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CHARACTERIZATION OF INTERSTATE ARRANGEMENTS: WHEN IS A COMPACT NOT A COMPACT?

David E. Engdahl*

NOTWITHSTANDING the relative lack of attention which the subject has received from legal scholars, one of the most significant developments in American federalism during the past forty, and especially the past twenty, years has been the increasing employment of formal interstate arrangements, commonly referred to as "compacts," for dealing with governmental problems affecting more than a single state. Prior to the twentieth century, formal arrangements bearing this name were used only for the settlement of interstate boundaries and for similar purposes; but since the successful experiment with the Port of New York Authority¹ and the significant study of "compacts" by Felix Frankfurter and James M. Landis² exhibited the modern potential for such arrangements, "compacts" have been increasingly recognized as a highly versatile device of state government.

The most common type of "compact" currently being concluded merely creates a study or advisory commission of representatives from each participating state. The commissioners are instructed to recommend to their respective individual states coordinated programs of legislation designed to deal with whatever problems of conservation, health, safety, or similar matters the "compact" may contemplate. Some of the modern "compacts," however, have a more immediate effect upon individuals; typical are those designed to make more equitable the distribution of taxes to be collected by several states from interstate carriers. Interstate authorities founded upon "compacts" govern some of the nation's major ports and associated facilities; others operate interstate bridges and ferries. The "compact" device has even been used to organize an interstate school district for neighboring communities within different states. Similarly, increasing consideration is being given to the creation of

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1. The Port of New York Authority, created by "compact" in 1921, continues to be the best illustration of the significance of modern interstate "compacts." For a short, recent account of the Authority's activities, see Goldstein, *An Authority in Action—An Account of the Port of New York Authority and Its Recent Activities*, 26 LAW & CONTEMP. PROB. 715 (1961).

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

governmental organs founded upon "compacts" for dealing with the problems of interstate metropolitan areas.³

The real increase in the use of "compacts" is still very recent, so there has as yet been little significant litigation concerning these instruments. For this reason, relatively few lawyers have had sufficient exposure to the subject to discover what an unhappy state the law of "compacts" is in. However, if the present trend toward their increased use continues, interstate authorities and agencies founded upon "compacts" may be expected to become as familiar to the average lawyer as conventional governmental agencies are today. This article is not intended to anticipate all of the legal problems which are sure to arise in the judicial process of integrating this new device—or new employment of an ancient device—with the other elements of mid-twentieth century American federalism. It focuses on only the one most basic problem: the applicability to these interstate arrangements of the tenth section of the first article of the United States Constitution. It is to discourage the premature conclusion that all of these modern arrangements necessarily fall within the scope of that constitutional provision that the term "compact" is set in quotation marks. It is hoped that this technique will also suggest the inexactness of its common usage.

I. THE PROBLEM OF CHARACTERIZATION UNDER ARTICLE I, SECTION 10

A. "Treaty" and "Agreement or Compact"

Article I, section 10, of the Constitution provides:

No State shall enter into any Treaty, Alliance, or Confederation [clause 1]

No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power [clause 3, the compact clause]

The question immediately arises whether a particular interstate arrangement is to be considered a "treaty" or rather an "agreement or compact" under this section. The answer which has received judi-

3. For a general survey of "compact" activities, see the sections on "Interstate Compacts" in the biennial volumes of *The Book of the States*, published by the Council of State Governments. For a recent summary of the development of "compacts" and their modern significance, see Grad, *Federal-State Compact—A New Experiment in Co-operative Federalism*, 63 COLUM. L. REV. 825, 834-40 (1963). For some thoughts on future applications of "compacts," particularly in metropolitan areas, see Dixon, *Constitutional Bases for Regionalism—Centralization; Interstate Compacts; Federal Regional Taxation*, 33 GEO. WASH. L. REV. 47 (1964).

cial recognition⁴ is that offered in Joseph Story's *Commentaries on the Constitution of the United States*, first published in 1833. Story suggested that the absolute prohibition in the first clause of the section might be taken "to apply to treaties of a political character"⁵ and that the qualified prohibition in the third clause pertained to "what might be deemed mere private rights of sovereignty."⁶ With respect to the latter category, the fact that congressional consent is required in every instance would, in Story's view, "check any infringement of the rights of the national government."⁷ Story made no pretensions of having deduced this interpretation of article I, section 10, from any source other than his own imagination. He had rejected the authority of an earlier interpreter of the section⁸ and frankly based his own interpretation upon conjecture. Recognizing the apparent ambiguity of the constitutional language,⁹ Story expressed his interpretation of it in highly tentative terms and confided a disposition to suppose that the original reading of the prohibition in the first clause might have been different and more supportive of his suggested interpretation.¹⁰

It is evident, however, from an investigation of the practice of the states prior to the time of Story's writing that the interpretation he put forward was not that commonly held even in 1833. Story included treaties of cession under the absolute prohibition of the first clause,¹¹ yet we know of cessions by states to the general government, as well as to one another, even after the Constitution was ratified.¹² Moreover, Story included under the qualified prohibition of the third clause all interstate boundary settlements and "other internal regulations for the mutual comfort, and convenience of states, bordering on each other."¹³ During the first decades of the

4. See *Virginia v. Tennessee*, 148 U.S. 503, 519-20 (1893). See also text accompanying notes 123-24 *infra*.

5. 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1397 (1st ed. 1833) (in subsequent editions, § 1403).

6. *Ibid.*

7. *Ibid.*

8. See text accompanying note 75 *infra*.

9. 3 STORY, *op. cit. supra* note 5, § 1397, at 271 n.1.

10. *Id.* § 1397, at 271 n.2.

11. "[T]reaties of a political character . . . treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges." *Id.* § 1397.

12. *E.g.*, North Carolina's cession to the United States in 1789, see *Burton's Lessee v. Williams*, 16 U.S. (3 Wheat.) 529 (1818); Georgia's cession to the United States of land on the disputed boundary between Georgia and Florida, see *Harcourt v. Gailard*, 25 U.S. (12 Wheat.) 523 (1827). As to interstate cessions, see, *e.g.*, *Burton's Lessee v. Williams*, *supra*, at 536.

13. 3 STORY, *op. cit. supra* note 5, § 1397. "[Q]uestions of boundary; interests in

constitutional Union, however, at least three boundary settlements were concluded between various states without any congressional approval,¹⁴ and their validity was never questioned.¹⁵ Similarly, interstate arrangements for public improvements were made without the thought of their being affected by this constitutional provision.¹⁶ Nevertheless, despite its conjectural origin and its inconsistency with contemporary practical construction of article I, section 10, Story's explanation came, with the passage of time, to share that aura of authority which his other studies had earned for him.

B. *Scope of "Agreement or Compact": The Rule of Virginia v. Tennessee*

Since the beginning of the second half of the nineteenth century, attention has been focused less upon the distinction between "treaties" and "agreements or compacts" in the constitutional provision than upon the inclusive scope of the terms "agreement" and "compact" themselves. New occasions for, and new varieties of, interstate cooperation engendered impatience with the onerous requirement of congressional consent, and disputes arose as to whether particular kinds of interstate arrangements were encompassed by the compact clause at all. In a curious feat of judicial doubletalk, Story's distinction between "treaties" and "agreements or compacts" was applied to the new task of exempting all but a narrow class of "agreements or compacts" from the requirement of congressional consent.

By the end of the nineteenth century, and after a course of judicial development discussed in more detail in subsequent pages, this perversion of Story's already tenuous construction had received the endorsement of the United States Supreme Court in *Virginia v. Tennessee*.¹⁷ Story had argued that *all* interstate arrangements¹⁸

land, situate in the territory of each other; and other internal regulations" *Ibid.*

14. Tennessee-Virginia Boundary Compact of 1803 (1 Scott, Tenn. Laws, ch. 58, at 798; Va. Rev. Code, 1819, 63); North Carolina-South Carolina Boundary Compact of 1815 (N.C. Rev. Acts, 1796-1820, ch. 885, at 1318; 1 Cooper, S.C. Stat. 419); North Carolina-Tennessee Boundary Compact of 1821 (2 N.C. Rev. Stat. 1837, 96; Tenn. Acts 1821, ch. 35, at 45).

15. The Tennessee-Virginia Boundary Compact of 1803 was in litigation as early as 1818, but it was not suggested that the lack of express consent impaired its validity. *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212 (1818). It was this same compact which was held valid, notwithstanding the compact clause, in *Virginia v. Tennessee*, 148 U.S. 503 (1893). See text accompanying notes 17-21 and 130-32 *infra*.

16. See notes 114-26 *infra* and accompanying text.

17. 148 U.S. 503 (1893).

18. If the language used in his *Commentaries* left any question as to Story's

must be submitted for the consent of Congress "in order to check any infringement of the rights of the national government"¹⁹ and that those arrangements which were "of a political character" fell within the absolute prohibition of the first clause.²⁰ However, in *Virginia v. Tennessee* his argument was quoted and used as if it were authority for the quite different proposition that the only arrangements which require consent are those which will affect "the political power or influence" of particular states and "encroach . . . upon the full and free exercise of Federal authority."²¹ The fact that this "rule" of *Virginia v. Tennessee* has been widely regarded as dictum²² has not prevented its use as precedent in numerous subsequent cases.²³

C. Analytical Vices of *Virginia v. Tennessee*

The rule which results from the juxtaposition of Story's own construction and that imposed by the Court in *Virginia v. Tennessee* is a curious one indeed. The opinion states that an "agreement or compact" upsetting to the political balance of the Union, or encroaching upon the free exercise of federal authority, can be concluded only with congressional consent. However, an "agreement or compact" with such political effects is an absolutely prohibited "treaty"²⁴ and cannot be validated even by Congress. Moreover, if such an arrangement *actually* encroached upon federal authority, it would not be approved by a responsible Congress and might well be judicially invalidated even if it were. As a matter of fact, Congress commonly inserts provisos in its consent acts and resolutions specifically preserving full federal authority over the

opinion of the comprehensiveness of the requirement, that question was resolved by Story's entire concurrence in Mr. Justice Taney's all-inclusive construction of the compact clause in *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840). See text accompanying note 109 *infra*.

19. 3 STORY, *op. cit. supra* note 5, § 1397.

20. *Ibid.*

21. 148 U.S. at 520 (1893).

22. See, e.g., THURSBY, INTERSTATE COÖPERATION 74 (1953); Bruce, *The Compacts and Agreements of States With One Another and With Foreign Powers*, 2 MINN. L. REV. 500 (1918); Dunbar, *Interstate Compacts and Congressional Consent*, 36 VA. L. REV. 753 (1950); Dutton, *Compacts and Trade Barrier Controversies*, 16 IND. L.J. 204 (1940).

23. See cases cited note 32 *infra*.

24. If instead of simply serving to "mark and define that which actually existed before, but was undefined and unmarked," a boundary established by compact "is so run as to cut off an important and valuable portion of a State," this is essentially a cession which, in Story's view as quoted with approval by the Court, falls within clause one, as a "treaty." See 148 U.S. at 519-20.

subject matter.²⁵ An "agreement or compact" having no such effects could be readily approved, but such an "agreement or compact" does not, under *Virginia v. Tennessee*, require consent. In other words, if consent is required, it cannot be given; and if consent could be given, it is not required.

If it were left to Congress to decide whether a particular "compact" actually would have political effects, or actually would encroach upon federal authority, then the compact clause, as interpreted in *Virginia v. Tennessee*, could retain some meaning. Congress would express its determination of that issue in each instance by granting or withholding its consent. However, under the rule of *Virginia v. Tennessee* as applied by the courts, the responsibility for making this determination has not been left to Congress. For example, even though boundary "compacts" as a class are a prime example of arrangements capable of disrupting the political balance of the Union,²⁶ particular boundary compacts have been found by the courts to have no political effects and therefore to be exempt from the compact clause.²⁷ Thus, the responsibility for determining whether the potential for ill effects has been realized in a particular instance has been claimed by the courts.

The test of the scope of the compact clause has been put by the courts in terms of the actual effects of particular compacts, rather than the potential effects of the species. Under *Virginia v. Tennessee*, as applied by the courts, it is the "compacting" states, second-guessed by the courts, that must determine whether a particular "compact" actually impairs federal authority or has political effects. If it does, congressional consent would be ineffectual; if it does not, then congressional consent would be superfluous. Thus, the provision for congressional consent to compacts is, in effect, written out of the Constitution and replaced with a criterion for validity under which congressional consent, or the lack of it, is irrelevant.

However, the rule of *Virginia v. Tennessee* has not been applied

25. Such provisos have a history of more than a century and a quarter. In its consent to a "compact" in 1834, Congress said: "Provided, That nothing therein contained shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement." Act of June 28, 1934, ch. 126, 4 Stat. 711. Of course, state action in spheres of federal competence is no *encroachment* upon federal authority so long as Congress retains its paramount power over the subject.

26. The most prolific writers on compact law cite boundary settlements by compact as "the clearest examples of arrangements affecting the political balance of our federalism." See ZIMMERMAN & WENDELL, *THE LAW AND USE OF INTERSTATE COMPACTS* 23 (1961).

