state courts. A state court could not unilaterally apply one state's law over another, absent a specific provision in the compact providing choice of law, because the signatories would not have consented to the broad application of a particular state's law to disputes.[60] For example, court rules that might conflict with a

58. West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 29 (1951). *See also* Kentucky v. Indiana, 281 U.S. 163 (1930); Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938).

59. *See,* Northeast Bancorp v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159 (1985) (reciprocal statutes passed by two states do not constitute a compact when states retain authority to unilaterally modify or repeal the statutes and the effect of the statutes is not conditioned upon the action of another state).

60. Hellmuth v. Wash. Metro. Area Transit Auth., 414 F. Supp. 408 (D. Md. 1976) (Maryland's public document act does not apply to WMATA as the compact did not contain a choice of law provision and the signatories did not agree to be bound by Maryland law).

provision in an interstate compact would most likely be void. Likewise, an executive order or departmental rules or policies that conflict with the terms and conditions of an interstate compact would also most likely be void.

The restrictive nature of a compact would not only extend to state actions, but would also extend to the actions of its political subdivisions. A county probation department could not act outside the parameters of the terms and rules of the Interstate Compact for Adult Offender Supervision in discharging its supervisory responsibilities over persons transferred into the state or in sending its probationers to another state. By entering into a compact, a state legislature binds "the state," including all of its governmental branches, departments, and political subdivisions.

There is, however, one exception to the general principle that, once adopted, member states cannot unilaterally impose individual state law on a compact or a compact-created commission. When a compact specifically reserves to the member states the authority to impose individual state law in an area governed by a compact, the imposition of that law is not nullified simply because the compact is an instrument of national law. Thus, as noted in *California Department of Transportation v. South Lake Tahoe* the application of state law to a bi-state entity is "precluded unless the Compact reserves * * * the right to impose such requirements."[61] The reservation of such rights in a compact can be a permissible element of the member states' agreement.

States are not, however, just parties to an ordinary, run-of-the-mill contract. The mere fact that the Supreme Court may exercise its very limited original jurisdiction in compact disputes is one indication of the importance the Framers attached to the status of states as sovereign members joined in a constituent union. This special status of states can present unique "contractual" issues, particularly with enforcing the terms of a compact. For example, in *South Dakota v. North Carolina,* the Supreme Court recognized the propriety of money judgments against states as part of an original action, but acknowledged that getting a state legislature to actually pay another state can present a unique problem.[62] However, the Supreme Court also noted in *Texas v. New Mexico*, "That there may be difficulties in enforcing judgments against States counsels caution, but does not undermine our authority to enter judgments against defendant States in cases over which the Court has undoubted jurisdiction, authority that is attested to by the fact that almost invariably the 'States against which judgments were rendered, conformably to their duty under the Constitution, voluntarily respected and gave effect to the same.'"[63] Thus, notwithstanding the special status of states and the challenges presented with enforcing compacts, compacts fundamentally constitute enforceable obligations between the states just as if the states were acting as private parties to a legal contract.

61. California Dep't of Transp. v. S. Lake Tahoe, 466 F. Supp. 527, 537 (E.D. Cal. 1978).

62. South Dakota v. North Carolina, 192 U.S. 286 (1904). *See also* Texas v. New Mexico, 482 U.S. 124, 130 (1987) ("The Court has recognized the propriety of money judgments against a State in an original action, and specifically in a case involving a compact. In proper original actions, the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a State." (citations omitted)). *See also* Maryland v. Louisiana, 451 U.S. 725 (1981). As to the limitations on actions to recover damages from states, *see* Kansas v. Colorado, 533 U.S. 1, 7 (2001) ("Colorado contends, however, that the Eleventh Amendment precludes any such recovery based on losses sustained by individual water users in Kansas. It is firmly established, and undisputed in this litigation, that the text of the Eleventh Amendment would bar a direct action against Colorado by citizens of Kansas. Moreover, we have several times held that a State may not invoke our original jurisdiction when it is merely acting as an agent or trustee for one or more of its citizens."). *See also* New Hampshire v. Louisiana, 108 U.S. 76 (1883) (court will not assume jurisdiction over an action to recover payment on defaulted bonds that had been formally assigned to the state but remained beneficially owned by private individuals; Eleventh Amendment bars jurisdiction where the state is only a nominal actor in the proceeding); North Dakota v. Minnesota, 263 U.S. 365 (1923), (state could obtain an injunction against the improper operation of Minnesota's drainage ditches, but the Eleventh Amendment barred damages based on injuries to individual farmers where the damages claim was financed by contributions from the farmers and the state had committed to dividing any recovery among the farmers in proportion to the amount of their loss); Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387 (1938) (to invoke original jurisdiction of the Supreme Court, a state must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest).

63. Texas v. New Mexico, 482 U.S. 124, 130-31 (1987) (by ratifying the Constitution, states gave Supreme Court complete judicial power to adjudicate disputes among them, and this power includes the capacity to provide one state a remedy for the breach of another).

1.3 THE ADVANTAGES AND DISADVANTAGES OF INTERSTATE COMPACTS

Administrative compacts are advantageous in managing multistate issues that do not typically fall within the ambit of federal authority. American

federalism rests on the shared exercise of government authority by two sovereign bodies, and thus solutions to problems have generally been conceived in term of exclusive duality. Those matters of national concern, such as interstate commerce, foreign affairs, and national defense, rest within the exclusive authority of the federal government, while the states exercise a significant portion of the nation's general police power as entities whose sovereignty is coterminous with that of the federal government's. Even today some argue that the "Constitution requires a distinction between what is truly national and what is truly local."[64] However, the experience of recent years shows that complex regional or national problems show little respect for the dual lines of federalism or the geographical boundaries of individual states. This fact has encouraged the reemergence of interstate compacts not only as devices for adjusting interstate relations but also as instruments for governing large regional or national issues.

As early as 1921, the U.S. Supreme Court noted in *New York v. New Jersey*: "We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."[65] The practicalities of governing a large, multifaceted, federally designed nation frequently blurs distinctions between what is distinctly "national" in scope and what is distinctly "local" in scope. The emergence of broad public policy issues that ignore state boundaries and the principles of federalism have presented new governing challenges to both state and federal authorities. Currently, some 30 of the largest metropolitan areas in the United States extend across state lines affecting almost 25 percent of the population of the United States and creating regional concerns.

This is precisely where interstate compacts provide an effective solution that respects fundamental principles of federalism, recognizing the supremacy of the federal government regarding national issues while allowing the states to take appropriate collective action in addressing supra-state problems. Thus, compacts enable the states, in their sovereign capacities, to act jointly and collectively, generally outside the confines of the federal legislative or regulatory process, while concomitantly respecting the view of Congress on the appropriateness of joint action. Because federal government agencies are generally politically removed from state interests, federal administrators tend not to emphasize regional concerns, thus portraying some insensitivity toward important state interests. The interstate compact provides states with the opportunity to offset this federal insensitivity. Equally important, compacts can effectively preempt federal interference into matters that are traditionally within the purview of the states but that have regional or national implications.

64. United States v. Morrison, 529 U.S. 598, 617-18 (2000) (holding unconstitutional the civil rights remedy of the Violence Against Women Act, 42 U.S.C. 13981).
65. New York v. New Jersey, 256 U.S. 296, 313 (1921).

Unlike federal actions that impose unilateral, rigid mandates, administrative compacts afford states the opportunity to develop dynamic, self-regulatory systems over which the member states can maintain control through a coordinated legislative and administrative process.[66] The very nature of an interstate compact makes it an ideal tool to meet the need of cooperative state action in developing and enforcing standards upon the member states. Compacts also enable the states to develop adaptive structures that can evolve to meet new and increased challenges that naturally arise over time.[67] In short, through the compact device, states acting jointly can control not only the solution to a problem but also shape the future agenda as the problem changes. However, to achieve the ends of flexibility and responsiveness, states must adopt compacts that provide sufficient elasticity to allow adaptation to address future developments.

Given these general benefits, interstate compacts also offer very specific benefits. First, compacts can be fashioned to provide for a high level of responsiveness to local and state needs. States in a specific region or involved with a specific issue are generally more familiar with the circumstances surrounding such problems than federal officials, who are generally more geographically and politically removed. This in turn allows for more responsive regulation than perhaps the federal regulatory process affords. State officials are, therefore, more likely sensitive to the type of regulation needed to address the problem efficiently and effectively.

66. It is important to note that compact-created agencies are not per se exempt from federal and state law simply as a function of being a unique creature of state action. Thus, the Family and Medical Leave Act, the Fair Labor Standards Act, and other acts may apply equally to compact-created agencies as to another agency of the states or the federal government, subject of course to consideration of Eleventh Amendment immunity. *Cf.*, Lizzi v. Alexander, 255 F.3d 128 (4th Cir. 2001).
67. The Supreme Court has recognized the flexibility of compacts to meet both immediate and future concerns. *See, e.g.*, Colorado v. Kansas, 320 U.S. 383, 392 (1943).

Second, interstate compacts can be structured to respect the balance of power among federal, state, and local interests. While many administrative compacts provide power to regulate cross-border problems, they can be structured to do so in a manner that preserves national interests while retaining sensitivity to more parochial interests. To a large extent the Compact Clause requirement of congressional consent to those compacts impacting federal interests ensures that federal concerns are at the forefront of compact design and construction, while simultaneously enabling states to maintain functional and regulatory control over an issue. Approval by Congress provides states with the authority to regulate in an area that would otherwise be unavailable to them. It should be noted, however, that while compacts may be designed to address local matters, they remain agreements between sovereign states and are not subject to control by sub-state units of local government.

Third, interstate compacts can broaden parochial focus by allowing states to act collectively and jointly in addressing regional and national problems. Making decisions based solely on an individual state's boundary can be problematic because, as noted, boundaries do not necessarily reflect the natural or logical divisions often present in many supra-state problems. Absent a binding agreement, state legislatures and state regulators generally do not make decisions that are likely to restrict their own citizens' activities based on the need to protect a neighboring state's interests. Consequently, an interstate compact provides the opportunity to make decisions across state boundaries without resorting to federalization as the only means for resolving matters that have broad cross-state implications. While respecting the boundaries, interstate compacts can enlarge the member states' sphere of power.

Finally, depending on its design and construction, an interstate compact can provide member states with a predictable, stable, and enforceable mechanism for policy control and implementation. Generally the contractual nature of the agreement, particularly in the regulatory context, ensures its effectiveness and enforceability on the member states. The fact that interstate compacts cannot be unilaterally amended provides member states with a predictable and stable policy platform for resolving problems. By entering into an interstate compact, each party state acquires the legal right to require the other states to perform under the terms and conditions of the compact.

The principle disadvantage of compacts may be characterized as threefold: (1) the long negotiations and arduous course they must run before becoming effective; (2) the ceding of traditional state sovereignty to quasi-independent bodies as required by several administrative compacts and the reluctance of states to cede such authority; and (3) compliance and enforceability. Interstate compacts are entered into force when state legislatures adopt the compact in substantively the same form if not outright verbatim.

Thus, to be effective, the compact instrument cannot substantively be altered by individual state legislatures solely to meet unique state needs. The very purpose of an interstate compact, which is to provide for the collective allocation of governing authority between member states, does not allow much room for individualism. The requirement of substantive sameness prevents member states from passing dissimilar enactments notwithstanding, perhaps, pressing state differences with respect to particular matters within the compact. For example, in the context of Midwest Radioactive Waste Compact, it is impossible for a member state to adopt provisions that substantively change the allocation of governing authority between all member states. However, as anyone who has attempted to get legislation through a state legislature knows, individual state concerns and intrastate political interests cannot be underestimated as a source for derailment. It is difficult to get state legislatures to adopt compacts because of the strict requirement of substantive sameness between all member states and the tendency of parochial political interest to trump consideration for interstate cooperation.

