

YALE LAW JOURNAL

Vol. XXXIV

MAY, 1925

No. 7

THE COMPACT CLAUSE OF THE CONSTITUTION— A STUDY IN INTERSTATE ADJUSTMENTS

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I.

The Constitution is naturally acclaimed as the creative achievement of statesmen bent on maintaining the co-operation of the States and on forming "a more perfect Union." But in the creation lurked the seeds of inevitable contest between the new Union and its constituent members. Controversy over the spheres appropriate for action by States or Nation began in 1789; it is rife today.¹ In 1900 the people of the Australian States "agreed to unite in one indissoluble Federal Commonwealth";² and for twenty-five years an uninterrupted process of conflict, discussion, and adjustment has followed, centering around the respective scope of action of States and Commonwealth.³ Only yesterday the question of the extent of control over industrial relations by the Commonwealth government divided the High Court of Australia and brought the States into sharp conflict with the Commonwealth.⁴ Ever since the Canadian Provinces "federally united into

¹ Thus those who fully agree on the civilized standards for child-life that should prevail in the United States are in disagreement as to whether State or Federal action is the most sustained and fruitful method for achieving the desired results. See e. g. Frankfurter, *Child Labor and the Court* (July 26, 1922) 31 NEW REPUBLIC, 248, and editorial reply thereto, *States Rights and Children*, *ibid.* 241; editorial in *New York World*, Dec. 8, 1924; Waite, *The Child Labor Amendment* (1924) 9 MINN. L. REV. 179. See also *Hearings before Subcommittee of Committee on Judiciary of U. S. Senate*, 67 Cong. 4th sess. Jan. 10-15, 1923, *passim*; Report No. 395, 68 Cong. 1st sess.; Abbott, *The Child Labor Amendment* (1924) 220 N. AMER. REV. 223.

² Commonwealth of Australia Constitution Act (1900) 63 & 64 Vict. c. 12; *Records and Debates of Australasian Convention* (1898) *passim*.

³ See Higgins, *McCulloch v. Maryland in Australia* (1904) 18 HARV. L. REV. 559; Haines, *The Constitution Act of Australia* (1917) 30 HARV. L. REV. 595; Keith, *Notes on Imperial Constitutional Law* (1924) 6 JOURN. COMP. LEG. 193; Moore, *Constitution of the Commonwealth of Australia* (2d ed. 1910); 1 Bryce, *Studies in History and Jurisprudence* (1901) 319; Atkinson, *The Political Systems of Australia* (1920) ch. 2.

⁴ *Amalgamated Society of Engineers v. Adelaide S. S. Co. Ltd.* (1920) 28 C. L. R. 129; *Same v. Same* (1921) 29 C. L. R. 496, commented on in (1922) 4

one Dominion,"⁵ the public, legislatures and courts have been grappling with conflicts generated by the existence of two areas of authority—the Provinces and the Dominion.⁶ In the recent invalidation by the Privy Council of the Canadian Industrial Disputes Investigation Act of 1907⁷ as *ultra vires* the Dominion Parliament has put on the front page of the daily paper a striking manifestation of this persistent problem.⁸ With the formation of the South African Union in 1909⁹ the powers of government were divided between the Provinces and the Union; since 1909, the history of South Africa has been partly the history of adjustments between Provincial and Union assertion of power.¹⁰ Here then we have an obstinate problem common to the four great systems of federated government in the English-speaking world.¹¹ The problem is inherent in the very conception of federalism. Constitutional provisions and constitutional adjudications may, at a given time, represent the forms of specific adjustment. But no matter how explicit the provisions nor how decisive the adjudications, they are not, because they cannot be, definitive answers to the central problem. The legal issues are continuous because the human difficulties are continuous. And in their application to the United States, behind all legalistic controversies lie deep issues of state-craft in the practical government of a farflung empire.¹²

JOURN. COMP. LEG. Pt. 4, p. 107. Special leave for appeal to the Privy Council was denied in [1923] A. C. 170, commented on in (1923) 5 JOURN. COMP. LEG. Pt. 3, p. 278.

⁵ British North America Act (1867) 30 & 31 Vict. c. 3.

⁶ See Kennedy, *The Disallowance of Provincial Acts in the Dominion of Canada* (1924) 6 JOURN. COMP. LEG. Pt. 1, p. 81; Haines, *Judicial Review of Legislation in Canada* (1915) 28 HARV. L. REV. 565. See also 1 Lucas, *Lord Durham's Report* (1912) introd.; Pope, *Confederation Documents* (1895); Lefroy, *Law of the Legislative Power in Canada* (1897); Newton, *Federal and Unified Constitutions* (1923); Keith, *Responsible Government in the Dominions* (1912); Kennedy, *Constitution of Canada* (1922) chs. 23-24, *passim*.

⁷ Can. Sts. 1917, c. 20.

⁸ *Toronto Electric Comm. v. Snyder* [1924] 2 D. L. R. (N. S.) 761, reversed by the Privy Council, [1925] A. C. 396. See also *A Privy Council Decision*, *The London Times*, Jan. 22, 1925. See the recent debate in the Canadian House of Commons on the proposal of Mr. McLean to secure for the Dominion the right to amend the British North America Act. Mr. McLean thus summed up the situation: "There is a dispute between the federal and provincial powers in this country, as there is in Australia, and the same is the case in the United States." See 60 HANSARD (1925, Can.) 300, 302, *et seq.*

⁹ Const. of South Africa Act (1909) 9 Edw. VII, c. 9. See Brand, *Union of South Africa* (1909) *passim*.

¹⁰ *De Waal, N. O. v. North Bay Canning Co. Ltd.* [1921, S. A.] A. D. 521; *Rex v. Amod* [1922, S. A.] A. D. 217.

¹¹ Cf. Edgerton, *Federations and Unions in the British Empire* (1911); Smith, *Federalism in North America* (1923); 1 Bryce, *Studies in History and Jurisprudence* (1901) 216.

¹² Cf. Curtis, *The Commonwealth of Nations* (1916) Pt. I, 610-611: "Exponents of mere centralization are forever harping on the vices of the State legislatures as though they were bodies not bad by comparison, but like Sodom and

II.

This is not the place to contend for the federal against the unitary state.¹³ Suffice it to say that on the eve of the Great War one of the most significant political thinkers of the Continent turned to federalism as a *cure* for the disruptive tendencies of the Austria-Hungarian monarchy.¹⁴ Federalism is again pressed as the solution for the legacies of the Great War in the Danubian and Balkan states.¹⁵ The persistence of federalism in this country in substantially its present form, namely, as a Union of States is, we submit, an assured fact. All fruitful political and legal discussion centering about the actual workings of government in the immediate future must accept its continuance as a presupposition. This assumption, at any rate, underlies this paper—the continuance of the States approximately with their present legal autonomy, and not, like the departments of France, mere administrative divisions of the central government.

We must face, therefore, two sets of legal authorities—the individual States and the United States—with their respective fields of action not definitively delimited by law and yet constantly interacting in fact, particularly in crucial legislative areas. The challenge of the situation is to make legal accommodations of these practical impingements. Inasmuch as there are these two categories of law-making agencies, State and Nation, the solution of the problem has

Gomorrah bad in themselves and past cure. In any state the local organs, when dissected and viewed apart, nearly always suffer by comparisons with the organ of the central government. What these critics forget, however, is that in a great commonwealth it is the presence of these local organs which alone renders possible the existence of the central government. If the State Governments were abolished as things too rotten to reform, the government of all America through the central organ at Washington would be wholly impossible." See also Thompson, *Federal Centralization* (1923) p. v: "Social, economic and psychological factors, as well as legal must be considered in attempting to find a workable division of functions in the federal government and the states." Senator Root's famous speech before the Pennsylvania Society on Dec. 12, 1906, Root, *Addresses on Government and Citizenship*, 362; Laski, *Sovereignty and Centralization* (1916) 9 NEW REPUBLIC, 176, and reply by Croly, *The Failure of the States*, *ibid.* 170; Croly, *Promise of American Life* (1909) *passim*.

¹³ The literature on federalism, as the key to the adjustment of forces that parade under the fighting slogans of centralization and decentralization, is voluminous. By way of suggestive references we note, Bryce, *American Commonwealth* (1913) chs. 29 & 30; 2 Bryce, *Modern Democracies* (1921) 435-6; Laski, *Foundations of Sovereignty* (1921) 30; Leacock, *Limitations of Federal Government* (1908) 5 PROC. AM. POL. SCI. ASSOC. 37; Dicey, *Law of the Constitution* (8th ed. 1915) lxxv, 517, 529; Thompson, *Federal Centralization* (1923) ch. 19.

¹⁴ See Redlich, "Austria-Hungary and Serbia" (July 25, 1914) 79 ECON. PT. I, 179. See also the extremely illuminating study of Popovici, *Die Vereinigten Staaten von Gross-Oesterreich*. (We are indebted for this valuable reference to Dr. D. Mitrany, the historian of South-Eastern Europe.)

¹⁵ Compare Mitrany, *The Unmaking of Jugo-Slavia* (Jan. 28, 1925) 41 NEW REPUBLIC, 253; *Program of Croatian Peasant Party* (Feb. 25, 1925) 120 NATION, 224.

usually been conceived in terms of exclusive duality. Evils calling for legislative redress, recognized subjects of administrative control, governmental promotion of social ends, have throughout our history divided men into two hostile camps, those seeking relief through State action and those appealing for national intervention. As a result legal inventiveness has been curbed and its resources largely confined to an untrue antithesis. The combined legislative powers of Congress and of the several States permit a wide range of permutations and combinations for governmental action. Until very recently these potentialities have been left largely unexplored. Political energy has been expended on sterile controversy over supposedly exclusive alternatives instead of utilized for fashioning new instruments adapted to new situations. Our rapid industrialization is generating an insistent variety of interaction in the affairs of the several States. The exclusiveness of the traditional choice in governmental intervention is becoming correspondingly inadequate. Creativeness is called for to devise a great variety of legal alternatives to cope with the diverse forms of interstate interests.

Intimations of fruitful direction are furnished by new technique and new machinery devised during recent years in the settlement of problems which transcend State lines. Since 1890 the National Conference of Commissioners on Uniform State Laws has promoted uniformity of State legislation on subjects beyond the power of Congress and where, from the nature of the case, diversity of treatment is an interstate evil. By this method a vast domain of the commercial transactions of the country which do not respect State lines are sought to be brought under common legal control.¹⁶ The scheme of reciprocal legislation has been resorted to whereby the capacity of one State to harm or advantage another, when conflicting interests need adjustment, is exercised by creating immunities or handicaps conditioned upon like treatment by sister States.¹⁷ The importance of a policy of com-

¹⁶ Thus 51 jurisdictions have passed the Uniform Negotiable Instruments Law, 48 jurisdictions the Uniform Warehouse Receipts Act, 26 jurisdictions the Uniform Bills of Lading Act, 27 jurisdictions the Uniform Sales Act, 16 jurisdictions the Uniform Partnership Act. See *Handbook of National Conference of Commissioners on Uniform State Laws* (1924) 28; Terry, *Uniform State Laws in the United States* (1920). See also Ilbert, *Unification of Commercial Law* (1920) 2 JOURN. COMP. LEG. Pt. I, p. 77.

¹⁷ See *Kane v. New Jersey* (1916) 242 U. S. 160, 167-168, 37 Sup. Ct. 30, per Brandeis, J.:

"The Maryland law contained a reciprocal provision by which non-residents whose cars are duly registered in their own States are given, for a limited period, free use of the highways in return for similar privileges granted to residents of Maryland. Such a provision promotes convenience of owners and prevents the relative hardship of having to pay the full registration fees for a brief use of the highways. It has become common in state legislation."

See, e. g., the Act of Cong. of Mar. 3, 1917 (39 Stat. at L. 1012), construed in *King v. District of Columbia* (1922, C. A. D. C.) 277 Fed. 562. Insurance and the control of foreign corporations offer familiar occasions for this type of legislation. See Lindsay, *Reciprocal Legislation* (1910) 25 POL. SCI. QUART. 435.

mon action in certain fields of legal control is again reflected in the conscious practice of courts to base decisions in these fields on grounds of needed harmony between jurisdictions legally independent of each other.¹⁸ Conferences of governors and other State officials, partly initiated by and partly in collaboration with Federal authorities, have more or less stimulated common State action and have served as a fruitful interchange of views on State policies essential to an understanding of common interests.¹⁹ Again, the States have been enabled,

¹⁸ See *Queen Ins. Co. v. Globe Ins. Co.* (1924) 263 U. S. 487, 493, 44 Sup. Ct. 175, 176, per Holmes, J.: "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business . . ."; *Commercial Bank v. Canal Bank* (1916) 239 U. S. 520, 36 Sup. Ct. 194.

¹⁹ Thus, President Roosevelt initiated the Conference of Governors in 1908; *Proceedings of Conference of Governors* (1908) v, et seq.; Roosevelt, *Autobiography* (1913) 445 et seq. The growing scope of this coöperative method is revealed through the reports of the great variety of associations of state officials, catalogued in the Monthly List of State Publications published by the Library of Congress since 1910. These associations, collectively, cover the whole scope of modern government. A partial list of them follows: Association of Governmental Labor Officials of the United States and Canada, American Institute of Park Executives, American Association of Port Authorities, American Association of State Highway Officials, American Prison Association, American Uniform Boiler Law Society, Assembly of Civil Service Commissions, Association of American Dairy, Food, and Drug Officials, Association of Official Agricultural Chemists, Conference of Art Commissions, Conference of Governors of the States of the Union, Conference of New England Governors, Conference of State and Territorial Health Officers, Conference of State Sanitary Engineers, Conference on Weights and Measures in the United States, Federation of State Medical Boards, International Association of Dairy and Milk Inspectors, International Association of Factory Inspectors, International Association of Game, Fish, and Conservation Commissioners, International Association of Industrial Accident Boards and Commissions, International Association of Public Employment Services, Joint New England Railroad Committee, National Association of Attorneys General, National Association of Boards of Medical Examiners, National Association of Commissioners, Secretaries and Departments of Agriculture, National Association of Comptrollers and Accounting Officers, National Association of Dental Examiners, National Association of State Universities, National Association of Railway and Utilities Commissioners, National Association of State Libraries, National Association of Supervisors of State Banks, National Convention of Insurance Commissions, National Probation Association, National Tax Association, New England State Tax Officials Association, Pacific Coast Association of Port Authorities.

In Canada there has been a growing tendency to secure coöperation between the Dominion and the Provinces by means of similar conferences. Interprovincial conferences were held in the years 1887, 1902, 1906, 1910, 1913, and 1919. Among other matters the Conference of 1887 passed resolutions calling for unanimity in Provincial legislation for the enforcement of debts, for the protection of officials acting under the authority of laws that may afterwards be held to have been beyond the legislative jurisdiction of Parliament, for the recognition by all the Provinces of probates and letters of administration granted in any one of them. See *Minutes of the Proceedings in Conference of the Representatives of the Provinces*, 37-38. In 1919 a National Industrial Conference of the Representatives of the Dominion and Provincial Governments was held in Ottawa to consider the subjects of industrial relations and labor laws. A resolution was adopted calling

to control more effectively matters predominately the concern of State legislation by auxiliary Federal legislation.²⁰ Following the English device of grants-in-aid,²¹ the Federal government has latterly sought to stimulate through financial assistance State action in matters subject to State control but involving an interest common to the whole country.²² Another method is seen in the regulation of interstate preserves through the practical fusion of distinct State administrative agencies by means of joint sessions and joint action in order to deal as a unit with legally separate parts of a common interest.^{22a}

for a further conference for the consideration of means and methods of unifying and coördinating the existing Provincial legislation bearing on the relations between employers and employees. See *Official Report of Proceedings and Discussions*, Appx. p. 18. This conference met the following year and submitted its report. See 20 LABOUR GAZETTE (1920, Can.) No. 5. Further conferences have been held at Ottawa in 1922 on unemployment, in 1923 on the obligations of Canada under the labor sections of the Treaties of Peace, and in 1924 on winter employment.

We are greatly indebted for the Canadian data to H. H. Ward, Esq., Deputy Minister of the Dominion Department of Labour, and to F. A. Acland, Esq., King's Printer.

* Liquor legislation and game statutes are illustrations of a resource of Federal legislation complementing State action, which is by no means exhausted. See Wilson Act of Aug. 8, 1890 (26 Stat. at L. 313); Lacey Act of May 25, 1900 (31 Stat. at L. 188); Webb-Kenyon Act of Mar. 1, 1913 (37 Stat. at L. 699). The scope and validity of such legislation has been frequently before the courts. *In re Rahrer* (1891) 140 U. S. 545, 11 Sup. Ct. 865; *Clark Distilling Co. v. Western Maryland Ry. Co.* (1917) 242 U. S. 311, 37 Sup. Ct. 180; *Rupert v. United States* (1910, C. C. A. 8th) 181 Fed. 87. See also *United States v. Green* (1905, N. D. N. Y.) 137 Fed. 179; *The Wilson v. United States* (1820, C. C. D. Va.) Fed. Cas. No. 17,846.

²⁰ Webb, *Grants-in-Aid* (1911).

²¹ McDonald, *Federal Subsidies to the States* (1923); Beard, *American Government and Politics* (4th ed. 1924) 443; Arneson, *Federal Aid to the States* (1922) 16 POL. SCI. REV. 443; Douglas, *A System of Federal Grants-in-Aid* (1920) 35 POL. SCI. QUART. 255, 522. An interesting illustration of the combined use of grant-in-aid and compact is furnished by the so-called Weeks Law of March 1, 1911 (36 Stat. at L. 961); see *Annual Report of Dept. of Agriculture* (1911) 402. The most recent use of this power is the Sheppard-Towner Act of Mar. 23, 1921 (42 Stat. at L. 224), which was before the Court in *Massachusetts v. Mellon* (1923) 262 U. S. 447, 43 Sup. Ct. 597. See Corwin, *The Spending Power of Congress* (1923) 36 HARV. L. REV. 548; Burdick, *Federal Aid Legislation* (1923) 8 CORN. L. QUART. 324. See also Budget Message of President Coolidge (1924) 66 Cong. Rec. 33, 35; *Report on Federal Subsidies to States* (Wash., Dec. 1924) Editorial Research Rep.

^{22a} In 1895 the States of New York and New Jersey appointed commissions to devise a scheme looking towards the acquisition and administration by the United States of the Palisades as a national park. N. Y. Laws, 1895, ch. 97; N. J. Laws, 1895 ch. 415, p. 802. In accordance with this plan, New Jersey passed an act ceding jurisdiction over the park to the United States. N. J. Laws, 1896, ch. 23, p. 47. The United States, however, failed to undertake the administration of this park, and the act was repealed. N. J. Laws, 1905, ch. 56, p. 91. Consequently, in 1900, both States enacted statutes authorizing the appointment of ten commissioners by each Governor, and creating this commission into "a body politic" with power to acquire and condemn land for the purposes of the park. Out of these ten

These six instances illustrate extra-constitutional forms of legal invention for the solution of problems touching more than one State. They were neither contemplated nor specifically provided for by the Constitution.

Two other modes of adjustment have their source in constitutional provisions. Through jurisdiction over "Controversies between two or more States"²³ the Supreme Court is building up a body of law for the settlement of interstate problems susceptible of judicial disposition.²⁴ Finally, the Constitution authorizes a State to "enter into any Agreement or Compact with another State" with "the Consent of Congress."²⁵ Although, on very restricted occasions, availed of from the beginning, the pressure of modern interstate problems has revealed the rich potentialities of this device. Constitutional problems raised by this mechanism of State compacts are the concern of this essay.

III.

While a notable study has been made of the employment of State compacts in the past and of their future possibilities,²⁶ the history of

commissioners, only five are required to be residents of the State, and each Governor is thus 'at liberty to appoint five commissioners who are residents of a different State. N. Y. Laws, 1900, ch. 170, as amended by N. Y. Laws, 1901, ch. 504; N. Y. Laws, 1906, ch. 691; N. Y. Laws, 1910, ch. 361; N. Y. Laws, 1917, ch. 251; N. J. Laws, 1900, ch. 87, as amended by N. J. Laws, 1901, ch. 112; N. J. Laws, 1916, ch. 81. The practical result is that each Governor appoints five members to the commission from the other State, who have already been appointed by the other Governor. Thus, a single commission of ten members constitutes the administrative body with control over the area of the park embracing a section of both New York and New Jersey. See *Annual Report of the Commissioners of Palisades Interstate Park (1924) passim*.

²³ U. S. Const. Art. III, Sec. 2.

²⁴ Smith, *The American Supreme Court as an International Tribunal (1920)*; Caldwell, *The Settlement of Inter-State Disputes (1920)* 14 AM. JOURN. INT. L. 38.

²⁵ The Constitution puts this power negatively in order to express the limitation imposed upon its exercise. By putting this authority for State action in a section dealing with restrictions upon the States, the significance of what was granted has probably been considerably minimized. The entire applicable provisions of the Constitution, contained in Section 10 of Article I, follow:

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

The Constitution of the Confederate States adopted the provisions of the United States Constitution on this subject with interesting modifications. The relevant clauses (Art. I, Sec. 10) of the Confederate Constitution follow:

1. No State shall enter into any treaty, alliance, or confederation. . . .
3. Nor shall any State enter into any agreement or compact with another State, or with a foreign power, 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.

²⁶ *Report of the Committee on Inter-State Compacts to the National Conference of Commissioners on Uniform State Laws (1921)* 297.

the constitutional provisions providing for this resource of state-craft has received scant attention. In fact, however, the Compact Clause has its roots deep in colonial history. It is part and parcel of the long and familiar story of colonial boundary controversies.²⁷ Almost all of the colonial charters, it will be recalled, were necessarily vague and expansive. They had to be applied to strange and ill-surveyed territory. We are also familiar with the surrender by the sea-board colonies of extravagant claims to remote stretches of the continent. More important, however, for our purposes were the conflicts ensuing from the claims of colonies to territory along the Atlantic sea-board.^{27a} As the populations of bordering colonies began to impinge upon one another the settlement of boundaries became one of their predominant problems. The story of these disputes, their final outcome and the resulting territorial changes, concern the historian; the methods evolved for settlement are of prime importance to the lawyer.

The records reveal two peaceful modes of settling these disputes. Negotiation between the contending colonies was the obvious way out, carried on usually through joint commissions.²⁸ If an agreement was reached, not infrequently after years of tortuous discussion, the further approval of the Crown was required.²⁹ If negotiations failed or

²⁷ See Appx. B, I, *infra*.

^{27a} See e. g. Adams, *Founding of New England, 1665-1667* (1921) 216, 227, 320, 328; Nevins, *The American States* (1924) 547, 578 *et seq.*

²⁸ See e. g. the Connecticut and New York negotiations of 1664, 1683, 1700, and 1725, Appx. A, I, (3), (4), (7).

²⁹ That the determination of boundary disputes was subject to the prerogative of the King is evident from the opinion of Lord Mansfield, as Sir W. Murray, Attorney-General, in the second controversy between Massachusetts and Connecticut: "I apprehend His Majesty will confirm their agreement, which of itself is not binding upon the Crown. . ." quoted in *South Australia v. Victoria* (1911) 12 C. L. R. 667, 704. Agreements between the Colonies were made subject to the approval of the Crown. The instructions to the Massachusetts Commissioners appointed to treat with the New York commissioners at Albany in 1754 provide that the "line (is) to be immediately submitted to his Majesty for his Royal Approbation & Confirmation. . ." See 15 Mass. Prov. Acts, 157. The Act of April 11, 1729, appointing the Massachusetts commissioners to treat with the New Hampshire commissioners, provides that "upon confirmation. . . His Majesty be humbly addressed by both Governments for his Royal Approbation." See 11 Mass. Prov. Acts, 396. With the appointment of new commissioners in 1730 they were directed to determine the boundary so that it might "be indisputable in all times to come, Upon its receiving the Royal Sanction." See 11 Mass. Prov. Acts, 517. The Act of Dec. 7, 1754, appointing commissioners on the part of New York, specifically recognizes the paramount character of the King's prerogative: "And altho' his most Gracious Majesty hath the Sole and Absolute Right of fixing and Determining Such Line of Jurisdiction as Aforesaid. ." See 3 N. Y. Col. Laws, 1036. The prerogative character of the royal sanction was only recently recognized in an Australian case, *South Australia v. Victoria*, *supra*. Again, the exercise of the royal power might be asserted through the appointment of a Royal Commission to determine a disputed boundary question. This was the practice adopted in the disputes between New Hampshire and Massachusetts (12 Mass. Prov. Acts, 392), between Massachusetts and Rhode Island (4 R. I. Col. Rec. 586, note), between Massachusetts and New York

in lieu of such direct settlement, the second mode of procedure was invoked. This was an appeal to the Crown, followed normally by a reference of the controversy to a Royal Commission.³⁰ In effect such a controversy before a Royal Commission bore the characteristics of a litigation. From the decision of the Commission an appeal lay to the Privy Council.³¹ These two forms of adjustments became common practice for a hundred years preceding the Revolution. An appeal in a boundary dispute between New York and New Jersey appears in the records of the Privy Council as late as 1773.³²

The Revolution found a large number of these disputes still undetermined. The Articles of Confederation were framed by statesmen deeply alive to these contentions and familiar with the colonial methods for their adjustment. But the framers of these Articles were also familiar with the New England Confederacy of 1643, the Temporary Congress of 1690, the Plan of Union of 1754; they were in the midst of a political struggle against the might of Great Britain, which could be successfully carried on only through the united political action of the Thirteen Colonies. While, therefore, provision had to be made for the settlement of boundary and other disputes, which now emerged between the new independent States, in case of failure of direct negotiations between them, it was perhaps even more important to protect the new Union of States established by the Articles of Confederation, from the destructive political combination of two or more States. The Articles, therefore, specifically provided for an appeal to Congress "in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any cause whatever." At the same time, they endeavored to secure the authority of the Confederacy against political rivalry by the following limitation upon the "sovereignty, freedom and independence" "retained" by each State:

(4 N. Y. Col. Laws, 948), and between New York and New Jersey (4 Acts of Privy Council, Col. Ser., 686). Appeals from the decision of such a commission lay to the King in Council. Appeals were taken from the decision of the Royal Commission in the New Hampshire-Massachusetts Controversy and the Massachusetts-Rhode Island Controversy. See 12 Mass. Prov. Acts, 407, 409; 13 *ibid.* 24. The decision on appeal, though in form proceeding from the King, due to pressure of business was usually delegated to the Privy Council. See 2 Batchellor, *Laws of New Hampshire* (1913) 790. The King's prerogative over boundary disputes between the Colonies must be distinguished from resort to Chancery to enforce boundary agreements between proprietary owners, upon the analogy of decreeing specific performance of contracts to convey land. See *Penn v. Lord Baltimore* (1750, Ch.) 1 Ves. 444, 446.