27. See *North Carolina v. Tennessee*, 235 U.S. 1 (1914); *Town of Searsburg v. Town of Woodford*, 76 Vt. 370, 57 Atl. 961 (1904).

extrajudicially in the same manner that it has been applied by the courts. Advisers to the Council of State Governments,²⁸ for example, take the position that interstate boundary settlements and "compacts" concerning jurisdiction over boundary waters all require consent,²⁹ even though, "in actuality, there have been no compacts adopted or proposed in our history which have really affected that political balance."³⁰ They urge that:

The real test of the need for Congressional consent in the present day is the degree to which an interstate agreement *may* conflict with federal law or federal interests. If it runs *any danger of conflict* with federal law or the doctrine of pre-emption, then the need for Congressional consent is clearly indicated.³¹

Thus, the rule has been made to seem more plausible by stating it in terms of the possible, rather than the actual, effects of "compacts." This extra-judicial understanding of the rule of *Virginia v. Tennessee* serves as the standard by which "compacting" states today try to determine the necessity of consent. The best criterion by which to judge the value of this reformulated rule is not its logical or analytical validity, or even its consonance with the rule actually applied by the courts, but rather its practical effects.

D. Practical Vices of *Virginia v. Tennessee*

The application of the rule of *Virginia v. Tennessee* to specific "compacts" is not easy. The mere statement of the rule makes it appear that only the exceptional "agreement or compact" will fall within the conditional interdiction of the compact clause; indeed, in every case since *Virginia v. Tennessee* in which an interstate arrangement has been challenged for lack of congressional consent, it has been held exempt from the consent requirement.³² Neverthe-

28. The Council of State Governments is a joint governmental agency created, supported, and directed by the fifty states. Much of its work consists of participating in the drafting and implementation of interstate "compacts."

29. This conclusion is inconsistent with the decided cases. See cases cited note 27 *supra*.

30. ZIMMERMAN & WENDELL, *op. cit. supra* note 26, at 23. The Southern Confederacy was an arrangement falling within the terms of Art. I, § 10, cl. 1, absolutely prohibiting any "treaty, alliance, or confederation." See *Williams v. Bruffy*, 96 U.S. 176 (1877).

31. ZIMMERMAN & WENDELL, *op. cit. supra* note 26, at 23. (Emphasis added.)

32. See, e.g., *North Carolina v. Tennessee*, 235 U.S. 1 (1914); *Wharton v. Wise*, 153 U.S. 155 (1894); *State v. Doe*, 149 Conn. 216, 178 A.2d 271 (1962); *Duncan v. Smith*, 262 S.W.2d 373 (Ky. 1953); *Dixie Wholesale Grocery, Inc. v. Martin*, 278 Ky. 705, 129 S.W.2d 181, *cert. denied*, 308 U.S. 609 (1939); *Roberts Tobacco Co. v. Department of Revenue*, 322 Mich. 519, 34 N.W.2d 54 (1948); *Ham v. Maine-New Hampshire Interstate Bridge Authority*, 92 N.H. 268, 30 A.2d 1 (1943); *Landes v. Landes*, 1

less, draftsmen have been so uncertain of the scope and application of the compact clause that until very recently nearly every formal interstate arrangement has been submitted for congressional consent.³³ Congress, no less than the states, seems uncertain as to the extent of its power to review interstate "agreements or compacts." Consent was denied to the Southern Regional Education Compact³⁴ after congressional discussion had raised the argument that consent was not required;³⁵ the interested states, sharing that view,³⁶ have since implemented the "compact" without congressional approval. Nevertheless, two subsequent "compacts" designed for purposes substantially identical to this one—the New England Higher Education Compact³⁷ and the Western Regional Education Compact³⁸—have been submitted by their parties and have been granted congressional consent.

Recently, the states have become more bold, insisting that consent to certain "compacts" is unnecessary³⁹ and even proceeding without it.⁴⁰ However, their judgment has not yet been subjected to judicial scrutiny in any of these instances, and it has already been noted that in some respects the judgment of their advisers conflicts with specific judicial precedents.⁴¹ Even the courts have not reached agreement on the application of the compact clause to specific types of arrangements. For example, the New Hampshire court⁴² applied *Virginia v. Tennessee* to exempt from the clause a "compact" substantially the same as those that were held subject to it in two United States

N.Y.2d 358, 135 N.E.2d 562, 153 N.Y.S.2d 14, *appeal dismissed*, 352 U.S. 948 (1956); *McHenry County v. Brady*, 37 N.D. 59, 163 N.W. 540 (1917); *Town of Searsburg v. Town of Woodford*, 76 Vt. 370, 57 Atl. 961 (1904).

33. See COUNCIL OF STATE GOVERNMENTS, INTERSTATE COMPACTS 1783-1956, 25-46 (1956). Current lists of compacts pending or proposed are published in the Council's biennial *The Book of the States*.

34. See Ferguson, *Interstate Agreements*, 39 Ky. L.J. 31 (1950); Ferguson, *The Legal Basis for a Southern University—Interstate Agreements Without Congressional Consent*, 38 Ky. L.J. 347 (1950).

35. See ZIMMERMAN & WENDELL, *op. cit. supra* note 26, at 21.

36. See authorities cited note 34 *supra*. For a discussion representing the contrary view, see Dunbar, *supra* note 22.

37. Consented to by Congress, Act of Aug. 30, 1954, ch. 1089, 68 Stat. 982.

38. Consented to by Congress, Act of Aug. 8, 1953, ch. 380, 67 Stat. 490.

39. See text accompanying note 45 *infra*.

40. Consent was not requested for the recent Compact on Juveniles, the Corrections Compacts, or the Welfare Services Compacts. See COUNCIL OF STATE GOVERNMENTS, 1964-1965 THE BOOK OF THE STATES 276-77 (hereinafter cited BOOK OF STATES); 1962-1963 BOOK OF STATES 268; 1960-1961 BOOK OF STATES 245-46.

41. See text accompanying notes 28-31 *supra*.

42. *Ham v. Maine-New Hampshire Interstate Bridge Authority*, 92 N.H. 268, 30 A.2d 1 (1943). Actually, congressional consent had been granted in the Act of July 28, 1937, 50 Stat. 538; the court, unaware of this fact, held consent unnecessary.

Supreme Court decisions.⁴³ Those persons who have undertaken to advise the states with respect to the applicability of the compact clause to particular arrangements have done as well as is possible under the handicap of the inherent ambiguity of the enigmatic rule of *Virginia v. Tennessee*; certainty simply is not possible under that rule.⁴⁴

Uncertainty of application is only one of the vices of the rule of *Virginia v. Tennessee*. A second problem is manifested in the developments which have recently induced states to make bolder assertions of exemptions from the compact clause. There has been a pronounced tendency on the part of Congress to exert sweeping powers of supervision and control over "compacts" and "compact" agencies. In an effort to summarize the situation, the Executive Director of the Council of State Governments stated:

The investigation of the Port of New York Authority by a Congressional committee, the sweeping demands made for all books, papers and records of the agency, and the subsequent prosecution of its Executive Director make clear the lengths to which Congress has gone in asserting authority over compacts to which it has given its consent. Also within the past year [1962], bills granting consent to compacts have been amended in various restrictive ways, including the adding of specific provisions granting Congress and its committees the right to examine all books, papers and records concerning operations under the compacts.

The states have strongly opposed these attempts by Congress to interfere in interstate programs. Resolutions expressing vigorous opposition have been adopted by [*e.g.*] the General Assembly of the States [and] the Governors' Conference Nevertheless, the fight goes on. Until it is won, compacts should not be submitted for consent unless it is completely clear that consent is necessary for the compact to become effective.⁴⁵

43. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959); *Delaware River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419 (1940).

44. There is simply no merit in the exuberant acclamation of the rule of *Virginia v. Tennessee* as "an exceedingly useful rule because it permits the maximum degree of flexibility compatible with safeguarding the national interest." ZIMMERMAN & WENDELL, *op. cit. supra* note 26, at 22. It is indeed flexible; "flaccid" might be the better term. It is so limp that when applied to practical affairs it sets no certain or unambiguous line.

45. Crihfield, *The States and the Council of State Governments—Annual Report of the Executive Director to the Board of Managers of the Council*, 36 STATE GOV'T 29, 68 (1963). "Another disturbing element regarding interstate compacts has been the increasing tendency of Congress to seek control over compacts by the attachment of far-reaching conditions to Congressional consent legislation." Crihfield, *The States and the Council of State Governments*, 35 STATE GOV'T 20, 65 (1962). See also the summaries by Zimmerman & Wendell, *Interstate Compacts*, in 1964-1965 BOOK OF STATES 269; 1962-1963 BOOK OF STATES 263.

The justification claimed for these attempts at greater federal control is the protection of federal authority from encroachment by the states.⁴⁶ Of course, any state act touching an area of federal competence is *pro tanto* subject to the paramount power of Congress.⁴⁷ However, *Virginia v. Tennessee* makes relationship to the sphere of federal competence the test of inclusion under the compact clause. As understood and applied in practice, this rule provides that if a projected "compact" may in any particular touch upon an area of federal competence, then the whole scheme is brought within the compact clause. The issue thus becomes not whether Congress can qualify its consent to state action in the federal sphere, but whether it can qualify the states' power to deal, in the same "compact," with strictly state concerns; not whether Congress can require periodic reports by, or conduct investigations into, "compact" agency activities affecting federal interests, but whether it can require complete reports and conduct comprehensive investigations of all activities under a sanctioned "compact," however unrelated to federal concerns; not whether Congress can require supplementary consent before states may grant to a "compact" agency additional powers which may touch upon federal concerns, but whether it can prevent states from conferring upon such agencies additional powers as to matters wholly within the states' own domain; not whether Congress can vindicate its paramount authority in its own area of competence by rescinding its permission for state activity in that area, but whether it can, by repealing its consent, dissolve arrangements and obligations which are strictly within the states' sphere of competence.

46. This was the avowed objective of the congressional committee which investigated the New York Port Authority. See *United States v. Tobin*, 195 F. Supp. 588 (D.D.C. 1961). "Another type of restrictive provision found in recent consent legislation limits the compact agency to the performance of the enumerated functions and requires congressional consent for each new or additional duty imposed on the agency by the compacting states. In imposing this kind of restriction, Congress has doubtless been motivated by a desire to protect the exercise of its constitutional responsibilities against erosion by *fait accompli* and the possible application thereto of a doctrine of implied consent." Celler, *Congress, Compacts, and Interstate Authorities*, 26 LAW & CONTEMP. PROB. 682, 689 (1961).

47. The major factor that persuaded the circuit court to reverse the decision in the Port Authority investigation case on a non-constitutional ground, thereby avoiding rendering judgment on the constitutional issues respecting the scope of congressional power under the compact clause, was the argument that "under our system of government the Constitution is paramount, and the Constitution gives to Congress certain plenary powers, as for example those in the field of interstate commerce and that of national defense. With the choice of acting pursuant to any or all of these plenary powers continuously available to it, Congress has at its disposal abundant authority to supervise and regulate the activities of operational compacts in such a way as to insure that no violence is done by these compacts to more compelling federal concerns." *Tobin v. United States*, 306 F.2d 270, 273 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962).

The states readily admit the paramount authority of Congress within the sphere of federal competence, and they do not deny that Congress may override "compact" activities encroaching upon that sphere.⁴⁸ What they decry is the assertion of a congressional power extending beyond this sphere, rationalized as legislation enacted pursuant to the compact clause.⁴⁹ However, this extraordinary power is vested in Congress by the holding in *Virginia v. Tennessee* that the presence of federal competence is the test of the scope of the compact clause. So long as this decision is followed, the only prospect for less federal control over non-federal facets of interstate "compacts" lies in congressional self-restraint. As noted previously, it is the contrary quality which has been evidenced in Congress for the past several years.

The constitutional requirement of congressional approval before an "agreement or compact" can come into effect has also given color to the doctrine that a sanctioned compact is a federal statute. This doctrine, unsound as it is, is still subscribed to by the United States Supreme Court.⁵⁰ Moreover, this theory forms the basis for certiorari review of state "compact" cases⁵¹ and for the remarkable rule that in construing a "compact" the intent of the parties is irrelevant and that of the consenting Congress controlling.⁵² The final vice of the rule in *Virginia v. Tennessee* is that it permits the application of this doctrine and its implications to a broader variety of interstate arrangements than would otherwise be required.

E. Objective of the Present Study

It should not be necessary to detail more fully either the practical inadequacies of the rule of *Virginia v. Tennessee* or its analytical infirmities. However, an explanation should be inserted here to dispel the concern of those who might discountenance the perti-

48. See the court's references to the argument for appellant in *Tobin v. United States*, 306 F.2d 270 (D.C. Cir. 1962).

49. See Resolution adopted by 53d annual meeting of the Governors' Conference, 1961, in 34 STATE GOV'T 183, 188 (1961); Resolution adopted by 52nd annual meeting of the Governors' Conference, 1960, in 33 STATE GOV'T 182 (1960).