Secondly, by their nature, most interstate compacts—even boundary compacts—require member states to cede some portion of their sovereignty, an act many state legislatures only reluctantly agree to do. Although boundary compacts can present difficult sovereignty questions, the matter of state sovereignty becomes particularly problematic when interstate compacts create ongoing administrative bodies that possess substantial governing power. Such compacts are truly a creation of the twentieth century as an out-growth of the modern administrative state. Any compact that seeks to allocate governing authority—as distinguished from a compact that merely calls for study—necessarily implicates a reallocation of sovereignty away from the traditional control of the state and to an intermediate administrative agency that is largely unregulated by individual state action or concerns. By entering into many administrative compacts, state authorities effectively cede some portion of state control over a matter that was traditionally "state" in nature, but which has become supra-state in scope. In place of individual state management, states have tilted toward the creation of supra-state administrative and management structures. This ceding of traditional state sovereignty to supra-state administrative bodies effectively means that individual states lose direct policy control over the issue that sparked interest in the compact.

Finally, although compacts are contracts between the member states, the state themselves are not ordinary parties in any sense. As sovereign entities, states enjoy a level of autonomy not available to any other government unit, save the federal government. Consequently, to a large degree, the effectiveness of a compact continues to rest upon the willingness of the member states to actually abide by the terms and conditions of the agreement notwithstand-

ing its contractual nature. This is particularly the case with administrative compacts. These compacts frequently create ongoing administrative bodies charged with overseeing and implementing the agreement. These bodies are not, however, state bodies in the traditional sense. Neither do they possess characteristics of federal agencies. As one court has noted, even obtaining congressional consent does not transform a compact-created administrative body into a "federal" agency such that the Appointments Clause of the Constitution applies to its members.[68] As a result, the enforcement of many administrative compacts falls to hybrid governmental agencies that, although possessing significant powers, must rely on the commitment of the states to abide by their agreement. Ultimately, in the absence of goodwill compliance the enforcement of compacts falls to the judicial process, which can be exceedingly expensive and time-consuming.

Although compacts may be viewed as disadvantageous when viewed purely from an individual state's perspective, their advantages in maintaining some semblance of "state" control over issues far outweigh individual concerns. In the absence of adopting an administrative compact approach to resolving many multilateral issues, states are left with a checker-board approach to managing their relationships. This lack of coordination between the states invites federal preemption over what are traditionally state matters, encourages the application of federal regulatory schemes to such issues, or leaves critical multistate matters to the mercy of individual state regulators with the attendant confusion that results when 50 states individually attempt to regulate a multilateral concern. The latter consequence should be of particular concern. Given the large number of urban areas that now span state boundaries and the explosion of multistate regulatory issues, individual state regulation is at best haphazard. Interstate compacts, when properly drafted, can provide a uniform regulatory scheme so necessary today.

1.4 IMPACT OF COMPACTS ON PRIVATE INTERESTS

The contractual nature of interstate compacts as mechanisms for allocating state governing authority could lead some to minimize the impact of such agreements on private interests. Yet compacts can have a direct and substantial impact on private parties and private interests. For example, a boundary compact that moves an established state line not only impacts an array of state authorities, ranging from law enforcement to courts to taxing bodies, but also can affect the interests of individual citizens. Changes in boundaries can affect

68. Seattle Master Builders Ass'n v. Pac. N.W. Elec. Power & Conservation Planning Council, 786 F.2d 1359 (9th Cir. 1986).

land titles that stretch back years, change citizens' tax obligations by subjecting them to taxation by multiple states, change the terms and conditions of property ownership, and even result in boundaries that are inconvenient to private property by placing the boundary in the middle of building.[69] A court cannot grant to private parties title to land that is later determined by interstate compact or Supreme Court decree to be beyond the true boundaries of the state.[70] Such determinations by compact or decree affect the private property rights of the citizens of a state as well as those matters that pertain to a state's sovereignty over the land within the boundaries of the state. Title, jurisdiction, and sovereignty are dependent questions. The fixing of a boundary by interstate compact does not result in the divesting of citizens' titles to lands that were derived from grants under the state. Rather, the citizens' titles are invalid as a matter of law because of the intrinsic defect of title in the states.

The impact of interstate compacts on private interests has grown remarkably in more recent times given the increasing use of these instruments as a regulatory device. In general, the adoption of an interstate compact by a state, as well as regulatory decisions promulgated under a compact, act to bind not only the state in its official capacity but also the citizens of the state.[71] Consequently, while compacts may once have been used strictly to adjust state relationships with private instruments impacted as a byproduct such as adjustments, today many administrative compacts have direct and measurable consequences on private parties. This has particularly become the case involving those administrative compacts that affect property interests and, to a lesser extent, those compacts affecting the liberty interests of criminal offenders and juveniles. In both contexts, the courts have recognized the power of regulatory commissions to manage not only interstate relations, but also to affect the interests of private parties not as a byproduct of a compact but as a direct and purposeful consequence of the compact.[72]

69. New Jersey v. New York, 523 U.S. 767, 811 (1998) ("We appreciate the difficulties of a boundary line that divides not just an island but some of the buildings on it, but these drawbacks are the price of New Jersey's success in litigating under a compact whose fair construction calls for a line so definite.").
70. Rhode Island v. Massachusetts, 37 U.S. 657 (1838); Poole v. Lessee of Fleeger, 36 U.S. 185 (1837).
71. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (states and their citizens are bound by the terms of compact). *See also* Frontier Ditch Co. v. Southeastern Colo. Water Conservancy Dist., 761 P.2d 1117 (Colo. 1998).
72. Badgley v. New York, 606 F.2d 358 (2d Cir. 1979).

There are many other examples of states employing administrative compacts, and sometimes their attendant commission or agencies, to create broad regulatory schemes that affect a broad range of private interests. Courts have recognized the authority of the Pacific Northwest Electric Power and Conservation Planning Council to promulgate the Northwest Conservation and Electric Power Plan to meet the regional environmental and ecological concerns as mandated by the Bonneville Project Act.[73] Courts have recognized the extensive authority of the Interstate Compact on the Placement of Children to control the movement and placement of children subject to a variety of legal actions including temporary placement, adoption, and guardianships. Compact commissions have been used to regulate milk price supports,[74] the interstate movement of adult offenders,[75] and large metropolitan transit systems.[76] New York and New Jersey employed an interstate compact to create a bi-state regulatory agency, the Waterfront Commission of New York Harbor, to license and regulate certain employment activities on the New York waterfront in part to control the influence of organized crime.[77]

Because compacts can, to varying degrees, impact such a broad range of private interests, courts have generally deferred to the authority of Congress, agreements, and compact-created commissions in compact-based litigation. For example, in *De Veau v. Braisted,* the Supreme Court upheld the validity of a compact creating the New York Waterfront Commission even though laborers affected by its regulations argued that the compact was an intrusion on federal labor authority and had been preempted by several federal acts. As the Supreme Court noted, one of the fundamental objects of the compact was to "keep criminals away from the waterfront" by imposing licensing and regulatory schemes on waterfront employment.[78] In upholding the validity of the compact and the authority of the commission to regulate employment, including the effective exclusion from employment of certain felons, the Supreme

73. Seattle Master Builders Ass'n v. Pac. N.W. Elec. Power & Conservation Planning Council, 786 F.2d 1359 (9th Cir. 1986).
74. Organic Cow, LLC v. N.E. Dairy Compact Comm'n, 164 F. Supp. 2d 412 (2001), *vacated* Organic Cow, LLC v. Ctr. for New England Dairy Compact Research, 335 F.3d 66 (2d Cir. 2003).
75. *See, e.g.,* Interstate Compact for Adult Offender Supervision (2002).
76. Washington Metropolitan Area Transit Regulation Compact (1981).
77. Waterfront Commission Act, 1953 N.Y. Laws 882, 883; 1953 N.J. Laws 202, 203. The compact was approved by Congress in August 1953. *See* 67 Stat. 541, c. 407 (1953).
78. De Veau v. Braisted, 363 U.S. 144, 149 (1960).

Court found that congressional authorization had effectively reconciled any conflict between the compact and federal labor law. The Commission was, therefore, duly empowered to regulate employment along the New York waterfront, and that included effectively excluding certain classes of individuals from employment by the application of its licensing and regulatory scheme.

Several examples illustrate the extent to which states have used interstate compacts as tools to regulate and manage private interests in an effort to manage interstate issues. One of the most pertinent is the Tahoe Regional Planning Compact. This compact, adopted by California and Nevada in 1968 and subsequently approved by Congress,[79] created the Tahoe Regional Planning Agency (TRPA) to manage water, land use, and development in the Lake Tahoe region. Regulatory decisions of the TRPA have been the source of significant litigation throughout the history of the compact, generally centering on regulatory control of development and land use. For example, in *Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency,* the Supreme Court recognized the authority of the TRPA to regulate land use and to define the terms and conditions under which land use regulation constitutes a "taking" for purposes of the Due Process Clause.[80] The Court concluded that the mere enactment of the regulations by a compact-created agency that sought to implement moratoria on development did not constitute a per se taking of property. Rather, whether a taking occurred depended upon consideration of the landowners' investment-backed expectations, the actual impact of the regulation on the landowners, the importance of the public interest involved, and the reasons for imposing the temporary restriction. In effect, the Supreme Court upheld the authority of the TRPA to impose two moratoria, totaling 32 months, on development in the Lake Tahoe Basin while it formulated a comprehensive land-use plan for the area, and to do so without the need to compensate the private landowners and developers affected by the moratoria.

Dairy compacts have been another source of litigation over the years, given the broad regulatory authority possessed by their commissions, particularly in the context of price supports. In *Organic Cow, LLC v. Northeast Dairy Compact Commission,* a court held that the rules of construction of the Northeast Interstate Dairy Compact demonstrated that the intent of the compact was to establish a basic structure by which the Northeast Dairy Compact

79. CAL. GOV'T CODE ANN. §§ 66800-66801 (1977); NEV. REV. STAT. §§ 277.190-277.230 (1973). Congress approved the compact in 1969. *See* Pub. L. No. 91-148, 83 Stat. 360 (1969).
80. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

Commission may achieve those purposes through the application, adaptation, and development of the regulatory techniques historically associated with milk marketing and to afford the commission broad flexibility to devise regulatory mechanisms to achieve the purposes of this compact.[81] A "handler" within the meaning of the Northeast Dairy Interstate Compact is subject to the compact's over-order price obligation, regardless of the contract price the handler pays its producers.

The impact that interstate compacts have on private interests can also be more subtle than the overt examples of fixing dairy prices, establishing state boundaries (and the attendant consequences of such), settling land use policy, or controlling the movement of adult and juvenile offenders. The terms and conditions of a compact can indirectly establish rights and obligations, define the circumstances under which individuals can participate in compact activities, and regulate which laws apply in particular circumstances. In each of these examples it is the operational impact of compacts, in addition to their legal impact, that must be considered by the practitioner. Consequently, the rights and obligations of private citizens can be defined by administrative compacts and by the actions of compact-created regulatory bodies, actions that courts have generally recognized as a legitimate use of compact power and to which they have generally deferred.

81. Organic Cow, LLC. v. N.E. Dairy Compact Comm'n, 46 F. Supp. 2d 298 (D. Vt. 1999), *aff'd*, The Organic Cow, LLC v. N.E. Dairy Compact Comm'n, 164 F. Supp. 2d 412 (D. Vt. 2001), *vacated by* Organic Cow, LLC v. Ctr. for New England Dairy Compact Research, 335 F.3d 66 (2d Cir. 2003).