³⁰ See e. g. the Massachusetts and New Hampshire Settlement of 1740, Appx. B, I, (1), *infra*.

³¹ It will, of course, be recalled that the Privy Council was not formally set apart through its Judicial Committee as a judicial organ until (1833) 3 & 4 Will. IV, c. 41. See Dicey, *Privy Council* (1887) *passim*.

³² 5 Acts of the Privy Council, Col. Ser. 45. See also Appx. B, I, (3), *infra*.

"ARTICLE VI. No state without the Consent of the united states in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, prince, or state.

"No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the united states in congress assembled, specifying accurately the purpose for which the same is to be entered into, and how long it shall continue."

The absence of any powerful national capabilities on the part of the Confederacy, except in the conduct of foreign affairs, underlines the significance of these clauses as insurance against competing political power. This curb upon political combinations by the States was retained almost *in haec verba* by the Constitution.

But the Constitution also authorized agreements between the States with the consent of Congress. Obviously the framers contemplated adjustments among the States which did not involve political entanglements embarrassing to the national government. The records of the Constitutional Convention furnish no light as to the source and scope of this compact provision of Article I, Section 10. Nor does the Federalist help. But the history of the times furnishes an ample commentary. "It is a part of the public history of the United States. . . . that at the adoption of the Constitution there were existing controversies between eleven states respecting their boundaries, which arose under their respective charters, and had continued from the first settlement of the Colonies."³³ In addition, the States had resorted to agreements among themselves, adjusting controversies other than boundary disputes.³⁴ The framers were familiar with the modes of settlement prior to the Revolution—that controversies were determined partly through agreements confirmed by the Crown, and partly by litigation on appeal to the Privy Council. The Philadelphia Convention wrote both methods practised by the Colonies into the Constitution. Controversies between the Colonies which came before the Privy Council were, in effect, precursors of the types of litigation over which the Supreme Court assumed jurisdiction³⁵ under Article III extending "the judicial Power" to "Controversies between two or more States." The power to negotiate settlements between the Colonies, subject to the sanction of the royal prerogative, was written into Article I, Section 8, 10.

Historically the consent of Congress, as a prerequisite to the validity of agreements by States, appears as the republican transformation of the needed approval by the Crown. But the Constitution plainly had two very practical objectives in view in conditioning agreement by States upon consent of Congress.³⁶ For only Congress is the

³³ See *Rhode Island v. Massachusetts* (1838, U. S.) 12 Pet. 657, 723. See also Beer, *British Colonial Policy, 1754-1765* (1907) 50, note.

³⁴ See Appx. B, III, *infra*.

³⁵ The power of the Court was first canvassed in *Rhode Island v. Massachusetts*, *supra*, and jurisdiction was assumed over the dissent of Chief Justice Taney.

³⁶ Madison in his retrospect on the framing of the Constitution reverts to these

appropriate organ for determining what arrangements between States might fall within the prohibited class of "Treaty, Alliance, or Confederation", and what arrangements come within the permissive class of "Agreement or Compact."³⁷ But even the permissive agreements may affect the interests of States other than those parties to the agreement: the national, and not merely a regional, interest may be involved. Therefore, Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions. The framers thus astutely created a mechanism of legal control over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment. They allowed interstate adjustments but duly safeguarded the national interest.

IV.

What has been the history of this clause in action? We have set forth in an appendix a detailed catalogue of the compacts to which Congress has given its sanction, the action of the State legislatures in negotiating, ratifying and enforcing agreements, the administration of agencies created by compacts, and adjudications involving them.³⁸ In addition, the appendix contains an enumeration of agreements which became operative without Congressional consent and litigation under them, proposals for agreements which were never concluded, and, finally, important pending projects for compacts awaiting State or Congressional ratification.³⁹

Despite the relatively limited resort to this constitutional machinery in the adjustment of interstate relations, its use to date reveals the possibilities of the wide scope of legislative problems for which it is available. Difficulties in the following fields of legislation have elicited application of the Compact Clause:

considerations: "In other cases the Fedl authy was violated by Treaties & wars . . . by compacts witht. the consent of Congress as between Pena. and N. Jersey. and between Virga. & Maryd. From the Legisl: Journals of Virga. it appears, that a vote to apply for a sanction of Congs. was followed by a vote agst. a communication of the Compact to Congs." Madison, *Preface to Debates in the Convention of 1787*, 3 Farrand, *Records of the Constitutional Convention* (1911) Appx. A, CCCI, 548.

³⁷ There is no self-executing test differentiating "compact" from "treaty." Story and other writers have attempted an analytical classification. Story, *Constitution* (5th ed. 1891) secs. 1402-1405. The attempt is bound to go shipwreck for we are in a field in which political judgment is, to say the least, one of the important factors. The considerations that led the Supreme Court to leave Congress the determination of what constitutes a republican form of government as guaranteed by the Constitution (*Pac. States Tel. & Tel. Co. v. Oregon* [1912] 223 U. S. 118, 32 Sup. Ct. 224) are equally controlling in leaving to Congress to circumscribe the area of agreement open to the States.

³⁸ See Appx. A, III, *infra*.

³⁹ See Appx. A, IV-VI, *infra*.

- (1) Boundaries and cessions of territory.
- (2) Control and improvement of navigation.
- (3) Penal jurisdiction.
- (4) Uniformity of legislation.
- (5) Interstate accounting.
- (6) Conservation of natural resources.
- (7) Utility regulation.
- (8) Taxation.

(1) Boundary disputes were the earliest as they have been the most continuous occasions for invoking the Compact Clause. Here is a type of controversy, one would suppose, which is readily amenable to judicial settlement. In a dozen or so cases the judicial power of the Supreme Court was in fact invoked. Yet litigation in notable instances did not settle, or settle permanently, contentions between the States.⁴⁰ Compacts furnished the solution.⁴¹ The Supreme Court itself has more than once adverted to the inadequacy of the judicial process, and counselled the parties to this more fruitful method of settlement.⁴²

(2) Community interest in navigation upon common waters of adjoining States gave rise to difficulties prior to the Constitution,⁴³ are pressing today,⁴⁴ and are bound to manifest themselves in the future. We find negotiated agreement between the affected States

⁴⁰ *Rhode Island v. Massachusetts*, *supra*, note 33; *Washington v. Oregon* (1909) 214 U. S. 205, 29 Sup. Ct. 631; *Minnesota v. Wisconsin* (1920) 252 U. S. 273, 40 Sup. Ct. 313.

⁴¹ See Compact between Massachusetts and Rhode Island of 1859, Appx. A, III, (7), *infra*. In *Missouri v. Nebraska* (1905) 197 U. S. 577, 25 Sup. Ct. 580, the Supreme Court entered a decree in accordance with a stipulation of the parties agreeing to a former survey as determining the boundary line. This suggestion of a stipulation was made by the Court in the earlier case of *Missouri v. Nebraska*, (1904) 196 U. S. 23, 25 Sup. Ct. 155, where it was held that avulsion had not worked any change in the boundary. In *Iowa v. Illinois* (1893) 147 U. S. 1, 13 Sup. Ct. 239, the Court decided that the boundary line between the two States was the middle of the Mississippi River and ordered that a commission be appointed to ascertain and designate this line. The commissioners filed a report which the Court ordered to be confirmed, but which in *Iowa v. Illinois* (1894) 151 U. S. 238, 14 Sup. Ct. 333, the Court set aside on the showing that Illinois had not concurred in the motion for the approval of the report as the Court believed it had. In *Iowa v. Illinois* (1906) 202 U. S. 59, 26 Sup. Ct. 571, both States moved to set aside the two prior decrees of the Court, and asked the Court to enter as a final decree the boundary line agreed upon between the parties, which request the Court so ordered. See also *Nebraska v. Iowa* (1891) 143 U. S. 359, 12 Sup. Ct. 396; *Nebraska v. Iowa* (1892) 145 U. S. 519, 12 Sup. Ct. 976.

⁴² "It seems appropriate to repeat the suggestion, made in *Washington v. Oregon*, *supra* 217, 218, that the parties endeavor with the consent of Congress to adjust their boundaries." *Minnesota v. Wisconsin* (1920) 252 U. S. 273, 283, 40 Sup. Ct. 313, 319. See also *State v. Faudre* (1903) 54 W. Va. 122, 136, 46 S. E. 269, 275.

⁴³ See *e.g.* the agreement between Virginia and Maryland concerning the Potomac River, Appx. A, II (3) *infra*.

⁴⁴ New York Port Authority Agreement, Appx. A, III (35) *infra*.

the key to such difficulties in pre-Constitution days;⁴⁵ State compacts give the most successful answer to similar problems of today. The history of the New York Port Authority furnishes a most hopeful story of effective treatment of interstate relations.⁴⁶ New York and New Jersey have a special interest in the Port of New York. But the greatest harbor in the United States is of vital commercial importance to the whole country. About half of the foreign commerce of the country passes through this port. The flow of commerce into New York from the West and the vast flow of importations from abroad entail an infinite complexity of transactions, facilities and processes in order to achieve an economic, efficient and continuous movement of commerce. This implies an alert regulation of traffic on the water, a steady attention to the engineering needs of the harbor, an adequate supply of terminal facilities, both on the New York and on the New Jersey side, the wise utilization of such facilities, quick means for loading and unloading, and speedy distribution.⁴⁷ Plainly these are the factors that make or mar a harbor.

From the point of view of geography, commerce, and engineering, the Port of New York is an organic whole. Politically, the port is split between the law-making of two States, independent but futile in their respective spheres. The scarcity of land and mounting commerce have concentrated on the New York side of the Hudson River the bulk of the terminal facilities for foreign commerce, while it has made the Jersey side, to a substantial extent, the terminal and breaking-up yards for the east-and west-bound traffic. In addition, both sides of the Hudson are dotted with municipalities, who have sought to satisfy their interest in the general problem through a confusion of local regulations.⁴⁸ In addition, the United States has been asserting its guardianship over interstate and foreign commerce. What in fact was one, in law was many. Plainly the situation could not be adequately dealt with except through the coördinated efforts of New York, New Jersey, and the United States. The facts presented a problem for the unified action of the law-making of these three governments, and law heeded facts.

In 1917 New York and New Jersey established commissions "to negotiate or agree upon a joint report recommending a policy to be pursued by the State of New York, the State of New Jersey, and the United States by legislative enactment or treaty or otherwise" for the Port of New York.⁴⁹ After comprehensive study and tentative proposals submitted for public discussion, the Joint Commission in

⁴⁵ See South Carolina and Georgia Agreement, Appx. A, II (4) *infra*. See also note 43.

⁴⁶ See Reports listed in Appx. A, III (35)-(d) *infra*.

⁴⁷ See the comprehensive plan contained in N. Y. Laws, 1922, ch. 43, p. 61.

⁴⁸ *Joint Report of New York, New Jersey Port & Harbor Commission (1920)* p. 6.

⁴⁹ N. Y. Laws, 1917, ch. 426, p. 1325; N. J. Laws, 1917, ch. 130, p. 288.

1920 submitted reports to the Governors of New York and New Jersey.⁵⁰ The recommendations of this report led to further legislation in 1921, for the appointment of commissioners by the two States to negotiate a compact between them.⁵¹ A compact was agreed upon, ratified by the States, and consented to by Congress.⁵² In brief, the agreement established an interstate administrative agency known as the Port of New York Authority, which is empowered to own or operate transportation facilities in conjunction with municipalities and private owners, to procure co-operation among existing agencies, and, most important, to formulate a comprehensive plan for the development of the port, the administration of which, approved by the Legislatures of the two States,⁵³ is entrusted to the Port Authority.

(3) Controversies over boundaries furnish loopholes for defendants in criminal cases where the *locus* of the crime is committed in disputed territory. Similar jurisdictional claims arise in prosecutions for crimes committed on boundary waters. To avoid the difficulties of proof compacts have been resorted to, giving penal authority to adjoining States.⁵⁴ The most striking illustration of this mode of accommodating interstate problems is the consent given by Congress for the formulation of some agreement by Wisconsin, Illinois, Indiana and Michigan for the trial of crimes committed on Lake Michigan.⁵⁵

(4) Diversity of legislation among the several States as to some matters is inevitable and desirable. We have all too few social experiments carried on "in the insulated chambers afforded by the several States."⁵⁶ But in other fields uniformity of legislation among the several States is equally necessary. Uniformity is being pursued with marked achievement through the National Conference of Commissioners on Uniform State Laws by securing the independent enactment by the individual States of the same measure.⁵⁷ In one instance, at least, the Compact Clause had been relied upon for uniformity.⁵⁸ Attaining this end through compact assures maintenance of uniformity during the life of the compact. But the scope of this type of law-making through rigid contracts between States is necessarily restricted.

(5) The solution of the intricate problem of apportionment of a State indebtedness following division of a State gave rise, in part, to another application of the Compact Clause. By agreement West

⁵⁰ *Joint Report, supra* note 48.

⁵¹ N. Y. Laws, 1921, ch. 154, p. 492; N. J. Laws, 1921, ch. 151, p. 412.

⁵² Act of Aug. 23, 1921 (42 Stat. at L. 174); N. J. Laws, 1921, ch. 151, p. 412; N. Y. Laws, 1921, ch. 203, p. 841.

⁵³ N. Y. Laws, 1922, ch. 43, p. 61; N. J. Laws, 1922, ch. 9, p. 25. See also Act of July 1, 1922 (42 Stat. at L. 822).

⁵⁴ See Appx. A, III (4), (19)-(23), (25), (32) *infra*.

⁵⁵ See Appx. A, IV, (25) *infra*.

⁵⁶ Holmes, J., dissenting, in *Truax v. Corrigan* (1921) 257 U. S. 312, 344, 42 Sup. Ct. 124, 134; Taft, *Popular Government* (1913) 155.

⁵⁷ See *supra* note 16.

⁵⁸ See Appx. A, III, (1) *infra*.

Virginia, upon its separation from Virginia, assumed its share of the old State debt. Even so, it required forty years of negotiation after the Civil War, followed by twelve years of litigation in the Supreme Court of the United States, to translate the general obligation into dollars and cents.⁵⁹ The erection of new States does not appear on the horizon and, therefore, the particular form of interstate accounting in which compact played a part between Virginia and West Virginia is not likely to arise in the near future. But it is not difficult to foresee other interstate financial entanglements for which a contract between States would be serviceable.

(6) What is now called the conservation of natural resources makes its early appearance in the regulation of fishing rights on boundary waters. Even before the Constitution we find that the common interest in natural resources, of a region embracing two States, was furthered by an agreement between such States.⁶⁰ As the frontier moved westward, as the free lands became absorbed and the Thirteen Colonies of three and a half million became a continent of a hundred and ten million no longer predominantly agricultural and, therefore, pressing more and more upon the food supply, habits of extravagance and waste acquired in the earlier days of apparently illimitable resources had to be supplanted by wise husbandry and systematic development. Conservation of natural resources is thus making a major demand on American statesmanship. An exploration of the possibilities of the compact idea furnishes a partial answer to one of the most intricate and comprehensive of all American problems.

The protection of fish on boundary waters becomes increasingly urgent. Here is a field for regulation which constitutionally seems beyond the scope of the Federal government.⁶¹ Regional control is the practical answer to wasteful non-action or wasteful conflict. Vigilance by one State, though based on scientific direction, may be thwarted by inaction, or lax administration, in an adjoining State.⁶² The practical effect may threaten an important food supply. These considerations are reflected in the constructive treatment by Washington and Oregon of the conjoint fisheries problems raised by the great salmon resources of the Columbia River. By compact the two States

⁵⁹ See Appx. A, III, (9) *infra*.

⁶⁰ See Appx. A, II, (3) *infra*.

⁶¹ The doctrine of *Missouri v. Holland* (1920) 252 U. S. 416, 40 Sup. Ct. 382, opens up possible vistas of Federal regulation through the exercise of the treaty-power.

⁶² Of course compact is not an automatic remedy. It requires vigorous and wise action by the contracting States. Referring to the Washington-Oregon compact, the Oregon court notes Washington's failure to enact suitable legislation to carry into effect its provisions: "That the usefulness of the act as a protective measure is largely impaired by the failure of the State of Washington to enact similar legislation is patent." *Union Fishermen's Co. v. Shoemaker* (1921) 98 Ore. 679, 680, 194 Pac. 854, 855.

have a policy of co-operation based on minimum requirements for the protection of fish within the common area.⁶³ A similar arrangement prevails between Delaware and New Jersey.⁶⁴ The country furnishes ample opportunity for the extension of this mode of regulation in the safeguarding of our fish supply.^{64a}

The conservation movement gained its initial momentum through a recognition of the irreplaceable destruction of our forests. Chemistry may invent new forms or new uses of food; unknown fuel may still be hidden in the earth. But new forests cannot be created except through very slow growth, nor can their need be replaced by substitutes. Climatic conditions, flood control, navigation, as well as our food supply, depend upon the range and density of our forests. Here again, we encounter situations for adjustment which cut across State lines and, therefore, necessitate interstate treatment. Legal authority is not coterminous with the needs for its exercise. Power to deal with the problem rests partly with the States and partly with the Federal Government as *dominus* of the public domain and as guardian of interstate navigation. The need for such a co-operative solution has been recognized by Congress in giving a general consent for future agreements between the States and the United States "for the purpose of conserving the forests and the water-supply of the States entering into such agreements."⁶⁵

The reclamation of arid territory through irrigation and the fullest possible satisfaction of the competing demands on a limited water-supply by an increasing population, present one of the most permeating aspects of the conservation problem. To a dramatic extent it is an ever-present concern in the daily lives of the people in one region,

⁶³ See Appx. A, III, (29) *infra*.

⁶⁴ See Appx. A, III, (19) *infra*.

^{64a} See Secretary Hoover's call for a conference on co-operation by the coastal States to conserve fisheries along the Atlantic and Gulf coasts. *New York Times*, April 30, 1925.

⁶⁵ Act of Mar. 1, 1911 (36 Stat. at L. 961) amended by Act of Mar. 3, 1925, 68th Cong. 2d sess. Public No. 591; Appx. A, III (26), *infra*. See also *Report of Dept. of Agriculture* (1911) 401-404; House Rep. No. 1036, 61st Cong. 2d sess. The possibilities of the compact idea in another field of conservation have recently been adumbrated by President Coolidge: "Many proposals have been put forward for exterminating the weevil, among which it seems probable that the most effective would be to starve it out of existence by absolutely discontinuing the growth of cotton year by year in successive zones. But there are great practical difficulties. The program would require the co-operation of the States throughout the cotton belt and of the cotton raisers in them.

A suggestion was made to a convention of the cotton-growing interests three or four years ago that the foundation for such co-operation might be laid if the cotton States would enter into a treaty among themselves pledging co-operation in executing it. There are several examples of such interstate treaties for the accomplishment of ends which could not be attained by the States acting separately. I believe the suggestion has much of practical value, and that if the cotton States would act upon it they would find the National Government prepared to give all possible assistance and encouragement to the program."—*New York Times*, April 7, 1925.

while it hardly touches the imagination, let alone the lives, of millions of people in other parts of the country. Wherever the pressure is felt one answer is clear: no one State can control the power to feed or to starve, possessed by a river flowing through several States.⁶⁶ A great number of our streams have this potency. Moreover, there can not be a definitive settlement. Population, engineering, irrigation conditions constantly change; they cannot be cast into a stable mould by adjudication or isolated acts of administration. The whole economic region must be the unit of adjustment; continuity of supervision the technique. Agreement among the affected States and the United States, with an administrative agency for continuous study and continuing action, is the legal institution alone adequate and adapted to the task.

The Colorado River is the Nile for the Southwest; the State of Colorado its Soudan. At first there was no collision among the various users because nature was adequate to their scattered needs. The earlier Imperial Valley development could be made without sacrifice elsewhere. The irrigation projects by Arizona and Colorado could likewise draw freely on the available surplus. But when, in course of time, the United States proposed enormous projects on the public domain within this basin, and when the abutting States planned further works, with the increasing need of water for domestic and industrial uses, the cumulative demands upon the river put an end to *laissez faire*. Conflicts followed, with the conventional resort to courts. But litigation added confusion, not settlement. The judicial instrument is too static and too sporadic for adjusting a social-economic issue continuously alive in an area embracing more than a half a dozen States. The situation compelled accommodation through agreement for continuous control of these continuously competing interests. Initiated by the Governor of Utah in 1919, a movement, participated in by the Colorado River Basin States in collaboration with the United States Reclamation Service, was started for the interstate study and solution of the problems presented by the utilization of the water supply of the Colorado River and its tributaries. After a series of conferences, the necessity of settlement by compact was agreed upon in principle.⁶⁷ The consent of Congress for such a compact accelerated its realization.⁶⁸ A second series of conferences of the accredited commissioners of the seven States, in which the special claims of each State were voiced at public hearings, and the concern of the United States was represented by Secretary Hoover, evolved the details of the plan now known as the Colorado River Compact.⁶⁹ In sum, the compact formu-

⁶⁶ *Colorado v. Kansas* (1907) 206 U. S. 46, 27 Sup. Ct. 655.

⁶⁷ The story of this movement is probably best related by D. E. Carpenter, Commissioner for Colorado, in his Report to the Governor of Colorado, submitted to the Judiciary Committee of the House of Representatives, *Hearings in re H. R. 6821* (1921) 16-20, 67 Cong. 1st sess.

⁶⁸ Act of Aug. 19, 1921 (42 Stat. at L. 171).

⁶⁹ *Report of Sec. of Commerce* (1922) 10.

lates the terms of a policy for the present equitable apportionment of the waters of the Colorado River System, and also provides machinery and method for continuous supervision and adaptations of policy to changing conditions. The compact has cleared the hurdles of six legislatures and will come into effect if and when Arizona ratifies.⁷⁰ Measured by the vastness of the region and the magnitude of the interests regulated, the Colorado Compact represents, thus far, the most ambitious illustration of interstate agreements.

The widespread public discussion elicited by the evolution of the Colorado River Compact has served to educate the irrigation States to the possibilities of the compact idea. Six projects for like settlement of other interstate irrigation difficulties followed. One has been perfected by recent consent of Congress;⁷¹ another has been embodied in an agreement, ratified by one State;⁷² the terms of a third have been agreed upon;⁷³ for three others commissioners to formulate a compact have been appointed.⁷⁴

The control of floods through drainage works is a growing subject of controversy between States. Litigation, when resorted to, has been long drawn out, costly and inconclusive. Again the States turn to compact. Surveys of drainage areas affecting more than one State and looking toward regulation by agreement are being undertaken through the joint action of the interested States, in collaboration with the Secretary of War.⁷⁵ Flood control through irrigation and drainage work is bound to demand attention through the increasing development of our inland water ways. The geographic unit of a river or lake basin is its drainage area. The legal unit must correspond to the geographic or engineering unit. Control will frequently have to be interstate; compact is apt to be its most effective form.

An adequate water supply for our teeming city populations presents one of the most exigent problems of conservation. Throughout the country cities are seeking to tap water for their inhabitants at distances remote from city limits. Los Angeles contemplates tapping the Colorado River over miles of desert; New York, fearing the exhaustion of the Catskill supply, is exploring the upper regions of the Delaware; Philadelphia aims toward a purer supply at remoter points on the Delaware River; the Jersey cities must draw on the same reservoir. Plainly here is a complexity which litigation cannot resolve, nor legislation by any one State through which a common stream happens to flow or which contains the common reservoir. The elaborate agreement just concluded by New York, Pennsylvania and New Jersey, now awaiting State action and Congressional sanction, represents the legal solution of the interests of three States dependent upon a

⁷⁰ See Appx. A, III, (34) *infra*.

⁷¹ See Appx. A, IV, (1) *infra*.

⁷² See Appx. A, III, (38) *infra*.

⁷³ See Appx. A, IV, (3) *infra*.

⁷⁴ See Appx. A, IV, (2), (3), (4), *infra*.

⁷⁵ See Appx. A, III, (28), (8); VI, (11) *infra*.

common supply of water.⁷⁶ Like the Colorado River Compact it formulates a policy for the apportionment and preservation of water and the adaptation of such policy to the future, secured through continuous study and supervision by a permanent joint administrative agency. The variety of powers proposed for this commission reveals the interrelation of the problems with which it is to deal and the scope of the proposed agreement. Priority of use, forest regulations, hydraulic constructions, sewage control, condemnation, riparian claims, all are inextricably bound up with the regulation of the water-supply. They are all aspects of a single problem and have to be dealt with as an entirety.

(7) Public utility regulation discloses a steady contraction of control by individual States and a corresponding absorption of authority by the Federal Government. More and more, in a growingly national system of transportation transactions which in their isolation constitute intrastate commerce have had their repercussion upon interstate commerce.⁷⁷ Even here, however, the transfer of power from the States to the Federal Government has been piece-meal, step by step. In its present far-reaching extension the localized interests of the individual States have been scrupulously written into law⁷⁸ and insisted upon by the Supreme Court.⁷⁹ Apart from the railroads, however, there is still left a wide and vital sphere of interstate communications which project beyond State lines but are nevertheless predominantly regional rather than national in their penetration. Congress has left a considerable part of this field unregulated just because it is essentially local or regional in its significance and because the burden of national oversight would be excessive and ineffective. Here, again, there is need for regulation by the unified action of the affected region. Again we find resort to compact. Early in our history such action was resorted to for the building of a canal between Virginia, Maryland and the District of Columbia, and incidentally affecting Pennsylvania.⁸⁰ A recent analogue of this method enabled New York and New Jersey to secure under-water communication through the Hudson Tunnels.⁸¹

⁷⁶ See Appx. A, IV, (2) *infra*.

⁷⁷ This phenomenon may be traced more particularly in the legislation beginning with the Hepburn Act of June 29, 1906 (34 Stat. at L. 584) as applied in such cases as the *Minnesota Rate Cases* (1913) 230 U. S. 352, 33 Sup. Ct. 724; the *Shreveport Case* (1914) 234 U. S. 342, 34 Sup. Ct. 833; the *Wisconsin Rate Case* (1922) 257 U. S. 563, 42 Sup. Ct. 232; the *New England Divisions Case* (1923) 261 U. S. 184, 43 Sup. Ct. 270; the Recapture Clause decision, *Dayton-Goose Creek Ry. v. United States* (1924) 263 U. S. 456, 44 Sup. Ct. 169; the Los Angeles Terminal case, *R. R. Comm. of California v. Southern Pac. Co.* (1924) 264 U. S. 331, 44 Sup. Ct. 376.

⁷⁸ Interstate Commerce Act, secs. 13 (2), 13 (3) as amended by the Transportation Act of 1920 (41 Stat. at L. 456):

⁷⁹ See *Wisconsin Rate Case*, *supra* note 77, at 590-591.

⁸⁰ See Appx. A, III, (3) *infra*.

⁸¹ See Appx. A, III, (31) *infra*.