50. The Court's earlier holding in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), that a sanctioned compact is not a federal statute, was overruled in *Delaware River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419 (1940). The Supreme Court's continued adherence to the "law of the Union" doctrine is demonstrated—and criticized—in Engdahl, *Construction of Interstate Compacts—A Questionable Federal Question*, 51 VA. L. REV. (October 1965).

51. See *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951); *Delaware River Joint Toll Bridge Comm'n v. Colburn*, *supra* note 50.

52. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959). See Engdahl, *supra* note 50.

nacity of this writer in challenging an interpretation of the compact clause which has long been acquiesced in by the Supreme Court and by every inferior court which has considered the problem, as well as by virtually every modern commentator.' The answer is simple: no one—court or commentator—has heretofore attempted any comprehensive, critical analysis of the rule expressed in *Virginia v. Tennessee*.⁵³ This absence of critical analysis is typical of the whole field of compact law. Indeed, it accounts for the fact that certain courts⁵⁴ and commentators⁵⁵ are oblivious to the Supreme Court's holding that a sanctioned "compact" is a federal statute and the reversal of the Court's earlier position with respect to this issue.⁵⁶ It accounts for the fact that, after six full years, the impact of the Supreme Court's holding that the intent of the parties is not controlling in "compact" construction⁵⁷ has still not been felt by the states.⁵⁸ In areas of the law where litigation is frequent enough that inadequacies of analysis can be corrected in the course of the judicial process itself, a more acquiescent attitude on the part of a commentator might be indicated. However, litigation of fundamental questions of "compact" law has been extremely rare, and even on those few occasions the judicial investigation into the issues has been quite shallow. Thus, a more rigorous and critical approach is justified and, indeed, required.

The primary design of this article, however, is constructive. The writer seeks to advance a construction of the compact clause which is not only wholly compatible with the terms of the constitutional provision, but also far more effective in achieving all the ends sought unsuccessfully to be attained through the rule of *Virginia v. Tennessee*. The ultimate objective is to determine what place the typical modern interstate "compact" holds in the scheme of article I, section 10, as actually intended by the framers. This exercise in constitutional exegesis—this attempt to determine the actual intent of the

53. In making this generalization, the writer does not overlook the several significant works dealing with the compact clause, which may have merit on other grounds.

54. See, e.g., *Rivoli Trucking Corp. v. American Export Lines, Inc.*, 167 F. Supp. 937, 939 (E.D.N.Y. 1958); *Henderson v. Delaware River Joint Toll Bridge Comm'n*, 362 Pa. 475, 485, 66 A.2d 843, 848 (dictum), cert. denied, 338 U.S. 850 (1949).

55. See, e.g., ZIMMERMAN & WENDELL, *op. cit. supra* note 26, at 7; 81 C.J.S. *States* § 10c, at 906 (1953); Abel, *Ohio Valley Panorama*, 54 W. VA. L. REV. 186, 229 (1952).

56. See note 50 *supra* and accompanying text.

57. See *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959).

58. The widely held view of *Petty v. Tennessee-Missouri Bridge Comm'n*, *supra* note 57, is that it merely reinterprets certain language frequently used in congressional acts of consent. See ZIMMERMAN & WENDELL, *op. cit. supra* note 26, at 5; Zimmerman & Wendell, *Interstate Compacts*, in 1960-1961 BOOK OF STATES 238.

eighteenth century constitutional draftsmen—will not by itself determine the proper construction of article I, section 10, for certainly constitutional history is not in itself the criterion of constitutional law. However, this examination of constitutional history is necessary not only to lay the foundation for the modern application of the constitutional provision which will be suggested here, but also to demonstrate that the rule of *Virginia v. Tennessee* is exegetically, as well as analytically, unsound.

II. EIGHTEENTH CENTURY ORIGINS

A. Source of the Distinction Between "Treaties" and "Agreements or Compacts"

There is nothing in the records of the constitutional convention which manifests the intent of the framers as to the distinction between "treaties" and "agreements or compacts" or as to the types of arrangements they meant to include in the latter designation. The single reference to this provision in *The Federalist* seems, at first glance, to be equally unenlightening. "The prohibition against treaties, alliances, and confederations makes a part of the existing articles of Union; and for reasons which need no explanation, is copied into the new Constitution."⁵⁹ Similarly, it is stated in a comment concerning the provision on compacts and agreements that "the remaining particulars of this clause fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark."⁶⁰ However, this failure of the authors of the *Federalist Papers* to anticipate the confusion which would prevail in later generations over the construction of this section is less a disappointment than a clue. The very obviousness of the matter to the drafters, and presumably to the audience to which the *Federalist Papers* were addressed, suggests that there must have been some distinction between the terms which was widely enough recognized in the last quarter of the eighteenth century that it could be considered by men of that time to be fully developed and obvious. The next step in our study is, therefore, a simple one of historical inquiry.

Chancellor Kent wrote in 1826 that "the most popular, and the most elegant writer on the law of nations, is Vattel, whose method

59. THE FEDERALIST No. 44, at 193 (Beard ed. 1948) (Madison). The statement is not actually correct. The prohibition in the Articles was conditional; in the Constitution it is absolute. A more thorough comparison of the analogous provisions in the Articles and the Constitution appears in the text accompanying notes 77-82 *infra*.

60. THE FEDERALIST No. 44, at 195 (Beard ed. 1948) (Madison).

has been greatly admired. He has been cited, for the last half century [since the Revolution], more freely than any one of the public jurists"⁶¹ It is the present writer's contention that the constitutional distinction between "treaties" and "agreements or compacts" was taken directly from Vattel.

According to Vattel,⁶² the term "treaty" in its more proper sense designates those international arrangements which oblige a party to perform repeated acts as specified occasions arise. For example, a treaty of commerce may call for favorable treatment each time another nation's goods are received, or a treaty of alliance may call for support each time the ally is attacked. The terms "agreement"⁶³ and "compact,"⁶⁴ on the other hand, both designate international

61. 1 KENT, COMMENTARIES ON AMERICAN LAW 118 (1826).

62. The relevant passages are in VATTTEL, LAW OF NATIONS, bk. II, ch. XII, §§ 152, 153, 192; ch. XIV, § 206. Vattel's treatise was originally published in French in 1758, and an English translation printed in London for J. Newberry *et al.* appeared in 1760; the evidence indicates that neither version of the work was circulated in the American colonies prior to 1775. See Reeves, *The Influence of the Law of Nature Upon International Law in the United States*, 3 AM. J. INT'L L. 547 (1909). In 1775, some copies of Dumas' new edition in French (Amsterdam: van Harrevelt, 1775) were delivered to Benjamin Franklin, and Franklin reported that the copy he kept "has been continually in the hands of the members of our Congress now sitting." *Letter of Franklin to Dumas*, Dec. 19, 1775, in 2 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 64 (Wharton ed. 1889). Personal copies of the same edition were probably procured by other statesmen. It was not until 1787 that the treatise was again made available in English, and it is not certain whether either of the translated editions which appeared in that year (New York: Berry & Rogers; Dublin: White) was published early enough to have been available to the delegates to the Constitutional Convention before the distinction between "treaties" and "compacts and agreements" was introduced by the Committee of Detail in July. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 169 (Farrand rev. ed. 1937). French was, of course, a familiar language to the educated men of that era. The fact that no English version of Vattel's treatise was apparently available to the Americans until at least 1787, and perhaps until after the Constitutional Convention had adjourned, suggests that no particular edition in English can be expected necessarily to represent the early statesmen's precise understanding of Vattel. Rather than merely quoting an English version, therefore, this writer has chosen to summarize Vattel as he believes Vattel was understood by the Americans of that era, with explanatory footnotes where they are needed.

63. Vattel's two French terms *accords* and *conventions* (Livre II, ch. XII, § 153; Amsterdam: Dumas ed., 1775) can both be translated with equal accuracy by the single English word "agreements."

64. Vattel's French word *pacte* was translated "pact" in the London edition of 1760 and the Dublin edition of 1787. The New York edition of 1787 is extremely rare, and although this writer has learned that copies are held in the Library of Congress and the New York City Public Library, he has been unable to examine them. However, the fact that the New York edition and the Dublin edition published in the same year have the same number of pages, according to the Library of Congress listings, suggests that one of the editions may be merely a copy of the other. In the several editions which appeared both in America and in England in the next forty or fifty years, some rendered the French word *pacte* as "pact" and some as "compact." Since the appearance of Chitty's edition in 1833, "compact" has been the uniformly preferred term and there is no distinction in meaning. Because it was the French, and not any English version, with which the constitutional draftsmen were probably most familiar (see note 62

arrangements which do not contemplate repeated acts of performance, but rather make one final disposition of the parties' claims or rights. Boundary settlements and agreements as to rights and jurisdiction over boundary waters fall within this class. Vattel referred to these "compacts" and "agreements" as transitory arrangements, but he did not mean to imply by that term that they were of lesser significance or merely temporary in effect. On the contrary, Vattel emphasized that "compacts" or "agreements" are perpetual; a right surrendered to another by "compact" no longer belongs to the one who surrendered it and can never be reclaimed.⁶⁵

The failure of some commentators to recognize that it was not the temporal connotations of the term "transitory" which Vattel intended has been instrumental in obscuring the Vattelian origins of the constitutional distinction between "compacts" and "treaties."⁶⁶ In its more etymological sense, the term also connotes transference—the movement of rights out of the hands of one party into those of another. It is this meaning of the term "transitory" that Vattel apparently intended. Westlake has suggested that the term "dispositive" would make the concept clearer than "transitory."⁶⁷ Thus, we find in Vattel a distinction between those international arrangements which are *dispositive*—for example, boundary settlements and cessions—and all others, which are *nondispositive*—for example, treaties of commerce and treaties of alliance. Vattel referred to the former group as "agreements" or "compacts"; the latter he called "treaties."⁶⁸

The distinction between dispositive and nondispositive international arrangements was not original with Vattel, although the representation of that distinction by a technical usage of the terms "treaty" and "agreement or compact" apparently was. The dispositive-nondispositive differentiation is traceable back at least to

supra), they may have preferred to translate the term as "compact" rather than "pact." Thus, the fact that the Constitution speaks of "compact," while most of the early translations of Vattel speak of "pact," cannot be raised as an objection to the argument deriving the constitutional terminology from Vattel.

65. VATTEL, *op. cit. supra* note 62, § 192. Of course, the effect of a "compact" could be altered or reversed by a subsequent "compact" between the parties.

66. See note 76 *infra*.

67. 1 WESTLAKE, INTERNATIONAL LAW 60-61 (1904). Westlake gives an explanation of Vattel's term "transitory" slightly different from, but not inconsistent with, that given above.

68. VATTEL, *op. cit. supra* note 62, §§ 152, 153, 192, 206. Vattel, to be sure, equivocated between this narrow usage of "compacts" and a broader usage which encompassed all arrangements including "treaties." Similarly, he equivocated between the narrow usage of "treaties" as excluding dispositive arrangements and the broader usage which encompassed all arrangements including "compacts" and "agreements."

Pufendorf,⁶⁹ and after Vattel, the distinction—but not Vattel's terminology⁷⁰—found consistent recognition among the international jurists of the nineteenth and even the twentieth century.⁷¹ Whatever the degree of its significance in contemporary international practice, it is certain that this distinction between dispositive and nondispositive arrangements has long been recognized in international legal theory.

Vattel's distinction between "treaties" and "agreements" or "compacts" appeared in a widely circulated work, the authority of which is known to have been generally, if not universally, accepted during the period in which the Constitution was conceived and adopted. Moreover, there is no other distinction between these terms which could provide a meaningful frame of reference for interpretation of the compact clause⁷² and which was known to have had such currency in America during the formative period as would explain the cavalier treatment of it in the *Federalist Papers*.⁷³ It seems to be strongly suggested by these circumstances that this was the distinction intended to be drawn by the draftsmen of article I, section 10.⁷⁴ This conclusion is corroborated by the earliest of commentators upon that section, St. George Tucker.⁷⁵ Judge Tucker

69. While suggesting that a succeeding ruler's obligation under a *foedera* which was concluded by his predecessor might depend upon numerous factors, Pufendorf noted that "'tis beyond dispute, that the Successor is obliged to stand to all those lawful Agreements [conventiones], by which his Predecessor transferred any Right to a Third Person." PUFENDORF, *OF THE LAW OF NATURE AND NATIONS*, bk. VIII, ch. IX, § VIII (1704).

70. The significance of the deviations from Vattel's terminology for the construction of the compact clause of the Constitution is explored in Part III of this study, *infra*.

71. The distinction between dispositive and nondispositive international arrangements was discussed by such early sources as MARTENS, *LAW OF NATIONS*, bk. II, ch. 1, § 3 (Cobbett transl. 1795); WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 296-301 (1836). The most recent discussions appear in McNAIR, *THE LAW OF TREATIES* 5 (1961); 1 WESTLAKE, *op. cit. supra* note 67, at 60-61; McNair, *The Functions and Differing Legal Character of Treaties*, 11 BRIT. YB. INT'L L. 100 (1930) ("treaties having the character of conveyances").