Chapter 2

THE FEDERAL GOVERNMENT'S ROLE IN INTERSTATE COMPACTS

The federal government's role in the interstate compact process can occur on several levels. The federal government has at times encouraged states to adopt compacts as a means of settling disputes or creating regulatory regimes to address ongoing problems, as evidenced by the federal prodding that led to the Interstate Compact on Adoption and Medical Assistance. Additionally, the federal government can be a member of an interstate compact as is the case with the Interstate Agreement on Detainers or the National Crime Prevention and Privacy Compact. Federal participation can also occur in less direct but equally important ways through the interaction of federal regulatory agencies with interstate compact agencies, and the application of federal laws to areas covered by interstate compacts. This most clearly happens in the field of environmental compacts given the great extent of overlapping jurisdiction between the states and federal government. Finally, and perhaps most importantly, the federal government has significant influence over the compact process through the exercise of congressional consent. Singularly taken, the act of consent, the denial of consent, or the modification of consent through subsequent congressional acts determines the fate of virtually any interstate compact falling within the ambit of the Compact Clause.

tributed by the reservoir, canals, and other works herein, authorized shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this subchapter to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.[39]

Likewise, Congress provided in the compact creating the Washington Metropolitan Area Transit Authority that "the applicability of the laws of the United States, and the rules, regulations, and orders promulgated thereunder, relating to or affecting transportation under the Compact . . . is suspended, except as otherwise specified in the Compact, to the extent that such laws, rules, regulations, and orders are inconsistent with or in duplication of the provisions of the Compact[.]"[40]

By contrast, states cannot create interstate governing agencies or enter into interstate governmental agreements as an avenue for avoiding federal regulation of matters that clearly rest within Congress's ambit of authority. In *Intermountain Municipal Gas Agency v. F.E.R.C.*, the court of appeals affirmed a determination by the Federal Energy Regulatory Commission (FERC) that Utah and Arizona could not by interstate agreement create a mutual governing entity to escape the regulatory authority given to the FERC by the Natural Gas Act.[41] Although Congress explicitly exempted municipalities from the coverage under the Natural Gas Act through the "Hinshaw Amendment,"[42] states could not authorize municipalities to form an interstate governing entity and then claim exemption from coverage as it seemed axiomatic that a state government can only create a governmental entity in its own state and not an interstate regulatory agency.[43] Therefore, while Congress may use its consent power to significantly change the landscape in which joint state action takes place, states may not conversely use the interstate compact or similar process as a means for avoiding or circumventing congressional authority in the absence of the explicit agreement by Congress that such action is permissible.

39. 43 U.S.C. § 617g(a) (2004).
40. D.C. Code Ann. § 9-1103.04 (2004).
41. Intermountain Mun. Gas Agency v. F.E.R.C., 326 F.3d 1281 (D.C. Cir. 2003).
42. 15 U.S.C. § 717 (c) (2004).
43. Intermountain Mun. Gas Agency, Questar Gas Co., 98 F.E.R.C. P61,216 (F.E.R.C. 2002).

Although Congress enjoys broad or even plenary authority over interstate compacts, that authority is not unlimited. Most notable is the limitation that Congress may not use its constitutional power to coerce states into acting as mere agents of the federal government on matters that rightfully belong to the federal government. To allow such usurpation by Congress disrespects the status of states as sovereign partners in the federal structure. Thus, in *New York v. United States*, the Supreme Court held various aspects of the Low-Level Radioactive Waste Policy Amendments Act of 1985,[44] which authorized low-level radioactive waste disposal compacts, violated the Tenth Amendment.[45] The Supreme Court declared the Act unconstitutional holding, in part, that (1) monetary incentives constituted permissible exercises of congressional power under the Commerce, Taxing, and Spending Clauses of the Constitution, (2) access incentives represented permissible conditional exercise of Congress's commerce power, but that (3) the take title clause exceeded the Tenth Amendment because the take title incentives of the Act were not an exercise of congressional power enumerated in the Constitution.[46] Although the Court did not reach the constitutionality of the compacts authorized by Congress, it did make clear that acts of Congress must be in furtherance of the powers it possesses. Consequently, congressional power, including its consent power, is constrained by constitutional principles. Congress could not mandate that states enter into a compact on a particular matter. Congress could, however, encourage states to enter into compacts by providing constitutionally appropriate incentives and sanctions.

In summary, the consent powers of Congress are robust and broad, extending beyond the mere granting of consent to encompass substantive changes in federal and even state law. Granting consent to the member states conditioned on them taking specific actions can result in substantial changes to both state law and the compact regulatory process. Thus, for the practitioner involved in matters related to the regulatory authority of a compact, it is important to grasp the extent to which Congress, through the act of consent, has changed the legal landscape.

2.1.5 When Is Congressional Consent Required?

An unvarnished reading of the Compact Clause would lead one to conclude that *any* agreement between two or more states requires congressional consent. Under the Compact Clause, all interstate compacts and agreements

44. 42 U.S.C.S. § 2021b, *et seq.* (2002).
45. New York v. United States, 505 U.S. 144 (1992).
46. *Id.*

would seem to require congressional consent before taking effect, a matter that could be of significant consequence given the plenary nature of Congress's consent authority. However, compacts can generally be divided into two simple camps: those that require congressional consent because they affect federal interests and those that do not because federal interests are not affected by the terms of the compact.

The Supreme Court has long held that not all interstate agreements constitute formal compacts requiring Article 1, Section 10 consent.[47] In *Virginia v. Tennessee,* the Court concluded that the Compact Clause requires congressional consent only with respect to those joint state agreements that intrude upon the power of the federal government or alter the political balance between the states and the national government.[48] The granting of consent is an act of political judgment by Congress and is intended to ensure that the political balance between the federal government and the states is maintained. To the extent that a compact does not shift the balance or intrude on federal interests, congressional consent is probably unnecessary.

As a result of this rather amorphous distinction between the conditions under which the consent requirement does or does not apply, it can be difficult to know when to seek congressional consent. Generally, the Constitution requires congressional consent only when the compact threatens to encroach upon the supremacy of the United States. But when does a compact intrude on the supremacy of the United States? Some have observed that a threat to the supremacy of the United States necessarily entails a threat to one of Congress's enumerated legislative powers since those powers are the source of supreme federal authority. Thus, as previously noted, when it approves a compact, Congress exercises the legislative power that the compact threatens to encroach upon and declares that the compact is consistent with Congress's supreme power in that area. This principle still leaves a vast opportunity for confusion as to the requirement or need for consent.

It is, perhaps, easier to think of the congressional consent requirement as applying in one of two principal circumstances. First, congressional consent

47. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978).
48. The Supreme Court in *Virginia v. Tennessee* not only affirmed the notion that only those compacts affecting the "political balance" of the federal system need consent, but also stated that consent can be implied after the fact. Thus, the Court concluded that Congress consented to the Virginia-Tennessee boundary compact by setting up judicial districts and taking a number of other actions acknowledging the boundary determined by the compact. *See generally* Virginia v. Tennessee, 148 U.S. 503 (1893).

is absolutely required when the substance of the compact would alter the balance of power between the states and federal government, potentially leading to impermissible state alliances that would diminish the power of the federal government or alter the balance of power among the states themselves. For example, congressional consent is required for boundary compacts because two states cannot unilaterally alter their political boundaries—and the authority each state exercises within those boundaries—without impacting federal interests, the stability of state boundaries, and the extent of state sovereignty and authority. Boundary compacts, left unregulated by Congress, could lead to impressible political allegiance between some states to the potential detriment of other states or the authority of the federal government. States could constantly renegotiate their boundaries, dissolve their boundaries in total, or create politically powerful alliances. Therefore, congressional consent is required when the states, acting collectively, take actions that they could not otherwise take and that may be detrimental to other states or the supremacy of the federal government.[49]

Second, congressional consent *may be* required when the subject matter of the interstate compact appears to intrude upon an area over which Congress has specific legislative authority. While arguably a compact intruding on Congress's authority may be deemed an intrusion on the supremacy of the United States, in actuality there are a vast array of compacts that would not contribute to impermissible political allegiance that threaten the existence of the federal government. Such compacts are generally regulatory in nature; rather than create impermissible state allegiances, these compacts may more correctly be characterized as preempting Congress's legislative authority and the federal government's regulatory power. For example, interstate dairy compacts that seek to create price supports and marketing programs for regional milk production intrude upon Congress's power to regulate interstate commerce. Likewise, the Supreme Court determined in *Cuyler v. Adams,* a seminal interstate compact case, that congressional consent to the Interstate Agreement on Detainers was warranted, noting that "[c]ongressional power to legislate in this area is derived from both the Commerce Clause and the Extradition Clause. The latter Clause, Article IV, Section 2, clause 2, has provided Congress with power to legislate in the extradition area since 1793 when it passed the first Federal Extradition Act."[50] The Interstate Compact on Adult Offender Supervision (ICAOS) requires congressional consent not so much because it changed the political balance between the states and federal

49. Abrams v. TransWorld Airlines, Inc., 728 F. Supp. 162 (S.D. N.Y. 1989).
50. Cuyler v. Adams, 449 U.S. 433, 442 n.10 (1981).

government but because the compact seeks to regulate an activity that could be subject to congressional regulation, such as extradition of probationers and parolees. In each of these examples, congressional consent is not required because the compact might lead to impermissible state allegiances that threaten the supremacy of the federal government, but because the subject matter of the compact intrudes on an area arguably delegated to Congress by the Constitution. In this context, Congress is not so much weighing the political relationship between the states and the federal government with respect to their sovereign authority, but the collective authority of the states to enter a compact that intrudes upon Congress's own legislative power.

The distinction between compacts that create impermissible state alliances and compacts that intrude on congressional authority is important for a singular reason: those compacts that may create impermissible alliances, such as boundary compacts, are generally not subject to alteration by subsequent congressional legislative action. For example, once Congress consents to a boundary compact, it cannot through subsequent legislation alter the landscape in which such compacts operate without the joint agreement of the states and Congress. Congress cannot, of its own accord, change state boundaries as though states were mere political subdivisions of the federal government. By contrast, those compacts that intrude on Congress's legislative authority—generally regulatory or administrative in nature—may be subject to significant alteration by subsequent congressional action. Congress can, for example, change water distribution schemes under its authority over interstate waterways notwithstanding the existence of a compact to which it has previously consented.[51]

If it is determined that a compact invades the legislative prerogatives of Congress, congressional consent should be sought. Two words of caution are needed, however. First, one should not assume that the granting of congressional consent—either explicit or implied—in the context of administrative compacts is Congress's final word on the matter. A compact does not deprive Congress of its legislative authority over matters delegated to it by the Constitution. As previously noted, through subsequent legislative action Congress can significantly alter the landscape in which compacts operate, notwithstanding consent. Second, state agreements, whether termed compacts or not, whose subject matter is appropriate for federal legislation but that do not threaten to increase the political power of the states at the expense

51. For an analysis of Congress's authority to regulate low-level radioactive waste through interstate compacts, *see generally* New York v. United States, 505 U.S. 144 (1992).

of the federal government, are not invalid for lack of consent. Many multilateral state issues can be the subject of federal legislation or regulation simply as a result of being larger than a single state's authority. However, these matters do not necessarily tread on the explicit authority of Congress or endanger the balance of power between the states and federal government. Nevertheless, in this latter context, consent should be sought to ensure that Congress is fully aware of the states' agreement and, therefore, at least tacitly respectful of the compact's arrangements.