Throughout the country local utilities cross State lines and raise irritating difficulties over regulation.⁸² State compact furnishes an effective answer. Kansas and Missouri have drawn on it to master such a situation.⁸³ Here is a ready means for avoiding undue congestion at Washington and the ineffectiveness of individual State control.

(8) The tax burden of this country is not comparable to the drain upon the national income of Great Britain, whose taxes absorb close to a fourth of its annual income, compared with about ten per cent. in this country.⁸⁴ But all political parties are agreed that our situation also calls for relief, however they may differ in their views as to the proper distribution of the incidence of taxation. Our own problem is complicated by the overlapping taxing powers of States and Nation as well as the opportunity for reciprocity and retaliation between States. Certainly as between the States there is much need for simplification, for avoidance of litigation, for equitable apportionment of common taxing resources, which, to some extent, may affect the total of taxation and the inconveniences incident to the administration of our tax laws.⁸⁵ An intimation of a field hitherto unexplored is furnished by the compact between Kansas and Missouri for the taxation of interstate municipal activities.⁸⁶ The taxing power is the most jealous power of government; it is also least amenable to the scientific process. Nevertheless, no one can scan the flood of cases dealing with "jurisdiction" to tax, rules for apportionment and the like, without realizing that the opportunities for taxation open to the States against common resources might find a more economic and more effective solution through negotiation than through litigation. At all events, in view of the growing burden upon time and feelings, as well as the cost in money due to the conflicts and confusion arising from the administration of independent systems of State taxation, the possibilities of amelioration and economy realizable through an alert use of the Compact Clause call for more intensive study, as part of a disciplined attack upon the entire tax problem.

We have passed in rapid review the concrete occasions which have evoked resort to compact, and the facts of life to which they were addressed. From this résumé it appears that the instances for which compact was found serviceable fall into two broad types of situations.

⁸² See *e. g.* *Covington & Cincinnati Bridge Co. v. Kentucky* (1894) 154 U. S. 204, 14 Sup. Ct. 1094; *Port Richmond & B. P. Ferry Co. v. Freeholders of Hudson County* (1914) 234 U. S. 317, 34 Sup. Ct. 221; *cf.* *New York Cent. R. R. Co. v. Freeholders of Hudson County* (1913) 227 U. S. 248, 33 Sup. Ct. 269.

⁸³ See Appx. A, III, (36) *infra*.

⁸⁴ Seligman, *Comparative Tax Burdens in the Twentieth Century* (1924) 39 POL. SCI. QUART. 106, 143.

⁸⁵ See *e. g.* *Proceedings of National Tax Association* (1922) *passim*. See *e. g.* Judson, *Interstate Comity in Taxation* (1907) PROC. NAT. TAX ASS'N 39; Reed, *A Council of States*, *ibid.* 20; Dix, *State County and Taxation* (1911) *ibid.* 45; *Report of Commission on Uniform Insurance Tax* (1910) *ibid.* 291.

⁸⁶ See Appx. A, III, (36) *infra*.

First, controversies between two or more States that abstractly may be fit subjects for litigation but which, because of the nature of the issues—the range, the intricacy, the technicality of the facts—make a court a very ill-adapted instrument for settlement; the second class comprises situations which are wholly beyond the process of adjudication.

Boundary controversies, one would suppose, furnish the most familiar opportunity for judicial action. But when a boundary controversy concerns two States we are at once in a world wholly different from that of a law-suit between John Doe and Richard Roe over the metes and bounds of Blackacre. The scale of the litigation, for one thing, makes a heavy drain upon the Supreme Court's time and, therefore, affects the quality of judgment which the Court is capable of exercising—a powerful consideration as the pressure upon the Court's energies becomes one of the most obvious as well as one of the subtlest factors in its work.⁸⁷ Again, the political implications of the

⁸⁷ A summary story of the progressive impact of business upon the resources of the Supreme Court down to 1880 was thus put by Ex-Justice Strong: "In 1801, when John Marshall was appointed Chief Justice of that court, the number of cases brought into it for adjudication was only ten. The entire number during the five next following years, including both writs of error and appeals, was only one hundred and twenty, or an average of twenty-four each year. Thence forward the business of the court increased slowly until, in the period between 1826 and 1830, the aggregate number of cases brought into it was two hundred and eighty-nine—the average being about fifty-eight a year. In 1836, when Roger B. Taney succeeded Marshall as Chief Justice, the number was only thirty-seven. From 1830 to 1850, the increase was also very gradual. Within the five years ending with 1850, the number of cases brought into the court, including those docketed and dismissed without argument, was three hundred and fifty-seven, or an average of seventy-one a year. The court was then able to dispose of its entire docket during a session of three months. But, since the year 1850, the increase has been much more rapid. Within the five years ending with 1880, the number of new cases has been nineteen hundred and fifty-five, averaging more than three hundred and ninety-one each year. This exhibits, certainly, a very remarkable increase, serious in its consequences." Strong, *The Needs of the Supreme Court* (1881) 132 N. AMER. REV. 437. For the last forty years the increase of business has been even more marked. The steady increase in pressure during the last decade has been authoritatively set forth in the testimony of Mr. Justice Van Devanter as Chairman of a Sub-Committee of the Court seeking legislative relief: "The summary shows that from 1913 to 1923 the number of new cases coming into the court increased from 526 to 720, and that the number of cases disposed of during those years increased from 597 in 1913 to 765 at the October, 1922, term." *Hearing before Sub-Committee of Committee on the Judiciary of U. S. Senate*, 68 Cong. 1st sess., on S. 2060 and S. 2061, Feb. 2, 1924, pp. 27-28, 43-45. The desired relief was granted by Congress in the so-called Judges Bill, which became law on Feb. 13, 1925 (68 Cong. 2d sess. Public No. 415).

Against this background of the Court's pressure and its capacity adequately to dispose of its task, must be projected the enormous drain on the Court's time and energy involved in these intricate interstate boundary disputes. Thus the Rhode Island-Massachusetts case was pending in the Court for fourteen years (1832-1846); and appears eight times in the reports. *Rhode Island v. Massachusetts*,

controversy are not readily satisfied through litigation. The area for sensible compromise, not following strictly legal lines, is fairly circumscribed even in the spacious body of legal doctrine which the Supreme Court has been working out in interstate litigation. Social traditions, political loyalties, extensive economic interests begin to manifest themselves, which are wholly absent in a case of *Doe v. Roe*. We strike here serious limits to effective judicial action.⁸⁸ It is not surprising, therefore, to find that Massachusetts and Rhode Island, after experiencing one long drawn-out irritating litigation over their boundary, disposed another phase of that conflict by compact.⁸⁹ Still more significant, the Supreme Court, conscious of its practical limitations, in two boundary cases counselled States to seek settlement through compact rather than by judicial decree.⁹⁰

Boundary disputes being so obstinate to litigious treatment, we naturally find that more complicated interstate controversies are still

(1833, U. S.) 7 Pet. 651, (1837, U. S.) 11 Pet. 226, (1838, U. S.) 12 Pet. 657, (1838, U. S.) 12 Pet. 755, (1839, U. S.) 13 Pet. 23, (1840, U. S.) 14 Pet. 210, (1841, U. S.) 15 Pet. 233, (1846, U. S.) 4 How. 591. The Florida-Georgia Case was pending for four years. *Florida v. Georgia* (1850, U. S.) 11 How. 293, (1854, U. S.) 17 How. 478. The Alabama-Georgia Case was pending four years. *Alabama v. Georgia* (1859, U. S.) 23 How. 505. The Missouri-Kentucky Case was pending for eleven years. *Missouri v. Kentucky* (1870, U. S.) 11 Wall. 395. The Missouri-Iowa Case, instituted in 1848, after one disposition by the Court in 1850, was re-opened for final disposition forty years later. *Missouri v. Iowa* (1849, U. S.) 7 How. 60; (1850, U. S.) 10 How. 1; (1896) 160 U. S. 688, 16 Sup. Ct. 433; (1897) 165 U. S. 118, 17 Sup. Ct. 290. The Indiana-Kentucky Case, after a decision in 1890 sustaining the claim of Kentucky, remained on the docket of the Court for six years before final disposition. *Indiana v. Kentucky* (1890) 136 U. S. 479, 10 Sup. Ct. 1051; (1895) 159 U. S. 275, 16 Sup. Ct. 320; (1897) 167 U. S. 270, 17 Sup. Ct. 999. The Maryland-West Virginia Case, in which the bill was filed in 1891, was not disposed of until 1912. *Maryland v. West Virginia* (1910) 217 U. S. 1, 577, 30 Sup. Ct. 268, 630; (1912) 225 U. S. 1, 32 Sup. Ct. 672. The Oklahoma-Texas litigation, begun in 1919, is only now being wound up. Scarcely a term of the Court went by without the entry of a decree or an order of some nature. *Oklahoma v. Texas* (1920) 253 U. S. 465, 40 Sup. Ct. 580; (1920) 254 U. S. 280, 603, 609, 615, 41 Sup. Ct. 12, 146, 317; (1921) 256 U. S. 70, 602, 41 Sup. Ct. 420, 539; (1922) 257 U. S. 308, 609, 611, 616, 621, 42 Sup. Ct. 46, 49, 94, 167, 187; (1922) 258 U. S. 574, 606, 42 Sup. Ct. 314, 406; (1922) 259 U. S. 565, 42 Sup. Ct. 594; (1923) 260 U. S. 606, 705, 711, 43 Sup. Ct. 166, 221, 251; (1923) 261 U. S. 340, 345, 606, 43 Sup. Ct. 364, 376; (1923) 262 U. S. 505, 724, 43 Sup. Ct. 701, 704; (1924) 264 U. S. 565, 44 Sup. Ct. 455; (1924) 265 U. S. 76, 490, 493, 500, 505, 513, 573, 44 Sup. Ct. 457, 460, 571, 573, 604, 607, 608; (1924) 266 U. S. 298, 303, 546, 583, 45 Sup. Ct. 101, 122, 195, 198, 355, 356. The North Dakota-Minnesota controversy, in which the bill was filed in 1916, was argued in 1921, restored again to the docket, reargued in 1923 when a decision was rendered. *North Dakota v. Minnesota* (1923) 263 U. S. 365, 583, 44 Sup. Ct. 138, 208. The New Mexico-Colorado controversy, in which the bill was filed in 1919, was not decided until 1925. *New Mexico v. Colorado* (1925) 266 U. S. 586, 45 Sup. Ct. 127, 202, 353. See Warren, *The Supreme Court and the Sovereign States* (1924) 87.

⁸⁸ Cf. Pound, *The Limits of Effective Legal Action* (1916) PA. BAR ASS'N REP. 221.

⁸⁹ See Appx. A, III, (7); Appx. B, I, (2) *infra*. See also note 41, *supra*.

⁹⁰ See *supra* note 42.

less amenable to court control. The attempt to make an equitable apportionment of water among States within a given region has been sought through litigation as though it involved the riparian rights of neighboring individuals.⁹¹ The most informed professional opinion registers the failure of this attempt⁹² and the present movement towards solution by interstate treaties is a decisive recognition that the instrument of state-craft in this field is not court but compact.⁹³ While assuming jurisdiction over these complicated and pervasive interstate difficulties the Supreme Court has recognized its own inadequacy to give relief. Continuous and creative administration is needed; not litigation, necessarily a sporadic process, securing at best merely episodic and mutilated settlements, which leave the central problems for adjustment unsolved. Thus, the futility of asking the Supreme Court to devise a scheme for sewage disposal for the cities bordering on the waters of New York Bay, simply because cast in the form of suit between New York and New Jersey, has been exposed by the Court:

"We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the States which are vitally interested than by proceedings in any court however constituted."⁹⁴

But most questions of interstate concern are beyond the jurisdiction of the Supreme Court; they are beyond all court relief. Legislation is the answer, and legislation must be coterminous with the region requiring control. We are dealing with regions, like the Southwest clustering about the Colorado River, or the States dependent upon the Delaware for water, which are organic units in the light of a common human need like water-supply. The regions are less than the nation and are greater than any one State. The mechanism of legislation must therefore be greater than that at the disposal of a single State. National action is the ready alternative. But national action is either unavailable or excessive. For a number of interstate situations Federal control is wholly outside the present ambit of Federal power, wholly unlikely to be conferred upon the Federal government by constitutional amendment and, in the practical tasks of government,

⁹¹ See *e. g.* *Kansas v. Colorado* (1907) 206 U. S. 46, 27 Sup. Ct. 655; *Wyoming v. Colorado* (1922) 259 U. S. 419, 496, 42 Sup. Ct. 552, 594; (1922) 260 U. S. 1, 43 Sup. Ct. 2.

⁹² Bannister, *Interstate Rights in Interstate Streams in the Arid West* (1923) 36 HARV. L. REV. 960, 968-977; Rogers, *Some Problems of Interstate Water War* (1923) COLO. BAR ASS'N REP. 107, 114-116.

⁹³ See *supra* notes 71-74. See also I Wiel, *Water Rights* (3d ed. 1911) 372; Carpenter, *Application of Reserve Treaty Powers of the States to Interstate Water Controversies* (1921) COLO. BAR ASS'N REP. 45, 82-88.

⁹⁴ *New York v. New Jersey* (1921) 256 U. S. 296, 313, 41 Sup. Ct. 492, 498.

wholly unsuited to Federal action even if constitutional power were obtained. With all our unifying processes nothing is clearer than that in the United States there are being built up regional interests, regional cultures and regional interdependencies.⁹⁵ These produce regional problems calling for regional solutions. Control by the nation would be ill-conceived and intrusive. A gratuitous burden would thereby be cast upon Congress and the national administration, both of which need to husband their energies for the discharge of unequivocally national responsibilities. As to these regional problems Congress could not legislate effectively. Regional interests, regional wisdom and regional pride must be looked to for solutions.

The regional economic areas demand continuity of administrative control in so far as control is to be exercised through law. The central problem of law, it is becoming clearer every day, is enforcement. Experience overwhelmingly demonstrates that the demands of law upon economic enterprises, like the modern utilities, cannot be realized through the occasional explosions of law-suits but call for the continuity of study, the slow building-up of knowledge, the stimulation of experiments, the initiative in enforcement which can only be secured through a permanent, professional administrative agency. The inventive powers exacted from modern State legislatures must grapple with problems whose stage is an interstate region. Collective legislative action through the instrumentality of compact by States constituting a region furnishes the answer.

V.

Perhaps the sharpest emergence of this problem is due to the widespread development of electric power. Engineering advances, a diminishing coal supply, the growing burden of transportation costs, the resulting stimulation of new forms of cheaper power, in its turn promoting industry, the pressure of war in accelerating the movement, have all combined to make the "electrical age" an apt characterization of our times. The primitive beginnings of this era lie less than forty years behind us. But probably no other material influence has had anything like such penetrating economic and social consequences in so short a time. It is not our province, nor within our competence, to tell the engineering details which are in process of affecting so drastically our social life. But we must take account of these engineering facts; legal inventiveness cannot operate *in vacuo*. It must deal with the realities of a world transformed by engineering science.

Thus far three stages mark the work of the engineer. At first a small independent plant, generating electricity mainly from coal, was the center of power for a limited local market. Soon progress was made in the art of transmitting energy at a small cost over longer

* Turner, *Sections and Nation* (1922) 12 YALE REV. (N. S.) 1.

distances. Plants multiplied freely. They were haphazard in their conception and frequently wasteful through needless duplication of equipment. The effort of each plant to extend its area of distribution led to cut-throat competition and reckless expansion. This gave rise to the familiar devices for division of territory among competitors. Often this division was wholly arbitrary and paid no heed to the economics of a situation.⁹⁶ Gradually competitors resorted to consolidation in its various forms.^{96a} These tendencies, feverishly stimulated by the war,⁹⁷ bring us to the second stage of interconnection. By this method the surplus energy of an independent generating station may be tapped for use beyond the distributing area of such a station. The extension of this system, known as the superpower movement, was proposed as the means of developing the necessary power resources of the country.⁹⁸ So rapid has been the development, however, that new and different projects are already to the fore. From interconnection we are passing to the third stage, which now confronts us under the rather hypnotic designation of Giant Power.⁹⁹

⁹⁶ Pennsylvania, for example, adopted a system of granting corporate charters, with the approval of the Public Service Commission, to an electric company with the exclusive right of distributing electric current to customers within a limited territory. Some of the companies acquired territory separated from each other by the territory that had been assigned to competing companies. In order to permit interconnections transmission lines had to be built across this intervening territory. A system of "strip charters" was thereby introduced, whereby the company was permitted to operate only over a strip of ground 100 feet wide, thus permitting transmission but denying any sale of the current *en route*. This practice, it is urged, has obstructed the pooling of demands for current, the development of generating stations to their full capacity, and is, in general, an uneconomical mode of meeting consumers' needs. See Cooke, *Report of the Giant Power Survey Board to the General Assembly of Pennsylvania* (1925) pp. 23-25.

^{96a} Stewart, *Consolidation in the Electric Utility Industry* (1925) 108 AM. ACAD. POL. SCI. ANN. 149.

⁹⁷ Cooke, *op. cit. supra* note 95, p. 23.

⁹⁸ In 1920 the Department of the Interior at the instance of the engineering profession undertook an exhaustive study of the possibilities of a coordinated development of electrical energy in the Northeastern States. In 1921 a report, by W. S. Murray and others, containing an extensive survey of this region and recommending a plan for its development, was published. (*Superpower System for the Region between Boston and Washington*, Dept. of Interior, Prof. Paper 123.) In 1923 Secretary Hoover held a conference of the Public Utilities Commissions of the eleven Northeastern States upon the superpower question. A Northeastern Superpower Committee was formed, consisting of members of these Commissions and members appointed by the United States Geological Survey, the Federal Power Commission, and the United States Army. A report, embodying portions of both the super power and the giant power schemes of development, was submitted on April 14, 1924. *Super Power Studies for the Northeast Section of the United States*, published by the Northeastern Super Power Committee.

⁹⁹ See *Report of the Giant Power Survey Board, supra* note 96. See also *Giant Power Number* (1924) 4 Survey Graphic, No. 6. *Giant Power* (1925) 108 AM. ACAD. POL. SCI. ANN. No. 207. Stimson, *Public Operation vs. Private Operation of Public Utilities*. Address delivered Jan. 24, 1925, at the National Republican Club, New York City.

In brief, an integration is proposed of a vast net-work of generating plants, transmission lines and distributing stations, heretofore independent in their operations and therefore individually confined to their territorial radius. This movement, sponsored by Governor Pinchot¹⁰⁰ and the Giant Power Survey Board of Pennsylvania, aims at a concentration of the sources of generation, a pooling of power supply, elimination of smaller generating stations and their transformation into centers of distribution. Giant Power, in Governor Pinchot's words, "proposes to create, as it were, a great pool of power into which power from all sources will be poured, and out of which power for all uses will be taken."¹⁰¹ Interconnection seeks "the disposal of surplus"; integration is based on "the pooling of supply."¹⁰²

The supply contemplated by these proposals is to be derived both from waterfalls and coal. At present, particularly in the Eastern States, coal is the predominant source for the development of electrical energy.¹⁰³ This large dependence on coal will, in the main, continue.¹⁰⁴ Giant Power, however, proposes radical changes in the system of carbolic generation by the establishment of powerful generating plants close to the centers of coal-production, as contrasted with the existing condition which finds smaller stations widely scattered at remote distances from the coal fields. Significant economic and social benefits are claimed for this change,—the saving of freight charges, the productive utilization of cheap grades of coal, the recovery of its valuable by-products through large scale consumption, continuity of production with its vast implications to the great coal communities.¹⁰⁵ This so-

¹⁰⁰ Governor Pinchot's Message, *Report of Giant Power Survey Board*, *supra* note 96, at pp. iii-xiii.

¹⁰¹ *Ibid.* vii.

¹⁰² "Interconnection is essentially an exchange of surplus between existing generating plants. . . The process is very much like a chain of reservoirs, perhaps twenty on the line from Mexico to Billings. Each reservoir represents a separate electrical system filled with current generated within that system. Suppose an electric drought strikes Billings and the current reservoir there gets low. The interconnection tap between that system and the next one in the chain is opened and current flows into the Billings tank. But that lowers the current level in the next reservoir. The interconnection tap between the next two is then opened, and the procedure is repeated. The same process can be carried on indefinitely up to the limit of interconnection. The next move was inherent in the logic of the situation. Why not pump new current into all these interconnected system reservoirs from giant generating stations with all the economies of large scale production? And why not place these stations not only at water power sites but also—for those that burn coal—at the mine mouth? Obviously, it is far easier to transport current than to transport either water or coal." Clark, *Giant Power Transforming America's Life* (Feb. 22, 1925), *New York Times*.

¹⁰³ Voskuil, *Water-Power Situation in the United States* (1925) 1 JOURN. LAND & PUB. UTIL. ECON. 89; Cooke, *op. cit. supra* note 96, at p. 18-19.

¹⁰⁴ Cooke, *op. cit. supra* note 96, at p. 20.

¹⁰⁵ Coleman, *Miners Turn to Giant Power* (1925) 108 AM. ACAD. POL. SCI. ANN. 60. See also Dickerman, *Pretreatment of Bituminous Coals*, Report of Giant Power Survey Board, *supra* note 96, at p. 117.

called mine-mouth movement is to be correlated to the development of available water power sites. The high installation costs of major hydro-electric projects, such as are contemplated, presuppose extensive markets for the distribution of this energy. This, in turn, according to the Giant Power program, requires that the instruments of generation, transmission and distribution be knitted together into a comprehensive system.

Time alone can tell the extent to which these plans will be realized and the exact forms which they will take. This is not the occasion to express either one's hopes or one's fears. But legal pre-vision may certainly presuppose a vast interrelated network of electric power freely playing across State lines, serving industrial centers and affecting scattered communities which themselves constitute individualized industrial and social units.¹⁰⁶ Such an integrated system, it is urged, will make for great social gains by cheapening power, minimizing waste, and above all, checking urbanized congestion by a wide diffusion of modern economic activities.¹⁰⁷ However, the terrific concentration of the electrical industry thus foreshadowed is certainly no less pregnant with far-reaching and pervasive dangers.¹⁰⁸ Every student of social economics recognizes the baffling problems raised by modern large-scale industry. All the familiar difficulties will be present in an intensified form should monopolized control determine the community's dependence upon power. The proponents of Giant Power, therefore, couple their engineering schemes for private development with a demand for a comprehensive legal control over rates, services, finances, construction and interconnections. An intricate integrated system for regulation is thus contemplated.

The system involves three distinct processes: generation, transmission and distribution. These three processes raise distinct problems for the electrical engineer; equally do they raise distinct problems for the social engineer. Hydro-electric generation concerns selection of water power sites on navigable and non-navigable waters, the capacity of plants at selected sites, the nature and range of public control over

¹⁰⁶ Developments are now being undertaken in the Lehigh Valley region looking forward to supplying the great industrial district centering around Newark, N. J., with power. The construction of a plant at Conowingo, Md., on the Susquehanna River is now under way. The power there generated is to be supplied to the city of Philadelphia, 150 miles distant. See *Fourth Annual Report of Water Power Commission* (1924) Project No. 405, p. 210.

¹⁰⁷ Cooke, *Report of Giant Power Survey Board*, *supra* note 96, at pp. 29-40; Bradford, *Influence of Cheap Power on Factory Location and on Farming* (1925) 108 AM. ACAD. POL. SCI. ANN. 91; Fisher, *Decentralization and Suburbanization of Population*, *ibid.* 96.

¹⁰⁸ See *e. g.* the early warning of President Roosevelt: "The movement is still in its infancy, and unless it is controlled the history of the oil industry will be repeated in the hydro-electric industry, with results far more oppressive and disastrous for people." *James River Veto Message of Jan. 15, 1909*, 16 Messages and Papers of Presidents, 7151-7154, 43 Cong. Rec. 978-979, and the recent debate on S. Res. 286, 68 Cong. 2d sess., 66 Cong. Rec. 939, 1101 *et seq.*, 2200 *et seq.*

such plants. But, as we have seen, electric generation draws more heavily on coal than on water. The process of carbo-electric generation in its turn raises a new series of problems. Apart from the exertion of eminent domain and the adaptation of capacity of plants to market needs, novel questions are presented, affecting the economic consumption of coal, allocation of supply to different uses, and the subjection of the coal industry to new and extensive public supervision. The process of transmission involves rights of way, interconnections, parallel lines, and the standardization of equipment. Finally, distribution introduces the sale-problems of this industry, bringing, in an accentuated form, the brood of difficulties familiar in the regulation of rates and services of utilities. Generation, transmission and distribution are, then, distinct parts with their special problems. But, plainly, they are parts of a whole; and legal control, while adjusted to the parts, must be co-extensive with the system as an entirety. Secretary Hoover has thus stated the practical situation which confronts lawyer and legislator:

"All this means the liquidity of power over whole groups of States. At once power distribution spreads across State lines and into diverse legal jurisdictions. We are, therefore, confronted not only with problems of the co-ordination in the industries of their engineering, financial, and ownership problems, but also with new legal problems in States rights and Federal relations to power distribution."¹⁰⁹

The shallow answer to this plethora of problems is Federal control, predicated on the surface fact that we are in the field of interstate commerce. There is proposed a Federal Commission with authority over power, analogous to that exercised by the Interstate Commerce Commission over railroads.¹¹⁰ History, policy, and law are alike disregarded by such a remedy. The Interstate Commerce Act is not a full-blown exertion of Federal power, but the story of a long travail of empirical legislation. Even now, despite the absorption by Federal authority of powers heretofore exercised by the States, the capacity of the Interstate Commerce Commission to discharge competently the vast burdens placed upon it is a subject of common concern, and the Supreme Court, Congress, and the Interstate Commerce Commission have been alive to the necessity of observing the limits to effective legal action by the Federal Government and of preserving the specialized local interests of the States. But apart from considerations of practical statesmanship in administration, the facts governing supervision of railroads are decisively different from those which

¹⁰⁹ *Report of the Secretary of Commerce* (1924) 14.

¹¹⁰ This project is embodied in the so-called Norris-Keller Super-Power Public Ownership Bill introduced into the House of Representatives at the first session of the Sixty-eighth Congress. See S. 2790, H. R. 7789, 68th Cong. 1st sess., 65 Cong. Rec. 3874, 3936. See Tripp, *Some Political Aspects of Super-Power Development* (1924) 34 *Stone & Webster Journ.* 689.

characterize the electric power problem.¹¹¹ The differences present issues of policy as well as of constitutional law. For the three processes of generation, transmission and distribution, interrelated though they be as a single network, give rise practically to separate emphases and separate social concerns. For this reason, as well as because of certain assumptions underlying our dual system of government, the problems of legal authority must be analyzed critically as to the scope of its operation over the different parts.