72. The term "compact" appears in the "social contract" literature of the eighteenth century, but in that context the term is never counterposed to "treaty." Furthermore, it could hardly be argued that the constitutional framers contemplated arrangements between states of such organic significance as that meaning of the term "compact" would import.

73. See text accompanying note 60 *supra*.

74. This writer is aware that he is not the first to find the source of the constitutional language in Vattel's treatise. See Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?*, 3 U. CHI. L. REV. 453 (1936). Weinfeld, however, made no attempt to show the significance of this finding for modern interstate relations.

75. Although not a delegate to the Constitutional Convention, Tucker was a prominent statesman of the period. Along with Edmond Randolph and James Madison, he had been a commissioner of Virginia to the Annapolis Convention of 1786.

supported this construction with a direct citation to the passage from Vattel discussed above.⁷⁶

B. *The Vattelien Explanation of the Compact Clause*

Vattel's distinction between "treaties" and "agreements" or "compacts" is also helpful in the interpretation of the analogous provisions in the Articles of Confederation,⁷⁷ which contained separate provisions concerning the diplomatic intercourse of individual states with foreign nations and with each other. Without first obtaining the consent of Congress, no individual state could "enter into any conference, agreement, alliance or treaty with any King, Prince or State."⁷⁸ The limitation as to interstate diplomatic relations was significantly different: "No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent"⁷⁹ of Congress. These restrictions upon the formation of confederations or alliances by individual states either with foreign nations or with sister states were an evident attempt to preclude the disruption of the Union by divergent allegiances. With respect to foreign nations, the additional restrictions on "conferences," "agreements," and "treaties" comported with the general purpose of the Articles to consolidate international relations by placing the whole of the States' international intercourse under joint surveillance.

Although the restriction on arrangements between sister states covered "treaties," this provision contained no reference to "agreements," and thus contrasted with the clause defining state relations with foreign powers. On the assumption that the draftsmen of the Articles had in mind the terminology of Vattel, this omission is susceptible of a logical explanation. Congressional surveillance over "treaties" between sister states would have been necessary to assure that the parties did not use such arrangements as a device to violate their obligations to all the other states. However, the term "agree-

76. 1 TUCKER, BLACKSTONE'S COMMENTARIES, app. at 309-10 (1803). Tucker's restatement of the Vattelien distinction was not faithful. He misconstrued Vattel's use of the term "transitory" (see text accompanying notes 65-67 *supra*), and this was, in part at least, the reason for Story's rejection of Tucker's Vattelien interpretation of the compact clause. 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1397 (1st ed. 1833) (in subsequent editions, § 1403). See text accompanying notes 4-10 *supra*. Furthermore, Vattel did not limit "agreements" or "compacts" to local affairs, nor to arrangements which could not affect any other interest than those of the parties; yet Tucker did insert this limitation and relied on Vattel for authority. Tucker is significant, nonetheless, for his recognition that Vattel was the source of the constitutional distinction between "treaties" and "agreements or compacts."

77. ART. OF CONFEDERATION art. VI.

78. *Ibid.*

79. *Ibid.*

ments" was understood to include only dispositive arrangements, which in colonial practice had been utilized primarily in settlements affecting territorial boundaries and rights in boundary waters.⁸⁰

It is understandable that mere boundary arrangements between particular states would not have been thought potentially harmful to the other states. Special provision for the disposition of such interstate disputes as might arise if a boundary could not be settled by agreement, or if a boundary agreement itself should give rise to a dispute, was made in article IX. Thus, it seems reasonable for the draftsmen of the Articles to have provided for joint surveillance of territorial agreements between a state and a foreign nation, which in case of subsequent contest could embroil all of the states in an international conflict, while leaving unimpeded the power of the states to conclude such agreements *inter sese*.

In the Constitution, unlike the Articles, diplomatic relations between the states and foreign nations and between the states themselves are treated together. The states are denied all power to conclude "treaties," whether with foreign nations or with sister states, and, in contrast to the Articles, the prohibition is not qualified by the possibility of congressional consent. This complete removal of the states' "treaty" power (bearing in mind the narrower meaning of "treaty" as used by Vattel) is not difficult to understand when one takes into account the whole new scheme of the Constitution. The matters which might otherwise have been dealt with by treaties between the states or between states and foreign powers were, under the new Constitution, brought within the competence of the federal government. Nevertheless, there were unresolved problems among the several states which might still become, as they had under the Articles, subjects of "compacts" or "agreements."

The requirement of congressional consent to such agreements with foreign powers was continued, probably for the same reasons that it had been included in the Articles of 1777. However, the Constitution extended the consent requirement to compacts and

80. See *Rundle v. Delaware & Raritan Canal Co.*, 55 U.S. (14 How.) 80 (1852), affirming 21 Fed. Cas. 6 (No. 12139) (C.C.E.D. Pa. 1849) (proprietary acts of N.J. and Pa., 1771, regarded as a compact); *Bennett v. Boggs*, 3 Fed. Cas. 221 (No. 1319) (C.C.D.N.J. 1830) (compact between people and proprietaries of N.J., 1676). The lack of any federal surveillance over such arrangements was one element in the Articles which seems to have troubled the Federalists. See Madison, *Preface to Debates in the Convention of 1787*, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 539, 548 (Farrand rev. ed. 1937). Either ignorance of, or Antifederalist resistance to, the change wrought by the compact clause of the Constitution may account for the failure of several states to submit boundary compacts for consent even after 1800. See note 14 *supra* and accompanying text.

agreements with sister states, even though these arrangements had not been subject to congressional surveillance under the Articles. The explanation for this change also seems quite logical. The Constitution did not provide any special means for the settlement of interstate territorial disputes, as had the ninth article of confederation, and the jurisdiction of the new federal judiciary over interstate controversies other than with the consent of each of the party states, and in particular over questions of disputed boundaries,⁸¹ was far from certain. Congressional surveillance over compacts or agreements between the states was therefore not only a check on the remote possibility of territorial arrangements upsetting to the structure of the Union,⁸² but also the only certain means by which the Union could preclude subsequent controversies over such agreements by assuring clarity and fairness in their terms and purposes.

III. NINETEENTH CENTURY ADUMBRATION

If it was Vattel's distinction between dispositive and nondispositive arrangements which was adverted to in article I, section 10, the promptness and permanence with which that meaning of the section was obscured demand explanation.

It was not long after the incorporation of the terms "treaty," "compact," and "agreement" into the Constitution to indicate the distinction between dispositive and nondispositive arrangements, that the recognized distinction between these terms began to be eroded away. Even Vattel had not confined himself strictly to the narrower signification of these terms, for he occasionally used both "compact" and "treaty" in a broader sense to include arrangements of every sort.⁸³ The next writer of significance to repeat Vattel's distinction was Martens, who wrote in France during the very years when the Americans were creating their Constitution. Since Martens' work⁸⁴ was not published until after the Americans' work was done and did not reach this continent until 1794,⁸⁵ it is clear that

81. It was not until *Rhode Island & Providence Plantations v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838), that the jurisdiction of the Supreme Court over boundary controversies was established.

82. "By the compact of 1820, Tennessee acquired nearly half a million of acres north of 36 degrees 30 minutes; if she could go to ten miles north, she might two hundred, and purchase out a sister state, sapping the foundations of the Union." *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185, 206 (1837) (John Catron, counsel for defendant in error).

83. VATTEL, *op. cit. supra* note 62, §§ 152, 153, 192, 206.

84. MARTENS, *PRÉCIS DU DROIT DES GENS MODERNES DE L'EUROPE FONDÉ SUR LES TRAITÉS ET L'USAGE* (1788).

85. See the translator's advertisement in the London edition of 1802. MARTENS, *LAW OF NATIONS*, at v (Cobbett transl. 1802).

his terminology could have had no influence upon the choice of words by the constitutional draftsmen.

Nevertheless, Martens' writing has contributed to the clouding of the draftsmen's intent. In the 1795 American translation of Martens' first edition, the term "treaties" was used freely in its more general sense, and the dispositive type of treaty was not denominated "compact" or "agreement," but rather "transitory covenant."⁸⁶ The translator of this first edition reported in 1802 that "The President, the Vice-President, and every member of the Congress became subscribers to it; and, I believe, there are few law-libraries in the United States, in which it is not to be found."⁸⁷ Among its original subscribers also were numbered many of the most prominent lawyers of that day, including several who were, or were to become, Justices of the Supreme Court.⁸⁸ It would not be accurate to say that Martens displaced Vattel as the leading authority on international law;⁸⁹ but considering the wide circulation of his treatise, the exclusive use in this translation of Martens of the term "covenants," and the exclusive use in the Constitution of the terms "compact" and "agreement," Martens may be seen as having contributed to the disassociation of the constitutional provision from the recognized distinction between types of international arrangements.

The American writer Henry Wheaton published his *Elements of International Law* in 1836; while he recognized and utilized the distinction between dispositive and nondispositive arrangements, he used only the term "conventions" to refer to the dispositive type.⁹⁰ Wheaton also used the term "compact," but only in the broadest sense, to include arrangements of all sorts, including those properly called "treaties."⁹¹ Throughout the course of the nineteenth century, common international usage eroded away even the distinctive significance of the term "conventions," and if there was any terminological distinction drawn in practice, it was the reservation of the term

86. MARTENS, *op. cit. supra* note 71. In a second and substantially revised edition of his work published in 1801, Martens again used the term *conventions transitaires*, but neither *pactes* (compacts) nor *accords* (agreements). MARTENS, *PRÉCIS DU DROIT DES GENS MODERNES DE L'EUROPE FONDÉ SUR LES TRAITÉS ET L'USAGE*, bk. II, ch. II, § 58 (2d ed. 1801).

87. Translator's advertisement in the London edition of 1802. MARTENS, *op. cit. supra* note 85, at v.

88. See the list of subscribers' names in the Philadelphia edition of 1795. MARTENS, *LAW OF NATIONS* 373 *et seq.* (Cobbett transl. 1795).

89. Martens' "is a treatise of greater practical utility, but it is only a very partial view of the system, being confined to the customary and conventional law of the modern nations of Europe." 1 KENT, *op. cit. supra* note 61, at 17. Kent had reference to the positivistic tenor of Martens' work, as well as its confessedly provincial scope.

90. WHEATON, *op. cit. supra* note 71, at 296-301.

91. *Ibid.*

"convention" for treaties of lesser importance, regardless of their dispositive or nondispositive character. By the end of the nineteenth century all of these terminological distinctions had worn so thin that Westlake could observe that "the terms are synonymous, and even the usage of calling the more important acts treaties, the less important ones conventions, is far from being uniformly followed."⁹² Although Westlake recognized the distinction between dispositive and nondispositive treaties,⁹³ this distinction was no longer represented by terminological distinctions between "treaties" and "compacts," "agreements," or even "conventions."

The trend away from precision in terminology and the concomitant clouding of the sense of article I, section 10, may be traced also in American court decisions and legal literature. Whether the term "treaty" was consistently used in its stricter sense in the Constitution itself is an unsettled,⁹⁴ but nevertheless wholly academic,⁹⁵ question. In any event, even among the notable members of the first generation American bar, the distinction between "treaties" and "compacts" was not always preserved.⁹⁶ The trend is even more discernible, however, in the second and succeeding generations. In 1823, the Supreme Court found occasion to apply the distinction between dispositive and nondispositive treaties in the decision of a case, but no distinctive terms such as "compact" or "convention" were employed.⁹⁷ In 1832, Mr. Justice McLean referred to a boundary agreement between Kentucky and Tennessee indiscriminately as a "compact" and as a "treaty,"⁹⁸ and similar imprecision in terminology was reflected in the argument of the same case on appeal.⁹⁹ In 1833, Mr. Chief Justice Marshall did not hesitate to use the term "compact" as an equivalent of "treaty, alliance or confederation."¹⁰⁰

92. 1 WESTLAKE, *op. cit. supra* note 67, at 279.

93. *Id.* at 283-84.

94. The view that the stricter sense was intended may have been the basis for President Jefferson's reluctance to accept the federal "treaty" power as constitutional justification for the Louisiana Purchase in 1803.

95. Even if the framers did intend the stricter meaning of the term "treaty" where it is used with reference to federal competence, to argue for anything less than the broadest possible construction of the federal treaty power today would be impractical to the point of absurdity.

96. In *Sims Lessee v. Irvine*, 3 U.S. (3 Dall.) 425, 445 (1799), Lewis, Tilghman, and Dallas, attorneys for the petitioner, equivocated in their argument between "treaty" and "compact" as the term applicable to the boundary agreement concluded by Pennsylvania and Virginia in 1780.