By contrast, congressional consent is clearly not required, nor, if given, does it presumptively "federalize" a compact if the subject matter does not alter the political balance or invade congressional interests. In *New Hampshire v. Maine*, for example, the Supreme Court held that congressional consent was not needed to legitimize an agreement between Maine and New Hampshire that ended a dispute over a lateral maritime boundary.[52] The Court concluded that because the agreement did not affect the balance of power between the states and federal government or threaten the prerogatives of the national government, congressional consent was not required.

Likewise, the Supreme Court determined, in *U.S. Steel Corp. v. Multistate Tax Commission*, that congressional consent was not required for a compact creating an interstate commission whose purpose was to develop uniformity and compatibility of state and local tax laws.[53] The Court held that the Multistate Tax Compact did not give to the states any powers that they did not already possess individually nor did the agreement intrude upon a federal interest.[54] In addressing the appellant's complaint that the Court had never approved of a multistate compact creating a powerful commission absent congressional consent, the Court noted: "It is true that most multilateral compacts have been submitted for congressional approval. But this historical practice, which may simply reflect considerations of caution and convenience on the part of the submitting States, is not controlling[.]"[55] Consequently, states may enter agreements among themselves without the consent of Congress so

52. New Hampshire v. Maine, 426 U.S. 363 (1976).
53. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978).
54. *Id.*
55. *Id.* at 472. *See also* Northeast Bancorp v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 176 (1985) (even assuming certain actions or agreements concerning banking in New England were an interstate compact, agreement did not need congressional consent because it neither enhanced the power of the New England states at the expense of other states nor impacted the federal structure of the government).

long as those agreements do not infringe on federal interests or shift the balance of power within the federal structure of the government.[56] Even when states have customarily sought congressional consent for reasons of caution and convenience, the mere act of consent is not dispositive of whether it was required. A compact will not become federal law simply because Congress, in an excess of caution, enacts consent legislation.[57]

Compacts not requiring congressional consent are still enforceable agreements between the states, and disputes arising from such agreements may even be ripe for litigation under the Supreme Court's original jurisdiction. Such compacts are not, however, presumptively federal law under the law of the union doctrine and, therefore, are not subject to immediate federal court intervention nor enforceable under the Supremacy Clause. State courts are fully empowered to interpret and enforce interstate agreements, and federal courts are required to interpret the agreement as state law, not federal law. For example, the Interstate Compact on the Placement of Children is not a compact requiring congressional consent because it regulates an area typically within the purview of the states. As noted in *Malone v. Wambaugh,* "The Interstate Compact on Placement of Children has not received congressional consent. Rather than altering the balance of power between the states and the federal government, this Compact focuses wholly on adoption and foster care of children—areas of jurisdiction historically retained by the states. Congressional consent, therefore, was not necessary for the Compact's legitimacy. . . . Because congressional consent was neither given nor required, the Compact does not express federal law. Consequently, this Compact must be construed as state law."[58]

56. *See* Cuyler v. Adams, 449 U.S. 433, 440 (1981), in which the Supreme Court held, "Where an agreement is not 'directed to the formulation of any combination tending to increase the political power of the States, which may encroach upon or interfere with the just supremacy of the United States,' it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent." Examples of compacts not requiring congressional consent include the Southern Regional Education Compact and the Interstate Compact on the Placement of Children. Also deemed to implicate compact concerns but not requiring congressional consent was the Master Settlement Agreement between the states and tobacco companies. *See* Star Science, Inc. v. Beales, 278 F.3d 339 (4th Cir. 2002) (agreement acted vertically between the states and did not implicate any political interests of the federal government in such a manner as to violate the Compact Clause). Likewise, a multistate gaming agreement was deemed not to require congressional consent. *See* Tichenor v. Missouri State Lottery Comm'n, 742 S.W.2d 170 (Mo. 1988).
57. Wash. Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312 (Cir. 4th 1983).

The lack of "federalization" can lead to inconsistent state court decisions that either render the goal of uniformity difficult to achieve or call into question whether an agreement even constitutes an enforceable compact among the member states. The Interstate Compact on the Placement of Children (ICPC) is one example of the problems that can arise concerning the enforceability of such state agreements. In *In re Adoption No. 10087 in Circuit Court,* the Maryland courts determined that the ICPC was not a compact but rather an interstate agreement effectuated by enactment of reciprocal statutes.[59] In this sense, it was more akin to a uniform law than an enforceable compact, notwithstanding its title and other court decisions finding the agreement constituted a compact between the states. Perhaps the greatest benefit, therefore, of congressional consent is the vesting in federal courts of the authority to interpret a compact in a uniform manner. Absent this consistency, the interpretation of compacts is left to the whim of the states, leading to the extreme case of one state declaring their agreement a compact (and therefore enforceable as a contract) and another state declaring their agreement a mere uniform law (subject to unilateral amendment and change). There is generally no question regarding the status or enforceability of interstate compacts that appropriately receive congressional consent.

2.1.6 The Effect of Congressional Consent on Court Jurisdiction

Compacts occupy a unique place within the nation's law, both as mechanisms for adjusting interstate relations and because of the effect of congressional consent on such agreements. The status of compacts has been a source of conflicting thought over the years. As early as 1852, the U.S. Supreme Court held in *Pennsylvania v. Wheeling & Belmont Bridge Company* that compacts sanctioned by Congress became the "law of the Union."[60] By contrast, in *People v. Central Railroad,* the Supreme Court suggested that interstate compacts could not be considered federal law.[61] Although *People v. Central Railroad* represents a period in American history when the "federal" status of compacts was questioned, this position has largely been rejected; it is now widely accepted that congressionally approved compacts are "federal-

58. Malone v. Wambaugh, 934 F.2d 474, 479 (3d Cir. 1991).
59. *In re* Adoption No. 10087 in Circuit Court, 597 A.2d 456 (Md. 1991).
60. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1856).
61. People v. Cent. R.R., 79 U.S. 455 (1872).

2.1.7 Contractual Nature of Compacts

Although a congressionally approved compact is federalized, it remains a contract between the member states that generally must be interpreted and enforced within the four corners of the agreement. In interpreting and enforcing compacts, the courts are constrained to effectuate the terms of the compact as a binding contract so long as those terms do not conflict with constitutional principles.[105] For example, in *Texas v. New Mexico*, the Supreme Court sustained exceptions to a Special Master's recommendation to enlarge the Pecos River Compact commission's ruling that one consequence of a compact becoming "a law of the United States" is that "no court may order relief inconsistent with its express terms."[106] In the case of *Hellmuth v. Washington Metropolitan Area Transit Authority*, the court held that Maryland's freedom of information act did not apply to WMATA because the parties had

MWAA compact cannot be modified unilaterally by state legislation and takes precedence over conflicting state law.") *See also* McComb v. Wambaugh, 934 F.2d 474, 479 (3d Cir. 1991) ("Having entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states."); Wash. Metro. Area Transit Auth.
v. One Parcel of Land, 706 F.2d 1312 (4th Cir. 1983) (the WMATA's "quick take" condemnation powers under the compact are superior to the Maryland Constitution, which expressly prohibited "quick take" condemnations); Malone v. Wash. Metro. Area Transit Auth., 622 F. Supp. 1422, 1426 (E.D. Va. 1985) ("Because congressionally sanctioned interstate compacts within the meaning of Art. 1, § 10 of the Constitution are federal law, state laws inconsistent with the terms of these compacts are unenforceable as to agencies formed by these compacts."); Kansas City Area Transp. Auth. v. Missouri, 640 F.2d 173 (8th Cir. 1981) ("One party to an interstate compact may not enact legislation which would impose burdens upon the compact absent the concurrence of other signatories."). *See also* Seattle Master Builders Ass'n v. Pac. N.W. Elec. Power & Conservation Planning Council, 786 F.2d 1359 (9th Cir. 1986).

105. N.Y. State Dairy Foods v. Northeast Dairy Compact Comm'n, 26 F. Supp. 2d 249, *aff'd*, 198 F.3d 1 (1st Cir. 1999). (Once a compact between states has been approved, it is the law of the case binding on the states and its citizens. Congressional consent transforms an interstate compact into a law of the United States. Unless the compact is somehow unconstitutional, no court may order relief inconsistent with its express terms, no matter what the equities of the circumstances might otherwise invite.)
106. Texas v. New Mexico, 462 U.S. 554, 565 (1983).

not agreed to be bound by Maryland law and, therefore, no court could order relief inconsistent with or not supported by the terms of the particular agreement.[107] Congressional consent may change the venue in which compact disputes are ultimately litigated; it does not change the controlling nature of the agreement on the member states.

However, although courts have acknowledged that interstate compacts are contracts to the extent they are binding legal documents between member states that set forth certain terms and conditions, which must be construed and applied in accordance with the intent of the agreement, the courts have also recognized the unique features and functions of compacts. Though a contract, an interstate compact represents a political compromise between "constituent elements of the Union," as opposed to a commercial transaction.[108] Such an agreement is made to "address interests and problems that do not coincide nicely either with the national boundaries or with State lines—interests that may be badly served or not served at all by the ordinary channels of National or State political action."[109] Consequently, with regard to congressionally approved compacts, the right to sue for breach of the compact differs from a right created by a commercial contract; it does not arise from state common law but from federal law. While contract principles generally inform and control the interpretation of a compact and the remedies available in the event of a breach, the underlying action is not like a contract action at common law as heard in the English law courts of the late eighteenth century. Rather, it is a controversy that involves intertwining considerations of contract law and statutory interpretation.

The dual nature of a compact as both statutory law and a contract between the states has implication for their interpretation and enforcement. Unlike a typical contract dispute, courts may look to extrinsic evidence to determine the intent of the parties and to effectuate the desired results of the compact. Extrinsic evidence, such as a compact's legislative history or the negotiation history, may be examined by a court in interpreting an ambiguous provision of a compact.[110] Thus, unlike a standard contract dispute, where principles, such as the parole evidence rule, may restrict the influence of

107. Hellmuth v. Wash. Metro. Area Transit Auth., 414 F. Supp. 408 (D. Md. 1976).
108. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 40 (1994).
109. *Id.*
110. Arizona v. California, 292 U.S. 341, 359-60 (1934); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511 (1989); Pierce v. Underwood, 487 U.S. 552, 564-65 (1988); Blum v. Stenson, 465 U.S. 886 (1984).

outside evidence in interpreting a contract provision, resort to extrinsic evidence of the compact negotiations is entirely appropriate because of the dual nature of a compact as both a contract and statute.[111] In interpreting a compact within its statutory context, the general rules of statutory interpretation, not contract interpretation, may be controlling. This is particularly true in the context of congressionally approved compacts.

2.2 FEDERAL PARTICIPATION IN COMPACTS

Federal participation and use of interstate compacts is not confined to obtaining congressional consent. With increasing frequency in recent years, the federal government has become more than a mere conferrer of federal status through the consent requirement. It is now not unusual for the federal government to be involved directly in compact-created agencies either as an observer, through direct membership on a commission, or through a body over which the federal government exercises substantial direct control, such as the District of Columbia. Through several of these avenues, the federal government participates in or is actively affected by compacts. Examples include the Washington Metropolitan Transit Regulation Compact, the Interstate Compact on the Potomac River Basin, the Ohio River Valley Water Sanitation Compact, the Upper Colorado River Basin Compact, the Delaware River Basin Compact, and the Interstate Agreement on Detainers.