When dealing with hydro-electric development we are sharply faced by the constitutional authority of Congress over water power sites on navigable waters and the public domain, and the reservation of that authority to the States over sites on non-navigable waters. About eighty-five per cent. of the available sites are thus under Federal control,¹¹² now lodged in the Federal Power Commission,¹¹³ leaving fifteen per cent. of the sources of this energy within the authority of the States. Even more dependent upon State action is the success of the mine-mouth movement. For, thus far, the widest scope of State authority over the coal fields has been sanctioned by the Supreme Court, even though production within the States inevitably flows into the channels of interstate commerce.¹¹⁴ Not only are many aspects of electric gen-

¹¹¹ Statement of Secretary Hoover to the Super Power Conference, New York, Oct. 13, 1923; Hard, *Giant Negotiations for Giant Power* (1924) 4 Survey Graphic, 577.

¹¹² Second Annual Report of Federal Power Commission (1922) 7.

¹¹³ The grave evils of unregulated exploitation of water power resources by private capital were forcibly brought to public attention by President Roosevelt in vetoing the James River Project. See note 108. The movement for safeguarding the public interest was given impetus by President Taft's veto of the Coosa River Project. (62d Cong. 2d sess., 48 Cong. Rec. 11796; Report of Secretary of War for 1911, 32-35, 179.) The Federal Water Power Act of 1920 (41 Stat. at L. 1063) is the legislative culmination of this effort. See Conover, *Federal Power Commission*, U. S. Gov't Ser. Monographs, No. 17, pp. 47-64. Congress, under its power over navigable streams, assumed control over the surplus water in these streams. See Howell, *Federal Power of Legislation as to Development of Water Power* (1916) 50 AM. L. REV. 883; First Annual Report of Federal Power Commission (1921) 43. The Act seeks to promote water-power development on terms sufficiently attractive to private capital and also duly protective of the public interest. Permits are required of all hydro-electric enterprises on navigable streams. Such licenses, for which an annual rental charge is made, are conditions precedent to the construction of any hydro-electric plant. The license runs for fifty years. The Commission is further authorized to investigate, alone or in cooperation with State agencies, the water resources of the nation and publish data concerning them. The conduct of hydro-electric plants is placed to a large extent under the supervision of the Commission. Accounting methods can be prescribed, renewals and replacements required. An amortization fund for the reduction of the net investment, to be established out of the surplus earned by the enterprise after the first twenty years, is part of the plan under which these projects are authorized. See Merrill, *Federal Water Power Act and its Administration* (1920) 12 Stone & Webster Journ. 251; Shields, *Federal Power Act* (1925) 73 U. PA. L. REV. 142.

¹¹⁴ Cf. *United Mine Workers of America v. Coronado Coal Co.* (1922) 259 U. S. 344, 42 Sup. Ct. 587; *United Leather Workers International v. Herkert &*

eration within the zone of legal control left to the States by Supreme Court decisions, but it is extremely doubtful if these aspects are not within exclusive State control, forbidding Federal intervention.

Again, the problems of transmission are not capable of being drawn completely within the area of solution by Congress, even if such a course were advisable. To be sure, the transmission of electricity across State borders is interstate commerce and as such subject to the Federal power evolved for the control of such commerce with its immunity against discrimination by State action.¹¹⁵ But to a considerable extent the future will have to deal, as does the present, with transmission and its facilities limited entirely to the confines of a single State. Yet some co-ordination of policy between these State-wide transmission systems and interstate transmission will call for a mechanism of control regional and not merely State-wide in its operation, in order to secure interconnection, exchange and distribution of power. Standardization of equipment may be found either necessary or desirable, not merely on interstate transmission lines but also on transmission systems confined to separate States. For all these purposes the Federal authority does not cover the field. The need for interstate co-operation must find expression through a continuous, dependable and flexible interstate arrangement.

The same need is revealed in the control of distributing agencies. Distributors of electric energy are localized in area. The interests of the consumer—what he gets and what he pays for—has a segregated local aspect, and is, therefore, a matter of local State concern.¹¹⁶ In the conventional phrases of constitutional law, these are matters not within the Commerce Clause of the Federal Constitution but within the police power of the State. In interstate transportation of goods or passengers, the service that is rendered and the service that is paid for is the carriage from State to State; but the distributor of electrical energy, itself the product of interstate transmission, sells, and the consumer buys, not the transmission but the power secured through transmission. The cost of transmission is an element in the cost paid per kilowatt hour by the consumer just as a similar item enters into the cost of goods transported from one State to another. But the essence of the transaction is local. Manifold local considerations affecting costs, social habits and standards, applicable to the local area of distribution, make this a local as distinguished from a national problem and subject to local as against national control.¹¹⁷

Neisel Co. (1924) 265 U. S. 457, 44 Sup. Ct. 623; *Heisler v. Thomas Colliery Co.* (1922) 260 U. S. 245, 43 Sup. Ct. 83; and *Oliver Iron Mining Co. v. Lord* (1923) 262 U. S. 172, 43 Sup. Ct. 526.

¹¹⁵ *Pennsylvania v. West Virginia* (1923) 262 U. S. 553, 43 Sup. Ct. 658.

¹¹⁶ *Public Utilities v. Landon* (1919) 249 U. S. 236, 39 Sup. Ct. 268; *Penna. Gas Co. v. Public Service Comm.* (1920) 252 U. S. 23, 40 Sup. Ct. 279; cf. *Missouri v. Kansas Natural Gas Co.* (1924) 265 U. S. 298, 44 Sup. Ct. 544.

¹¹⁷ "The pipes which reach the customers served are supplied with gas directly

Our system of constitutional law compels a close analysis of the differentiated aspects of such a vast phenomenon as is presented by the modern development of electric power. Applying merely the familiar legal patterns, the practical difficulties would have to be fitted into the exclusive alternatives of independent separate State action or Federal action. How adequate are these alternatives? The constitutional limitations upon Federal authority have already been noted. The inadequacy of independent State action is equally clear. The States disclose wide divergence of views. Governor Smith is insistent on New York's ownership of its water power;¹¹⁸ Governor Pinchot urges upon Pennsylvania private development with stringent public regulation.¹¹⁹ Several States aim chiefly to retain their resources. Maine, for instance, has prohibited the development of hydro-electric energy for transmission beyond its borders.¹²⁰ These policies repre-

from the main of the company which brings it into the State, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. . . . It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the State from making local regulations of a reasonable character." *Penna. Gas Co. v. Public Service Comm.* (1920) 252 U. S. 23, 31, 40 Sup. Ct. 279, 281. The local character of rate regulation in the distribution of electrical energy is recognized by Congress in the Federal Water Power Act, where the Commission is given power to prevent licensees from charging unreasonable rates, *only in the absence of State regulation*. Act of June 10, 1920, sec. 20 (21 Stat. at L. 1063).

¹¹⁸ See Message to New York Legislature (1924) LEG. DOC. No. 3; Smith, *Stake of the Public* (1924) 4 Survey Graphic, 574.

¹¹⁹ Governor's Message, *Report of Giant Power Survey Board*, *supra* note 96, at pp. viii-ix.

¹²⁰ Me. Rev. Sts. 1916, ch. 60, sec. 1, p. 985. In 1919 a Water Power Commission was created to investigate the water power resources of the State and its rights in storage reservoirs, and was charged with the duty of reporting violations of the laws forbidding the transmission of electric current beyond the State. See Me. Laws, 1919, ch. 132, p. 131, as amended by Me. Laws, 1921, ch. 203, p. 219. Adherence to the policy against transportation of electric energy beyond the State has been vigorously urged by Governor Baxter and by the newly-elected Governor Brewster. See Inaugural Address of Governor, Me. Laws, 1923, p. 855; Proclamation of Governor, Me. Laws, 1923, 924, 931; Message of Governor, Me. Laws, 1923, 1057, 1063; Address of Senator Brewster, *Maine and Its Water Resources* (1924). To prevent this policy from being disturbed by an attack upon the validity of the legislation under the doctrine of *Pennsylvania v. West Virginia* (1923) 262 U. S. 553, 43 Sup. Ct. 658, the charters of Maine power companies have recently been amended by the State so as to prevent them from taking power out of the State, in accordance with the policy of the so-called "Baxter Amendment." See Message of Governor, Me. Laws, 1923, 1057, 1065. A fear that the Federal Power Commission Act would interfere with the successful pursuance of this policy of non-exportation led the legislature of Maine on February 16, 1921, to address a memorial to Congress urging an amendment to that Act in order that there should "be no federal interference with and control of the water powers lying within the borders of the State of Maine." See Me. Laws, 1921, 638. Maine's power problem has been further complicated by an advisory opinion of the

sent various answers to legitimate concern by the States for conservation of precious resources within their borders. Diversity of policy, as a means of realizing these important ends, is both natural and desirable in a field where experimentation is essential if we are to base future action on "a judgment from experience as against a judgment from speculation."¹²¹ But the range of experimentation must not

Supreme Court denying the Legislature power to authorize the construction of water storage reservoirs for water power development. *Opinion of the Justices* (1919) 118 Me. 503, 106 Atl. 865. That the key to the development of Maine's water power resources lies in water storage development, is generally recognized. See e.g. Message of Governor, Me. Laws, 1923, 1057, 1067; Inaugural Address of Governor, Me. Laws, 1923, 841, 855; Remarks of Representative Brewster in the House, 1921, Me. Leg. Rec. 557, 1257. Proposals have been made to overcome the opinion of the Supreme Court by a constitutional amendment. See Debates, 1921, Me. Leg. Rec. 557, 1257; 1923, Me. Leg. Rec. 733. The problem has been further embarrassed by divergent views as to whether the policy to be adopted by the State is to conform in general to the federal policy under the Water Power Commission Act of long term leases to private corporations upon guaranteed rentals, or of outright sales of the State's water power rights to private corporations. These divergent views came into direct conflict with the questions centering about the Kennebec Reservoir Charter and the Dead River Storage Bill, the Legislature and the Governor taking opposite stands in a bitter fight that led eventually to an appeal by the Governor to the people against the Legislature. See Proclamation of the Governor, Me. Laws, 1923, 924; Communication of Governor to Legislature, Me. Laws, 1923, 1021, 1043, 1047; Debates 1923, Me. Leg. Rec. 1134, 1153-1164. Governor Brewster has followed his predecessor in support of a policy of long term leases. See Inaugural Address of Jan. 8, 1925, p. 44. See also the special message of Governor Brewster on the New Brunswick Water Power Development, and Hydro-Electric Development in Passama-Quoddy Bay, on April 1, 1925. For much of this material we are indebted to the kindness of Governor Brewster of Maine.

In New Hampshire the transmission of electric power without the State is prohibited save by permission of the Public Service Commission. N. H. Laws, 1911, ch. 164, sec. 7-(e), p. 193. See also N. H. Laws, 1913, ch. 145, sec. 17, p. 674; N. H. Laws, 1917, ch. 356, p. 936. West Virginia similarly requires a permit and provides also that the corporation in order to secure such a permit must agree that the State at its election may require the power generated within the State to be distributed solely within the State. Barnes, West Va. Code, 1923, ch. 54B, sec. 15. Many States provide for the issuance of permits as a condition precedent to the development of power sites and the maintenance of dams. See e.g. Wis. Sts., 1923, ch. 31, secs. 31.01-31.33; N. Y. Laws, 1921, ch. 579; Pa. Sts. 1920, secs. 5940, 5943; Pa. Sts. Supp. 1924, sec. 11130a; Neb. Const. 1875, Art. XV, sec. 7. Quebec has dealt with the problem in the same fashion. Quebec Rev. Sts. 1909, sec. 7291, as amended by (1920) 10 Geo. V, c. 74. For the Ontario solution of the problem, see Beck (1924) 4 Survey Graphic, 585. See also Ont. Rev. Sts. 1914, c. 39; (1914) 4 Geo. V, c. 16; (1914) 5 Geo. V, c. 19; (1916) 6 Geo. V, c. 19, 21; (1917) 7 Geo. V, c. 20, 22; (1918) 8 Geo. V, c. 20; (1918) 9 Geo. V, c. 16; (1920) 10-11 Geo. V, c. 18, 19; (1922) 12-13 Geo. V, c. 31. The Hydro-Electric Power Commission of Ontario has become the subject of controversy. Wyer, *Niagara Falls: Its Power Possibilities and Preservation* (1925); Reply by Sir Adam Beck, *Re Wyer-Walcott Report* (1925); the Beck pamphlet, in turn, has elicited rejoinders from the Smithsonian Institution and Dr. Wyer. 67 Cong. Rec. 338 ff.

¹²¹ *Tanner v. Little* (1916) 240 U. S. 369, 386, 36 Sup. Ct. 379, 384.

exclude the capacity for co-operation between States. An effective response to the complex of forces loosed by electric power must adapt or devise legal instruments and safeguards adequate to cope with the phenomenon as an entirety. And while electric power development does not present a nation-wide system, it does break through the confines of individual States.

Here, as elsewhere in the domain of public law, the legal mechanism should evolve from actualities. Despite all mechanical invention and depressing forces for standardization, the United States by virtue of its size reveals distinct regions with differences of climate, geography, economic specialization, and social habits. The integration of the power industry is likewise assuming regional forms. Secretary Hoover has thus drawn the picture:

"There is a phase of this whole public relationship that seems to me to be slowly emerging and that is that the United States will naturally divide itself into several power areas. For instance, the barren areas of power consumption formed by the Adirondacks on the east and the character of natural resources along the Mason Dixon line on the South create a natural district in the New England and Mid-Atlantic States. Another power district lies to the west of the Alleghanies and east of the Mississippi River. Still another district lies in the Southeastern States, again in the Southwestern States, and still another in the Northwestern States. The problems in each of these power districts are essentially different as to the origins of power, the character of their industries, and are affected by the rate of probable industrial development in some States. And if we are to make a rightful solution of national problems we should consider their development as essentially separate problems."¹²²

From this analysis issues the legal answer. The regional characteristic of electric power, as a social and engineering fact, must find a counterpart in the effort of law to deal with it. No single State in isolation can wholly deal with the problem. The facts equally exclude the capacity of the Federal government to cover the field. Co-ordinated regulation among groups of States, in harmony with the Federal administration over developments on navigable streams and in the public domain, must be the objective. Regional solutions in such new and complicated demands upon law must necessarily be empiric and cautious in their unfolding. The exact form of future legal devices will have to be modified from time to time and from region to region, adapted to varying conditions and, it is to be hoped, built on a growing body of experience. The vehicle for this process of legal adjustment is at hand in the fruitful possibilities inherent in the Compact Clause of the Constitution. It is this solution which Governor Pinchot is press-

¹²² Statement of Secretary Hoover to the Super Power Conference, New York, Oct. 13, 1923. See also Hoover, *Government Policies in Relation to Power Development and Distribution*, address before World Power Conference (London, July 1924).

ing upon his own and neighboring States.¹²³ Only most painstaking study by lawyers saturated with the practical problems, in collaboration with engineers and social economists, can bring the proposal to fruition. But at the very threshold the central idea encounters opposition drawn from doctrines of constitutional law. In the scope of the Commerce Clause lie fatal obstructions, it is urged, to co-operation among the States, through compact, in the regulation of interstate movement of power. These constitutional objections must be faced.

VI.

Specifically, may a regional group of States especially affected by a project for electric power development enter into an agreement, with the consent of Congress, for the effective utilization of such energy generated in one State and transmitted for distribution to neighboring States? All aspects of this problem, as we have seen, are not included within the conception of interstate commerce. But to the extent that the process of electrification crosses State lines we are in a field open to Federal regulation. If it chooses, Congress may act and pre-empt State control.¹²⁴ Even without Federal action, no State may discriminate against,¹²⁵ or obstruct,¹²⁶ the transactions in interstate commerce. Between these limits—what Congress may do and the States obviously may not do—lies the field in which compact would operate. Its availability, as a matter of law, depends on whether the constitutional grant to Congress of power to regulate commerce among the several States, however unused, excludes all State action, however reasonably conceived and restricted to the interests of a region of States immediately affected.

A simple syllogism is supposed to furnish the answer. Congress alone can regulate interstate commerce; the flow of energy from State to State is interstate commerce; therefore, its control is beyond the authority of the States. In the elaboration and application of the argument there are recognized exceptions and qualifications, but the lowest terms to which we have reduced it is the guiding mode of approaching a conception of the Commerce Clause.¹²⁷ The mode of approach is everything in constitutional controversies; it is largely decisive in the solution of specific problems under the Commerce Clause. And the atti-

¹²³ Governor's Message, *Report of Giant Power Survey Board*, *supra* note 96, at p. vi. Governors Smith of New York and Silzer of New Jersey have embodied the same suggestion in their special messages to their State Legislatures. See *New York Times*, Mar. 28, 1925, and message of Governor Silzer of March 11, 1925 to the New Jersey Legislature.

¹²⁴ See *e.g.* *New York Central R. R. Co. v. Winfield* (1917) 244 U. S. 147, 37 Sup. Ct. 546; *Lemke v. Farmers' Grain Co.* (1922) 258 U. S. 50, 42 Sup. Ct. 244.

¹²⁵ See *e.g.* *Welton v. Missouri* (1875) 91 U. S. 275; *Cook v. Pennsylvania* (1878) 97 U. S. 566; *Robbins v. Shelby County Taxing District* (1887) 120 U. S. 489, 7 Sup. Ct. 592.

¹²⁶ See *e.g.* *Buck v. Kuykendall* (1925) 45 Sup. Ct. 324.

¹²⁷ See *e.g.* Cooke, *Commerce Clause* (1908) pp. iv-vi.

tude which we have summarized will work mischief in concrete situations because it embodies the fallacy of over-simplification.

The frequent resort in recent years to the Commerce Clause as a source of regulatory power by Congress,¹²⁸ has blurred its historic purpose and its continued use as a veto power on obstructive and discriminatory State action. It is a reservoir of Federal power and not a dam against State action, as State action. The experience which evoked the Commerce Clause, its contemporaneous construction, and the course of judicial decision, compel the conclusion that the States are not excluded from dealing with interstate commerce as long as Congress itself has not legislated, provided that State action neither discriminates against interstate commerce nor unreasonably hampers it. These provisos are not self-enforcing conditions. They imply a process of adjustment by the Supreme Court between State and national interests. Their application is difficult and is bound to result in variable judgments. But the process is an accommodation of actualities; it deals with real interests and is not intended for exercises in logomachy. These real interests are the stuff of the decisions and determine their results.¹²⁹ But the line they prick out is too often dimmed by expansive or vague language, which constitutional controversies too frequently provoke. Terms like "exclusive" and "concurrent," "direct" and "indirect," have only served to confuse. To discard them will tend to clarify. They are labels of a result, and not instruments for the solution of a problem.

¹²⁸ See *e. g.* Interstate Commerce Act of Feb. 4, 1887 (24 Stat. at L. 379); Sherman Act of July 2, 1890 (26 Stat. at L. 209); Clayton Act of Oct. 15, 1914 (38 Stat. at L. 730); Bills of Lading Act of Aug. 29, 1916 (39 Stat. at L. 538); Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65); Federal Trade Commission Act of Sept. 26, 1914 (38 Stat. at L. 717); Packers and Stockyards Act of Aug. 15, 1921 (42 Stat. at L. 159); Grain Futures Act of Sept. 21, 1922 (42 Stat. at L. 998); Federal Water Power Commission Act of June 10, 1922 (41 Stat. at L. 1063); Pure Food and Drugs Acts (34 Stat. at L. 768, 32 Stat. at L. 194, 632, 29 Stat. at L. 253, 26 Stat. at L. 414); Lottery Act of Mar. 2, 1895 (28 Stat. at L. 963).

¹²⁹ *Cf. Davis v. Farmers' Coöperative Co.* (1923) 262 U. S. 312, 315, 43 Sup. Ct. 556, 557, per Brandeis, J.: "That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in States and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers; these are matters of common knowledge. Facts, of which we, also, take judicial notice, indicate that the burden upon interstate carriers imposed specifically by the statute here assailed is a heavy one; and that the resulting obstruction to commerce must be serious. (A message, dated February 2, 1923, of the Governor of Minnesota to its Legislature, recites that a recent examination of the calendars of the district courts in 67 of the 87 counties of the State disclosed that in those counties there were then pending 1,028 personal injury cases in which non-resident plaintiffs seek damages aggregating nearly \$26,000,000 from foreign railroad corporations which do not operate any line within Minnesota.)"

The history of the Commerce Clause is a thrice-told tale. But the nature of the mischief against which it was devised and which has shaped its development is too frequently overlooked. Madison makes it perfectly clear that behind the grant to Congress lay not exclusion of action by the States, but restrictions upon them:

" . . . It is very certain that it [the power to regulate commerce among the several States] grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged."¹³⁰

A hundred years have inevitably brought greater reliance on "the remedial power" of the general government; they have not altered the power of the States in default of action by Congress.

At the core of the whole problem is the fact that the regulation of the infinite expanse of interstate commerce cannot be subjected to one legislative authority. Continuously since 1789, State legislation has busied itself with interstate commerce.¹³¹ The States may regulate "commerce among the States" because they must—always with the power of Congress to gainsay through legislation, and the power of the Supreme Court to annul through litigation. Policy undisguised invokes Congressional action; the form and temper of adjudication disguises the large measure of policy implicit in judicial determination. In this field of constitutional adjustment the traditional technique of judicial empiricism¹³² is peculiarly appropriate. It has been freely exercised. Of course, from time to time a succession of particulars has developed into tentative generalizations. Always the generalization involved judgment about practical affairs, and, as such, subject to the impact of new facts soliciting judgment.¹³³

And so, for a hundred years, we find exertions by State authority within the field of interstate commerce successively passing the scrutiny of the Supreme Court. Where a State law conflicts with an act of

¹³⁰ Letter of Madison to J. C. Cabell of Feb. 13, 1829, 3 Farrand, *Records of the Constitutional Convention* (1911) 478.

¹³¹ See *e.g. infra* notes 136, 139-142.

¹³² Pound, *Spirit of the Common Law* (1921) ch. 7.

¹³³ Thayer, *Cases on Constitutional Law* (1895) pp. v-vi: "Even under the most favorable circumstances, in dealing with such a subject as this, results must often be tentative and temporary. Views that seem adequate at the time, are announced, applied, and developed; and yet, by and by, almost unperceived, they melt away in the light of later experience, and other doctrines take their place." See *e.g.* the trend of decision from *Woodruff v. Parham* (1869, U. S.) 8 Wall. 123, to *Sonneborn Bros. v. Cureton* (1923) 262 U. S. 506, 43 Sup. Ct. 643, and the qualification in the latter case of the tendencies developed in the earlier cases of *Standard Oil Co. v. Graves* (1919) 249 U. S. 389, 39 Sup. Ct. 320; *Askren v. Continental Oil Co.* (1920) 252 U. S. 444, 40 Sup. Ct. 355; *Bowman v. Continental Oil Co.* (1921) 256 U. S. 642, 41 Sup. Ct. 606; *Texas Co. v. Brown* (1922) 258 U. S. 466, 42 Sup. Ct. 375.

Congress regulating interstate commerce the State law must, of course, yield; there is then no difficulty except an occasional difference of opinion as to the existence of a conflict.¹³⁴ But, when Congress has not passed an act in execution of its power to regulate commerce, much more complicated considerations come into play. The decisions turn, as Marshall made clear from the beginning, on "all the circumstances of the case."¹³⁵ The "circumstances" at bottom are the practical adjustments of State and national needs, interests and capacities. The "circumstances" which, in the silence of Congress, allow State action have been summarized, in one large series of cases, as matters that warrant a treatment non-uniform throughout the country.¹³⁶ But this formula in sustaining State action, familiar as the doctrine of *Cooley v. Board of Wardens*,¹³⁷ neither enumerates the considerations which permit or exclude non-uniformity, nor does it avoid the crucial exercise of judgment by the Court upon these considerations. The decisions constitute evaluations of these factors. Reviewing the streams of adjudication for a hundred years, Judge Cardozo is forced to conclude that "no general formula can tell us in advance where the line is drawn."¹³⁸ The only fixed datum of constitutional doctrine is that the *States may act*. But how, when, to what extent and under what safeguards, will be found in each instance to depend on the Court's judgment whether a given State action discriminates in favor of State business as against interstate business or casts unreasonable burdens upon interstate com-

¹³⁴ Cf. Brandeis, J., dissenting in *New York Central R. R. Co. v. Winfield*, *supra* note 124; Clarke, J., dissenting in *Penna. R. R. Co. v. Pub. Service Commission* (1919) 250 U. S. 566, 40 Sup. Ct. 36; Brandeis, Holmes, Clarke, JJ., dissenting in *Lemke v. Farmers' Grain Co.*, *supra*, note 124.

¹³⁵ Marshall, C. J., in *Wilson v. Blackbird Creek Marsh Co.* (1829, U. S.) 2 Pet. 245, 252.

¹³⁶ See e. g. State regulations for the improvement of navigation: *Wilson v. Blackbird Creek Marsh Co.* *supra*, note 135; *Manigault v. Springs* (1905) 199 U. S. 473, 26 Sup. Ct. 127; *County of Mobile v. Kimball* (1880) 102 U. S. 691; *Huse v. Glover* (1886) 119 U. S. 543, 7 Sup. Ct. 313; *Sands v. Manistee River Imp. Co.* (1887) 123 U. S. 288, 8 Sup. Ct. 213; State regulations concerning traffic over bridges crossing navigable waters: *Escanaba Co. v. Chicago* (1882) 107 U. S. 678, 2 Sup. Ct. 185; State authorizations for the building of bridges across navigable waters: *Gilman v. Philadelphia* (1865, U. S.) 3 Wall. 713; *Cardwell v. Am. Bridge Co.* (1885) 113 U. S. 205, 5 Sup. Ct. 423; *Hamilton v. Vicksburg, S. & P. R. R. Co.* (1886) 119 U. S. 280, 7 Sup. Ct. 206; *The Passaic Bridges* (1865, C. C. D. N. J.) 3 Wall. 782, Appx.; State police regulations over harbors: *Owners of Brig James Gray v. Owners of Ship John Fraser* (1858, U. S.) 21 How. 184; State quarantine regulations: *Morgan's R. R. & S. S. Co. v. Louisiana* (1886) 118 U. S. 455, 6 Sup. Ct. 1114; *Missouri, K. & T. Ry. Co. v. Haber* (1898) 169 U. S. 613, 18 Sup. Ct. 488; *Smith v. St. Louis & S. W. R. R. Co.* (1901) 181 U. S. 248, 21 Sup. Ct. 603; *Compagnie Francaise v. La. Board of Health* (1902) 186 U. S. 380, 22 Sup. Ct. 811; *Reid v. Colorado* (1902) 187 U. S. 137, 23 Sup. Ct. 92.

¹³⁷ (1851, U. S.) 12 How. 299.