97. See *Society for the Propagation of the Gospel v. Town of New Haven*, 21 U.S. (8 Wheat.) 464, 494-95 (1823).

98. See *Fleeger v. Pool*, 9 Fed. Cas. 257 (No. 4860) (C.C.W.D. Tenn. 1832).

99. See *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185 (1837).

100. See *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833).

Story published his *Commentaries* in that same year, and, having rejected Tucker's Vattelian interpretation of article I, section 10,¹⁰¹ found no better source than conjecture for an explanation of the distinctive significance of these terms.¹⁰² Finally, the total obliteration of meaningful distinctions between the terms "treaty," "compact," "agreement," and "convention" was reflected by American courts in the last decades of the nineteenth century.¹⁰³ Thus, it can be seen that the link between the terms "agreement" or "compact" and the dispositive variety of arrangements had been totally lost to the judicial mind.¹⁰⁴

It should also be noted that the term "compact" found its most frequent use in the nineteenth century among the proponents of nullification and secession,¹⁰⁵ whose "compact theory" of the Constitution, however it may have comported with the meaning of the term "compact" in certain eighteenth century social contract writings, did not reflect at all Vattel's signification of the term. Indeed, their conception of "compact," which was broad enough to include even the federal Union, explains why the draftsmen of the Confederate Constitution provided that compacts and agreements between the Confederate States were prohibited, with one minor exception,¹⁰⁶ as absolutely as were treaties, alliances, and confederations.¹⁰⁷

IV. EMERGENCE OF THE NEW CONSTRUCTION

A. *Holmes v. Jennison*

This obscuring of the intended meaning of article I, section 10, had no effect upon the dispositive type of interstate arrangement, which continued to find employment primarily in the settle-

101. See note 76 *supra*.

102. See text accompanying notes 7-16 *supra*.

103. In 1870, the New York court indiscriminately used the terms "treaty," "agreement," "compact," and "convention." *People v. Central R.R.*, 42 N.Y. 283 (1870). (Earl, C.J., dissenting, used the term "agreement" in a consistent manner.) In *Aitchison v. The Endless Chain Dredge*, 40 Fed. 253 (E.D. Va. 1889), the court referred to a 1785 agreement between Maryland and Virginia both as a "compact" and as "a solemn treaty and convention" between those states.

104. In *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840), even the quotation of Vattel by the Court itself was insufficient to restore the original intent of the constitutional provision. See text accompanying notes 108-13 *infra*.

105. St. George Tucker, whose significant, albeit unfaithful, association of Vattel with the compact clause has been commented upon in note 76 *supra*, was an advocate of this theory. See 1 TUCKER, *op. cit. supra* note 76, app. at 73-75, 140.

106. "But when any river divides or flows through two or more States, they may enter into compacts with each other to improve the navigation thereof." CONFEDERATE STATES OF AMERICA CONST. art. I, § 10, cl. 3.

107. *Ibid.*

ment of interstate boundaries, but it left the courts without an established construction of that constitutional provision against which to measure the new varieties of interstate arrangements which soon began to appear. The foil for the cases which evolved the currently accepted interpretation of the compact clause was Mr. Chief Justice Taney's opinion in *Holmes v. Jennison*.¹⁰⁸ The issue in that case was whether an extradition arrangement between the governor of Vermont and an official of Canada, entered into without congressional consent, fell under the proscription of the compact clause. In deciding that it did, Taney offered this all-encompassing interpretation of the Compact Clause:

The word "agreement," does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an "agreement." And the use of all of these terms, "treaty," "agreement," "compact," show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a state and a foreign power: and we shall fail to execute that evident intention, unless we give to the word "agreement" its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.¹⁰⁹

Taney claimed to find support for his interpretation in Vattel,¹¹⁰ but this assertion was manifestly unfounded. It should be remembered that Mr. Justice Story, who fully concurred in, and may fairly be assumed to have had some influence in shaping, Taney's opinion, had already in his *Commentaries* rejected Judge Tucker's interpretation of the same selection from Vattel.¹¹¹ Vattel had used the terms "compact" and "agreement" as equivalents and as alternative terms for the dispositive type of treaty. He drew no distinction between these terms *inter sese*. It was not from Vattel, therefore, that Taney drew his conclusion that even the most inexplicit, indirect, and informal understanding on any subject was an "agreement" in the constitutional sense. Taney construed the language of

108. 39 U.S. (14 Pet.) 540 (1840). The sharp disagreement among the Justices prevented any opinion being delivered as that of the Court. Taney's, however, was the principal opinion and enjoyed the full concurrence of Justices Story, McLean and Wayne.

109. 39 U.S. (14 Pet.) at 572. The Vermont court regarded Taney's opinion as controlling. *Holmes Ex parte*, 12 Vt. 631 (1840).

110. *Ibid.*

111. 3 STORY, *op. cit. supra* note 76, at § 1396 (in subsequent editions, § 1402).

Vattel, and with it that of the Constitution, not as a classification of two types of international arrangements, but rather as an exhaustive catalog of all possible types of arrangements. This, to be sure, does violence to Vattel's intention and to that of the Constitution's drafters, but for an adherent of Story's construction of article I, section 10, there is really no other way to construe Vattel.¹¹²

Taney thought it necessary to construe the constitutional restriction on state relations with foreign powers in the broadest manner possible. However, since the same restriction applies equally to state relations with sister states, a construction so all-encompassing as to cut off all possible international arrangements by the states might undesirably hamper efforts toward cooperation among members of the federation. This was one factor which disinclined the other members of the Court, and in particular Mr. Justice Catron,¹¹³ from joining with Justices Taney, Story, McLean and Wayne to make their opinion in *Holmes v. Jennison* that of the Court.

B. Counterthrust—*Virginia v. Tennessee*

The technological advances of the first half of the nineteenth century, along with the redirection of the attention of the country toward the improvement of overland travel and communications, created new occasions for cooperation among the states. The increasing need for roads, railroads, and canals, in particular, occasioned new varieties of interstate arrangements not contemplated in 1787.¹¹⁴ At the outset, it seems, there was little thought given to the possible applicability to these arrangements of the compact clause. States acted as co-incorporators of companies commissioned to construct interstate bridges¹¹⁵ and canals,¹¹⁶ and no congressional approval was sought.¹¹⁷ States agreed, without federal sanction, to grant each other the privilege of extending their railroads into one another's

112. Taney's opinion in *Holmes v. Jennison* actually offers no help in distinguishing between "treaties" and "compacts" or "agreements" under § 10; it decides only that the meaning of one of these three terms, "agreements," is large enough to include whatever the other two do not.

113. 39 U.S. (14 Pet.) at 597. Cf. *Fisher v. Steele*, 39 La. Ann. 447, 1 So. 882 (1887).

114. For an excellent study of cooperative activities among states up to about 1830, see Abel, *Interstate Cooperation as a Child*, 32 IOWA L. REV. 203 (1947).

115. See *Dover v. Portsmouth Bridge*, 17 N.H. 200 (1845).

116. See *Chesapeake & Ohio Canal Co. v. Baltimore & O.R.R.*, 4 Gill & J. 1 (Md. 1832). See also *Mackay v. New York, N.H. & H.R.R.*, 82 Conn. 73, 72 Atl. 583 (1909).

117. Congressional accession was thought necessary and was sought in the case of the Chesapeake & Ohio Canal Company, but only for those improvements which were placed within the District of Columbia. Act of March 3, 1825, 4 Stat. 101. See *Chesapeake & Ohio Canal Co. v. Baltimore & O.R.R.*, *supra* note 116.

territory,¹¹⁸ and projected the cooperative construction of improvements within sister states.¹¹⁹ Whether because of the influence of Taney's all-inclusive construction of the compact clause, or because of their relation to subjects of federal concern, after 1840 a few of the new cooperative arrangements were considered—by Congress at least—to require federal consent.¹²⁰ Nevertheless, these cooperative efforts were generally undertaken without federal surveillance.

Even after Taney's opinion in *Holmes v. Jennison*, state courts, reflecting the impatience of the states with the onerous requirement of consent to this new variety of interstate arrangements, held various arrangements to be outside the compact clause. One means of doing so was simply to deny that there was any consensus underlying the separate acts of two states authorizing an interstate improvement.¹²¹ However, a more conscientious approach to the task was taken by the Supreme Court of Georgia in 1853, when it admitted that some sort of "agreement" underlay the complementary acts of the two states, but denied that it came within the scope of the compact clause.¹²²

The Georgia court's opinion was a direct affront to Taney's interpretation and set the course which subsequent decisions were to follow in establishing the modern construction of the compact clause. Since the Vattelian origins of the constitutional language had already been obscured, the Georgia court turned instead to the *Commentaries* of Mr. Justice Story. Overlooking the significance of Story's unqualified concurrence in Taney's all-inclusive interpretation of the clause,¹²³ this court became the first to claim Story as authority for the exemption of certain arrangements from the requirement of consent.¹²⁴ The Georgia court interpreted the clause thus:

[T]his prohibition applies only to such an "agreement or compact" as is in its nature political; or more properly, perhaps, such as may, in any wise, conflict with the powers which the States, by the adoption of the Federal Constitution, have delegated to the General Government. . . .¹²⁵

118. See *Union Branch R.R. v. East Tenn. & Ga. R.R.*, 14 Ga. 327 (1853). See also *St. Louis & S.F. Ry. v. James*, 161 U.S. 545 (1896).

119. See *Fisher v. Steele*, 39 La. Ann. 447, 1 So. 882 (1887).

120. *E.g.*, joint action by Texas, Louisiana, and Arkansas to render the Red River navigable, 12 Stat. 250 (1861); concurrent legislation by New York and Canada incorporating the International Bridge Company to span the Niagara River at Buffalo, 16 Stat. 173 (1870).

121. See *Dover v. Portsmouth Bridge*, 17 N.H. 200 (1845).

122. *Union Branch R.R. v. East Tenn. & Ga. R.R.*, 14 Ga. 327 (1853).

123. See text accompanying note 111 *supra*.

124. *Union Branch R.R. v. East Tenn. & Ga. R.R.*, 14 Ga. 327, 339 (1853).

125. *Ibid.*

Other courts thought the inapplicability of the compact clause too obvious to merit even serious deliberation.¹²⁶

There were two cases which followed the construction urged by Taney in *Holmes v. Jennison*,¹²⁷ but both of these involved "agreements" between a state and a foreign power rather than between sister states. It is understandable that greater circumspection should have been manifested in judging arrangements with foreign powers than arrangements between sister states, but this need not have led to a harsh construction of the compact clause. Arrangements with foreign powers must satisfy other constitutional requirements than those imposed by the compact clause. Indeed, a coordinate argument in Taney's *Holmes v. Jennison* opinion, for which that opinion has since been endorsed by the Supreme Court,¹²⁸ emphasized this fact.¹²⁹ It was not necessary, therefore, in order to prevent abuse of the states' power of international intercourse, to impose upon the compact clause a construction so harsh as to inhibit cooperative arrangements between sister states.

It was not until the last decade of the nineteenth century that the scope of article I, section 10, found exposition in a majority opinion of the Supreme Court. In *Virginia v. Tennessee*,¹³⁰ which was discussed in Part I above, the interstate arrangement actually at stake was of the older, dispositive variety, but an awareness of the significance of its decision for the newer, cooperative type of arrangement is evident in the Court's opinion.¹³¹ The frequently quoted language of *Virginia v. Tennessee* need not be repeated at great length here. The substance of the decision is that the terms "compact" and

126. E.g., *Fisher v. Steele*, 39 La. Ann. 447, 454, 1 So. 882, 888 (1887).

127. *Holmes Ex parte*, 12 Vt. 631 (1840). But see Redfield, J., dissenting, *id.* at 646-47; *People ex rel. Barlow v. Curtis*, 50 N.Y. 321, 326-30 (1872).

128. See *United States v. Rauscher*, 119 U.S. 407 (1886).

129. Taney argued that extradition fell within the treaty power of the federal government and that the exercise by a state of any power in international extradition, even in the absence of any positive exercise of the federal power, would be inconsistent with the existence of that power in the federal government. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 574 (1840).

130. 148 U.S. 503 (1893).

131. By the use of four examples, the Court sought to show the absurdity of requiring consent to arrangements which would not concern the federal government: first, where a state wishes to arrange for the acquisition of land lying within its borders but currently owned by a second state; second, where one state wishes to transport goods on a canal running through a second state; third, where neighboring states wish to cooperate in draining a disease-infested swamp on their common border; and fourth, where cooperative action is necessary to meet the threat of some plague or other menace to life and health. See 148 U.S. at 518. Of these four examples, the first two are mere contracts of a private-law character made by states and should not be construed as within the compact clause under any construction. Cf. note 174 *infra*. However, the latter two are examples of cooperative arrangements of the type here under discussion.

"agreement" import different degrees of formality or seriousness, but both denote declarations based upon mutual considerations; in the context of the compact clause, both terms are limited to combinations "tending to the increase of political power in the [affected] States, which may encroach upon or interfere with the just supremacy of the United States."¹³² To justify this conclusion, the Court claimed support from Story's *Commentaries*,¹³³ as had the Georgia court before it.¹³⁴

The opinion in *Virginia v. Tennessee*, with its citation to Story, was quoted at length the following year to decide the question raised in *Wharton v. Wise*:¹³⁵ whether an interstate arrangement entered into under the Articles of Confederation was invalid under the provisions of article VI thereof relating to interstate "treaties." The Court ruled that this term in the Articles, like "compact" and "agreement" in the Constitution, was limited to arrangements which "encroach upon or weaken the general authority of Congress."¹³⁶ Thus, this one criterion originated by Story is now used with equal facility to distinguish between "treaties" and "agreements or compacts" and between classes within each of these categories as well.