Federal participation in compacts takes several forms. Examples of full federal membership in an interstate compact include the Interstate Agreement on Detainers and the National Crime Prevention and Privacy Compact. While full federal participation is clearly the most overt example of Congress using compacts to manage collective state action and national affairs, other forms also exist. Most notably, interstate compacts have become instruments of federal control in such areas as criminal justice information sharing, water rights, energy regulations, and federal grant funding. In each of these areas, the federal government, either through overt participation or subtle involvement, has used the interstate compact instrument as a broad regulatory tool, controlling not only the states, but also federal agencies and even courts.

Several examples illustrate the extent to which federal participation in the compact process has been used to regulate state, federal, and individual conduct. One most notable example is the National Crime Prevention and Privacy Compact Act of 1998, the so-called "Triple III" compact. In enacting the compact, Congress specifically found "an interstate and Federal-State

111. Oklahoma v. New Mexico, 501 U.S. 221 (1991). *But see id.* at 245-46 (Rehnquist, J., dissenting).

compact is necessary to facilitate authorized interstate criminal history record exchanges for noncriminal-justice purposes on a uniform basis[.]"[112] Under its terms, the U.S. Attorney General has authority to appoint a 15-member governing council, comprising of both state and federal officials vested with authority to promulgate rules and procedures governing the use of criminal justice information for noncriminal-justice purposes, the rules of which are "not to conflict with FBI administration of the III System for criminal justice purposes."[113] The FBI and member states agree to maintain detailed databases of criminal history records and to make those records available to the federal government and member states pursuant to the rules of the governing council, so long as those rules do not conflict with the FBI's administration of information systems.

The importance of this compact illustrates the power of compacts and their interaction at the federal level cannot be understated. The notion that the federal government is an "equal" member of a congressionally approved compact must be understood in the context of both federal-state relations on interstate matters and the practical effect of the federal government's participation in an agreement. Often federal participation is a means of encouraging or coercing states to undertake certain actions. Though not specifically stated, federal participation in a regulatory interstate compact also provides a direct measure of control over joint or collective state action, control that would otherwise be limited to the conditions Congress imposed as part of granting consent. Thus, the so-called "Triple III" not only ensures the regulation of information sharing among states, it also ensures that such regulation will not conflict with or supersede federal interests over the regulation of criminal justice information sharing. Clearly, Congress could have expressly limited the authority of the compact's commission and arguably did so by the construction of the compact. But Congress also added another measure of securing federal interests by requiring that the federal government be an active and equal member of the compact's governing commission. Once again, the lack of any restriction or direction on Congress's authority over interstate compacts means, in the main, that absent a constitutional prohibition, Congress is essentially free to use its consent powers as it sees fit, including imposing regulatory schemes on both the state and federal governments.

Even in the absence of direct participation, federal agencies can leverage compacts to supplement their regulatory powers. Projects financed through resource conservation loans and watershed loans must comply with interstate

112. 42 U.S.C. § 14611 (2003).
113. 42 U.S.C. § 14616 (2003).

all litigation involving an interstate compact must be conducted in federal court. They act only to bind the states and any compact-created administrative body as to the forum for bringing actions regarding the enforcement and interpretation of a compact as to the member states. State courts, subject to the Supremacy Clause, would be required to defer to a compact's terms and conditions just as any federal court is required to do when confronted with compact issues. State court jurisdiction over compact disputes would presumably extend to enforcing the terms of the compact on state officials, and even declaring a state statute, rule, or constitutional provision void as conflicting with the terms of a compact to which that state is a member. A state court's jurisdiction would not, of course, extend to enforcing a compact's terms and conditions on other states, that matter resting clearly with the federal courts.

The Supreme Court has considered the status of interstate compacts in connection with its certiorari jurisdiction.[11] In these cases, the Court addressed the question of whether a claim based on an interstate compact is cognizable under the Supreme Court's certiorari provisions as applied to reviewing the judgments of the highest state court where a title, right, privilege or immunity is claimed under the Constitution, treaties, or statutes of the United States.[12] In *Colburn*, the Court unequivocally answered this question affirmatively, holding:

> [T]he construction of such a [bi-state] compact sanctioned by virtue of Article I, section 10, clause 3 of the Constitution, involves a federal "title, right, privilege or immunity," which when specially set up and claimed in state court may be reviewed here on certiorari under section 237 (b) of the Judicial Code.[13]

In reaching this interpretation of the certiorari statute, the Supreme Court in *Colburn* and its progeny has firmly established that the construction of a compact, by virtue of congressional consent, presents a federal question.

4.2 APPLICATION OF FEDERAL AND STATE LAW TO COMPACT DISPUTES

Because interstate compacts are agreements among the states, suits between the parties over their interpretation and enforcement or to vindicate rights arising under them usually have been suits in the U.S. Supreme Court. Since the federal Constitution provides original jurisdiction over suits between states, recourse has been made in that manner.[14] Additionally as has been noted, interstate compacts that have received congressional consent are transformed into federal law. Therefore, an interstate compact requiring judicial determination of the nature and scope of the obligations thereunder is subject to federal construction.[15]

Some disputes arising under an interstate compact may properly be litigated in the state courts, particularly with respect to interstate compacts for which congressional consent is neither given nor required. While compacts such as the Interstate Compact for Adult Offender Supervision and the Interstate Compact for Juveniles have choice of forum requirements, such restrictions act only to bind the states and any compact-created administrative body as to the forum for bringing actions regarding that enforcement and interpretation of the compact as to the member states. These provisions do not automatically preclude a private citizen from suing in state court, nor do they prevent state courts from enforcing the terms of a compact as a collateral matter to other litigation.[16] However, particularly where congressional consent has been given, state courts, subject to the Supremacy Clause, are required to defer to the compact's terms and conditions, just as any federal court is required to do when confronted with compact issues.

By entering into a compact, the member states contractually agree on certain principles and rules pertaining to the subject matter of the compact. Once entered, the terms of the compact, as well as any rules authorized by the compact, supersede substantive state laws that may be in conflict, including state constitutional provisions unless exempted by the compact's provisions.[17] This applies to prior state law[18] and subsequent statutes of the signatory states.[19] Moreover, states must not take unilateral actions, such as the adoption of

11. *See* Delaware River Comm'n v. Colburn, 310 U.S. 419, 427 (1940); West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 28 (1951).
12. *Id.*
13. Delaware River Comm'n v. Colburn, 310 U.S. 419, 427 (1940).
14. FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 14 (1976).
15. *See* Carchman v. Nash, 473 U.S. 716 (1985); Cuyler v. Adams, 449 U.S. 443 (1981).
16. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).
17. West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951).
18. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 70 P.2d 849 (Colo. 1937), *rev'd*, 304 U.S. 92 (1938).
19. *See* Green v. Biddle, 21 U.S. 1, 92 (1823).

conflicting legislation or the issuance of executive orders or court rules, that violate the terms of a compact.[20] Based on this principle, a number of lower courts have also reaffirmed the principle that the provisions of a compact take precedence over statutory law in member states.[21]

4.3 APPLICATION OF CONTRACT LAW TO COMPACTS

Interstate compacts are initiated by the adoption of enabling statutes by the legislatures of the member states. As formal agreements between states, they have the characteristics of both statutory law and contractual agreements. As both statutes and contracts, the substantive law of contracts is applicable to them.[22]

4.3.1 Offer

Using the contract law analysis, the proposed compact statute adopted by the first state to enact, and which invites other states to become a party to the agreement, constitutes the *offer.* As with any other contract, the inception of a compact must be in a form of an offer to make a binding agreement. Since a compact is an instrument that is also a statute, and always has the force and effect of any other statutory law, the offer must be made in a manner that produces such law in the jurisdiction in which the offer is made. The compact provisions typically identify the jurisdictions to which the enacting jurisdiction (offeror) offers to bind itself.[23]

4.3.2 Acceptance

The *acceptance* of the offer occurs when any subsequent state legislature (offeree) enacts the compact statute in substantially identical form to that contained in the offering state's enactment. It is a fundamental requirement in the substantive law of contracts that no act constitutes an acceptance unless it is an acceptance of the offer that has been made. Consequently, the same problems raised by the variance in the terms of the offer and acceptance in

20. *See* N.E. Bancorp v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 175 (1985).
21. *See* Wash. Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312, 1319 (4th Cir. 1983); Kansas City Area Transp. Auth. v. Missouri, 640 F.2d 173, 174 (8th Cir. 1981).
22. FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 2 (1976).
23. *Id. at* 7-8.

the common law of contracts also can create similar problems in the negotiation of interstate compacts. Because compacts are statutes, it is impossible to enter into them orally or by an exchange of other communications that would otherwise lead to many of the troublesome controversies with other types of contractual agreements. However, care should be taken to enact identical texts in the statutory law of all compacting jurisdictions.

4.3.3 Mutual Consent or "Meeting of the Minds"

Where the statutory texts of a compact putatively entered into by eligible states have not been identical, the problem raised has been the customary one in contract law: Are the variations in the relevant statutory enactments sufficiently similar to permit a reasonable person to conclude that an agreement has been reached?

For example, due to its adoption of a version of an earlier draft of the compact statute that it mistakenly believed was the final draft, the State of New Hampshire's initial attempt to become a party to the Interstate Compact on Juveniles failed. Because all the other states that adopted the measure had in fact adopted the most recent version, the New Hampshire compact statute was not identical in all material respects. The errant provisions concerned the prescribed method of affecting the return of a runaway or escapee, as well as a provision that specified gubernatorial participation in the requisitioning process required for the return of such juveniles, while the versions enacted by the other states made this unnecessary and permitted a direct court-to-court approach. Subsequently, the legislature corrected this error by enacting the provisions of the Interstate Compact on Juveniles as adopted by the other states and successfully joined the compact. A different result was reached in the case of a Vermont enactment of a civil defense compact where its version of the compact statute was identical to the compact statutes adopted by the other member states in almost all respects with the exception of the immunities given to civil defense workers from another state sent to render aid. In that case it was determined by mutual agreement of Vermont and the other member states that they were contractually bound to one another to the extent of the similarity in the respective versions of the compact.[24]

Notwithstanding these concerns, the enabling legislation does not have to be uniform in each compact statute and can be utilized "to fit variations into the compactual pattern."[25] Provisions in the enabling legislation can be used to condition the impact of a compact in a state. Last-minute developments

24. *Id.* at 9.
25. *Id.* at 20.

Even though courts have acknowledged that interstate compacts are contracts to the extent they are a binding legal document among and between party states that set forth terms and conditions that must be construed and applied in accordance with the intent of the agreement, courts have also recognized the unique features and functions of compacts as compared with other sorts of contractual agreements. Though a contract, an interstate compact represents a political compromise between "constituent elements of the Union," as opposed to a commercial transaction.[34] Such an agreement is made to "address interests and problems that do not coincide nicely either with the national boundaries or with State lines—interests that may be badly served or not served at all by the ordinary channels of National or State political action."[35] Consequently, with regard to congressionally approved compacts, the right to sue for breach of the compact agreement differs from a right created by a commercial contract; it does not arise from state common law but from federal law. While contract principles may inform the interpretation of a compact and the remedies available in the event of breach, the underlying action is not like a contract action at common law as heard in the English law courts of the late eighteenth century.[36]

4.3.7 Parol Evidence

Extrinsic evidence may be considered by courts, when appropriate, to determine the intent of the parties to an interstate compact and to effectuate the desired purpose of the compact. Such evidence as the compact's legislative history or negotiation history may be examined in interpreting an ambiguous provision of a compact in the same manner as any other contract.[37] Thus, unlike in standard contract disputes, where the parol evidence rule is more restrictive of the admissibility and influence of outside evidence in contract interpretation, resort to extrinsic evidence of the compact negotiations is entirely appropriate. As the Court stated in *Oklahoma v. New Mexico,* "The use of extrinsic evidence to interpret and enforce a compact arises from the dual nature of such agreements as both statutory and contractual in nature."[38]

34. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 40 (1994).
35. *Id.*
36. *See* Interstate Commission for Adult Offender Supervision, *Training Outline* 11 (2004), *available at* http://www.interstatecompact.org.
37. Arizona v. California, 292 U.S. 341 (1934). *See also* Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989); Pierce v. Underwood, 487 U.S. 552 (1988); Blum v. Stenson, 465 U.S. 886 (1984).
38. Oklahoma v. New Mexico, 501 U.S. 221 (1991).