¹³⁸ See *Penna. Gas Co. v. Public Service Commission* (1919) 225 N. Y. 397, 405, 122 N. E. 260, 262.

merce. Extremely practical considerations, it cannot too often be insisted upon, decide the fate of State legislation when challenged merely by the dormant power of Congress. State necessities, the adaptability of State relief as against nation-wide action, the limited manifestation of a given evil or the limited benefit of its correction, the actual interest of the whole country in a phenomenon especially virulent in a particular State or region, the advantage of a local regulation balanced against the cost or inconvenience to interests outside the States—these and like questions are involved in the process of delimiting in the concrete the interacting areas of State and national action when Congress has not legislated.¹⁸⁹

¹⁸⁹ That the judicial process in this field is not the unfolding of logical inevitabilities, but a conscious balancing of practical considerations in permitting or excluding State action, is strikingly illustrated by the characteristically candid language of Judge Cardozo in *Penna Gas. Co. v. Pub. Ser. Comm.* *supra* note 138: "We think the line must be drawn here so as to bring the attempted regulation within the power of the State." Thus the validity of a State regulation ordering the stoppage of an interstate train turns on the specific facts attending each situation in their relation to the general flow of interstate commerce. Contrast *Lake Shore & Michigan So. Ry. Co. v. Ohio* (1899) 173 U. S. 285, 19 Sup. Ct. 565; *Gladson v. Minnesota* (1897) 166 U. S. 427, 17 Sup. Ct. 627; *Gulf, C. & S. F. Ry. Co. v. Texas* (1918) 246 U. S. 58, 38 Sup. Ct. 236, upholding the validity of such regulation, with *Cleveland, C. C. & St. L. Ry. Co. v. Illinois* (1900) 177 U. S. 514, 20 Sup. Ct. 722; *Miss. R. R. Comm. v. Ill. Cent. R. R. Co.* (1906) 203 U. S. 335, 27 Sup. Ct. 90; *Herdon v. Chicago, R. I. & P. Ry. Co.* (1910) 218 U. S. 135, 30 Sup. Ct. 633; *Chicago, B. & Q. Ry. Co. v. Wis. R. R. Comm.* (1915) 237 U. S. 220, 35 Sup. Ct. 560; *St. Louis-San Francisco Ry. Co. v. Mo. Pub. Service Comm.* (1923) 261 U. S. 369, 43 Sup. Ct. 380, which found such regulations unreasonably burdensome. Other illustrative cases are *Missouri, K. & T. Ry. Co. v. Texas* (1918) 245 U. S. 484, 38 Sup. Ct. 178, invalidating State regulation of train stops for interstate transit; *Seaboard Airline Ry. v. Blackwell* (1917) 244 U. S. 310, 37 Sup. Ct. 640, invalidating State regulation of speed at grade crossings for all trains; *Hennington v. Georgia* (1896) 163 U. S. 299, 16 Sup. Ct. 1086, upholding a State statute forbidding all freight trains to run on Sunday; *L. & N. R. R. Co. v. Kentucky* (1896) 161 U. S. 677, 16 Sup. Ct. 714, upholding a State statute forbidding railroads to consolidate their lines or pool their earnings; *Atlantic Coast Line R. R. Co. v. N. C. Corp. Comm.* (1907) 206 U. S. 1, 27 Sup. Ct. 585, upholding the order of a State commission requiring railroads to re-arrange their schedules so as to make connections with other through trains; *Wisconsin, M. & P. R. R. v. Jacobson* (1900) 179 U. S. 287, 21 Sup. Ct. 115, *Michigan Central R. R. v. Michigan R. R. Comm.* (1915) 236 U. S. 615, 35 Sup. Ct. 422, *Seaboard Air Line Ry. v. Ga. R. R. Comm.* (1916) 240 U. S. 324, 36 Sup. Ct. 260, upholding, and *Oregon R. R. & Nav. Co. v. Fairchild* (1912) 224 U. S. 510, 32 Sup. Ct. 535, denying the validity of orders of State commissions requiring railroads to establish connections; *Ill. Central R. R. Co. v. Mulberry Hill Co.* (1915) 238 U. S. 275, 35 Sup. Ct. 760, upholding a State statute requiring railroads to furnish cars within a reasonable time after demand; *Chicago, M. & St. P. Ry. Co. v. Iowa* (1914) 233 U. S. 334, 34 Sup. Ct. 592, upholding the validity of a State commission's order requiring a connecting carrier to use the equipment of a prior carrier in shipping cars from without the State to their final destination; *Grand Trunk Ry. v. Michigan R. R. Comm.* (1913) 231 U. S. 457, 34 Sup. Ct. 152,

The same central issue has appeared in hundreds of cases, and the recurrence of analogous situations has woven a few clear patterns for judgment. Certain interests, although embraced under interstate commerce and open to Congressional control, are of such special concern to the individual States that State action in regard to them has been sanctioned. Thus laws affecting pilotage,¹⁴⁰ health,¹⁴¹ safety,¹⁴² public works,¹⁴³ taxation,¹⁴⁴ although indisputably regulating the currents of interstate commerce, have been permitted to the States. State action is not barred, but by no means is all State action free. The exact form and incidence of State legislation is tested. Frequently

upholding the order of a State commission requiring the interchange of traffic on the terminal tracks of an interstate carrier, compared with *Ill. Cent. R. R. v. Louisiana R. R. Comm.* (1915) 236 U. S. 157, 35 Sup. Ct. 275. Other illustrative cases are classified in notes 140-145, *infra*.

¹⁴⁰ *Cooley v. Board of Wardens* (1851, U. S.) 12 How. 299; *Ex parte McNeil* (1871, U. S.) 13 Wall. 236; *Wilson v. McNamee* (1880) 102 U. S. 572; *Olsen v. Smith* (1904) 195 U. S. 332, 25 Sup. Ct. 52.

¹⁴¹ *Plumley v. Massachusetts* (1894) 155 U. S. 461, 15 Sup. Ct. 154, upholding a State statute prohibiting the sale of deleterious oleomargarine imported in original packages; *N. Y., N. H. & H. R. R. v. New York* (1897) 165 U. S. 628, 17 Sup. Ct. 418, upholding a State statute regulating heating on interstate trains; *Rasmussen v. Idaho* (1901) 181 U. S. 198, 21 Sup. Ct. 594, upholding a State statute authorizing the governor to prohibit the importation of sheep from localities in other States where he has reason to believe an epidemic exists. See also quarantine cases collected *supra* in note 136.

¹⁴² *Smith v. Alabama* (1888) 124 U. S. 465, 8 Sup. Ct. 564, upholding State statute requiring the licensing of interstate engineers; *Nashville, C. & St. L. Ry. v. Alabama* (1888) 128 U. S. 96, 9 Sup. Ct. 28, upholding State statute requiring interstate engineers to undergo color blindness tests; *Chicago, M. & St. P. Ry. Co. v. Solan* (1898) 169 U. S. 133, 18 Sup. Ct. 289, upholding State statute invalidating a contract of a carrier that exempts him from his ordinary common law liability; *St. Louis Iron Mountain & So. Ry. v. Arkansas* (1916) 240 U. S. 518, 36 Sup. Ct. 443, upholding State statute forbidding switching over crossing except by a train crew of specified numbers; *Kane v. New Jersey* (1916) 242 U. S. 160, 37 Sup. Ct. 30, upholding State statute requiring the registration of automobiles of non-resident owners and providing for service of process upon them; *Vandalia R. R. Co. v. Ind. Pub. Service Comm.* (1916) 242 U. S. 255, 37 Sup. Ct. 93, *Atlantic Coast Line R. R. Co. v. Georgia* (1914) 234 U. S. 280, 34 Sup. Ct. 829, upholding State statutes regulating the headlight equipment of railroad locomotives; *Erie R. R. Co. v. Board of Pub. Util. Commissioners* (1921) 254 U. S. 394, 41 Sup. Ct. 169, upholding a State statute requiring the abolition of grade crossings.

¹⁴³ See cases collected *supra* in note 136; also *Willamette Iron Bridge Co. v. Hatch* (1888) 125 U. S. 1, 8 Sup. Ct. 811, upholding State statute authorizing construction of bridge across navigable waters; *Monongahela Nav. Co. v. United States* (1893) 148 U. S. 312, 13 Sup. Ct. 622, upholding State authorization allowing a corporation to exact tolls for the use of improvements constructed by it in a navigable stream; *Lake Shore & Mich. So. Ry. Co. v. Ohio* (1897) 165 U. S. 365, 17 Sup. Ct. 357, upholding State order requiring removal of a bridge as obstruction to navigation.

¹⁴⁴ The numerous cases on this subject are collected by Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the States* (1917-18) 31 HARV. L. REV. 321, 572, 721, 932; (1918) 32 *ibid.* 234, 374, 634, 902.

it appears that, while a State may deal with a subject that is part of interstate commerce, it has in fact dealt with it unfairly¹⁴⁵ or imposed an unreasonable burden upon commerce beyond the State line.¹⁴⁶ Again, conditions change and the inadequacy of State regulation provokes exercise of the Federal power. Local pilotage laws are displaced by a national pilotage act;¹⁴⁷ aspects of transportation, theretofore left to local regulation because of the presumed predominance of local significance, are absorbed into a Federal system of control;¹⁴⁸ diverse local laws governing injuries incident to work in interstate commerce are supplanted by nation-wide legislation.¹⁴⁹ In fine, from time to time what was of local concern, and therefore wisely left to local action, becomes a national concern vindicated through national regulation. But always the concrete issues—whether of adjudication or of legislation—turn on the concrete circumstances.

The practical necessities and the shrewd judgments about practical matters which underlie the decisions are conveyed in recurring phrases of the opinions—"the diversified regulation which was necessary,"¹⁵⁰ "diversity of treatment according to the special requirements of local conditions,"¹⁵¹ "under all the circumstances of the case,"¹⁵² "distinctly local in character although embraced within the Federal authority,"¹⁵³ "the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants."¹⁵⁴ These practical considerations of majority opinions gain significance from dissents which were rejected because they insisted on doctrinaire views leading to an arbitrary and impracticable division between State and national authority over interstate commerce.¹⁵⁵ The cases that invalidate State

¹⁴⁵ See *e. g.* *Cook v. Pennsylvania* (1878) 97 U. S. 566.

¹⁴⁶ See *e. g.* the train stoppage cases collected *supra* in note 139.

¹⁴⁷ U. S. Rev. Sts. 1878, secs. 4237, 4401, 4426, 4442-4444; Act of Mar. 4, 1907 (34 Stat. at L. 1411); Act of Mar. 24, 1908 (35 Stat. at L. 46).

¹⁴⁸ See *e. g.* *R. R. Comm. of California v. Southern Pac. Co.* (1924) 264 U. S. 331, 44 Sup. Ct. 376.

¹⁴⁹ See *e. g.* *New York Central R. R. v. Winfield*, *supra*; *Erie R. R. Co. v. Winfield* (1916) 244 U. S. 170, 37 Sup. Ct. 556; *New York Central R. R. Co. v. Tonsellito* (1917) 244 U. S. 360, 37 Sup. Ct. 620.

¹⁵⁰ Hughes, J., in *Port Richmond & B. P. Ferry Co. v. Freeholders of Hudson County* (1914) 234 U. S. 317, 327, 34 Sup. Ct. 821, 824.

¹⁵¹ Hughes, J., in *Port Richmond & B. P. Ferry Co. v. Freeholders of Hudson County*, *supra* note 150, at p. 330, 34 Sup. Ct. 825; Hughes, J., in *Minnesota Rate Cases* (1913) 230 U. S. 352, 399, 33 Sup. Ct. 729, 739.

¹⁵² Marshall, C. J., in *Wilson v. Blackbird Creek Marsh Co.*, *supra*, note 135, at p. 252.

¹⁵³ Hughes, J., in *Wilmington Transportation Co. v. R. R. Comm. of California* (1915) 236 U. S. 151, 154, 35 Sup. Ct. 276, 278.

¹⁵⁴ Curtis, J., in *Cooley v. Board of Wardens*, *supra* note 140, at p. 320.

¹⁵⁵ See, *e. g.* McLean, J., dissenting in *Cooley v. Board of Wardens*, *supra* note 140, at p. 324: "In this case, the power to regulate pilots is admitted to belong to the commercial power of Congress; and yet it is held, that a State, by virtue of its inherent power, may regulate the subject, until such regulation shall be annulled by Congress And it is in this light that the decision is chiefly

legislation, as well as those that sustain it, recognize that our constitutional system not only sanctions, but in its practical workings necessitates State treatment of phases of interstate commerce.

Where Congress is silent, then, State action may cope with State needs, so long as it does not minister to State interests at the expense of commerce among the States. But our constitutional system permits even greater flexibility in the regulation of interstate commerce. Federal legislation is sometimes exercised not to supplant State action but to support it. We have seen that States may deal with those phases of interstate commerce which, as a matter of practice, peculiarly affect them. But this local interest may be defeated by currents of interstate commerce which a State cannot effectively control. Therefore, Congress may draw upon its power over commerce to effectuate local State policies. Congress may forbid movements in interstate commerce solely to prevent the defeat of local laws—although those laws vary in different parts of the country because based on different views of local policy. In all these cases, and there have been a number of them, Congress has recognized the local emphasis in the interplay of State and national interests involved in commerce among the States. The regulation of liquor,¹⁵⁶ food,¹⁵⁷ drugs,¹⁵⁸ game,¹⁵⁹ have all invoked the Commerce Clause to sustain local or regional social policies.

The predominant State or regional interest may, then, be left to State action through Congressional abstention. Also, Congress may exert its own powers to re-inforce the segregated interests of a State or a region of States. Surely, then, the predominant interest of a region may constitutionally be recognized by Congressional assent to the protection of a regional interest through interstate compact. If State action over a phase of interstate commerce is permitted where the specific facts justify "diversity of treatment according to the

to be regretted. The power is recognized in the State, because the subject is more appropriate for State than Federal action; and consequently, it must be presumed the Constitution cannot have intended to inhibit State action. This is not a rule by which the Constitution is to be construed."

¹⁵⁶ Wilson Act of Aug. 8, 1890 (26 Stat. at L. 313), sustained *In re Rahrer* (1891) 140 U. S. 545, 11 Sup. Ct. 865, construed in *Rhodes v. Iowa* (1897) 170 U. S. 412, 18 Sup. Ct. 664, and *Louisville & Nashville R. R. Co. v. Cook Brewing Co.* (1912) 223 U. S. 70, 32 Sup. Ct. 189; Webb-Kenyon Act of Mar. 1, 1913 (37 Stat. at L. 699), sustained in *Clark Distilling Co. v. Western Maryland Ry. Co.* (1917) 242 U. S. 311, 37 Sup. Ct. 180.

¹⁵⁷ Act of May 9, 1902 (32 Stat. at L. 193), sustained in *United States v. Green* (1905, N. D. N. Y.) 137 Fed. 179. See also Act of June 30, 1906, sec. 10 (34 Stat. at L. 804).

¹⁵⁸ U. S. Rev. Sts. 1878, sec. 4280.

¹⁵⁹ Lacey Act of May 25, 1900 (31 Stat. at L. 188), carried into Fed. Crim. Code, secs. 242, 243, 244, sustained in *Rupert v. United States* (1910, C. C. A. 8th) 181 Fed. 87. See also *Wilson v. United States* (1820, C. C. D. Va.) 30 Fed. Cas. No. 17,846, inferentially sustaining Act of Feb. 28, 1803 (2 Stat. at L. 205); *Hanover Nat'l Bank v. Moyses* (1902) 186 U. S. 181, 22 Sup. Ct. 857. Compare Bradley, J., in *The Lottawanna* (1874, U. S.) 21 Wall. 558, 581.

special requirements of local conditions," then the Constitutional issues turn upon the facts of the specific situation of our immediate problem, the regulation of electric power; or, to put it more accurately, they turn upon a judgment on such facts which Congress, as the guardian of the national interest, may reasonably entertain. The constitutional issues, therefore, bring us back to the facts presented by the electric power situation, and the facts determine the constitutional issues. If the country "naturally divides itself into several power areas"¹⁶⁰ and "the problems in each of these power districts are essentially different" and if "a rightful solution" demands that we consider them as "essentially separate problems" affecting distinct regions with distinct necessities and distinct resources, the Constitution opposes no barrier to solution through agreements between the States of a given region supported by Congressional approval.

In no wise does this solution imply a transfer by Congress of its duty towards national affairs. On the contrary, it is a deliberate recognition by Congress that a particular electric power situation is predominantly the concern of the region limited by the radius of a specific electric power development and outside the regulative concern of the nation. In a zone for legislation open both to Congress and the States, the controlling facts justify, at least for the time being, co-operative State adjustment. Congress does not surrender any of its powers; it merely finds no occasion for its present exercise of them. There is, therefore, no "delegation" of its power in any legally significant use of the term.¹⁶¹ But Congress does not foreclose the future.

¹⁶⁰ See *supra* note 122.

¹⁶¹ It is now clear that the cases in notes 156 and 159 involve no "delegation" of legislative power from Congress to the States. They merely illustrate the process of Congressional delimitation of the respective areas of Federal and State control over a field, such as interstate commerce, subject to the legislative authority of both State and Nation. This conception of the true nature of the issue thus presented was set forth by the Court in sustaining the Wilson Act: "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction." *In re Rahrer*, *supra* note 156, at p. 564, 11 Sup. Ct. 870. The misconception about "delegation" was exposed again, by White, C. J., in sustaining the validity of the Webb-Kenyon Act: "The argument as to delegation to the States rests upon a mere misconception. . . . Or, in other words, stating the necessary result of the argument from a concrete consideration of the particular subject here involved, that because Congress in adopting a regulation had considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce coöperation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution. And it is well again to point out that this abnormal result to which the argument leads concerns a subject as to which both State and Nation in their respective spheres of authority possessed the supremest authority before the action of Congress which is complained of, and hence the

If and when circumstances which now call for solution through compact change, Congress is wholly free to assume control.¹⁶² Our constitutional history, as we have noted, records numerous instances of control by the States over phases of interstate commerce subsequently replaced by national control because the facts of life had shifted the center of predominance from State to national interest. The exercise of authority as between the States and Congress, in the field of interstate commerce, is necessarily an empiric process, simply because it may invoke the exertion of legislative power both by the States and by the Nation, and, through the expedient of compact, by a combination of the two.

We are thus dealing with a very different grant of power to the Federal government than that which is embodied in the Admiralty Clause of the Constitution. Because of the international aspect of maritime commerce,¹⁶³ control over admiralty matters is vested in the Federal Government to an extent very different from that which pertains to interstate commerce.¹⁶⁴ Therefore the doctrines of "uni-

argument virtually comes to the assertion that in some undisclosed way by the exertion of congressional authority, power possessed has evaporated." *Clark Distilling Co. v. Western Maryland Ry. Co.* *supra*, note 156, at p. 33, 37 Sup. Ct. 185. The source of the misconception as to "delegation" is a misinterpretation of *Leisy v. Hardin* (1890) 135 U. S. 100, 10 Sup. Ct. 681. This case, widely criticized by judges and the profession, has been "restrained in its application to the case actually presented for determination." See *Plumley v. Massachusetts*, *supra* note 141, at p. 474, 15 Sup. Ct. at p. 159. For our purposes, the decisive case is *In re Rahwer*, *supra* note 156. The effect of that decision is to put a quietus on any question of "delegation." Recent writers on the Webb-Kenyon Act have demonstrated the myth of "delegation" in the field of interstate commerce. See Denison, *States' Rights and the Webb-Kenyon Liquor Law* (1914) 14 COL. L. REV. 321; Rogers, *State Legislation under the Webb-Kenyon Act* (1915) 28 HARV. L. REV. 225; Powell, *Validity of State Legislation under the Webb-Kenyon Law* (1917) 2 SO. L. QUART. 112; *contra*, Cooke, *Commerce Clause* (1908) sec. 99.

¹⁶² See *e. g.* the New York-Connecticut Boundary Agreement of 1925, supplanting the agreement of 1879, Appx. A, III, (37), (13), *infra*.

¹⁶³ McReynolds, J., in *Southern Pacific Co. v. Jensen* (1917) 244 U. S. 205, 216, 37 Sup. Ct. 524, 529: "And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law *in its international* and interstate relations," and Bradley, J., in the *Lottawanna* (1874, U. S.) 21 Wall. 558, 573: "The common maritime law of the world . . ." (Italics ours.)

¹⁶⁴ It is significant that in the contest over the establishment of inferior Federal courts under the Judiciary Act of 1789, the opponents of inferior Federal courts always conceded the propriety of such courts with a jurisdiction confined to cases of admiralty and maritime law. A motion reducing their scope of jurisdiction to this class of cases was made by Richard Henry Lee in the Senate on June 22, 1789. Edward Carrington wrote to Madison on Aug. 3, 1789: "The State courts where they are well established might be adopted as the inferior Federal Courts, except as to maritime business. . . ." Tucker in the House proposed a substitute plan for that established by the Judiciary Act, confining the inferior courts to courts of admiralty. Fisher Ames wrote to Minot on Sept. 3, 1789: "The question whether we shall have inferior tribunals (except Admiralty

formity" and "delegation," developed in the recent series of admiralty decisions,¹⁶⁵ are restricted to a special and independent branch of constitutional law, and are irrelevant to the historic applications of the Commerce Clause. The decisive differences in the considerations applicable to the commerce cases compared with those that govern the admiralty decisions are strikingly illustrated in a recent dissent by Mr. Justice McReynolds, the spokesman of the Court for the admiralty doctrine.¹⁶⁶ The only question of "uniformity" which is raised by Congressional assent to regional control of electric power is the practical question whether the proposed regional control is in fact confined to a regional problem. Being a question of fact it must be adjudged as a question of fact, not by any technical or pedantic presuppositions.¹⁶⁷ The circumstances of the individual situation control. Being a judgment on practical affairs its exercise is primarily and persuasively for Congress, not for the courts. The process which is invoked and the profound reasons for deference to the Congressional judgment have been put in classic language by James Bradley Thayer:

"Now the question whether or not a given subject admits of only one uniform system or plan of regulation is primarily a legislative question, not a judicial one. For it involves a consideration of what, on practical grounds is expedient, possible, or desirable; and whether, being so at one time or place, it is so at another; as in the cases of

Courts, which were not denied to be necessary). . . ." See Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 67, 110, 119, 123. Hamilton in the *Federalist*, No. LXXX, writes: "The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present Confederation, submitted to federal jurisdiction."

¹⁶⁵ *Southern Pacific Co. v. Jensen supra* note 163. *Knickerbocker Ice Co. v. Stewart* (1919) 253 U. S. 160, 40 Sup. Ct. 438; *Union Fish Co. v. Erickson* (1919) 248 U. S. 308, 39 Sup. Ct. 112; *Chelentis v. Luckenbach S. S. Co.* (1918) 247 U. S. 372, 38 Sup. Ct. 501; *Washington v. Dawson & Co.* (1924) 264 U. S. 219, 44 Sup. Ct. 302. The series of decisions has been severely criticized by writers bred in the admiralty tradition. See Hough, *Admiralty Jurisdiction—Of Late Years* (1924) 37 HARV. L. REV. 529; Palfrey, *Common Law Courts and the Law of the Sea* (1923) 36 HARV. L. REV. 777; *Uniformity in the Admiralty Law* (1924) 37 HARV. L. REV. 1114. See also Fell, *Recent Problems in Admiralty Jurisdiction* (1922) *passim*.

¹⁶⁶ See McReynolds, J., dissenting in *Buck v. Kuykendall* (1925) 45 Sup. Ct. 327: "Interstate commerce has been greatly aided—amazingly facilitated, indeed—through the legislation and expenditures of the States . . . As the Federal Government has not and cannot undertake specific regulation, local control must continue; otherwise chaotic conditions will quickly develop. The problems are essentially local and, until something is done which tends really to hinder interstate commerce, should be left to the local authorities . . . Manifestly, the situation cannot be met by general Federal rules."

¹⁶⁷ Cf. Holmes, J., in *Swift & Co. v. United States* (1905) 196 U. S. 375, 398, 25 Sup. Ct. 276, 280: "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."

quarantine and pilotage laws, and laws regulating the bringing in and sale of particular articles, such as intoxicating liquors or opium. As regards the last-named drug, the desirable rule for California, where there are many Chinamen, and for Vermont, where there are few, may conceivably be different. It is not in the language itself of the clause of the Constitution now in question or in any necessary construction of it, that any requirement of uniformity is found in any case whatever. That can only be declared necessary, in any given case, as being the determination of someone's practical judgment. The question, then, appears to be a legislative one; it is for Congress and not for the courts—except, indeed, in the sense that the courts may control a legislative decision, so far as to keep it within the bounds of reason, of rational opinion."¹⁸⁸

VII.

Resort to the Compact Clause in regulating electric power development demands a discriminating technique in applying commonplaces of constitutional law governing interstate commerce. But occasions for the use of the Compact Clause, as its history abundantly reveals, will arise in fields not presenting any possible collision between States and Nation, but affecting concerns wholly outside the scope of Federal legislation. These concerns may increasingly transcend the boundaries of a single State, and yet be confined to a regional group of States like New England. An enlargement of the Federal power through constitutional amendment may, in specific instances, be the answer; but this need not be, and ought not to be, our only relief from State impotence or State inadequacy.

The imaginative adaptation of the compact idea should add considerably to resources available to statesmen in the solution of problems presented by the growing interdependence, social and economic, of groups of States forming distinct regions. It may well be that the New England States, the Middle Atlantic States, the Pacific Coast States, and similar groupings will each evolve, through compact, common industrial standards, thereby recognizing diversities not coincident with the capricious boundaries of forty-eight States nor yet to be resolved by a flat common denominator nation-wide in its operation. Time and circumstances alone must determine the existence of such diversities and common needs and the wisdom of regional rather than national treatment. The overwhelming difficulties confronting modern society must not be at the mercy of the false antithesis embodied in the shibboleths "States-Rights" and "National Supremacy." We must not deny ourselves new or unfamiliar modes in realizing national ideals. Our regions are realities. Political thinking must respond to these realities. Instead of leading to parochialism, it will bring a fresh ferment of political thought whereby national aims may be achieved through various forms of political adjustments.

¹⁸⁸ 2 Thayer, *Cases on Constitutional Law* (1895) 2190, note; Thayer, *Legal Essays* (1908) 36.

APPENDIX A.

THE LEGISLATIVE, JUDICIAL AND ADMINISTRATIVE HISTORY OF
INTERCOLONIAL AND INTERSTATE AGREEMENTS*

I.