In this fashion, at the close of the nineteenth century, the paradoxical construction of article I, section 10, was established; it has persisted until this day. It evolved from an effort to eliminate the burdensome requirement of congressional consent from the new types of cooperative interstate arrangements which emerged during that century. At that time, no better legal rationale to accomplish that purpose was known. Enough has been said already in criticism of the rule of *Virginia v. Tennessee*;¹³⁷ we must now explore the advantages of the interpretation based upon Vattel, as applied to interstate arrangements of today.

V. TWENTIETH CENTURY APPLICATION OF ARTICLE I, SECTION 10

In this country, cooperative arrangements between the states have come of age in the present century. Because of the label they bear,

132. 148 U.S. at 519.

133. Although the Court's introduction of the passage from Story gives the impression that it is offered as an analogy only, substantive analysis will show that Story's distinction between the first and third clauses of art. I, § 10, was being applied squarely to the third clause alone.

134. See text accompanying notes 123-25 *supra*.

135. 153 U.S. 155 (1894).

136. *Id.* at 170.

137. See Part I (C) & (D) *supra*.

the qualified prohibition of the compact clause, softened only by the dubious rule of *Virginia v. Tennessee*, is generally assumed to be applicable to these modern "compacts." The error of this assumption can be shown through more careful characterization.

A. Characterization of International Arrangements

The new examples of American interstate arrangements have their counterparts on the international scene.¹³⁸ The writers on international law, however, have recognized this new type of arrangement as distinctly different from those employed up through the eighteenth century. The earliest adequate statement of the character of the new variety of international arrangement was that of Heinrich Triepel in 1899.¹³⁹ Triepel argued that formal¹⁴⁰ international arrangements can be classified into two categories: *Verträge*¹⁴¹ and *Vereinbarungen*.¹⁴² This is a different distinction from that drawn by Vattel. As will soon be evident, both dispositive and nondispositive arrangements fall within Triepel's category, *Verträge*.

The basis of Triepel's classification is the relationship of the interests and wills of the several parties to one another. Triepel uses the term *Vertrag* in a strict sense to mean only those arrangements which arise from parties having different but complementary interests. The analogy to private law contracts—for example, a sale or exchange of goods—is suggested.¹⁴³ In contrast, the term *Vereinbarung* is applied to arrangements which arise from parties sharing a single, mutual interest.¹⁴⁴ The essential characteristic of the *Vereinbarung* is this identity of interests and objectives of the parties; the best analogy in private law might be a joint act or undertaking. In short, *Vertrag* designates a *transactional* arrangement, while *Vereinbarung* designates a *cooperative* arrangement. As examples of *Vereinbarungen*, Triepel offered instances where two or more

138. See notes 164-66 *infra*.

139. TRIEPEL, *VÖLKERRECHT UND LANDESRECHT* (1899). Triepel was enlarging upon a terminological distinction drawn in BINDING, *DIE GRÜNDUNG DES NORDDEUTSCHEN BUNDES* (1889). Triepel's theory was expressed again in an article, *Les Rapports Entre le Droit Interne et le Droit International*, I RECUEIL DES COURS DE L'ACADÉMIE DU DROIT INTERNATIONAL 77 (1923).

140. Triepel distinguished less formal arrangements. TRIEPEL, *op. cit. supra* note 139, at 66-67.

141. This is a technical usage of the term *Vertrag*, which in ordinary usage is approximately equivalent to the English terms "contract" and "treaty."

142. This is a technical usage of the term *Vereinbarung*, which in ordinary usage means simply any agreement or arrangement.

143. *A* wants what *B* can give him, and *B* wants what *A* is willing to give in exchange. See TRIEPEL, *op. cit. supra* note 139, at 45.

144. Both *A* and *B* want the same thing, attainable by their mutual endeavor. See Triepel, *op. cit. supra* note 139, at 67-68.

nations had undertaken joint action or cooperatively exercised their respective powers over a single territory or subject matter.¹⁴⁵ Arrangements between states to form various administrative unions,¹⁴⁶ or to form a confederation or a federal state, Triepel also classified as *Vereinbarungen*.¹⁴⁷ *Verträge*, according to Triepel, may create or destroy rights¹⁴⁸ in each contracting party vis-à-vis the other, but they cannot establish general legal principles.¹⁴⁹ By means of a *Vereinbarung*, however, states may legislate conjointly; they may jointly create objective law.¹⁵⁰

In the development of this classification, Triepel was concerned with buttressing the positivistic theory that objective principles of international law had their origin in the wills and agreement of states.¹⁵¹ That purpose, and consequently the arguments which have since been made against the sharpness of the distinction between *Verträge* and *Vereinbarungen*,¹⁵² do not concern us here. For our purposes, it is not necessary to argue that *Verträge* and *Vereinbarungen* are sharply distinguishable with respect to the inter-relation of the wills and interests of their parties or their possibilities as sources of international law. It is only necessary to recognize the major

145. "Two states, which stand in a relation of joint domination over a single region, . . . bring themselves to agreement over the granting of a servitude in such region in favor of a third state, or over the appointment of magistrates; several states, which have undertaken a joint protectorate over another, agree upon discipline, thus exhibiting their joint exercise of the common protectorate. These are *Vereinbarungen*, not *Verträge*." *Ibid.* [The translations in this and all succeeding footnotes are by the present writer unless otherwise indicated.]

146. *E.g.*, the Universal Postal Union, founded in 1874; the Copyright Union, founded in 1836.

147. TRIEPEL, *op. cit. supra* note 139, at 68. The nineteenth and twentieth century concept of confederation or federation is distinguishable from the concept of alliance, which Triepel classified as *Vertrag*. However, in historical perspective the distinction emerged gradually.

148. In continental terminology, subjective rights, as distinguished from objective law.

149. TRIEPEL, *op. cit. supra* note 139, at 70.

150. *Ibid.* "The rules of the Vienna Congress concerning the freedom of navigation and the rank of diplomatic agents, the Declaration of Paris of 1856 (concerning maritime law), the Geneva Convention of 1864, the Petersburg Convention of 1868, . . . and also numerous treaties concerning the law of prize at sea, blockades, contraband, . . . treaties, under which all future controversies of the contractants may be determined by arbitration, etc.—all these are not *Verträge* in the proper sense of the word, but *Vereinbarungen* of the sort which create objective law." *Id.* at 70-71.

151. Two other writers who shared this view were Bergbohm (see note 153 *infra*) and Oppenheim; the latter introduced this theory into Anglo-American legal literature. See 1 OPPENHEIM, *INTERNATIONAL LAW* §§ 18, 492, 555-68 (1906).

152. See, *e.g.*, GIHL, *INTERNATIONELL RÄTT* 14-15 (1955); GIHL, *INTERNATIONAL LEGISLATION* 12 (Charleston transl. 1937); KELSEN, *INTERNATIONAL LAW* 319-20 (1952); LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 153-59 (1927); I SCHWARZENBERGER, *MANUAL OF INTERNATIONAL LAW* 141 (4th ed. 1960); SCHWARZENBERGER, *INTERNATIONAL LAW* 421 (3d ed. 1957).

difference between them, which is suggested by their descriptions and examples and even by the etymology of the terms. It should also be noted that this new characterization of formal international arrangements was not merely a new classification of ancient examples, but rather reflected the nineteenth century diversification of international arrangements into previously unknown forms.

Neither Triepel nor his predecessor Bergbohm¹⁵³ found genuine examples of the cooperative sort of arrangements which Triepel denominated *Vereinbarungen* prior to the Congress of Vienna in 1815. There may have been prototypes of the *Vereinbarung* which antedated the nineteenth century,¹⁵⁴ but "the old treaty which predominated until the Congress of Vienna¹⁵⁵—treaties of peace, alliance, friendship, neutrality, guarantee, commerce, &c.—was essentially the *Vertrag* . . ." ¹⁵⁶ "Eighteenth century conditions did not necessitate the elaborate cooperation of numerous states. Many new fields for international action were opened up by the industrial revolution and by the improvements of the means of communication and transportation which characterized the first half of the nineteenth century."¹⁵⁷

Just criticism has been directed at attempts to give the distinction between *Verträge* and *Vereinbarungen* too deep a significance,¹⁵⁸ and it is recognized that the distinction is not always easily¹⁵⁹ or meaning-

153. About twenty years before Triepel published his treatise, Carl Bergbohm had distinguished between treaties which are essentially transactions between the party states, "for example, peace treaties, treaties of federation, treaties of succession, transactions concerning servitudes in favor of one state in territory of another, exchanges of jurisdiction, and all economic favors" and those which are actually legal principles—treaties by which the party states expressly agree upon uniform rules to govern their future affairs. BERGBOHM, *STAATSVERTRÄGE UND GESETZE ALS QUELLEN DES VÖLKERRECHTS* 80 (1877). In the latter class belong "all the conventions concerning the law of war, concerning the rights and obligations of neutrals, concerning the [conditions for the] extradition of criminals, concerning the international protection of copyrights, concerning institutions for the advancement of trade and commerce, concerning certain ceremonies, etc." *Id.* at 81.

154. *E.g.*, the confederation, as it began to become distinguishable from mere alliances during the later eighteenth century; instances of joint rule by allied conquerors; the ancient Swiss *Pfaffenbrief* and *Sempacher Brief* (see Huber, *The Intercantonal Law of Switzerland*, 3 AM. J. INT'L L. 62, 69-70 (1909)); stipulations of articles of contraband (see 3 HYDE, *INTERNATIONAL LAW* § 799 (2d rev. ed. 1945)).

155. "I do not overlook such earlier treaties as those cited by Hyde, *International Law*, Vol. II, § 799, for the denomination of contraband." [Renumbered footnote from original text.]

156. McNair, *The Functions and Differing Legal Character of Treaties*, 11 BRIT. YB. INT'L L. 100, 105 (1930).

157. 1 *INTERNATIONAL LEGISLATION* xviii (Hudson ed. 1931).

158. See GIHL, *INTERNATIONAL LEGISLATION* 51-52 (Charleston transl. 1937).

159. "This distinction has little practical worth, because both kinds of treaties deal

fully¹⁶⁰ applied in international practice. However, the abstract validity of the distinction, and the fact that it illustrates significant changes in the character of international relations since the close of the eighteenth century, are widely recognized. "The nineteenth century made the peoples of the world into an international community,"¹⁶¹ and the *Vereinbarung* emerged as a product of, and in turn a contributor to, this phenomenon. In part, perhaps, because of the original emphasis upon the possibilities of the *Vereinbarung* as a source of objective international law, modern writers refer to this class of international arrangements as "law-making treaties"¹⁶² or occasionally as "international legislation."¹⁶³ Included within the broad scope of these terms, as within Triepel's definition of *Vereinbarung*, are all those modern international arrangements by which are created joint international or supra-national agencies,¹⁶⁴ by which nations jointly undertake projects beneficial to both or all of the parties,¹⁶⁵ or by which coordinated efforts toward the solution of common problems are assured.¹⁶⁶

B. Characterization of Interstate Arrangements in Switzerland

Although the significance of distinctions in the character of treaties for international law may be only slight, such distinctions may take on substantial significance in the context of the limited diplomatic competence left to constituent states in a federation. The employment in the American Articles of Confederation and the

with the same rules, and most treaties contain not only abstract rules but also concrete settlements between parties." I VON DER HEYDTE, *VÖLKERRECHT* 69 (1958).

160. I HYDE, *INTERNATIONAL LAW* § 34C (2d rev. ed. 1945).

161. Hudson, *The Prospect for International Law in the Twentieth Century*, 10 *CORNELL L.Q.* 419, 459 (1925).

162. BRIERLY, *THE LAW OF NATIONS* 59 (1949); I OPPENHEIM, *INTERNATIONAL LAW* §§ 18, 492, 555-68 (1905); *accordi- or trattati-normativi*, I SERENI, *DIRITTO INTERNAZIONALE* 72, 136 (1956), and *id.* at vol. 3, p. 1394; *tratados-leyes*, SIERRA, *DERECHO INTERNACIONAL PUBLICO* 398 (4th ed. 1963); *rechtssetzende Verträge*, I VON DER HEYDTE, *op. cit. supra* note 159, at 69; *traités-lois*, Bourquin, *Règles générales du droit de la paix*, 35 *RECUEIL DES COURS DE L'ACADÉMIE DU DROIT INTERNATIONALS* 55 (1931); *convention-loi*, de Visscher, *La codification du droit international*, 6 *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL* 329, 370 (1925); and sometimes *trattati-accordi*, GEMMA, *APPUNTI DI DIRITTO INTERNAZIONALE* 212-14 (1923); or *accords internationaux*, REUTER, *INSTITUTIONS INTERNATIONALES* 94-103 (3d ed., revised, 1962).