Chapter 5

STRUCTURES FOR ADMINISTERING INTERSTATE COMPACTS

One of the hallmarks of the interstate compact mechanism is its flexibility. Compacts can and do serve many purposes, and they assume a variety of forms, ranging from simple, bi-state agreements that permanently resolve discrete issues to complex, multistate regulatory schemes of a far more dynamic nature. Similarly, the means by which compacts are administered, and the frameworks they establish for their own implementation, vary widely depending on the purpose, scope, and intricacy of a particular agreement. This chapter looks at some alternative structures for the governance and administration of interstate compacts. It also highlights the strengths and weaknesses associated with each option.

5.1 ADMINISTRATION BY EXISTING STATE AGENCIES AND OFFICIALS

Self-executing compacts that permanently settle an interstate issue between the parties (e.g., bi-state boundary agreements) typically embody the full extent of the agreement between the participating members and, therefore, require little or no administrative machinery to ensure their successful implementation. In those instances, however, where compliance with the terms of such an agreement is not a simple matter to achieve or ascertain, at least some provision is usually made for the implementation and administration of the deal. One approach is to assign general oversight duties to existing agencies or officials within the member states. For example, the Colorado River

Compact, which prescribed a fixed allocation of waters between states in the upper and lower Colorado River basins, included an article assigning basic administrative and compliance responsibilities for the agreement to the appropriate officials in each party state. Specifically, Article V of the compact provided:

> The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey shall cooperate, ex officio:
> (a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consumption, and use of water in the Colorado River Basin, and the interchange of available information in such matters.
> (b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.
> (c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.[1]

The agreement also provided for the contingent appointment by the member states' governors of commissioners empowered to resolve any disputes that might arise among the parties related to the administration and enforcement of the compact.[2] Beyond these relatively simple terms, however, no additional administrative provisions were required by, or included in, the agreement.

A more recent example of this approach to compact administration was provided by the Interstate Corrections Compact, which permits the cooperative incarceration and rehabilitation of criminal offenders. Without establishing any new entities or requiring the designation of any particular authorities, the compact instead places the burden of its administration variously upon the "duly constituted authorities," "appropriate officials," "appropriate authorities," and "duly accredited officers" of the party states, thus giving the participating jurisdictions a great deal of flexibility to determine for themselves how best to distribute compact-related powers and duties within their own existing agencies.[3]

1. Colorado River Compact, art. V (1921).
2. Colorado River Compact, art. VI (1921).
3. Interstate Corrections Compact, art. IV, §§ (a), (b), & (f); art. V, § (a) (1997).

This form of compact administration works best with respect to self-executing, fixed agreements that require little or no ongoing oversight and those agreements, like the Interstate Corrections Compact, that can adequately be administered (in this case, pursuant to the terms of more detailed subsidiary agreements between the parties[4]) through existing state entities. One obvious advantage of this approach is that it is relatively inexpensive. Another is that it allows participating states to pursue cooperative goals without expanding their own bureaucracies. This can be a strong selling point for a proposed compact, especially when financial resources are in short supply. On the other hand, reliance on existing state agencies can undermine a compact's potential effectiveness if, for example, the internal distribution of administrative responsibilities within member states is not sufficiently clear, or if the specified administrative authorities are not adequately equipped with the resources they need to fulfill their compact-related duties.

5.2 "COMPACT ADMINISTRATORS"; NEW STATE ENTITIES

Many interstate compacts go at least one step beyond the simple (and often unspecified) delegation of administrative responsibilities to existing state agencies by requiring party states to affirmatively designate official compact administrators. Though the states usually retain considerable discretion with respect to such appointments, some compacts require the selection of administrators who possess certain qualifications or who represent specified agencies within their states. The Driver License Compact, for example, provides that, "The head of the licensing authority of each party state shall be administrator of this compact for his state."[5] Similarly, the proposed New England Compact on Involuntary Detention for Tuberculosis Control requires that each participating state's compact administrator "shall be the head of the state agency responsible for tuberculosis control."[6]

The powers and duties assigned by compacts to their designated administrators can vary, but most agreements that rely on this model for their administration provide generally that the authorized administrators shall be responsible for the initial implementation of the compact, for the internal enforcement of its terms, and for the oversight of any ongoing compact-related activities. Some compacts also require their administrators to serve as official liaisons on behalf of their respective states, to help ensure effective

4. *Id.* at art. III.
5. Driver License Compact, art. VII (a) (1958).
6. New England Compact on Involuntary Detention for Tuberculosis Control, art. VI (proposed 1997).

communication between the parties, and many specifically authorize or direct their administrators to act jointly for certain purposes, such as the promulgation of any rules that might be necessary to the fulfillment of compact objectives.

The Interstate Compact on Mental Health, for example, provides in typical fashion as follows:

> (a) Each party state shall appoint a "compact administrator" who, on behalf of his state, shall act as general coordinator of activities under the compact in his state and who shall receive copies of all reports, correspondence, and other documents relating to any patient processed under the compact by his state either in the capacity of sending or receiving state. The compact administrator or his duly designated representative shall be the official with whom other party states shall deal in any matter relating to the compact or any patient processed thereunder.
> (b) The compact administrators of the respective party states shall have power to promulgate reasonable rules and regulations to carry out more effectively the terms and provisions of this compact.[7]

A variation of this approach can be found in select recent agreements that assign internal oversight and administrative authority for compact-related matters to new in-state entities. The Interstate Compact for Adult Offender Supervision (ICAOS), for instance, not only requires the appointment of "compact administrators"[8] (as well as the establishment of an interstate regulatory commission) but also provides for the establishment within each participating jurisdiction of a new "state council" charged with various administrative duties. These include oversight, advocacy, and the "development of policy concerning operations and procedures of the compact within that state."[9]

As a practical matter, the ICAOS requirement that such state councils be established can be fulfilled either by creating a wholly new state entity or by conferring a new role, including all compact-required duties, upon an existing state agency. Either way, the result is the establishment of an internal administrative structure that exceeds in scope the simple designation of an individual compact administrator.

7. Interstate Compact on Mental Health, art. X (1972). *See also* Driver License Compact, art. VII (1958); Interstate Compact on Juveniles, art. XII (1955).
8. Interstate Compact for Adult Offender Supervision, art. IV (2002).
9. *Id. See also* Interstate Compact for Juveniles, art. IX (proposed 2003).

The chief benefit of these approaches to compact administration is that by going beyond sole reliance upon existing state agencies, they help to ensure that participating states pay closer attention to their own compact-related commitments and duties. Whether limited to the appointment of individual administrators or expanded to include the establishment of new in-state entities, the compact-specific nature of such administrative schemes can serve to raise the visibility of the compact itself within the member states. This, in turn, can help to bring about a greater degree of compliance with compact obligations than might otherwise be achieved in the absence of such provisions. A potential downside is the diversion of resources that might be necessary to satisfy a compact requirement that states designate specific administrators or establish new oversight authorities.

5.3 ADMINISTRATION BY ASSOCIATIONS

Associations of various kinds can, and often do, play key roles with respect to the administration of interstate compacts. This is true even though compacts rarely either expressly require or specifically authorize the participation of associations in their administration. Instead, such associations typically either grow out of various compact-required collaborations between designated administrators representing the member states, or they are recruited by compact-created entities to assist with the implementation and day-to-day administration of compact activities.

An early example of "administration by association" grew out of the Interstate Compact for the Supervision of Parolees and Probationers, enacted in 1937. That agreement expressly authorized the gubernatorial appointment in each member state of "an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact."[10]

Not long after the compact took effect, the administrators appointed pursuant to this provision found it desirable to form their own association, and in 1945, they established the Parole and Probation Compact Administrators' Association (PPCAA) to assist their collective rulemaking efforts and to provide a forum for the exchange of information among members.[11] For more

10. Interstate Compact for the Supervision of Parolees and Probationers § 5 (1946).
11. The Probation and Parole Compact Administrations Association (PPCAA) claimed legal authority for its existence under the compact provision quoted above. *See* PPCAA MANUAL, ch. 1 (August 2003). This claim is, at best,

than 50 years thereafter, the PPCAA served as the de facto administrative authority for the compact while facilitating the cooperative efforts of the duly authorized compact administrators.

Several other compacts requiring designated administrators to act jointly in pursuit of various objectives have also resulted in the establishment of associations to facilitate their collective efforts. The Association of Juvenile Compact Administrators, for example, was established shortly after the enactment of the Interstate Compact on Juveniles and continues to assist the duly authorized administrators of that agreement in their cooperative endeavors. Likewise, and for similar reasons, the administrators of the Interstate Compact on the Placement of Children formed their own association in 1974.

Some of these associations have, in turn, enlisted the assistance of other organizations to support their ongoing activities, usually by providing secretariat services to the principal association. The Association of Administrators of the Interstate Compact on the Placement of Children, for example, relies upon the American Public Human Services Association (APHSA) for secretariat services,[12] and similar assistance is provided to the Interstate Compact Coordinators for Mental Health/Mental Retardation-Developmental Disabilities (the administrators of the Interstate Compact on Mental Health) by the National Association of State Mental Health Program Directors.

In some instances, associations that currently play key roles in the administration of interstate compacts either predated or contributed to the creation of the agreements they serve. For instance, the Nurse Licensure Compact was originally developed and promoted by the National Council of State Boards of Nursing, which now assists in administering the agreement by providing secretariat services to the Nurse Licensure Compact Administrators. Another example is provided by the Emergency Management Assistance Compact (EMAC), which delegates administrative authority in each state to "the legally designated state official who is assigned responsibility for emergency management[.]"[13] Although an association of emergency managers already existed at the time the compact was being developed by the Southern Governors' Association (SGA), no role in the administration of the agreement was envisioned for the National Emergency Management Association (NEMA) until EMAC's original geographic scope was expanded to permit national participation. Soon thereafter, however, NEMA inherited the secretariat duties originally performed by the SGA, and it continues to play the lead role in administering EMAC today.

Even those compacts that provide for the establishment of new interstate agencies to oversee their implementation occasionally rely on assistance from outside associations. The Interstate Compact for Adult Offender Supervision, for instance, specifically empowered the commission it created to "contract for services of personnel,"[14] which it did when the commission entered into a cooperative agreement with The Council of State Governments (CSG) for interim staff support during the start-up phase of its operations. Pursuant to similar authority contained in the Midwest Interstate Passenger Rail Compact and the bylaws of the commission it creates, CSG also provides administrative support on an ongoing basis to the Midwest Interstate Passenger Rail Commission.[15]

Reliance on associations for assistance in administering interstate compacts makes the most sense in connection with those agreements that require joint action on the part of designated in-state administrators. In those instances where collective decision making is required only occasionally and where other administrative demands are relatively limited, informal associations of compact administrators may be sufficient with little or no outside support. By the same token, those agreements requiring more frequent policy decisions or the close oversight of ongoing activities may demand more from the associations employed in their administration. In addition to providing forums for meetings and deliberations between representatives of the party states, they may be called upon to meet a wide range of other needs, including public outreach, staff resources, and substantive expertise.