AGREEMENTS OF THE COLONIAL PERIOD

(1) *Connecticut and New Netherlands Boundary Agreements of 1656:*

The Treaty of Hartford, concluded between the United Colonies and New Netherlands on September 19, 1650, dealt in part with the boundary between the two Colonies.¹ These provisions were confirmed on the part of New Netherlands by the States General of the United Netherlands on January 22, 1656.²

(2) *Rhode Island and Connecticut Boundary Agreement of 1663:*

On April 7, 1663, an agreement to abide by the decision of arbitrators, to whom both parties had submitted the dispute, was signed by the agents of Connecticut and Rhode Island.³ The claim was later resisted by Connecticut on the ground that Governor Winthrop, its agent, had entered into the agreement without authority from its General Court.^{3a}

(3) *New York and Connecticut Boundary Agreement of 1664:*

An agreement dealing with the respective claims of New York and Connecticut to Long Island was concluded on November 30, 1664.⁴ A supplemental settlement was concluded on December 1, 1664.^{4a}

* This Appendix aims to give an inventory of agreements undertaken by the Colonies and the Thirteen States prior to the Constitution, and of compacts concluded or proposed under the Constitution, covering a period from 1656 to the prospective Columbia River Compact, consented to by Congress on Mar. 4, 1925. A summary of the legislative, judicial and administrative history of these agreements has been based on investigation of the material in the Harvard Law School and Widener Libraries. Undoubtedly mistakes have crept in, and omissions will be revealed. Partly, of course, inaccuracies and errors are unavoidable as long as our Colonial Records remain so deplorably inaccessible. In any event, we hope that the defects of this summary will stimulate further study.

We have been greatly aided in the collection of recent documents, as yet unavailable in the libraries, by the ready help of J. H. Cohen, Counsel for the Port of New York Authority, M. L. Cooke, Director of the Pennsylvania Giant Power Survey, and E. E. Hunt, of Secretary Hoover's Staff.

¹ Laws of New Netherlands, 1638-1674, 215, 455.

² *Ibid.* 38.

³ R. I. Col. Rec. 518. A collection of documents bearing on this agreement is contained in Conn. Col. Rec. 526-541. See also Adams, *Founding of New England, 1665-1667* (1921) 320-321.

^{3a} Conn. Col. Rec. 1665-1667, 527.

⁴ Report of the Regents of the University on the Boundaries of New York, 1873, 24. See 3 Osgood, *American Colonies in the Seventeenth Century* (1907) 175-177; Dickinson, *American Colonial Government* (1912) 288-290.

^{4a} Report of the Commissioners on New York-Connecticut Boundary, N. Y. Sen. Doc. 1857, No. 165, p. 102.

(4) *New York and Connecticut Boundary Agreement of 1683:*

Encroachment by New York upon Connecticut was protested against as a violation of the earlier agreement of 1664.⁵ Commissioners were appointed to negotiate for the settlement of these difficulties⁶ and an agreement was concluded between the governors of the two Colonies on November 28, 1683.⁷ It was confirmed by the General Court of Connecticut on May 8, 1684.⁸ A supplemental agreement dealing with the same boundary was concluded between the commissioners of the two Colonies on March 28, 1700.⁹

(5) *Connecticut and Rhode Island Boundary Agreement of 1703:*

Commissioners were appointed by the two Colonies in 1699¹⁰ and 1702,¹¹ and concluded an agreement on May 12, 1703.¹² The commissioners that were appointed to run the line in accordance with this agreement failed after numerous attempts to come to any acceptable decision.¹³ Finally in 1720 an appeal was taken to the King.¹⁴ In 1726 he confirmed the earlier agreement of 1703.¹⁵ After further minor disputes the line was run in accordance with this agreement.¹⁶

(6) *Massachusetts and Rhode Island Boundary Agreements of 1710 and 1719:*

A partition line agreed upon by commissioners of the two Colonies on January 19, 1710, was accepted by Massachusetts on March 16, 1710.¹⁷ Commissions appointed to run the line thus determined were given powers to make a full and final settlement of the controversy.¹⁸ Such an agreement was entered into on May 14, 1719, and in the same year was approved by the legislatures of the two Colonies.¹⁹

⁵ Letter of Governor and Council of Connecticut to Governor Dongan of New York on Oct. 5, 1683, and Reply of Governor Dongan on Oct. 9, 1683. See Conn. Col. Rec. 1678-1689, 326, 327, 328.

⁶ Conn. Col. Rec. 1678-1689, 140.

⁷ Conn. Col. Rec. 1678-1689, 330; Reports of Commissioners of New York-Connecticut Boundary, N. Y. Sen. Doc. 1857, No. 165, p. 43; 2 Report of the Regents of the University on the Boundaries of New York, 1873, 244.

⁸ Conn. Col. Rec. 1678-1689, 140.

⁹ 1 Report of the Regents of the University on the Boundaries of New York, 1873, 58. By the Act of June 25, 1719, New York appointed a commission to run this line again, providing that the line thus established should be invalid until the King should assent thereto. The Royal Assent was given on Jan. 23, 1723. See 1 N. Y. Col. Laws, ch. 384, p. 1039. The agreement of 1683 was the basis of the present line, which was run in 1878. See Thwaites, *The Colonies* (1891) 267.

¹⁰ 3 R. I. Col. Rec. 378.

¹¹ Conn. Col. Rec. 1689-1706, 399.

¹² 3 R. I. Col. Rec. 474.

¹³ 4 R. I. Col. Rec. 175, 251, 273.

¹⁴ 4 R. I. Col. Rec. 283.

¹⁵ 4 R. I. Col. Rec. 370; Conn. Col. Rec. 1726-1735, 178.

¹⁶ Conn. Col. Rec. 1726-1735, 156, 178; 4 R. I. Col. Rec. 405. See also 2 *New and Complete History of the British Empire in America* (1756) 138 (author unknown).

¹⁷ 9 Mass. Prov. Acts, 164.

¹⁸ 9 Mass. Prov. Acts, 399, 499, 535, 562, 573; 4 R. I. Col. Rec. 206, 218.

¹⁹ 9 Mass. Prov. Acts, 655; 4 R. I. Col. Rec. 253. A preliminary settlement had

(7) *New York and Connecticut Boundary Agreement of 1725:*

Commissioners were appointed by Connecticut on October 8, 1724,²⁰ and by New York on June 24, 1784, and given extensive powers by the Act of April 8, 1724.²¹ Preliminary articles of agreement were entered into on April 29, 1725,²² and a final settlement was concluded on May 12, 1725.²³ This agreement was approved by Connecticut on October 8, 1730.²⁴ A survey made according to the terms of the agreement had been confirmed by the commissioners on May 14, 1730.²⁵

(8) *North Carolina and South Carolina Boundary Agreement of 1735:*

The negotiation of an agreement between the Governors of these two Colonies is recorded as of April 23, 1735.²⁶

(9) *New York and Massachusetts Boundary Agreement of 1773:*

Commissioners were appointed to negotiate an agreement by Massachusetts on February 3, 1773,²⁷ and by New York on March 8, 1773.²⁸ The agreement was to be binding when signed by the governors of the two Colonies, subject to approval by the King. An agreement was concluded between the commissioners and signed by the respective governors on May 18, 1773.²⁹

II.

COMPACTS UNDER THE ARTICLES OF CONFEDERATION

(1) *Pennsylvania and Virginia Boundary Agreement of 1780:*

(a) An agreement between commissioners of the two States was

been approved by Rhode Island on Oct. 29, 1718. See 4 R. I. Col. Rec. 243. See also *Rhode Island v. Massachusetts* (1838, U. S.) 12 Pet. 657, 665-666.

²⁰ Conn. Col. Rec. 1717-1725, 496.

²¹ Report of the Commissioners on New York-Connecticut Boundary, N. Y. Sen. Doc. 1857, No. 165, Appx. T.

²² *Ibid.* Appx. U. See also 2 Conn. Priv. Laws, 1789-1836, p. 1527.

²³ Report, *supra* note 21, Appx. V.

²⁴ Conn. Col. Rec. 1726-1735, 294.

²⁵ 2 Report of the Regents of the University on the Boundaries of New York, 1873, 355; Report of the Commissioners on New York-Connecticut Boundary, N. Y. Sen. Doc. No. 165, 1857, 50-55.

²⁶ 5 N. C. Col. Rec. 374; 1 Cooper, S. C. Sts. 407. This agreement was an attempt to settle a controversy between Governor Burrington of North Carolina and Governor Johnson of South Carolina in 1732. A dispute over the boundary arose again in 1763 and was referred to the King for settlement. The boundary line was run during the years 1764-1772 pursuant to the royal instructions. See 1 Cooper, *op. cit.* 408.

²⁷ 18 Mass. Prov. Acts, 680.

²⁸ 5 N. Y. Col. Laws, ch. 1601, 522.

²⁹ 1 Report of the Regents of the University on the Boundaries of New York, 1873, 211. No evidence of royal assent has been found, but the agreement was thereafter treated as binding by New York. See Act of Mar. 24, 1795, N. Y. Laws, 1789-1796, ch. 33, p. 577.

negotiated on August 31, 1779.³⁰ Pennsylvania ratified this agreement on November 19, 1779.³¹ Virginia took no action looking forward to ratification, and remonstrances against this delay and Virginia's continual encroachments upon Pennsylvania's territory were made by President Reed of Pennsylvania to Virginia³² and to the Continental Congress.³³ The latter body adopted a resolution counselling amicable settlement of the controversy and protesting against disturbance of the possession of the land-owners upon the disputed territory.³⁴ Under this pressure Virginia's ratification was secured on June 23, 1780.³⁵ Pennsylvania again ratified the agreement on September 23, 1780.³⁶ The agreement looked forward to joint action by the States in running the boundary line. Proposals to run the line were deferred for several years³⁷ and a temporary line was accepted.³⁸ In 1783 a proposal to run the permanent line was made³⁹ and commissioners were appointed by the two States,⁴⁰ who ran a line that was adopted by both legislatures.

(b) Cases in which this compact has come up for judicial construction are *Sims, Lessee v. Irvine* (1799, U. S.) 3 Dall. 485; *Marlatt v. Silk* (1837, U. S.) 11 Pet. 1.

(2) *Pennsylvania and New Jersey Agreements of 1783 and 1786:*

(a) An agreement dealing with the respective claims of the two States to jurisdiction over certain islands in the Delaware River was concluded between commissioners on April 31, 1783. This was ratified by Pennsylvania on September 20, 1783⁴¹ and by New Jersey on May

³⁰ 10 Hening, Va. Stat. at L. 534.

³¹ 10 *ibid.* 533.

³² Letter of Pres. Reed to Scott, boundary commissioner for Virginia, on Dec. 29, 1779, and the reply of Scott on Jan. 21, 1780. See 8 Pa. Archives, 63, 91.

³³ Letter of Pres. Reed to Continental Congress on Dec. 15, 1779. See 8 Pa. Archives, 46.

³⁴ Res. of Dec. 27, 1799, 15 Journ. of Cont. Cong. 1411.

³⁵ 10 Hening, *op. cit.* 535; 8 Pa. Archives, 352.

³⁶ 8 Pa. Archives, 570.

³⁷ Letters of Gov. Jefferson to Pres. Reed on April 17 and June 3, 1781. See 9 Pa. Archives, 78, 189. See Res. of Assembly on Mar. 2, 1782, 9 *ibid.* 506.

³⁸ Letter of Gov. Harrison to Pres. Moore on Mar. 22, 1782. See 9 Pa. Archives, 518. Virginia appointed a commission for this purpose on June 6, 1782. See 9 *ibid.* 562. The report of the boundary commissioners was accepted by Pennsylvania on Mar. 22, 1783. See 10 *ibid.* 8. See also Letter of Pres. Dickinson to Gov. Harrison on Mar. 27, 1783, 11 *ibid.* 497.

³⁹ Letter of Gov. Harrison to Pres. Dickinson on June 12, 1783, 10 *ibid.* 497.

⁴⁰ Virginia appointed a commission on June 27, 1783. See 10 *ibid.* 171. Pennsylvania appointed a commission on Aug. 28, 1783. See 10 *ibid.* 95. See also 10 *ibid.* 223, 230; 11 *ibid.* 499. Pres. Dickinson suggested that the Continental Congress should also appoint a commissioner. See Letter of Pres. Dickinson to Cont. Cong., April 11, 1785, 10 *ibid.* 440. See also the reports of the Commission, 10 *ibid.* 373, 374, 438, 506.

⁴¹ 11 Pa. Stat. at L. 1782, ch. 1035, p. 151.

27, 1783.⁴² Commissioners appointed under the terms of this agreement⁴³ contemplated a further agreement between the States looking forward to the improvement of navigation on the Delaware River and its branches.⁴⁴ Such an agreement was reached on December 2, 1785, and ratified by New Jersey on March 16, 1787.^{44a} Pennsylvania by the Act of September 25, 1786, made effective those terms of the compact that applied to her.^{44b} Further legislation under the terms of the agreement of 1783 was undertaken by Pennsylvania in 1786,⁴⁵ and by New Jersey in 1856.⁴⁶

(b) This agreement was considered in *Comm. v. Frazee* (1856, Pa.) 2 Phila. 191; *State v. Davis* (1856, N. J.) 1 Dutch. 386; *Att'y Gen'l v. Dela. & Bound Brook R. R. Co.* (1876) 27 N. J. Eq. 1.

(3) *Virginia and Maryland Agreement of 1785:*

(a) This agreement, concluded between commissioners of the two States on March 28, 1785, dealt with the regulation of navigation and of fishing, and the exercise of jurisdiction over the waters of the Potomac River. It was confirmed by Maryland in November, 1785,⁴⁷ and by Virginia in October, 1785.⁴⁸

(b) This compact was considered in *Georgetown v. Alexandria Coal Co.* (1838, U. S.) 12 Pet. 91; *Wharton v. Wise* (1894) 153 U. S. 155, 14 Sup. Ct. 783; *Ex parte Marsh* (1813, E. D. Va.) 57 Fed. 719; *Hendricks v. Commonwealth* (1882) 75 Va. 934.

(4) *South Carolina and Georgia Agreement of 1788:*

(a) This agreement concluded on February 1, 1788, dealt with the boundary between the two States and the navigation of the Savannah River. It was confirmed by Georgia on February 1, 1788,⁴⁹ and by South Carolina on February 27, 1788.⁵⁰

(b) This compact was held to have no limiting effect upon the power of Congress over commerce, since both States had thereafter adopted the Constitution. *South Carolina v. Georgia* (1876) 93 U. S. 4.

⁴² N. J. Rev. Sts. 1847, tit. III, ch. 5, p. 41; Nixon, Dig. N. J. Laws, 1709-1855 (2d ed. 1855) 824.

⁴³ 9 Pa. Archives, 129.

⁴⁴ The Pennsylvania Commission was authorized to co-operate with the New Jersey Commission. See 9 Pa. Archives, 710. This authorization was communicated by Pennsylvania to the Governor of New Jersey. See 9 *ibid.* 458. See also Letter of Pres. Dickinson to Governor of New Jersey, on Dec. 14, 1783, 9 *ibid.* 366.

^{44a} N. J. Rev. Sts. 1847, tit. III, ch. 6, p. 43.

^{44b} 12 Pa. Stat. at L. 1786, ch. 1245, p. 304.

⁴⁵ 12 Pa. Stat. at L. 1786, ch. 1245, p. 304.

⁴⁶ N. J. Laws, 1856, ch. 123, p. 242.

⁴⁷ 1 Dorsey, Md. Laws, 1692-1839, 187.

⁴⁸ 12 Hening, Va. Stat. at L. 50.

⁴⁹ Prince, Dig. Ga. Laws, 53.

⁵⁰ 1 Cooper, S. C. Sts. 411.

III.

COMPACTS WITH THE CONSENT OF CONGRESS SINCE 1789*

(1) *Virginia and Kentucky Compact of 1789:*

(a) The assent of Congress is found in the Act of February 4, 1791,⁵¹ admitting Kentucky into the Union.

(b) The Virginia Act of December 18, 1789, sec. 7,⁵² by which Kentucky was severed, provides:

"Third, that all private rights and interests of land within the said district, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state."

Section 11 of the same act⁵³ provided that the jurisdiction of Kentucky over the Ohio River should be concurrent only with those States who might possess the opposite shore of the river. Both provisions of this Act were accepted by Kentucky and embodied in its Constitution.⁵⁴

(c) The compact created as a result of the seventh section was considered in *Green v. Biddle* (1823, U. S.) 8 Wheat. 1; *Hawkins v. Burney's Lessee* (1831, U. S.) 5 Pet. 457; *Kentucky Union Co. v. Kentucky* (1911) 219 U. S. 140, 31 Sup. Ct. 171.

The compact created under the eleventh section was considered in *Wedding v. Meyler* (1904) 192 U. S. 573, 24 Sup. Ct. 322; *Niconlin v. O'Brien* (1918) 248 U. S. 113, 39 Sup. Ct. 23; *State v. Faudre* (1903) 54 W. Va. 122, 46 S. E. 269.

(2) *Kentucky and Tennessee Boundary Compact of 1820:*

(a) Congressional assent was given by Resolution of May 12, 1820.⁵⁵

* The first attempt, so far as we are aware, to enumerate the Congressional consents to compacts formed under the Constitution was made by Judge A. A. Bruce in (1918) 2 MINN. L. REV. 500. This, in turn, became the foundation for a list of such Acts of Congress in the report of the Committee on Inter-State Compacts made on May 1, 1921 to the National Conference of Commissioners on Uniform State Laws at its Thirty-first Annual Meeting. Mr. Charles Warren in his Stafford Little Lectures (*The Supreme Court and the Sovereign States* [1924]) has drawn upon the Bruce List, adding a few of the later consents. The lack of a scientific index to Federal legislation does not make it surprising that all these lists are incomplete for the periods which they cover. None of them, moreover, (with negligible exceptions in the Warren list) refers to the very important State legislation concerning these compacts. The story is obviously incomplete without a recital of such legislation. We have, therefore, attempted a comprehensive list of the compacts to which Congress consented and not confined ourselves to corrections and additions of prior lists. Undoubtedly we have not escaped inaccuracies and omissions.

⁵¹ 1 Stat. at L. 189.

⁵² 13 Hening, Va. Stat. at L. 17, 19.

⁵³ See note 39, *supra*.

⁵⁴ Ky. Const. Art. VIII, sec. 7, 1 Litt. Ky. Laws, 32.

⁵⁵ 3 Stat. at L. 609.

(b) Commissioners were appointed at various intervals by both States during the period of 1801-1820 in an attempt to secure a settlement of the boundary line favorable to both States.⁵⁶ By the Act of November 23, 1819,⁵⁷ the Tennessee legislature appointed two commissioners with authority to enter into a binding agreement with Kentucky. By the Act of January 1, 1820,⁵⁸ Kentucky appointed commissioners to negotiate an agreement to be submitted to the legislature for ratification. The agreement thus concluded, after slight modifications to comply with the request of the Kentucky legislature,⁵⁹ was ratified by that State by the Act of February 11, 1820.⁶⁰

(c) This compact was considered in *Poole v. Fleegeer* (1837, U. S.) 11 Pet. 185, affirming *Fleegeer v. Poole* (1832) Fed. Cas. No. 4,860.

(3) *Incorporation of C. & O. Canal Company in 1825:*

(a) The requisite Congressional assent for the incorporation of the Company was given by the Acts of March 3, 1825,⁶¹ May 23, 1828,⁶² and July 14, 1832.⁶³

(b) By the Act of January 27, 1824,⁶⁴ Virginia incorporated the C. & O. Canal Company with the privilege of exercising the right of eminent domain, on condition that assent would be given, together with similar rights of eminent domain, by Congress, Maryland, and the Potomac Company. Maryland by the Act of January 31, 1825,⁶⁵ gave its assent on the condition of assent being given by the other named States, together with Potomac Company, and also requesting the assent of Pennsylvania. Congressional assent was given by the Acts enumerated above. On May 16, 1825, the Potomac Company gave its assent.⁶⁶ On February 9, 1826,⁶⁷ Pennsylvania gave its assent.

(c) In *C. & O. Canal Co. v. B. & O. R. R. Co.* (1832 Md.) 4 Gill & J. 1, it was held that this was a binding compact between the States

⁵⁶ Commissioners were appointed by Tennessee on Nov. 3, 1803. See 1 Scott, Tenn. Laws, ch. 63, p. 801. The so-called Walker's line was then run, and confirmed by Tennessee with a request that Kentucky should do the same, on Oct. 21, 1812. See 2 Scott, *op. cit.* ch. 61, p. 91. Kentucky had appointed commissioners on Dec. 14, 1801. See Tomlinson, Coll. Ky. Acts, 481. But on Dec. 22, 1802, Kentucky repealed this act. See 3 Litt. Ky. Laws, ch. 37, p. 80. Commissioners were again appointed on Feb. 4, 1812, to act with the Tennessee commissioners. See Ky. Laws, 1811, 188. Kentucky refused to accept Walker's line, but sought to secure a settlement by continuing negotiations with Tennessee. See Ky. Laws, 1812-13, 93. Further action was taken by Tennessee to establish Walker's line in 1817. See 2 Scott, *op. cit.* ch. 157, p. 425. Kentucky, however, by legislative resolution of Feb. 10, 1816, adopted a variation of Walker's line.

⁵⁷ 2 Scott, *op. cit.* ch. 67, p. 520.

⁶¹ 4 Stat. at L. 101.

⁵⁸ Ky. Laws, 1819, ch. 461, p. 820.

⁶² 4 Stat. at L. 292.

⁵⁹ Res. of Jan. 28, 1820, Ky. Laws, 1819, 990.

⁶³ 4 Stat. at L. 602.

⁶⁰ Ky. Laws, 1819, ch. 546, p. 922.

⁶⁴ Va. Laws, 1823-24, ch. 38, p. 41.

⁶⁵ Md. Laws, 1824-25, ch. 79.

⁶⁶ The act of assent is found in 4 Stat. at L. 802. A complete list of all the acts is to be found in 4 Stat. at L. Appx. I.

⁶⁷ Pa. Acts, 1825-26, ch. 7, p. 8, as amended by Act of Mar. 9, 1826, Pa. Acts, 1825-26, ch. 28, p. 73.

of Maryland and Virginia, with the requisite Congressional assent, which could not be impaired by the independent action of Maryland.

(4) *New York and New Jersey Compact of 1833:*

(a) Congressional assent was given by the Act of June 28, 1834.⁶⁸

(b) Commissioners were appointed by New York by the Act of June 18, 1833,⁶⁹ and by New Jersey under the Act of February 6, 1833.⁷⁰ The compact, concluded on September 16, 1833, dealt with the boundary line between the States, the exercise of jurisdiction by them over the waters of the Hudson River, and the title of the respective States to the river bed and the islands in the river. It was ratified by New York on February 5, 1834,⁷¹ and by New Jersey on February 16, 1834.⁷²

(c) This compact was considered in *Central R. R. Co. v. Jersey City* (1908) 209 U. S. 473, 28 Sup. Ct. 592; *State v. Babcock* (1862, N. J.) 1 Vroom, 29; *People v. C. R. R. of N. J.* (1870) 42 N. Y. 293; *Ferguson v. Ross* (1891) 126 N. Y. 459, 27 N. E. 954.

(5) *Missouri and Arkansas Boundary Compact of 1846:*

(a) Congressional assent was given by the Act of February 15, 1848.⁷³

(b) Commissioners were appointed by Arkansas under the Act of January 12, 1843,⁷⁴ and by Missouri under the Act of February 25, 1843.⁷⁵ The agreement was ratified by Arkansas on December 23, 1846,⁷⁶ and by Missouri on February 16, 1847.⁷⁷

(6) *Massachusetts and New York Boundary Compact of 1853:*

(a) Congressional assent was given by the Act of January 3, 1855.⁷⁸

(b) By the Act of May 14, 1853,⁷⁹ Massachusetts ceded to New York certain territory on condition that the cession would be accepted by the latter State. Acceptance by New York is found in the Act of July 21, 1853.⁸⁰

(7) *Massachusetts and Rhode Island Boundary Settlement of 1859:*

(a) Congressional assent was given by the Act of February 9, 1858.⁸¹

(b) A boundary suit had been pending for many years in the Supreme Court of the United States. By the Resolution of April 5, 1859,⁸² Massachusetts authorized its attorney-general to conclude an adjustment of this dispute that would be binding upon both States.

⁶⁸ 4 Stat. at L. 708.

⁶⁹ N. Y. Laws 1833, ch. 6, p. 6.

⁷⁰ N. J. Laws, 1832-1833, 54.

⁷¹ N. Y. Laws, 1834, ch. 8, p. 8.

⁷² N. J. Laws, 1833-1834, 118.

⁷³ 9 Stat. at L. 211.

⁷⁴ Ark. Acts, 1843-44, 53.

⁸² Mass. Acts, 1858-1859, ch. 69, p. 459.

⁷⁵ Mo. Laws, 1843, 23.

⁷⁶ Dig. Ark. Laws, 1857, ch. 13, p. 154.

⁷⁷ Mo. Laws, 1847, 13.

⁷⁸ 10 Stat. at L. 602.

⁷⁹ Mass. Acts, 1852-1853, ch. 340, p. 564.

⁸⁰ N. Y. Laws, 1853, ch. 586, p. 1102.

⁸¹ 11 Stat. at L. 382.

By the Act of March 8, 1860,⁸³ Rhode Island invested its attorney-general with similar authority.

(8) *Prospective Agreement between Arkansas, Louisiana, and Texas of 1861:*

(a) By a Joint Resolution of February 21, 1861,⁸⁴ Congress gave its assent to joint action by these States for the removal of raft from the Red River.

(b) No evidence of any formal agreements between these States concerning such a project has been found.

(9) *Virginia and West Virginia Debt Agreement of 1862:*

(a) Congressional assent to this agreement is found in the Act of December 31, 1862,⁸⁵ admitting West Virginia into the Union.

⁸³ R. I. Acts, 1859-1860, ch. 320, p. 139. There have been other cases of an agreement between counsel representing the interests of two States in a boundary dispute, where an agreement was reached to avoid determination by a commission appointed by the Court. Thus in *Nebraska v. Iowa* (1892) 143 U. S. 359, 12 Sup. Ct. 396, the Court having held that avulsion did not affect the former boundary line between the States, permitted the two States to agree upon a designation of the boundary to pass into the final decree, and provided that if the parties could not agree a commission would be appointed by the Court to survey the line. An agreement having been reached by the parties, its terms were embodied in the final decree. *Nebraska v. Iowa* (1892) 145 U. S. 519, 12 Sup. Ct. 976. Exactly the same procedure was adopted in the case of a boundary dispute between Missouri and Nebraska. *Missouri v. Nebraska* (1904) 196 U. S. 23, 25 Sup. Ct. 155. Here again the final decree was entered in accordance with the agreement of the parties. *Missouri v. Nebraska* (1904) 197 U. S. 577, 25 Sup. Ct. 580. In *Iowa v. Illinois* (1893) 147 U. S. 1, 13 Sup. Ct. 239, the Court having held that the boundary line between the two States was the middle of the Mississippi River, ordered a commission to be appointed to designate this line. The report of the commissioners was confirmed, but later set aside on a showing that Illinois had not, contrary to the Court's belief, concurred in the motion for approval. *Iowa v. Illinois* (1894) 151 U. S. 238, 14 Sup. Ct. 333. Later both States moved to set aside the proceedings had in the second case and the order of the court in the first case appointing a commission, and the Court, upon their request, entered as its final decree a boundary line agreed upon by the parties. *Iowa v. Illinois* (1906) 202 U. S. 59, 26 Sup. Ct. 571.