163. See I *INTERNATIONAL LEGISLATION*, *op. cit. supra* note 157.

164. See generally Hahn, *International and Supranational Public Authorities*, 26 *LAW & CONTEMP. PROB.* 638 (1961).

165. *E.g.*, international bridges and highways.

166. *E.g.*, the several opium conventions and numerous arrangements associated with the United Nations.

Constitution of the distinction between dispositive and nondispositive arrangements is one illustration. The further distinction between transactional and cooperative arrangements—between *Verträge* and *Vereinbarungen*—is recognized for interstate purposes in the federal system of Switzerland. Our purpose here is not to draw analogies between Swiss and American interstate law, but rather to demonstrate the approval and utilization within another federation of Triepel's theory. The distinction between *Verträge* and *Vereinbarungen* has found in this context a real significance which it has never permanently attained in international law.

Under article 7 of the Swiss federal constitution of 1874, as under Article 7 of the previous constitution of 1848, the cantons are forbidden to conclude any separate alliances or political treaties. By this same section, however, there is specifically reserved to the cantons a sphere of diplomatic competence much greater than that *expressly* left to the states by the United States Constitution: the cantons are left a very broad power to conclude arrangements with one another.¹⁶⁷ The cantons are also left a limited international diplomatic competence with respect to matters of essentially local significance.¹⁶⁸

In contrast to the American compact clause, the distinction drawn by the Swiss constitution with respect to intercantonal arrangements is not patterned after Vattel; instead, it is patterned after Story,¹⁶⁹ whose *Commentaries*, then recently translated into French,¹⁷⁰ as well as the United States Constitution itself, were influential upon the Swiss constitution-makers of 1848. The term "treaty" is never used in the Swiss constitution in the strict sense urged by Vattel. Rather, the term is used in its broad sense to include *all* formal intercantonal arrangements.¹⁷¹ It is not all "treaties" in the Vattelian sense of nondispositive arrangements which are forbidden to the cantons

167. "The cantons, however, have the right to make agreement [*Verkommnisse, conventions*] with one another on matters of legislation, administration, or justice." Art. 7, Swiss federal constitution (*Bundesverfassung*, hereinafter cited BV). The translation of the BV used throughout this paper is that found in 3 PEASLEE, CONSTITUTIONS OF NATIONS (2d ed. 1956). The specification of "matters of legislation, administration or justice" does not serve as a limitation upon the power; it is merely a tripartite classification of state functions. BURCKHARDT, KOMMENTAR DER SCHWEIZERISCHEN BUNDESVERFASSUNG VOM 29 MAI 1874, at 74 (1931).

168. Art. 10, BV.

169. See text accompanying note 5 *supra*.

170. STORY, COMMENTAIRE SUR LA CONSTITUTION FÉDÉRALE DES ÉTATS-UNIS (Odent transl. 1843). The translation was of Story's 1833 abridged edition.

171. This broad scope of the term was manifestly intended where it is used in arts. 85(5), 102(7), 113, BV.

by the Swiss constitution, but only "treaties of a political character." All nonpolitical intercantonal treaties, whether dispositive or not, are included in the permissible class designated "agreements" in article 7.¹⁷²

In contrast to the situation at the time the American Constitution was drafted, arrangements of the kind Triepel would later denominate *Vereinbarungen* had emerged and become familiar by the year 1848. Thus, unlike their American exemplars, and although even in 1848 (and in 1874, for that matter) the new kind of arrangement had not been recognized by the theorists as a distinct species, the Swiss constitution-makers did contemplate intercantonal *Vereinbarungen* as well as *Verträge*. Once Triepel illustrated the distinction, Swiss commentators were quick to argue, and have been persistent in arguing, that the right to use both species is constitutionally secured to the cantons. Thus, it is declared¹⁷³ that the treaties which may be concluded between cantons with respect to all matters of public law¹⁷⁴ within cantonal competence may be either transactional¹⁷⁵ (creating legal relations¹⁷⁶ between the parties), or rule-making.¹⁷⁷

172. Obviously there is the further implied limitation of the intercantonal treaty-making power to matters constitutionally within cantonal competence. GIACOMETTI, SCHWEIZERISCHES BUNDESSTAATSRECHT 160 (1949).

173. BOLLE, DAS INTERKANTONALE RECHT (1907), although now somewhat dated, is still cited as the landmark study of the subject. GIACOMETTI, SCHWEIZERISCHES BUNDESSTAATSRECHT (1949), is the leading contemporary commentary on the Swiss federal constitution. See also BURCKHARDT, *op. cit. supra* note 167. Huber, *The Intercantonal Law of Switzerland*, 3 AM. J. INT'L L. 62 (1909), repeats in summary fashion the substance of the work of Huber's student, Bolle. However, Huber's choice of English words to express the Swiss conceptions is sometimes unfortunate and misleading.

174. *Hoheitlichen Materien, im Gegensatz zu privatrechtlichen Materien*. GIACOMETTI, *op. cit. supra* note 173, at 160. It is regarded as obvious that the cantons may also conclude mere private-law contracts, which are not within the purview of the constitutional provision. *Id.* at 160 n.3.

175. *Rechtsgeschäftlicher*. GIACOMETTI, *op. cit. supra* note 173, at 160. See also BOLLE, *op. cit. supra* note 173, at 6-7.

176. *Rechtsverhältnissen*. GIACOMETTI, *op. cit. supra* note 173, at 160. See also BOLLE, *op. cit. supra* note 173, at 6-7.

177. *Rechtsetzender*. GIACOMETTI, *op. cit. supra* note 173, at 160. See also BOLLE, *op. cit. supra* note 173, at 6-7. Even the terminology of Triepel—*Vertrag* and *Vereinbarung*—was borrowed by the Swiss commentators. See BOLLE, *op. cit. supra* note 173, at 6-7, 122-23; GIACOMETTI, *op. cit. supra* note 173, at 159-65. The Swiss, however, had their own distinctive term for the non-transactional variety of intercantonal arrangement (*Vereinbarung*) long before Triepel's terminology was introduced. This term, "concordat," is widely used outside Switzerland to refer to arrangements between a civil government and the Holy See, but in Switzerland it has been used, since early in the nineteenth century, in a sense practically synonymous with Triepel's *Vereinbarung*. See Huber, *supra* note 154, at 73 n.3. As to the synonymy of "concordat" and *Vereinbarung*, see GIACOMETTI, *op. cit. supra* note 173, at 160-61; BOLLE, *op. cit. supra* note 173, at 124-25. As to distinctions drawn by the Swiss within the class "concordat," see generally BOLLE, *op. cit. supra* note 173, at 101-06; GIACOMETTI, *op. cit. supra* note 173, at 164 n.32; Huber, *supra* note 173, at 72-76, 83.

For the Swiss commentators, the distinction between intercantonal *Vereinbarungen* and *Verträge* is an important one. Since the provisions of article 7 apply to both types of arrangements,¹⁷⁸ the distinction is not significant with respect to the requirement of federal surveillance;¹⁷⁹ it does, however, provide the basis for the application of different rules with respect to cantons' accession to, and withdrawal from, these arrangements. The commentators have concluded that no more than two parties can enter into a strictly transactional treaty,¹⁸⁰ whether it is dispositive or not, since it is a give-and-take affair between the contractants. *Vereinbarungen*, or cooperative arrangements, on the other hand, permit the accession of other interested cantons.¹⁸¹ The principles of international law are considered applicable to both varieties of intercantonal arrangement.¹⁸² However, these principles are qualified by the fact that the cantons are not actually international entities, but rather members of a federal state; the principles are also subject to the countervailing force of customary intercantonal law, the terms of any applicable agreement, and Swiss federal law.¹⁸³ It is by virtue of peculiarly Swiss custom that cantons are accorded an unrestricted right of withdrawal from *Vereinbarungen*, but not from *Verträge*.¹⁸⁴

The small size of their country and their cantons, the fact that the various agencies of the federal government may be called upon to assist in the implementation and enforcement of intercantonal arrangements,¹⁸⁵ and the nature of most of the problems beyond federal competence which might be dealt with by *Vereinbarungen* probably account for the fact that the Swiss have not resorted to the

178. See note 167 *supra* and accompanying text.

179. Federal review of intercantonal arrangements is provided for in Art. 7, BV. However, unlike American interstate "agreements or compacts," federal consent is not a condition precedent to the validity of these Swiss arrangements. GIACOMETTI, *op. cit. supra* note 173, at 163-64. Federal assent, however, brings such an arrangement under federal "protection." *Ibid.*

180. See, e.g., BOLLE, *op. cit. supra* note 173, at 122.

181. *Ibid.*; GIACOMETTI, *op. cit. supra* note 173, at 160-61.

182. See GIACOMETTI, *op. cit. supra* note 173, at 162.

183. *Ibid.*

184. "Just as a canton may repeal an internal statute, so may it repeal rules of law agreed upon in a concordat. A different condition exists, on the other hand, as to intercantonal treaties of a transactional nature. These establish contractual rights and obligations. For that reason, conformably to that maxim of international law, *pacta sunt servanda*, the freedom of disposition of the separate cantons is withdrawn, so that a unilateral retreat from a *Vertrag* does not seem permissible." GIACOMETTI, *op. cit. supra* note 173, at 162. The right of withdrawal from a concordat (or *Vereinbarung*, see note 177 *supra*) has not always been unqualified. See Huber, *supra* note 173, at 75-76.

185. Arts. 7, 102(2), BV. See GIACOMETTI, *op. cit. supra* note 173, at 164.

establishment of intercantonal agencies or authorities by *Vereinbarungen*. The purposes served by many of the Swiss *Vereinbarungen* are the same as those accomplished by uniform state laws in the United States.¹⁸⁶ Perhaps the most important of these arrangements are those dealing with public assistance and problems of multiple cantonal citizenship.¹⁸⁷ In others, cantons bordering on a lake or waterway often join in a common system of navigation, fishing, or water-utilization regulation.¹⁸⁸ On at least one occasion, several cantons have cooperatively formed a company to construct an Alpine highway.¹⁸⁹

However, there is nothing in Switzerland to compare, for example, with the Port of New York Authority,¹⁹⁰ or even with the study and advisory agencies commonly established by "compacts" in this country. The more limited variety of *Vereinbarungen* actually employed in Switzerland must be borne in mind when one thinks analogically about the law of American interstate arrangements. Some principles of the Swiss law—for example, free unilateral withdrawal—may not be appropriate to varieties of *Vereinbarungen* not employed in Switzerland. However, as was indicated earlier, our purpose here is not to draw particular analogies, but only to show that Triepel's distinction between transactional arrangements—*Verträge*—and cooperative arrangements—*Vereinbarungen*—has been accepted and successfully applied within the federal system of Switzerland.

C. Comments on the Scope of the Compact Clause

Triepel's distinction can also be fruitfully applied to the characterization of American interstate arrangements. It bears repeating that the whole of Triepel's theory, and the implications which may be sought to be built upon it, need not be imported. For our purposes it is immaterial that Triepel's categories, like all the neat

186. See RICE, *LAW AMONG STATES IN FEDERACY* 802-03 (1959). Uniform laws are not unknown in Switzerland. *Id.* at 821 n.13. On the role of *Vereinbarungen*, or concordats, in settling questions of the conflict of laws, see Schoch, *Conflict of Laws in a Federal State—The Experience of Switzerland*, 55 HARV. L. REV. 738 (1942).

187. See RICE, *op. cit. supra* note 186, ch. 8; Rice, *Intercantonal Public Assistance Liability in Switzerland*, 8 AM. J. COMP. L. 463 (1959).

188. For a list of intercantonal *Vereinbarungen*, or concordats, concluded up to 1907, see BOLLE, *op. cit. supra* note 173, at 162-204.

189. See Schindler, *The Administration of Justice in the Swiss Federal Court in Intercantonal Disputes*, 15 AM. J. INT'L L. 149, 162 (1921).

190. See generally Leach, *Interstate Authorities in the United States*, 26 LAW & CONTEMP. PROB. 666 (1961).

categories defined by reason, when they are imposed upon the coalescent whole of objective experience may be shown to be in reality less distinct than their nominal discreteness suggests. The gist of the distinction is clear enough. The kinds of cooperative arrangements existing today between nations—and between this nation's states—were unknown in the eighteenth century. They were neither anticipated nor provided for by the constitutional draftsmen of 1787.

This, then, is the conclusion to which mere exegesis leads us. If it is considered necessary *at the level of exegesis* to find these cooperative arrangements within the restrictive provisions of article I, section 10, they must be read into the prohibitive first clause, for "treaties" was regarded as the broadest term, even in its stricter signification. These cooperative arrangements, whatever they may be called, are not *dispositive* arrangements and therefore are manifestly not within the class intended by the statesmen of 1787 when they used the terms "agreement" and "compact." Such an exegetical construction, however, would render the whole spectrum of formal cooperative interstate arrangements unconstitutional, without even the possibility of legitimation through congressional consent. Thus, it is not only more justifiable in logic, but obviously more desirable in practical effect, to regard these cooperative arrangements as outside the contemplation of the framers and therefore outside the constitutional provision.