Associations can provide a flexible and relatively affordable alternative to the establishment of permanent administrative structures. They are particularly appealing when alternative mechanisms are not provided by compact, but assistance is required to ensure the fulfillment of stated objectives. On the other hand, for all the advantages of this approach, the procurement

debatable, since the compact itself speaks only to the administrators' authority to promulgate rules. Though not prohibited, neither was the establishment of such an association expressly authorized by the compact, a fact that temporarily acquired relevance during the externally led effort to develop and implement a successor agreement, the Interstate Compact for Adult Offender Supervision. *See* discussion, Michael L. Buenger & Richard L. Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems,* 9 ROGER WILLIAMS U. L. REV. 71, 110 n.106 (2003).

12. APSHA also provides secretariat services to the Association of Administrators of the Interstate Compact on Adoption and Medical Assistance.

13. Emergency Management Assistance Compact, art. II (1996).
14. Interstate Compact for Adult Offender Supervision, art. V (2002).
15. The commission is staffed by Council of State Governments' Midwestern Office.

of professional secretariat services and other association support can be more expensive than simple reliance upon existing state agencies for the administration of compacts. It can also be insufficient to meet the needs of more complex interstate agreements.

5.4 ADMINISTRATION BY INTERSTATE AGENCIES

Compacts that govern complex, high-volume transactions or that address ongoing multistate concerns requiring the development of shared regulatory solutions, often provide for the establishment of new interstate agencies to oversee their implementation and administration. Numerous compacts of recent origin have created regulatory commissions charged with developing and enforcing specific policies to solve the very problems that inspired the parties to enact compacts in the first place. In other words, instead of resolving the underlying issues up front, such compacts serve instead to establish frameworks for the subsequent development of the desired solutions.

This approach to interstate regulation goes well beyond the simple question of compact administration, since what it really entails is the establishment of new governing authorities whose members play active roles as policy makers, as well as administrators. Therefore, compacts that establish such regulatory entities often include numerous provisions defining their composition, describing their specific powers and duties and providing the means for their continuous operation.

The first compact to establish a permanent interstate agency was the New York–New Jersey Port Authority Compact of 1921, which conferred unprecedented regulatory authority upon the commission it established. Though sparse in detail compared to compacts of more recent vintage, the Port Authority agreement included provisions specifically authorizing or requiring the appointment of commissioners, the adoption of bylaws, the promulgation of rules, the acquisition and management of port facilities, the submission of annual reports to the party states, and the exercise of various other commission powers.[16] It also contained additional terms providing for the election of officers, the appointment of staff, and the appropriation of funds to support the operations of the new commission.[17] Given the size and complexity of the bureaucratic structure that eventually resulted,[18] these provisions are notable for their relative simplicity:

16. New York–New Jersey Port Authority Compact of 1921, arts. IV-VII & XVIII (1921).
17. *Id.* at arts. XIV-XV (1921).
18. The Port Authority of New York and New Jersey employs thousands of workers and operates on an annual budget that exceeded $4.5 billion in 2004.

- *Article XIV.* The port authority shall elect from its number a chairman, vice chairman, and may appoint such officers and employees as it may require for the performance of its duties, and shall fix and determine their qualifications and duties.
- *Article XV.* Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two states, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year.[19]

Another early administrative compact was the Ohio River Valley Water Sanitation Compact, which also established an interstate commission vested with rulemaking authority. In many ways, this agreement resembled the port authority compact in that the provisions governing the establishment and general operations of the Ohio River Valley Water Sanitation Commission (ORSANCO) were fairly simple.[20] However, whereas the former compact had circumscribed the broad rulemaking power of the Port Authority by reserving to the member states the right to veto the actions of their own commissioners,[21] the latter agreement included no similar checks, thus effectively giving ORSANCO wider latitude to exercise its discretionary rulemaking powers.

As the use of interstate compacts to address complex regulatory matters gradually became more common, the administrative schemes contained in such agreements also continued to evolve. Administrative compacts of more recent origin have tended to include more detailed provisions prescribing the powers and duties of the commissions they create,[22] and some have introduced new tools. The Waterfront Commission Compact, for example, was the first to empower an interstate agency to levy taxes. Specifically, the compact authorized the new commission to partially finance its own operations by collecting assessments from the employers of various waterfront workers required to be licensed under the agreement.[23]

19. New York–New Jersey Port Authority Compact of 1921, arts. XIV-XV (1921).
20. Ohio River Valley Water Sanitation Compact, arts. III-V (1940).
21. New York–New Jersey Port Authority Compact of 1921, art. XVI (1921).
22. *See, e.g.*, Washington Metropolitan Area Transit Regulation Compact, tit. III (1966).
23. Waterfront Commission Compact, art. XIII (1953).

Some compacts that establish interstate agencies include elaborate voting procedures or detailed provisions governing the appointment of commissioners. By way of example, one that does both is the Tahoe Regional Planning Compact, under which the states of California and Nevada established the Tahoe Regional Planning Agency. The compact requires the appointment of seven commissioners from each of the two party states, but in an effort to ensure adequate representation of both state and local interests on the governing body, it goes on to require that the 14 appointments be made by a total of 13 different authorities, including the governors of both states, county boards in four specified counties on both sides of the border, municipal authorities in two cities, legislative leaders in California, and designated executive officials in Nevada.[24]

The same compact is also noteworthy for its inclusion of language specifying three different commission voting standards, depending on the type of action being contemplated by the agency. The most important matters require affirmative votes from a majority of commissioners within each state delegation. Others require a higher number of votes, but from only one of the two state delegations, and still others may be approved by a simple majority of all commissioners without regard to state affiliation.[25]

Of course, simpler schemes can also be found, even in compacts that authorize significant regulatory activity or that permit the participation of numerous party states. The Delaware River Basin Compact, for example, delegates broad regulatory responsibility for the management and protection of water resources in the Delaware River Basin to an interstate commission comprised of just one representative from each party to the agreement[26] and requires only the vote of a simple majority of all members for the approval of any matter before the commission.[27] Similarly, the Pest Control Compact, which has been enacted in 35 states,[28] is administered by a "governing board" that includes one representative from each party state and requires the vote of a simple majority of all members for the approval of any action.[29]

Some administrative compacts contain detailed provisions governing the operations and resources of the interstate agencies they create. For instance, the

24. Tahoe Regional Planning Compact, art. III (a) (1981).
25. *Id.* at art. III (g).
26. The parties include the states of Delaware, New Jersey, New York, and Pennsylvania, as well as the federal government.
27. Delaware River Basin Compact, art. 2, § 2.5 (1961).
28. As of March 2004.
29. Pest Control Compact, art.IV (b) (1968).

Susquehanna River Basin Compact specifically empowers the commission it establishes to borrow money, to issue bonds, to accept grants and contributions, and to acquire property by a variety of means, including eminent domain.[30] And the Washington Metropolitan Area Transit Regulation Compact includes elaborate provisions covering such commission activities as planning, financing, and procurement. It also includes a detailed section on labor policy and even authorizes the establishment of a special police force.[31]

Other compacts are far less specific with respect to the administrative machinery that might be required by the regulatory agencies they establish. The Tri-State Lotto Compact, for example, provides simply as follows:

> *1. Commission functions.* The commission's functions shall be performed and carried out by its members and by such advisory committees or panels, or both as the commission may establish, and by such officers, independent contractors, agents, employees and consultants as may be appointed by the commission. All such officers, independent contractors, agents, consultants and employees shall hold office at the pleasure of the commission, unless the commission otherwise decides, and the commission shall prescribe the person's powers, duties and qualifications and fix their compensation and other terms of their employment.[32]

Interstate agencies can be as useful in administering purely advisory agreements as they are in implementing administrative compacts. As noted previously, some such commissions are aided in their efforts by associations that provide them with various forms of assistance ranging from occasional secretariat services to ongoing operational support.[33] Others rely on one or more of their members for administrative help. For example, the Compact Council established pursuant to the National Crime Prevention and Privacy Compact, to which the federal government is a party, receives direct staff support from the FBI. Still other such agencies go it alone and, like many of their regulatory counterparts, either provide for themselves pursuant to general grants of compact authority or are equipped with the resources they need by the compacts that authorize their establishment.

30. Susquehanna River Basin Compact, arts. 13 & 15 (1970).
31. Washington Metropolitan Area Transit Regulation Compact, tit. III, arts. VI, VII, IX, X, XIV & XVI (1966).
32. Tri-State Lotto Compact, art. II, § d (1983).
33. *See, e.g.*, the Midwest Interstate Passenger Rail Commission, which is supported by the Midwestern Office of The Council of State Governments.

One example is provided by the Interstate Oil and Gas Compact Commission (IOGCC). Established almost 70 years ago, pursuant to the Interstate Compact to Conserve Oil and Gas, the IOGCC was empowered to encourage the conservation of oil and gas through the prevention of waste and "to recommend the coordination of the exercise of the police powers of the several States within their several jurisdictions to promote the maximum ultimate recovery from the petroleum reserves of said States, and to recommend measures for the maximum ultimate recovery of oil and gas."[34]

The compact made no provision for the resources necessary to support the activities of the commission and expressly stipulated that its terms imposed no financial obligations upon its members.[35] Moreover, the commission's bylaws later provided that the IOGCC's expenses were to be paid "from voluntary contributions by the Member States and from other sources of revenue approved by the Commission."[36] Nevertheless, the IOGCC has, over the years, generated sufficient funding from its members and through various grants and contracts to support its activities, and it continues to serve as a forum for the exchange of information and as an advocate on behalf of the nation's oil and gas producing states.

Other nonregulatory and advisory compacts often include more specific provisions for the administrative agencies they create and typically rely heavily upon required contributions from participating states for the support of commission activities. For example, the nonregulatory New England Higher Education Compact, one of four regional agreements that authorize interstate agencies to administer various programs for the advancement of higher education,[37] requires party states to pay membership dues in support of the compact commission (the New England Board of Higher Education). It even specifies the formula to be used in determining the appropriate amounts to be paid by each state:

> Each state agrees that, when authorized by the legislature pursuant to the constitutional processes, it will from time to time make available to the board such funds as may be required for the expenses of the board as authorized under the terms of this compact. The contribution of each state for this purpose shall be in the proportion that its population bears to the total combined population of the states who are parties hereto as shown from time to time by the most recent official published report of the Bureau of the Census of the United States, unless the board shall adopt another basis in making its recommendation for appropriation to the compacting states.[38]

34. Interstate Compact to Conserve Oil and Gas, art. VI (1967).
35. *Id.* at art. VII.
36. Interstate Oil and Gas Commission, Bylaws, art. VII (2004), *available at* http://www.iogcc.oklaosf.state.ok.us/ABOUTIO1.HTM#BYLAWS.
37. The other three are the Western Regional Higher Education Compact (1953), the Southern Regional Education Compact (1948), and the Midwestern Higher Education Compact (1991).

In contrast, compacts that anticipate the availability of other revenue streams often rely on those sources to fund the operations of the commissions they create. This is true even with respect to commissions that exercise only limited regulatory authority while administering activities that include more substantial operations. Thus, for instance, the Historic Chattahoochee Compact between the states of Alabama and Georgia empowered the Historic Chattahoochee Commission to accept governmental appropriations, but did not require the party states to make them. Instead, anticipating that sufficient revenues might be derived through other sources, such as "admissions, inspection fees, gifts, donations, grants, bequests [and] loans,"[39] the compact granted the commission broad authority to acquire and manage various assets and specifically empowered it to borrow funds, issue bonds, accept gifts, dispose of property, and promulgate rules governing the operation of its facilities,[40] all of which could potentially generate the revenues necessary to support the commission's administrative efforts.