⁸⁴ 12 Stat. at L. 250.

⁸⁵ 12 Stat. at L. 633. See also *Virginia v. West Virginia* (1911) 220 U. S. 1, 26, 31 Sup. Ct. 330, 332. An agreement of a similar nature between Vermont and New York has been omitted from the above list, because the status of Vermont at the time of making the agreement did not bring it within the category of a "State." With the establishment of an independent State out of territory claimed partly by New York and by Massachusetts controversies as to boundaries and the mutual rights of the parties naturally arose. Negotiations for their settlement continued over a period of ten years. Finally in 1794 Vermont paid \$30,000 for certain lands granted to it by New York in extinguishment of claims which had theretofore been urged against the State by the New York commissioners. The payment was in accordance with the terms of an agreement entered into by commissioners of both States on Oct. 15, 1790. A collection of documents bearing on this controversy, and of the acts of the Vermont legislature with reference to its settlement, is contained in 3 Records of Governor and Council of Vermont, Appx. H, 421-463.

(b) By the Ordinance of Aug. 20, 1861, sec. 9,⁸⁶ of the "Restored State of Virginia" a provision was made for the payment by the State of West Virginia for an equitable portion of the debt contracted by the parent state. This obligation was accepted by West Virginia and embodied in its Constitution.⁸⁷

(c) In *Virginia v. West Virginia* (1907) 206 U. S. 290, 27 Sup. Ct. 732, it was held that the Court had jurisdiction of a suit by Virginia to enforce this obligation. In (1908) 209 U. S. 514, 28 Sup. Ct. 614, the Court rendered a decree referring the cause to a master. In (1911) 220 U. S. 1, 31 Sup. Ct. 330, it was decided that West Virginia was under a liability to pay an equitable portion of this debt. In (1911) 222 U. S. 17, 32 Sup. Ct. 4, a motion by Virginia that the Court proceed to determine the questions left undecided by its earlier opinion, was overruled. In (1913) 231 U. S. 89, 34 Sup. Ct. 29, the Court postponed action in order to allow a reasonable time for amicable settlement of the controversy. In (1914) 234 U. S. 117, 34 Sup. Ct. 189, West Virginia was permitted to file a supplemental answer asserting the existence of new credits serving to reduce its liability. In (1915) 238 U. S. 202, 35 Sup. Ct. 795, the master's decree fixing the amount of West Virginia's liability was affirmed. In (1916) 241 U. S. 531, 36 Sup. Ct. 719, a motion of Virginia for execution was denied, on the ground that the legislature of West Virginia had not convened since the rendering of the decree. In (1918) 246 U. S. 565, 38 Sup. Ct. 400, the Court re-affirmed West Virginia's liability and announced itself as capable and willing to resort to execution in the event of continued refusal on the part of West Virginia to meet its adjudged liability. A bill providing for the payment of this debt was passed by West Virginia on April 1, 1919.⁸⁸ Payment was to be partly in cash and partly through a bond issue, Virginia having agreed to accept these bonds at par in payment of the debt. The cash payment of \$1,062,867.17 was made on April 18, 1919, and bonds for the remaining \$13,500,000 were issued.⁸⁹

(10) *Virginia and West Virginia Boundary Agreement of 1866:*

(a) Congressional assent was given by Joint Resolution of March 10, 1866.⁹⁰

(b) By the Acts of January 31, 1863,⁹¹ and February 4, 1863,⁹² of the General Assembly held at Wheeling, the two counties of Berkeley and Jefferson were ceded to West Virginia in the event that a plebiscite

⁸⁶ Va. Acts (Wheeling) 1861-1862, 16, 19.

⁸⁷ West Va. Const. Art. VIII, sec. 8.

⁸⁸ 1919 W. Va. Acts (Ext. Sess.) ch. 10, p. 19. On Feb. 20, 1919, it had been resolved to accept Virginia's offer of settlement, and the preparation of bills for the payment of the debt was directed. See W. Va. Acts, 1919, 507.

⁸⁹ *New York Times*, Apr. 13, and 19, 1919.

⁹⁰ 14 Stat. at L. 350.

⁹¹ Va. Acts (Wheeling) 1862-1863, ch. 54, p. 38.

⁹² Va. Acts (Wheeling) 1862-1863, ch. 78, p. 65.

taken in the two counties would indicate this to be their choice. West Virginia accepted this cession by the Acts of November 2, 1863,⁹³ and August 5, 1863.⁹⁴ These two Acts of the "Restored State of Virginia" were repealed by Virginia by the Acts of December 5, 1865⁹⁵ and March 1, 1866.⁹⁶

(c) In *Virginia v. West Virginia* (1870, U. S.) 11 Wall. 39, it was held that the later repeal of the Acts of cession by Virginia was ineffective to terminate the compact concluded with Congressional assent.

(11) *Virginia and Maryland Boundary Agreement of 1877:*

(a) Congressional assent was given by the Act of March 3, 1879.⁹⁷

(b) By the Act of April 3, 1876,⁹⁸ Maryland bound itself to abide by the award of the arbitrators appointed to determine the dispute. The award was made on January 16, 1877, and approved by Virginia by the Act of March 14, 1878.⁹⁹

(12) *New York and Vermont Boundary Agreement of 1880:*

(a) Congressional assent was given by the Act of April 7, 1880.¹⁰⁰

(b) Vermont ratified this agreement by the Act of November 27, 1876,¹⁰¹ and New York by the Act of March 20, 1879.¹⁰²

(13) *New York and Connecticut Boundary Agreement of 1879:*

(a) Congressional assent was given by the Act of February 26, 1881.¹⁰³

(b) The agreement concluded on December 8, 1879, was ratified by Connecticut on March 12, 1880,¹⁰⁴ and by New York on May 8, 1880.¹⁰⁵

(14) *Connecticut and Rhode Island Boundary Agreement of 1887:*

(a) Congressional assent was given by the Act of October 12, 1888.¹⁰⁶

(b) The Agreement was ratified by Connecticut by the Act of May 4, 1887,¹⁰⁷ and by Rhode Island by the Act of May 5, 1887.¹⁰⁸

⁹³ W. Va. Laws, 1863, ch. 90, p. 103.

⁹⁵ Va. Acts, 1865-1866, ch. 84, p. 194.

⁹⁴ W. Va. Laws, 1863, ch. 35, p. 33.

⁹⁶ Va. Acts, 1865-1866, ch. 85, p. 195.

⁹⁷ 20 Stat. at L. 481. See, in general, Report and Proceedings of the Joint Commissioners to adjust the Boundary Line, (1874); Report and Accompanying Documents of the Virginia Commissioners (1873).

⁹⁸ Md. Laws, 1876, ch. 148, p. 317.

¹⁰⁰ 21 Stat. at L. 72.

⁹⁹ Va. Acts, 1877-1878, ch. 246, p. 233.

¹⁰¹ Vt. Laws, 1876, No. 201, p. 380.

¹⁰² N. Y. Laws, 1879, ch. 93, p. 138. An act further defining the boundary thus established was passed on May 13, 1907. See N. Y. Laws, 1907, ch. 339, p. 617.

¹⁰³ 21 Stat. at L. 351. This agreement is superseded by the later agreement consented to by Congress on Jan. 10, 1925. See *infra* Appx. A, III, (37). See also 16 Conn. Spec. Laws, 1104.

¹⁰⁴ 8 Conn. Spec. Laws, 377.

¹⁰⁶ 25 Stat. at L. 553.

¹⁰⁵ N. Y. Laws, 1880, ch. 213, p. 329.

¹⁰⁷ 10 Conn. Spec. Laws, 717.

¹⁰⁸ R. I. Laws, 1886-1887, ch. 635, p. 146.

(15) *New York and Pennsylvania Boundary Agreement of 1886:*

(a) Congressional assent was given by the Act of August 19, 1890.¹⁰⁹

(b) This agreement, concluded on March 26, 1886, was ratified by New York on June 4, 1886,¹¹⁰ and by Pennsylvania on June 6, 1887.¹¹¹

(16) *South Dakota and Nebraska Boundary Agreement of 1897:*

(a) Congressional assent was given by the Act of July 24, 1897.¹¹²

(b) By the Act of June 3, 1897,¹¹³ South Dakota authorized the governor to sign the agreement. A similar Act was passed by Nebraska on June 7, 1897.¹¹⁴

(17) *Virginia and Tennessee Boundary Agreement of 1901:*

(a) Congressional assent was given by Joint Resolution of March 3, 1901.¹¹⁵

(b) The agreement was ratified by Tennessee on January 23, 1901,¹¹⁶ and by Virginia on February 9, 1901.¹¹⁷

(c) In *Tennessee v. Virginia* (1903) 190 U. S. 64, 23 Sup. Ct. 827, the report of the boundary commissioners in accordance with this compact was adopted by the Court.

(18) *South Dakota and Nebraska Boundary Agreement of 1905:*

(a) Congressional assent was given by the Act of March 1, 1905.¹¹⁸

(b) The agreement was ratified by Nebraska on February 3, 1905.¹¹⁹ Commissioners were appointed by South Dakota on March 9, 1903,¹²⁰ and the agreement was ratified February 5, 1905.¹²¹

(19) *New Jersey and Delaware Agreement of 1905:*

(a) Congressional assent was given by the Act of January 24, 1907.¹²²

(b) This agreement, dealing with jurisdiction and service of process in penal causes over the Delaware River, was ratified by Delaware on March 20, 1905,¹²³ and by New Jersey on March 21, 1905.¹²⁴

(20) *Mississippi and Louisiana Agreement of 1909:*

(a) By Joint Resolution of January 26, 1909,¹²⁵ Congress gave

¹⁰⁹ 26 Stat. at L. 329.

¹¹⁰ N. Y. Laws, 1886, ch. 560, p. 787.

¹¹¹ Pa. Sts. 1920, secs. 20065-20080.

¹¹² 30 Stat. at L. 214.

¹¹³ S. D. Laws, 1897, ch. 80, p. 230.

¹¹⁴ Neb. Laws, 1897, ch. 121, p. 458.

¹¹⁵ 31 Stat. at L. 1465.

¹¹⁶ 23 Del. Laws, 1905, ch. 5, p. 12.

¹¹⁷ N. J. Laws, 1905, ch. 42, p. 67. Further legislation in furtherance of the compact was enacted by New Jersey on May 7, 1907. See N. J. Laws, 1907, ch. 131, p. 302.

¹¹⁸ 35 Stat. at L. 1160.

¹¹⁹ Tenn. Laws, 1901, ch. 85, p. 128.

¹²⁰ Va. Acts, 1901 (Ext. Sess.) ch. 59, p. 57.

¹²¹ 33 Stat. at L. 820.

¹²² Neb. Laws, 1905, ch. 234, p. 792.

¹²³ S. D. Laws, 1903, ch. 16, p. 28.

¹²⁴ S. D. Laws, 1905, ch. 95, p. 118.

¹²⁵ 34 Stat. at L. 858.

assent to any agreement which might be made between these States dealing with their boundary line on the Mississippi and their penal jurisdiction over its waters.

(b) By the Act of March 19, 1918,¹²⁶ Mississippi appointed a boundary commissioner to negotiate a compact which was not binding until ratified by the Mississippi legislature. No evidence of action by Louisiana has been found.

(21) *Mississippi and Arkansas Agreement of 1909:*

(a) By the Joint Resolution of January 26, 1909,¹²⁷ Congress gave assent to any agreement which might be made between these States dealing with their boundaries and their penal jurisdiction over the Mississippi River.

(b) By the Act of May 31, 1909,¹²⁸ Arkansas ratified an agreement that had been concluded between the two States. Mississippi ratified this agreement on April 12, 1910.¹²⁹

(22) *Arkansas and Tennessee Agreement of 1909:*

(a) By the Joint Resolution of February 4, 1909,¹³⁰ Congress gave assent to any agreement which might be reached by the two States dealing with their boundaries and their penal jurisdiction over the Mississippi River.

(b) By the Act of May 31, 1909,¹³¹ Arkansas ratified an agreement to become effective when similar action was taken by Tennessee. No evidence of action by Tennessee has been found.

(23) *Missouri and Kansas Agreement of 1910:*

(a) By the Joint Resolution of June 10, 1910,¹³² Congress gave its assent to any agreement which might be entered into by the two States dealing with their boundaries and their criminal jurisdiction over boundary waters.

(b) No evidence of action taken by either State in furtherance of such an agreement has been found.

(24) *Oregon and Washington Agreement of 1910:*

(a) By the Joint Resolution of June 10, 1910,¹³³ Congress gave its assent to any agreement that might be reached between the two States dealing with their boundaries.

(b) No evidence of action taken under this has been found, but by the Act of February 23, 1915,¹³⁴ Oregon provided for a change in its boundary conditioned on the assent of Washington and Congress.

(25) *Lake Michigan Agreement of 1910:*

(a) By the Joint Resolution of June 22, 1910,¹³⁵ Congress gave its

¹²⁶ Miss. Laws, 1918, ch. 262, p. 317.

¹²⁷ 35 Stat. at L. 1161.

¹²⁸ Ark. Laws, 1909, ch. 290, p. 888.

¹²⁹ Miss. Laws, 1910, ch. 141, p. 132.

¹³⁰ 35 Stat. at L. 1163.

¹³¹ Ark. Laws, 1909, ch. 290, p. 888.

¹³² 36 Stat. at L. 881.

¹³³ 36 Stat. at L. 881.

¹³⁴ Ore. Laws, 1915, ch. 150, p. 179.

¹³⁵ 36 Stat. at L. 882.

assent to any agreement which might be reached by Wisconsin, Illinois, Indiana, and Michigan as to their respective criminal jurisdiction over the waters of Lake Michigan.

(b) No evidence of action under the terms of this Resolution has been found.

(26) *Forestry Conservation Agreement of 1911:*

(a) By the Act of March 1, 1911,¹³⁶ Congress gave its assent to any agreements which might be reached between States affecting the conservation of forests

(b) No evidence of any such agreements has been found.

(27) *Massachusetts and Connecticut Boundary Agreement of 1914:*

(a) Congressional assent was given by the Act of October 3, 1914.¹³⁷

(b) The agreement was ratified by Massachusetts by the Act of March 10, 1908,¹³⁸ and by Connecticut by the Act of June 6, 1913.¹³⁹

(28) *Minnesota, North Dakota, and South Dakota Agreements of 1917:*

(a) By the Act of August 8, 1917,¹⁴⁰ Congress authorized these States to enter into agreements for the improvement of navigation and the control of floods on their boundary waters and their tributaries. The Secretary of War was also authorized to make a survey of any project which might be proposed for this purpose by the States.

(b) By two Acts passed on April 18, 1921,¹⁴¹ Minnesota provided for co-operation of this nature with the United States and South and North Dakota, investing the board of directors of any drainage or flood control district to enter into contracts with similar agencies of these two States. By the Act of March 13, 1919,¹⁴² North Dakota created a Flood Control Commission with authority to co-operate with South Dakota and Minnesota, and the United States in making surveys in preparation for flood control projects. By a Resolution of March 5, 1921,¹⁴³ this authority was extended to include Canada. By the Act of February 24, 1917, sec. 3,¹⁴⁴ South Dakota granted her drainage commissioners the same powers.

(29) *Oregon and Washington Agreement of 1915:*

(a) By the Act of April 8, 1918,¹⁴⁵ Congress gave its assent to the

¹³⁶ 36 *ibid.* 961, as amended by the Act of March 3, 1925, 68 Cong. 2d sess. Public No. 591.

¹³⁷ 38 *ibid.* 727.

¹³⁸ Mass. Acts, 1908, ch. 192, p. 141.

¹³⁹ 16 Conn. Spec. Laws, No. 365, p. 1104.

¹⁴⁰ 40 Stat. at L. 250, 266.

¹⁴¹ Minn. Laws, 1921, ch. 326, sec. 3, 481; Minn. Laws, 1921 ch. 327, p. 488.

¹⁴² N. D. Laws, 1919, ch. 115, p. 138.

¹⁴³ N. D. Laws, 1921, 241.

¹⁴⁴ S. D. Laws, 1916-1917, ch. 209, pp. 271, 274.

¹⁴⁵ 40 Stat. at L. 515.

agreement concluded between Washington and Oregon for the protection of fish in the Columbia River.

(b) By the Act of February 23, 1915,¹⁴⁶ Oregon entered into a compact to the effect that no change should be made in the fishing codes of either State save by mutual consent. This identical provision was adopted by Washington in its Fishing Code of March 6, 1915.¹⁴⁷

(c) In *Olin v. Kitzmiller* (1922) 259 U. S. 260, 42 Sup. Ct. 510, subsequent legislation respecting the rights of aliens to fish in the river was held not to violate the terms of the compact. Similar results were reached in *State v. Gates* (1922) 104 Ore. 112, 206 Pac. 863; *Alsor v. Kendall* (1924, Ore.) 227 Pac. 286. The compact was held not to apply to the subject-matter of the complaint in *Union Fisherman's Co-operative Packing Co. v. Shoemaker* (1920) 98 Ore. 659, 193 Pac. 476, rehearing denied in (1921) 98 Ore. 679, 194 Pac. 854; *Vail v. Seaborg*, (1922) 120 Wash. 126, 207 Pac. 15. In *State v. Belknap* (1918) 104 Wash. 221, 176 Pac. 5, a section of the Washington Fishing Code was held unconstitutional in that it exceeded the proper limits of the state police power.

(30) *Wisconsin and Minnesota Boundary Agreement of 1917:*

(a) Congressional assent was given by the Act of September 13, 1918.¹⁴⁸

(b) By the Act of March 26, 1917,¹⁴⁹ Minnesota ceded certain territory to Wisconsin, to be effective upon a cession of corresponding territory by Wisconsin and the consent of Congress, and authorizing the governor to give formal acceptance to such act of cession by Wisconsin. A similar act was passed by Wisconsin on April 9, 1917.¹⁵⁰

(31) *New York and New Jersey Tunnel Agreement of 1919:*

(a) Congressional assent was given by the Act of July 11, 1919.¹⁵¹

(b) By the Act of February 14, 1918,¹⁵² the New Jersey legislature authorized the appointment of a commission with power to enter into contracts for the construction and operation of "vehicular tunnels" under the Hudson River. By the Act of April 8, 1919,¹⁵³ this commission was authorized to enter into compacts with commissioners from New York, and form a joint commission for the development of this scheme. By the Act of April 11, 1919,¹⁵⁴ a commission was appointed by New York, and this commission was given the power to enter into compacts that would be binding upon New York. An agreement between the commissioners was reached on December 30, 1919, which was ratified by the New Jersey legislature on April 5, 1920.¹⁵⁵

¹⁴⁶ Or. Laws, 1915, sec. 20, pp. 226, 233.

¹⁴⁷ Wash. Laws, 1915, ch. 31, sec. 116. ¹⁵¹ 41 Stat. at L. 158.

¹⁴⁸ 40 Stat. at L. 959. ¹⁵² N. J. Laws, 1918, ch. 50, p. 142.

¹⁴⁹ Minn. Laws, 1917, ch. 116, p. 142. ¹⁵³ N. J. Laws, 1919, ch. 70, p. 128.

¹⁵⁰ Wis. Laws, 1917, ch. 64, p. 171. ¹⁵⁴ N. Y. Laws, 1919, ch. 178, p. 758.

¹⁵⁵ N. J. Laws, 1920, ch. 76, p. 140. By the Act of May 11, 1920, New Jersey provided for the issuance of bonds in an amount not exceeding \$28,000,000 to

(c) This agreement has not been passed upon by the courts.

(d) Reports: Reports of the New Jersey Interstate Bridge and Tunnel Commission (1920-1924); Reports of the New York State Bridge and Tunnel Commission (1920-1924). A complete history of the movement culminating in the Compact of 1919 and these commissions can be found in the 1920 Reports of these Commissions.

(32) *South Dakota and Minnesota Agreement of 1917:*

(a) By the Joint Resolution of March 4, 1921,¹⁵⁶ Congress consented to an agreement that had already been reached between these two States and was under consideration by North Dakota, Wisconsin, Iowa and Nebraska, dealing with the penal jurisdiction to be exercised by them over their boundary waters.

(b) The agreement was ratified by Minnesota on April 20, 1917,¹⁵⁷ and by South Dakota on February 13, 1917.¹⁵⁸

(33) *Pennsylvania and Delaware Boundary Agreement of 1921:*

(a) Congressional assent was given by the Joint Resolution of June 30, 1921.¹⁵⁹

(b) The agreement was ratified by Pennsylvania on June 22, 1897,¹⁶⁰ and by Delaware on March 28, 1921.¹⁶¹

(34) *Colorado River Compact of 1921:*

(a) Congressional assent to negotiate an agreement for the equitable apportionment of the waters of the Colorado River among the seven States forming the basin of this river, was given on August 19, 1921.¹⁶² The agreement was to be concluded before January 1, 1923, and thereafter subject to approval by the State legislatures.

(b) Commissioners to negotiate such an agreement were appointed by these seven States in 1921—by Wyoming on February 22, 1921,¹⁶³ by Arizona on March 5, 1921,¹⁶⁴ by New Mexico on March 11, 1921,¹⁶⁵ by Utah on March 14, 1921,¹⁶⁶ by Nevada on March 21, 1921,¹⁶⁷ by Colorado on April 2, 1921,¹⁶⁸ and by California on May 12, 1921.¹⁶⁹ The agreement was concluded at Sante Fe, New Mexico, on November 24, 1922. It was ratified by Wyoming on February 2, 1923,¹⁷⁰ by New Mexico on February 7, 1923,¹⁷¹ by Utah on January 29, 1923,¹⁷²

pay for the construction of bridges and tunnels across the Delaware and Hudson Rivers. See N. J. Laws, 1920, ch. 352, p. 863.

¹⁵⁶ 41 Stat. at L. 1447.

¹⁵⁷ Minn. Laws, 1916-1917, ch. 505, p. 850.

¹⁵⁸ S. D. Laws, 1916-1917, ch. 248, p. 411.

¹⁵⁹ 42 Stat. at L. 104.

¹⁶⁰ Pa. Laws, 1897, ch. 152, p. 182.

¹⁶¹ Dela. Laws, 1921, ch. 4, p. 7.

¹⁶² N. Mex. Laws, 1921, ch. 121, p. 217.

¹⁶³ Utah Laws, 1921, ch. 68, p. 184.

¹⁶⁴ Nev. Laws, 1920-1921, ch. 115, p. 190.

¹⁶⁵ Colo. Laws, 1921, ch. 246, p. 811.

¹⁶⁶ Calif. Sts. 1921, ch. 88, p. 85.

¹⁶⁷ Utah Laws, 1923, ch. 5, p. 4.

¹⁶⁸ 42 Stat. at L. 171.

¹⁶⁹ Wyo. Laws, 1921, ch. 120, p. 166.

¹⁷⁰ Ariz. Laws, 1921, ch. 46, p. 53.

¹⁷¹ Wyo. Laws, 1923, ch. 3, p. 3.

¹⁷² N. Mex. Laws, 1923, ch. 6, p. 7.

by California on February 9, 1923,¹⁷³ by Nevada on January 27, 1923,¹⁷⁴ and by Colorado on April 2, 1923.¹⁷⁵ Arizona has as yet failed to ratify.¹⁷⁶

(c) The compact has, of course, not yet come before the courts.

(d) Reports: Annual Report of the Secretary of Commerce for 1922, p. 10; Annual Report of the Secretary of Commerce for 1923, p. 25; Report of Delph E. Carpenter, *in re* H. R. 6821, 67 Cong. 1st sess. June 4, 1921; House Doc. 605, 67 Cong. 4th sess.; Cal. Leg. 45th sess., *Assembly Daily Journal*, January 9, January 25, 1923, *Senate Daily Journal*, February 1, 1923, and reports therein contained; Statement before Federal Power Commission by Arizona Colorado River Conference Commission, September, 24, 1923; Pamphlets Containing Official Reports, etc. (Harvard Law School Library).

(35) *Port of New York Authority Agreement of 1921:*

(a) Congressional assent was given by Joint Resolution of August 23, 1921,¹⁷⁷ and to the supplemental agreement by the Joint Resolution of July 1, 1922.¹⁷⁸

(b) Commissioners were appointed by New York on May 8, 1917,¹⁷⁹ and by New Jersey on March 26, 1917,¹⁸⁰ to recommend a policy to be pursued by the two States by "legislative enactment, treaty, or otherwise," for the development of the Port of New York. New York on April 2, 1921,¹⁸¹ and New Jersey on April 7, 1921,¹⁸² authorized these commissioners to enter into the compact that had been proposed, creating the Port of New York Authority. Commissioners were authorized to be appointed to this newly-created Port Authority by New York on April 15, 1921,¹⁸³ and by New Jersey on April 7, 1921.¹⁸⁴ The comprehensive plan for the development of the port was agreed to by New York on February 24, 1922,¹⁸⁵ and by New Jersey on February 23, 1922.¹⁸⁶ Additional administrative powers were conferred upon the Port of New York Authority by New York under the Act of May 5, 1924.¹⁸⁷ Authority to construct, operate and maintain a bridge from Staten Island to Elizabeth was conferred upon the Port Authority by New York under the Act of April 18, 1924,¹⁸⁸

¹⁷³ Calif. Sts. 1923, ch. 17, p. 1530.

¹⁷⁴ Nev. Laws, 1923, No. 2, p. 393. See also Act of Feb. 20, 1923, as amended by Act of Mar. 20, 1923, Nev. Laws, 1923, chs. 29, 169, pp. 35, 286.

¹⁷⁵ Colo. Laws, 1923, ch. 189, p. 684.

¹⁷⁶ Message of Gov. Hunt to Sixth State Legislature on Jan. 8, 1923, p. 30; Special Message of Gov. Hunt to Sixth State Legislature on Jan. 23, 1923; Statement before Federal Power Commission of Arizona-Colorado River Conference Committee. See also Olson, *Arizona's Point of View with Respect to Ratification* (unpublished).

¹⁷⁷ 42 Stat. at L. 174.

¹⁷⁸ 42 Stat. at L. 822.

¹⁷⁹ N. Y. Laws, 1917, ch. 426, p. 1325.

¹⁸⁰ N. J. Laws, 1917, ch. 130, p. 288.

¹⁸¹ N. Y. Laws, 1921, ch. 154, p. 492.

¹⁸² N. J. Laws, 1921, ch. 151, p. 412.

¹⁸³ N. Y. Laws, 1921, ch. 203, p. 841.

¹⁸⁴ N. J. Laws, 1921, ch. 152, p. 423.

¹⁸⁵ N. Y. Laws, 1922, ch. 43, p. 61.

¹⁸⁶ N. J. Laws, 1922, ch. 9, p. 25.

¹⁸⁷ N. Y. Laws, 1924, ch. 623, p. 1156.