Although this may be the conclusion to which exegesis leads, it is not by virtue of that fact alone the answer to the ultimate question of the application or interpretation of the constitutional provision today. The merit of the exegetical analysis belabored at such length here is not that it is in itself decisive of the "proper" application of the compact clause, for exegesis is only the first step in constitutional construction. Its merit, rather, is that it clears away the debris of unsuccessful attempts to acclimate the compact clause to modern conditions and opens the field for the first time to a meaningful discussion of the applicability of that clause as a policy question.

It is this writer's conviction that the courts, including the Supreme Court, have never engaged in the kind of careful deliberation and creative exposition with respect to cooperative interstate arrangements which is appropriate when a question of the application of the Constitution to unforeseen conditions is raised. *Virginia v. Tennessee* has been uncritically followed because no alternative theory has been suggested which could place the exemption of some

arrangements, recognized as necessary to make the compact clause compatible with modern conditions, upon any sounder legal basis. If the argument advanced here is accepted, the way will be open for a free determination, on non-exegetical grounds, as to whether cooperative interstate arrangements should remain wholly outside the constitutional provision, or whether some or all of them should be brought within either the first or the third clause of article I, section 10.

The Supreme Court's most often professed criterion at this level of constitutional construction is the purpose, insofar as it may be determinable, underlying a specific provision. Even though such cooperative interstate arrangements as we know today were not contemplated by the framers, it would be proper to bring them in under article I, section 10, if the purpose which guided the framers in drafting that section is still our purpose today and requires their inclusion for its effectuation. However, inquiries into constitutional "purpose" are essentially deliberations upon policy. Given the difficulty of determining with unimpeachable accuracy the policy objectives of the framers where they are not evident from the words alone, the tendency is for the modern commentator to state the framers' conception of the constitutional purpose in a manner bearing striking resemblance to his own. Thus, some commentators have stated the purpose behind article I, section 10, in a manner that comports with the rule of *Virginia v. Tennessee*,¹⁹¹ and this writer has already discussed his own understanding of the purpose of the framers in terms consistent with the exegetical construction of the constitutional provision here propounded.¹⁹² Moreover, if the Supreme Court were to define the purpose underlying article I, section 10, it would surely do so in terms of *current* notions of constitutional purpose. Thus, if it were thought necessary today for the protection of the constitutional system, or desirable in point of policy, for federal surveillance over cooperative interstate arrangements to be provided, a construction facilitating that result could be imposed upon the compact clause.

However, it is the lack of any such necessity and the undesirability of an all-inclusive requirement of consent which are most evident. The very statement of the rule of *Virginia v. Ten-*

191. See Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *YALE L.J.* 685, 694-95 (1925).

192. See text accompanying notes 77-82 *supra*.

nessee, purporting to include within the compact clause only politically disruptive arrangements, of which not a single instance has been found in our history,¹⁹³ is significant. The language of subsequent decisions applying that rule to exempt every challenged arrangement from the consent requirement is also indicative of modern needs.¹⁹⁴ Not only the speculative possibility of injury to some state through the cooperative action of others, but also the substantial benefits to be derived from the facilitation of interstate cooperation, must be considered. To the extent that there is any real risk of injury to the interests of other states by such arrangements, a better remedy than the dubious palladium of anticipatory congressional review is available through interstate suits in the Supreme Court, just as if the injury had been done by the separate actions of a single state. Almost without exception,¹⁹⁵ those who are actually engaged with interstate arrangements in practice share the opinion that federal surveillance of many modern "compacts" is unnecessary¹⁹⁶ and that it handicaps the states and impairs effective cooperation.¹⁹⁷ It is certainly clear that limitation, and not extension, of the scope of the compact clause has been the keynote of its construction for more than a hundred years.

It is the opinion of this writer that the new—or rather the older and original—construction of the compact clause here suggested offers a more analytically defensible and exegetically sound, and, most important, more efficacious means of realizing the end heretofore consistently striven for: the facilitation of interstate cooperation.

193. See note 30 *supra*.

194. See cases cited note 32 *supra*.

195. The only notable voice raised in dissent has been that of Hon. Emanuel Celler, Chairman of the House Judiciary Committee, which has primary responsibility for compact consent legislation. See, e.g., Celler, *Congress, Compacts, and Interstate Authorities*, 26 LAW & CONTEMP. PROB. 682 (1961). See also the commentary on Celler's efforts to extend federal control over compact agencies, 1962-1963 BOOK OF STATES 263-64.

196. See, e.g., ZIMMERMAN & WENDELL, *THE LAW AND USE OF INTERSTATE COMPACTS* 22-23 (1961), citing specific examples. Cf. Carman, *Should the States Be Permitted To Make Compacts Without the Consent of Congress?*, 23 CORNELL L.Q. 280 (1938).

197. The requirement of congressional consent to such arrangements also unnecessarily encumbers the agenda of Congress. See ZIMMERMAN & WENDELL, *op. cit. supra* note 196, at 24. "As with any other enterprise, the needless multiplication of and delay in procedural requirements can have a withering effect, and the use of interstate compacts is no exception." *Report of the Committee on Interstate Compacts*, in PROCEEDINGS OF THE 1960 CONFERENCE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL 218 (1961). Congressional tactics with respect to consent to "compacts" have on occasion aroused other significant protests from the states. See ZIMMERMAN & WENDELL, *op. cit. supra* note 196, at 22. See also 1960-1961 BOOK OF STATES 239; 1958-1959 BOOK OF STATES 214-15.

Formal arrangements between states may be either transactional or cooperative. The first class corresponds to Triepel's category *Vertrag*, the second to *Vereinbarung*. Those arrangements which are transactional may be either dispositive or nondispositive, as these terms were explained in connection with Vattel's theories.¹⁹⁸ The term "treaty" in the first clause of article I, section 10, is to be understood as encompassing arrangements which are transactional but not dispositive; for example, treaties of commerce. Like the other classes of arrangements proscribed by that clause—alliances¹⁹⁹ and confederations²⁰⁰—"treaties" in this sense are not devices which states under the American constitutional system could properly make use of in any case.

The terms "compact" and "agreement" as they are used in the third clause are to be understood as equivalents, both having exclusive reference to transactional, dispositive arrangements. Under this clause, then, must be considered all interstate boundary "compacts,"²⁰¹ as well as other dispositive arrangements such as those apportioning interstate waters.²⁰² These arrangements are properly to be called "compacts" or "agreements" in the constitutional sense, and require congressional consent. In contrast, other interstate arrangements—those which are cooperative rather than transactional—*Vereinbarungen*—are, just like the several less formal means of modern interstate cooperation, "extra-constitutional arrangements,"²⁰³ "neither contemplated nor specifically provided for by the Constitution."²⁰⁴ To these, which comprise the great majority of the more recently executed or projected "compacts," the requirement of congressional consent *under the compact clause* does not apply. If there are arrangements which combine both dispositive and

198. See text accompanying notes 62-68 *supra*.

199. Alliances may be classified as transactional political arrangements.

200. To the eighteenth century mind, confederations were different from alliances only in degree. However, in their modern character they could be more accurately described as politically oriented *Vereinbarungen*.

201. Interstate boundary "compacts" not affecting the political status of the states have been held exempt from the consent requirement under the rule of *Virginia v. Tennessee*. *North Carolina v. Tennessee*, 235 U.S. 1 (1914); *Town of Searsburg v. Town of Woodford*, 76 Vt. 370, 57 Atl. 961 (1904). Even the arrangements exempted in *Virginia v. Tennessee* itself dealt with an interstate boundary. The fact that several boundary compacts concluded in the early decades after the adoption of the Constitution were never submitted for consent (see note 14 *supra*) might indicate that some exemption was thought to exist from the outset. *But see* note 80 *supra*.

202. In this class as well should be numbered those arrangements which deal dispositively with rights in, or jurisdiction over, boundary waters.

203. *New York v. O'Neill*, 359 U.S. 1, 9 (1959).

204. *Id.* at 10, quoting from *Frankfurter & Landis, supra* note 191, at 691.

cooperative features, consent under the compact clause is required only as to the former.

However, congressional assent to interstate arrangements may be sought for other reasons than to satisfy the requirements of the compact clause. Some may be submitted in order to secure federal assistance in their implementation,²⁰⁵ or strictly out of political considerations.²⁰⁶ The federal government may even be invited to join as a full participant.²⁰⁷ Federal consent might also be sought for a more important reason. If there is no doubt that a single state may build and operate airport facilities, ports, bridges, or other projects affected by federal law, provided that in doing so it abides by the applicable stipulations of federal law, then there is no reason why two or more states should not be able to do the same thing together and be subject only to the same conditions. Finally, if states contemplate affirmative regulatory activity in areas where the federal government also has competence, the need for specific congressional consent should be clear. Consent is required in such a case, not to satisfy the requirements of the compact clause, but rather to preclude the operation of the familiar doctrine of federal pre-emption.

The difference between consent to avoid pre-emption and consent to satisfy the compact clause under the rule of *Virginia v. Tennessee* deserves emphasis. When consent is needed only to avoid pre-emption,²⁰⁸ denial or repeal of congressional consent to state action in the federal sphere can occasion only *pro tanto* invalidity, conditions attached to congressional consent to avoid pre-emption can affect only those activities within the federal sphere, and congressional investigative power relative to such consent cannot extend to joint state activities beyond the federal sphere. To the extent that federal

205. For example, to make available federal research staffs and facilities, as under the Marine Fisheries Compacts.

206. While urging that consent not be sought in cases clearly exempted by the rule of *Virginia v. Tennessee*, the Committee on Congressional Consent to Interstate Compacts and Agreements of the National Association of Attorneys General in 1957 recognized that even in such cases, it might be "decided to seek such consent for policy reasons." PROCEEDINGS OF THE 1957 CONFERENCE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL 171 (1958).

207. E.g., The Delaware River Basin Compact, 75 Stat. 688 (1961). See generally Grad, *Federal-State Compact—A New Experiment in Co-operative Federalism*, 63 COLUM. L. REV. 825 (1963). See also Dixon, *Constitutional Bases for Regionalism—Centralization; Interstate Compacts; Federal Regional Taxation*, 33 GEO. WASH. L. REV. 47 (1964); Engdahl, *Consolidation by Compact: A Remedy for Pre-emption of State Food and Drug Laws*, 14 J. PUB. L. — (No. 2, 1965).

208. Compare the consequences of making federal competence the test of the scope of the compact clause under the rule of *Virginia v. Tennessee*, as discussed in text accompanying notes 47-48 *supra*.

powers are affected, but no further, all interstate arrangements must be recognized as voidable by congressional action.²⁰⁹

VI. CONCLUSION

The continued use of the term "compact" in reference to modern cooperative arrangements between states is almost certain to contribute to the perpetuation of the erroneous association of these arrangements with the compact clause. The term "agreement," because of its parallel usage with "compact" in that clause, is equally misleading. However, the use of the term "compact" in a loose sense with reference to all sorts of formal interstate arrangements has become so widespread that to attempt a refinement of this terminology now might well prove futile.²¹⁰ It is also widely recognized, however, that not all "compacts" in this loose sense of the term fall within the compact clause; the test applied for exemption has been the rule of *Virginia v. Tennessee*. Therefore, so long as the exegetical meaning of the constitutional terminology is not lost sight of, it may be more expedient to tolerate the broader common usage of the term "compact" and simply introduce the analysis here set forth to displace *Virginia v. Tennessee* as the test of exemption of such "compacts" from the compact clause.

It should go without saying that the initiative in asserting any construction of the compact clause must rest in the first instance not with the courts, but rather with the states, which must decide whether to submit particular arrangements for consent. Reluctance to reject extrajudicially the generally accepted construction of the compact clause should be overcome at least in part by the wide recognition that what this writer has called the "rule" of *Virginia v. Tennessee* is merely dictum;²¹¹ this reluctance should also be dis-

209. Some writers have urged that because of the compact clause, all interstate arrangements, including those which deal with wholly local matters, are voidable by Congress, even if they do not require congressional consent for their initial validity. Bruce, *The Compacts and Agreements of States With One Another and With Foreign Powers*, 2 MINN. L. REV. 500, 516 (1918); Dunbar, *Interstate Compacts and Congressional Consent*, 36 VA. L. REV. 753 (1950). This assertion has no basis in authority. Voidability under the doctrine of federal supremacy, on the other hand, rests upon authority too well established to require discussion.

210. There is a strong temptation to import the term "concordat" as used by the Swiss (see note 177 *supra*), since the German term *Vereinbarung* seems hardly suitable for introduction into English, a more familiar and perhaps appropriate term would be "convention." However, if the history of the compact clause teaches anything, it is that the technical denotations of such terms are quickly obscured and forgotten.

211. See note 22 *supra* and accompanying text.

pelled by the realization that the extrajudicial application of this "rule" is different from its application in the courts.²¹² In time the courts, too, will have occasion to consider the various implications of adhering to one or another construction of the clause. The liberating construction of the compact clause here advanced, if its cogency is sufficient to establish it in the minds of state officials and the courts, may contribute substantially to the freer and more fruitful utilization of such cooperative arrangements among the several states.

212. See text accompanying notes 28-31 *supra*.