Regardless of their precise form, interstate agencies can be extremely effective as tools for the implementation of interstate compacts. Whether serving as forums for the exchange of information and ideas between the parties, as advocates for the implementation of best practices and suggested solutions, as administrators of cooperative ventures and other ongoing activities, or as governing authorities with significant policy-making and regulatory powers, compact agencies are uniquely well suited to pursue shared interstate objectives. This is due in part to the special legal status of interstate compacts, relative to other state statutes, but there are other, more practical advantages as well.

If nothing else, the establishment of an interstate agency can increase the chances of a compact's success simply by ensuring that someone takes ownership for its implementation. Without an oversight entity of some kind to

38. New England Higher Education Compact, art. VI (1954).
39. Historic Chattahoochee Compact, art. VII (1978).
40. *Id.* at art. VIII.

coordinate the efforts of the parties, compacts that rely solely on existing state agencies or designated officials may languish through neglect or because they lack sufficient administrative machinery to effectuate their purposes. Interstate agencies, on the other hand, can help the parties to more effectively focus their efforts and marshal their resources in pursuit of compact objectives. They also provide a useful "home" for compact-related issues and can assist in raising the visibility of the underlying concerns they are meant to address.

The agency approach to compact administration is as flexible as the compact mechanism itself. This, too, is a significant advantage, since the agency model can be tailored to meet the specific needs of virtually any agreement. Compact agencies need not require the establishment of extensive bureaucratic support structures (although some do, and the cost can be high). Many that perform nonregulatory duties or that serve primarily in an advisory capacity function well with only limited staff resources and operational support.

Nevertheless, the agency model arguably best serves those compacts that address complex regulatory matters or that entail significant operations requiring continuous oversight. As multijurisdictional governing authorities often charged with significant policy-making powers, compact agencies are far better positioned than single-state agencies acting independently, or loosely organized associations of compact administrators to oversee the implementation and administration of interstate agreements.

But the very attributes that render interstate agencies so useful in the administration of compacts are also, occasionally, a source of concern among lawmakers or others who are not familiar with the compact mechanism itself or who, for various reasons, question the delegation of state authority to such entities. Some fear the loss of state sovereignty inherent in any delegation of power to an agency that the delegating state does not unilaterally control. Others question whether such delegations are even permissible on constitutional grounds, a concern that goes directly to the legal status of compact agencies.

The status question is understandable in light of the relatively unusual nature of compact entities. As joint instrumentalities of all states that participate in their creation, interstate agencies are equally responsible to each, though subject only to the collective governance of their principals in accordance with the terms of their compact charters. And like the statutes that authorize their establishment, any administrative rules duly promulgated by compact agencies enjoy a special, presumptively superior status relative to other state laws. Despite these unique characteristics, however, the status of interstate commissions as legally permissible entities is now well understood. Moreover, the U.S. Supreme Court has held that a state legislature's ability to

delegate regulatory authority to an administrative agency is "one of the axioms of modern government" and that this ability extends as well to the creation of interstate commissions by compact.[41] Generally, therefore, neither the establishment of such entities nor their exercise of regulatory power is legally problematic with respect to constitutional prohibitions against the delegation of state authority.

As for concerns related to the loss of individual state sovereignty, there is no question that the parties to interstate compacts necessarily give up the right to unilaterally control the joint agencies they create. But when measured against the nature of congressional intervention and the loss of state authority that can result from federal preemption of a particular field, the legislative and regulatory control that states jointly retain under interstate compacts is usually preferred by states. Viewed through this lens, the decision to empower an interstate agency is more likely to be seen as a welcome protection of "collective state sovereignty" than it is to be resisted as an unacceptable sacrifice of individual state authority.

Of course, the parties to an interstate compact ultimately retain the ability to terminate the agreement altogether, and they can, if they so desire, build other mechanisms into the statute to limit the discretion delegated to an interstate agency or to protect the prerogatives of individual states. For example, some compacts reserve to their parties specified veto powers over the actions of the agencies they create,[42] while others include mechanisms allowing their members to jointly reject,[43] or to individually "opt out" of the enforcement of,[44] individual rules promulgated by interstate commissions. Such provisions also serve to further illustrate the wide variety of ways in which interstate agencies can be structured and empowered to ensure the successful administration of the compacts under which they are created.

41. West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951).
42. *See, e.g.*, New York–New Jersey Port Authority Compact of 1921, art. XVI (1921).
43. *See, e.g.*, Interstate Compact for Adult Offender Supervision, art. VIII (2002).
44. *See, e.g.*, Interstate Insurance Receivership Compact, art. VII (1996).

COUNCIL OF STATE GOVERNMENTS—NATIONAL CENTER FOR INTERSTATE COMPACTS

Interstate Compacts vs. Uniform Laws

Interstate Compacts

Interstate compacts are formal agreements between states that have the characteristics of both statutory law and contractual agreements. They are enacted by state legislatures adopting reciprocal laws that substantively mirror one another. Compacts are considered contracts because of the manner in which they are enacted. There is an offer (the presentation of a reciprocal law to state legislatures), acceptance (the actual enactment of the law) and consideration (the settlement of a dispute or creation of a regulatory scheme).

Since a state is forbidden by the Constitution to impair the obligation of contracts, it cannot unilaterally renounce an interstate compact except as agreed by the parties. Consequently, the interstate compact is the instrument best suited for the establishment of permanent arrangements among the states. The interstate compact is effective in the formulation of arrangements where a high degree of stability is desired.

Interstate compacts are not uniform laws. Unlike laws such as the Uniform Commercial Code, compacts are not subject to unilateral amendment. Nor are interstate compacts mere administrative agreements. As contracts, compacts constitute solemn treaties between the states, which are acting as sovereigns within a constituent union when adopting a compact.

Therefore, compacts have standing as both binding state law and a contract between the member states such that no one state can unilaterally act in conflict with the terms of the compact. Any state law in contradiction or conflict with the compact is unconstitutional, absent the reserve of power to the party states. The terms of the compact take precedence over state law even to the extent that a compact can trump a state constitutional provision. In effect, by entering a compact, the party states have contractually agreed that the terms and conditions of the compact supercede state considerations to the extent authorized by the compact relative to any conflicting laws or principles.

Advantages of Interstate Compacts

- Interstate compacts provide an effective solution that respects fundamental principles of federalism, recognizing the supremacy of the federal government regarding national issues while allowing the states to take appropriate collective action in addressing suprastate problems. Compacts enable the states – in their sovereign capacity – to act jointly and collectively, generally outside the confines of the federal legislative or regulatory process while concomitantly respecting the view of Congress on the appropriateness of joint action. The interstate compacts can effectively preempt federal interference into matters that are traditionally within the purview of the states and yet which have regional or national implications.

- Unlike federal actions that impose unilateral, rigid mandates, compacts afford states the opportunity to develop dynamic, self-regulatory systems over which the party states can maintain control through a coordinated legislative and administrative process. The very nature of an interstate compact makes it an ideal tool to meet the need of cooperative state action in developing and enforcing standards upon the party states. Compacts also enable the states to develop adaptive structures that can evolve to meet new and increased challenges that naturally arise over time. In short, through the compact device, states acting jointly can control not only the solution to a problem but also shape the future agenda as the problem changes. The closer the coordination between the various elements of the cooperative undertaking, the more necessary is the use of the compact approach.

- Interstate compacts can be structured to respect the balance of power among federal, state, and local interests. While many regulatory compacts provide power to regulate cross-border problems, they can be structured to do so in a manner that preserves national interests. To a large extent, the Compact Clause requiring congressional consent to compacts that impact federal interests ensures that federal concerns are at the forefront of compact construction while simultaneously enabling states to maintain functional and regulatory control over an issue. Approval by Congress provides states with the authority to regulate in an area which would otherwise be unavailable to the state.

- Interstate compacts can broaden a state's parochial focus by allowing states to act collectively and jointly to address regional and national problems. Making decisions based on the state line boundaries can be problematic because boundaries do not necessarily reflect natural or logical divisions to supra-state problems. State legislatures and state regulators generally do not make decisions that are likely to restrict their own citizens' activities based on the need to protect a neighboring state's interests. Consequently, an interstate compact provides the opportunity to make decisions across state boundaries without resorting to federalization, which has limitations in resolving cross-boundary problems.

- Interstate compacts provide party states with a predictable, stable and enforceable instrument of policy control. The contractual nature of compacts ensures their enforceability on the party states. The fact that compacts cannot be unilaterally amended ensures that party states will have predictable and stable policy platform for resolving problems. By entering into an interstate compact, each party state acquires the legal right to require the other states to perform under the terms and conditions of the compact.

Disadvantages of interstate compacts

The principle disadvantage of compacts may be characterized as twofold:

- The long negotiations and arduous course they must run before becoming effective; and

- The ceding of traditional state sovereignty, particularly as required by several modern administrative compacts. The very purpose of an interstate compact is to provide for the collective allocation of governing authority between party states, which does not allow much room for individualism. The requirement of substantive "sameness" prevents party states from passing dissimilar enactments notwithstanding, perhaps, pressing state differences with respect to particular matters within the compact. To the extent that a compact is used as a governing tool, they require, even in the boundary compact context, that party states cede some portion of their sovereignty.

Uniform Laws

The concept of uniformity is most familiar in connection with the work of the National Conference of Commissioners on Uniform State Laws. That organization has accomplished much by preparing uniform laws and offering them for consideration by the states. A number of these laws, especially in the commercial field, have achieved wide adoption over a period of years. However, uniformity attained in this way is subject to dissipation from two directions:

1. Uniformity can be impaired by the unilateral action of particular state legislatures in amending a uniform statute so that it is no longer uniform or in introducing non-uniform provisions when the act is being initially considered by the legislature.

2. Differing interpretations of provisions of uniform acts can impair the degree of uniformity actually achieved. The ordinary law, for all its identity in language with the laws of other states, is only a simple statute organically unconnected with the statutes of other jurisdictions. Accordingly, the courts in different states can and sometimes do interpret identical provisions differently. Since the highest court of each state is the final authority on the meaning of the statutes of its own state, there is no satisfactory way to achieve a reconciliation of divergent interpretations.

If uniform provisions are embodied in a compact, no state could subsequently destroy this uniformity by unilateral amendment of its own statute except to the extent that such variation might be permitted by specific provision of the compact. To some degree, this limitation of a state's freedom to alter its law unilaterally may raise questions. However, if the virtue of a uniform measure is to be found in the identity of the law from state to state, the superior stability produced by a compact should be considered.

PROOF OF SERVICE

I declare that I am employed with the law firm of Silverstein & Pomerantz LLP, whose address is 3833 18th Street, San Francisco, California 94114. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on January 22, 2014, I served a copy of:

PLAINTIFFS/APPELLANTS' SECOND MOTION FOR JUDICIAL NOTICE

☒ **BY PERSONAL SERVICE [Code Civ. Proc sec. 1011]** by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and delivery at the mailroom of Silverstein & Pomerantz LLP, causing personal delivery of the document(s) listed above to the person(s) at the address(es) set forth below through registered process server Wheels of Justice whose business address is located at 657 Mission Street, #502, San Francisco, California 94105.

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First District Court of Appeal
Division Four
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San Francisco, California 94102

San Francisco Superior Court
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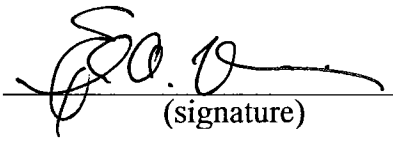
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California, this 22nd day of January, 2014.

Elsa O. Valmidiano
(typed)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