¹⁸⁸ N. Y. Laws, 1924, ch. 186, p. 406.

and by New Jersey under the Act of March 11, 1924.¹⁸⁹ Similar authority to construct, operate and maintain a bridge from Perth Amboy to Tottenville was conferred upon the Port Authority by New York under the Act of April 23, 1924,¹⁹⁰ and by New Jersey under the Act of March 11, 1924.¹⁹¹

(c) An injunction to prevent the commissioners from entering into this projected agreement was denied by the court in *City of New York v. Willcox* (1921, Sup. Ct.) 115 Misc. 351, 189 N. Y. Supp. 724. The Compact was considered in *Newark v. C. R. R. of N. J.* (1925) 45 Sup. Ct. 328.

(d) Reports: Joint Report of New York, New Jersey Port and Harbor Development Commission (1920); Port of New York Authority, Annual Reports (1921-1925).

(36) *Kansas City Waterworks Agreement of 1922:*

(a) Congressional assent was given by the Joint Resolution of September 22, 1922.¹⁹²

(b) Kansas and Missouri entered into an agreement for the development of waterworks at Kansas City, Kansas, and Kansas City, Missouri. The agreement contemplated co-operation in the regulation of these plants, whose facilities were situated in both States, and particularly provided for immunity from taxation. This agreement was ratified by Kansas on March 18, 1921,¹⁹³ and by Missouri in the same year.¹⁹⁴

(c) The consent of Congress was held to have been properly given in *State v. Joslin* (1924, Kan.) 227 Pac. 543, commented on by Wigmore in (1925) 19 ILL. L. REV. 479.

(37) *New York and Connecticut Boundary Agreement of 1911-1912:*

(a) Congressional assent was given by the Act of January 10, 1925.¹⁹⁵

(b) The agreement concluded on January 3, 1911, was ratified by Connecticut on June 6, 1913,¹⁹⁶ and by New York on April 15, 1912.¹⁹⁷ The ratifying act of New York was amended on February 14, 1913.¹⁹⁸

(38) *The La Plata River Compact of 1923:*

(a) Congressional assent was given by the Act of January 29, 1925.¹⁹⁹

¹⁸⁹ N. J. Laws, 1924, ch. 149.

¹⁹⁰ N. Y. Laws, 1924, ch. 230, p. 457.

¹⁹¹ N. J. Laws, 1924, ch. 125. Congressional assent for the construction of both these bridges has been recently given. See *Boston Herald*, Feb. 28, 1925.

¹⁹² 42 Stat. at L. 1058.

¹⁹³ Kan. Laws, 1921, ch. 304, p. 471.

¹⁹⁴ *Mo. House Journ.* 1921, 1258; *Mo. Sen. Journ.* 1921, 932.

¹⁹⁵ 68th Cong. 2nd sess. Public No. 316.

¹⁹⁶ 16 Conn. Spec. Laws, 1104.

¹⁹⁷ N. Y. Laws, 1912, ch. 352, p. 692.

¹⁹⁸ N. Y. Laws, 1913, ch. 18, p. 27.

¹⁹⁹ 66 Cong. Rec. 2831, 68th Cong. 2nd sess.

(b) Commissioners were appointed by New Mexico on March 12, 1921,²⁰⁰ and by Colorado on April 2, 1921.²⁰¹ The compact negotiated by them was ratified by New Mexico on February 7, 1923,²⁰² and by Colorado on April 13, 1923.²⁰³

(39) *The Columbia River Compact of 1925:*

(a) By the Act of March 4, 1925,^{203a} Congress assented to compacts that might be entered into by Washington, Idaho, Oregon, and Montana for the apportionment of the water supply of the Columbia River, on the condition that a representative of the Department of the Interior and the War Department should participate in the negotiations as representatives of the United States and report to Congress any agreement that might be entered into.

(b) No action has as yet been undertaken by these States.

IV.

COMPACTS AWAITING RATIFICATION BY THE STATES AND THE
CONSENT OF CONGRESS

(1) *The South Platte River Compact:*

The commissioner appointed by Colorado on April 2, 1921,²⁰⁴ had his appointment continued by the Act of April 3, 1923.²⁰⁵ Nebraska appointed a commissioner on April 28, 1923.²⁰⁶ The compact, concluded between them, was ratified by Nebraska on May 3, 1923,²⁰⁷ It awaits ratification by Colorado and by the United States.

(2) *The Delaware River Tri-State Compact:*

Commissioners were appointed by New York on March 22, 1923,²⁰⁸ by New Jersey on March 19, 1923,²⁰⁹ and by Pennsylvania on May 24, 1923.²¹⁰ A compact, dealing with the development and diversion of the waters of the Delaware River, the construction of works in the river, the disposal of sewage, the maintenance of an adequate forest cover in the drainage area, the condemnation of riparian rights for the purposes of hydraulic construction, and the creation of a supervising joint administrative agency, was negotiated on January 24, 1925.²¹¹ It awaits ratification by the legislatures of the three States and the assent of Congress.^{211a}

²⁰⁰ N. Mex. Laws, 1921, ch. 147, p. 413.

²⁰⁵ Colo. Laws, 1923, ch. 190, p. 694.

²⁰¹ Colo. Laws, 1921, ch. 244, p. 803.

²⁰⁶ Neb. Laws, 1923, ch. 123, p. 297.

²⁰² N. Mex. Laws, 1923, ch. 7, p. 7.

²⁰⁷ Neb. Laws, 1923, ch. 125, p. 299.

²⁰³ Colo. Laws, 1923, ch. 191, p. 696.

²⁰⁸ N. Y. Laws, 1923, ch. 56, p. 63.

^{203a} 68 Cong. 2d sess. Public No. 609.

²⁰⁹ N. J. Laws, 1923, ch. 94, p. 180.

²⁰⁴ Colo. Laws, 1921, ch. 243, p. 799.

²¹⁰ Pa. Laws, 1923, ch. 239, p. 448.

²¹¹ Pamphlet Copy (Harv. Law School Library).

^{211a} See Message of Governor Silzer to New Jersey Legislature on Jan. 27, 1925.

(3) *The Pecos River Compact:*

Commissioners were appointed by New Mexico on March 8, 1923,²¹² and by Texas on March 24, 1923,²¹³ for the purpose of negotiating a compact dealing with the distribution of the waters of the Pecos River for irrigation purposes. The agreement, concluded on December 19, 1924, and further amended on February 10, 1925, awaits action by the legislatures of the two States and Congress.²¹⁴

V.

ACTION BY STATES PROPOSING COMPACTS

(1) *Nebraska:*

By the Act of March 30, 1905,²¹⁵ Nebraska requested action on the part of the States of Missouri, Iowa, and South Dakota, with the consent of Congress, concerning jurisdiction to be exercised by them over any land which might be left adjoining one of these States as a consequence of a change in the course of the Missouri River.

(2) *Colorado and Kansas:*

For the purpose of negotiating a compact dealing with the distribution of the waters of the Arkansas River for irrigation purposes, Colorado appointed a commissioner on April 2, 1921,²¹⁶ and continued this appointment in force by the Act of April 3, 1923.²¹⁷ A commissioner was also appointed by Kansas on March 21, 1923.²¹⁸

(3) *Colorado and New Mexico:*

For the purpose of negotiating a compact dealing with the distribution of the waters of the Rio Grande River for irrigation purposes, Colorado appointed a commissioner on March 20, 1923.²¹⁹ New Mexico appointed a commissioner on March 12, 1923.²²⁰

(4) *Colorado:*

For the purpose of negotiating a compact dealing with the distribution of the waters of the Laramie River for irrigation purposes, Colorado appointed a commissioner on April 2, 1921.²²¹

VI.

INTERSTATE AGREEMENTS WITHOUT CONGRESSIONAL ASSENT

(1) *Virginia and Tennessee Boundary Agreement of 1803:*

Commissioners were appointed by Tennessee on November 13, 1801,²²² and by Virginia on January 13, 1800.²²³ The agreement was

²¹² N. Mex. Laws, 1923, ch. 64, p. 104. ²¹³ Tex. Laws, 1923, ch. 133, p. 274.

²¹⁴ Pamphlet Copy (Harv. Law School Library).

²¹⁵ Neb. Laws, 1905, ch. 153, p. 599.

²¹⁶ Colo. Laws, 1923, ch. 192, p. 702.

²¹⁷ Colo. Laws, 1921, ch. 242, p. 795.

²¹⁹ N. Mex. Laws, 1923, ch. 112, p. 175.

²¹⁸ Colo. Laws, 1923, ch. 190, p. 694.

²²¹ Colo. Laws, 1921, ch. 245, p. 807.

²²⁰ Kan. Laws, 1923, ch. 222, p. 313.

²²² 1 Scott, Tenn. Laws, ch. 49, p. 736.

²²³ Va. Laws, 1800, 33.

ratified by Virginia on January 22, 1803.²²⁴ and by Tennessee on November 3, 1803.²²⁵

In *Robinson v. Campbell* (1818, U. S.) 3 Wheat. 212, the Supreme Court assumed the validity of the compact. In *Virginia v. Tennessee* (1893) 148 U. S. 503, the Supreme Court held that the compact was to be deemed to have had the implied assent of Congress. In *Tennessee v. Virginia* (1900) 177 U. S. 501, 20 Sup. Ct. 715, the Court decreed the re-marking and re-ascertainment of the line established by the 1803 agreement. A further development of this dispute was settled by compact in 1901.²²⁶

(2) *North Carolina and South Carolina Boundary Agreements of 1813 and 1815:*

Commissioners were appointed by North Carolina on November 21, 1803,²²⁷ and by South Carolina on December 21, 1804.²²⁸ An agreement was entered into on July 11, 1808, and ratified by North Carolina in the same year.²²⁹ South Carolina, however, on December 17, 1808, passed a resolution²³⁰ calling for more definiteness in the description of the boundaries. On December 14, 1809, the South Carolina boundary commission reported to the legislature that a further change in the agreement was necessary.²³¹ A provisional agreement was concluded on September 4, 1813, and ratified by South Carolina on December 17, 1813,²³² and by North Carolina during the same year.²³³ Commissioners were appointed by North Carolina in 1814 to run the line established by this agreement.²³⁴ Finally a convention was entered into between the commissioners of the two States, on November 2, 1815, ratified by South Carolina on December 15, 1815,²³⁵ and by North Carolina during the same year.²³⁶

(3) *North Carolina and Georgia Boundary Agreement of 1818:*

Commissioners were appointed for this purpose by Georgia on December 10, 1804,²³⁷ and by North Carolina during the same year.²³⁸ An agreement concluded between them on June 18, 1807, together with a supplemental agreement of June 27, 1807, was ratified by North Carolina.²³⁹ Georgia, however, suspecting that its commissioners had

²²⁴ Va. Rev. Code, 1819, 63.

²²⁵ 1 Scott, Tenn. Laws, ch. 58, p. 798.

²²⁶ Appx. A, III, (17); *supra*.

²²⁷ 2 Martin, N. C. Rev. Acts, 1790-1803, 214.

²²⁸ 1 Cooper, S. C. Sts. 415.

²²⁹ 2 N. C. Rev. Acts, 1796-1820, ch. 717, p. 1110.

²³⁰ S. C. Acts, 1808, 106. ²³¹ S. C. Acts, 1809, 99.

²³² 1 Cooper, S. C. Sts. 416.

²³³ 2 N. C. Rev. Acts, 1796-1820, ch. 717, p. 1280.

²³⁴ 2 *ibid.* ch. 880, p. 1315. ²³⁵ 1 Cooper, S. C. Sts. 419.

²³⁶ 2 N. C. Rev. Acts, 1796-1820, ch. 885, p. 1318.

²³⁷ Clayton, Ga. Laws, 1800-1810, 189.

²³⁸ 2 N. C. Rev. Acts, 1796-1820, ch. 654, p. 1013.

²³⁹ 2 *ibid.* ch. 717, p. 1110.

betrayed her interests,²⁴⁰ expressed dissatisfaction with the line that had thus been marked and appointed new commissioners.²⁴¹ North Carolina refused to appoint new commissioners, even though in the next year in December 1808, Georgia passed a resolution requesting action by North Carolina.²⁴² Her continued refusal to act caused Georgia on December 15, 1809, to address a memorial to Congress praying for the appointment of a commissioner by the United States to run the boundary line between the two States.²⁴³ Again failure to secure any response from Congress caused the Georgia legislature on December 15, 1810, to appoint new commissioners and request North Carolina to do the same.²⁴⁴ No action by North Carolina followed this request. Finally, on November 13, 1818, commissioners were again appointed to run the line with commissioners from North Carolina.²⁴⁵ On this occasion North Carolina acceded to Georgia's request, and the line thus run, corresponding with the line that had been agreed upon in 1807, was ratified and confirmed by North Carolina in 1819,²⁴⁶ and acquiesced in by Georgia.

(4) *North Carolina and Tennessee Boundary Agreement of 1821:*

Commissioners were appointed by both States in 1796²⁴⁷ to survey the line in accordance with the Act of cession by North Carolina of the territory comprising the State of Tennessee to the United States in 1789.²⁴⁸ Differences having arisen as to the exact location of this line, in 1819 North Carolina appointed commissioners to settle and adjust these differences.²⁴⁹ Tennessee appointed commissioners during the following year.²⁵⁰ Their report, agreeing upon the location of the boundary line, was ratified by both States in 1821.²⁵¹

In *North Carolina v. Tennessee* (1914) 235 U. S. 1, 35 Sup. Ct. 8, the Court made a determination of what the judgment of the commissioners, as to the exact location of the line agreed upon by them, was with reference to the agreement of 1821. It was held that the question of whether this agreement required for its validity the consent of Congress was foreclosed by the decision in *Virginia v. Tennessee* (1893) 148 U. S. 503, 13 Sup. Ct. 728. The agreement was also construed in the cases of *Belding v. Hebard* (1900, C. C. A. 6th) 103 Fed. 532, and *Stevenson v. Fain* (1902, C. C. A. 6th) 116 Fed. 147.

²⁴⁰ Res. of Dec. 7, 1807, Clayton, *op. cit.* 683.

²⁴¹ Res. of Dec. 5, 1807, Clayton, *op. cit.* 682.

²⁴² Clayton, *op. cit.* 689.

²⁴⁴ *Ibid.* 694.

²⁴³ *Ibid.* 690.

²⁴⁵ Ga. Acts, 1818, 219.

²⁴⁶ 2 N. C. Rev. Acts, 1796-1820, ch. 1005, p. 1487.

²⁴⁷ 2 N. C. Rev. Acts, 1796-1820, ch. 461, p. 816.

²⁴⁸ In 1784, North Carolina passed an act of cession. See 1 N. C. Rev. Acts, 1715-1796, ch. 299, p. 599. This was accepted by the United States on April 2, 1790. See 1 Stat. at L. 106.

²⁴⁹ N. C. Laws, 1819, ch. 11, p. 18.

²⁵⁰ 2 Scott, Tenn. Laws, ch. 22, p. 635.

²⁵¹ 2 N. C. Rev. Sts. 1837, 96; Tenn. Code, 1857-58, tit. 2, ch. 1, art. 1, sec. 61, p. 80

(5) *South Carolina and Georgia Navigation Agreement of 1825:*

In 1820, at the instance of South Carolina, commissioners were appointed by Georgia and South Carolina to negotiate a convention concerning the improvement of navigation on the Savannah and Tugaloo Rivers. This convention, as negotiated, was to be effective only upon ratification by the legislatures of both these States and the consent of Congress. It was ratified by Georgia on December 20, 1823,²⁵² and by South Carolina on December 20, 1825.²⁵³ However, Congress never assented to the compact and it failed to come into effect. On November 29, 1828, the Georgia legislature passed a resolution declaring "that under present circumstances, it is impolitic on the part of Georgia, to attempt to procure a full and entire ratification of the Convention with South Carolina."²⁵⁴

(6) *Georgia and Tennessee Agreement of 1837:*

By the Act of January 24, 1838,²⁵⁵ Tennessee granted a railroad company the privilege of a right of way through the State, on condition that upon the extension of its line through Georgia the latter State would give it the same privileges. By the Act of December 23, 1847,²⁵⁶ Georgia granted the railroad the same privileges.

In *Union Bridge R. R. Co. v. E. T. & Ga. R. R. Co.* (1853) 14 Ga. 327, the Court held that this was not such a compact as required the assent of Congress in order to make it valid.²⁵⁷

(7) *Vermont and Canada Extradition Agreement of 1839:*

The governor of Vermont authorized the seizure and extradition of one Holmes, who had committed a crime in Canada and fled to Vermont. His writ of *habeas corpus* was denied by the lower Court, and the Supreme Court of the United States being divided upon the appeal, the decision was affirmed. *Holmes v. Jennison* (1840, U. S.) 14 Pet. 540. Taney C. J., assumes that there was a tacit agreement between the Governor of Vermont and the Canadian authorities to deliver Holmes into the custody of the latter,²⁵⁸ and asserts that such an

²⁵² Ga. Laws, 1823, 102.

²⁵³ 1 Cooper, S. C. Sts. 422.

²⁵⁴ Ga. Laws, 1828, 239.

²⁵⁵ Tenn. Laws, 1837-1838, ch. 221, p. 319.

²⁵⁶ Ga. Laws, 1847, 171.

²⁵⁷ In *St. Louis & San Francisco Ry. Co. v. James* (1896) 161 U. S. 545, 562, 16 Sup. Ct. 621, 627, the Court said: "It is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State. Such legislation on the part of two or more States is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States."

²⁵⁸ It is submitted that such an assumption is unwarranted in the face of the express assertion that there was no request by Canada for extradition. See *Holmes v. Jennison* (1840, U. S.) 14 Pet. 540, 595.

agreement, without the assent of Congress, is a violation of the Compact Clause of the Constitution.²⁵⁹

(8) *Massachusetts and Connecticut Agreement of 1871:*

By the Act of April 5, 1872,²⁶⁰ the Massachusetts legislature in conjunction with the Connecticut legislature, who had already enacted the necessary legislation on July 26, 1871,²⁶¹ accomplished the merger of a Connecticut and Massachusetts railway corporation in order to subject this corporation to the laws of each State as to the portion of the road within its boundaries.

In *Mackay v. New York, N. H. & H. R. R. Co.*, (1909) 82 Conn. 73, 72 Atl. 583, it was held that this was not a compact, within the meaning of the Constitution, requiring the assent of Congress.²⁶²

(9) *Louisiana and Arkansas Levee Agreement of 1806:*

In 1886 Louisiana provided that certain State taxes should be placed to the credit of certain levee districts "to be used...in constructing, repairing, and maintaining any and all levees in the State of Arkansas (said State consenting) that will protect said district from overflow."²⁶³ There is no evidence that Arkansas consented by any other action than mere acquiescence.

In *Fisher v. Steele* (1887) 39 La. Ann. 447, 1 So. 882 (1887), this Act and action under it were held not to be in violation of the Compact Clause of the Federal Constitution.

(10) *New Hampshire and Massachusetts Boundary Agreements of 1889 and 1894:*

An agreement, reached between the commissioners of these two States on August 16, 1888, defining their respective boundaries, was assented to by Massachusetts on June 16, 1890,²⁶⁴ and by New Hampshire on August 16, 1889.²⁶⁵ A similar agreement, concluded on June 13, 1894, was assented to by Massachusetts on May 25, 1895,²⁶⁶ and by New Hampshire on June 30, 1895.²⁶⁷

(11) *North Dakota Drainage Agreement of 1909:*

The joint drainage boards of two North Dakota counties entered into a contract on February 24, 1909, with the municipality of Arthur, Manitoba, permitting the drainage boards to make improvements extending fourteen miles across the Canadian border, providing that the

²⁵⁹ Taney's *dictum* has been cited with approval in *United States v. Rauscher*, (1886) 119 U. S. 407, 414, 7 Sup. Ct. 234, 237, and *People v. Curtis* (1872) 50 N. Y. 321, 325.

²⁶⁰ Mass. Acts, 1872, ch. 171, p. 124. ²⁶¹ 7 Conn. Spec. Laws, 252.

²⁶² So also *Dover v. Portsmouth Bridge* (1845) 17 N. H. 200, which held that the incorporation of a bridge company by two States, to construct a bridge across the boundary river between them, was no violation of the compact clause.

²⁶³ La. Acts, 1886, No. 79, p. 120. ²⁶⁴ N. H. Laws, 1889, ch. 159, p. 143.

²⁶⁵ 16 Mass. Spec. Laws, ch. 73, p. 546. ²⁶⁶ 17 Mass. Spec. Laws, ch. 106, p. 787.

²⁶⁷ N. H. Laws, 1895, ch. 124, p. 488.

expenses of these improvements would be borne by the North Dakota drainage boards, who should also be surety to the municipality of Arthur for any taxes or losses which might result as a consequence of such construction, and that the construction of all additional improvements were to be controlled by the municipality of Arthur and the North Dakota joint drainage board.

In *McHenry County v. Brady* (1917) 37 N. D. 59, 163 N. W. 540, it was held that such an agreement was not a violation of the Compact Clause of the Federal Constitution.

APPENDIX B.

SUMMARY OF SELECTED BOUNDARY CONTROVERSIES

I.

COLONIAL PERIOD

(1) *New Hampshire and Massachusetts Boundary Controversy of 1726-1768:*

A dispute over the boundary line between these two provinces had been a continuing source of conflict between them.¹ In 1726 the controversy was submitted to the King for settlement.² Under advice from the King,³ the commissions that had been appointed by both the colonies⁴ were authorized to act in conjunction with each other.⁵ They failed, however, to come to an agreement. From 1731-1735 further attempts at settlement were made but without success.⁶ Finally in 1735, a royal commission was appointed.⁷ The claims of both provinces were presented to this commission,⁸ which in 1737 announced its decision.⁹ Both sides appealed from this decision to the Privy Council,¹⁰ but it was affirmed by the King in 1740.¹¹ Massachusetts, still

¹ For references to this dispute, see 9 Mass. Prov. Acts, 442, 608, 680, 701; 10 *ibid.* 19, 414; 11 *ibid.* 52. See, in general, Adams, *Founding of New England* (1921) 183, 216, 382; Akagi, *Town Proprietors of the New England Colonies* (1924) 194-195, 200; Smith, *Massachusetts and New Hampshire Boundary Line Controversy* (1909) Mass. Hist. Soc. Proceedings, 79.

² See 11 Mass. Prov. Acts, 108, 268.

³ See Instructions of the King to Governor Belcher, 2 Batchellor, N. H. Laws, 486.

⁴ See 11 Mass. Prov. Acts, 396.

⁵ See Act of Oct. 13, 1730, 11 Mass. Prov. Acts, 517; Act of Dec. 3, 1730, 2 Batchellor, *op. cit.* 521.

⁶ See 11 Mass. Prov. Acts, 610, 617; 12 *ibid.* 129.

⁷ See 2 Batchellor, *op. cit.* 768; 12 Mass. Prov. Acts, 392.

⁸ See 12 Mass. Prov. Acts, 396, 398, 400, 402.

⁹ See 2 Batchellor, *op. cit.* 770.

¹⁰ See 2 Batchellor, *op. cit.* 771, 773, 780, 783; 12 Mass. Prov. Acts, 407, 409. For prosecution of the appeal, see 12 Mass. Prov. Acts, 413, 559, 562.

¹¹ See 2 Batchellor, *op. cit.* 513, 634, 790.

dissatisfied with the decision,¹² made some further attempts to prosecute a supplementary appeal but without success.¹³

(2) *Massachusetts and Rhode Island Boundary Controversy of 1740:*

A dispute over a portion of the boundary line, which had been left unsettled by the agreement of 1710,¹⁴ continued over a period of twenty years. Various ineffective attempts to come to an agreement were made during this period.¹⁵ Finally in 1739 Rhode Island refused to appoint any more commissioners and determined to submit the dispute to the King.¹⁶ Royal commissioners were then appointed to settle the controversy,¹⁷ and the claims of the two provinces presented before them.¹⁸ Their decision¹⁹ was appealed from by Massachusetts.²⁰ Agents were appointed to prosecute the appeal before the Privy Council in England.²¹ The hearing upon the appeal was delayed for several years, but the judgment of the commissioners was eventually affirmed on May 28, 1746.²² Rhode Island in the same year appointed commissioners to run the line in accordance with this decision.²³ This *ex parte* act was never assented to by Massachusetts,²⁴ and in 1792 objected to as an unwarranted encroachment upon its boundaries.²⁵ It was one of the points left for determination by the Supreme Court in the suit by Rhode Island against Massachusetts, which was finally settled by a compromise between the attorneys-general of the two States.²⁶

(3) *New York and New Jersey Boundary Controversy of 1771:*

The boundary line run by a joint commission of New York and New Jersey in 1719²⁷ was affirmed by the Privy Council in 1756 as a

¹² Massachusetts' objection to the decision can be gathered from the numerous acts of the General Assembly appropriating land to aid grantees who had been ousted from their former holdings by New Hampshire. See 13 Mass. Prov. Acts, 272, 548; 15 *ibid.* 45.

¹³ See 14 Mass. Prov. Acts, 541; 18 *ibid.* 208, 211, 289.

¹⁴ See *supra* Appx. A, I, (4).

¹⁵ For appointments of boundary commissioners by Massachusetts, see 9 Mass. Prov. Acts, 680, 681; 10 *ibid.* 19; 12 *ibid.* 129, 572, 601, 660. For appointments by Rhode Island, see 4 R. I. Col. Rec. 431, 445, 453, 546, 559. See J. Noble, *An Incident in 1731 in the long Dispute of Massachusetts and Rhode Island over their Boundary Line* (1905) 19 Mass. Hist. Soc. Proc. 20.

¹⁶ See 4 R. I. Col. Rec. 562.

¹⁷ See 4 R. I. Col. Rec. 586, note.

¹⁸ See 12 Mass. Prov. Acts, 723, 726, 732.

¹⁹ See Mass. Sen. Doc. 1848, No. 14, Appx. 8.

²⁰ See 13 Mass. Prov. Acts, 24.

²¹ See 13 Mass. Prov. Acts, 75, 76, 77, 160, 232; 5 R. I. Col. Rec. 35, 116, 121. See also Acts of Privy Council (Col. Ser. Unbound Papers) sec. 470.

²² See Mass. Sen. Doc. 1848, No. 14, pp. 19, 43.

²³ See Mass. Sen. Doc. 1848, No. 14, Appx. 10.

²⁴ See *ibid.* Appx. 9.

²⁵ See *ibid.* Appx. 11.

²⁶ See *supra* Appx. A, III, (7).

²⁷ See N. J. Acts, 1719, 105.

provisional line until the true line of division should be determined by royal commissioners.²⁸ Such a commission was appointed in 1764 and the boundary was determined by them.²⁹ Although an appeal was taken from their decision,³⁰ New York, during the pendency of this appeal, on February 16, 1771, passed an Act³¹ confirming the line announced by the commissioners on condition that New Jersey would pass a similar Act. This was done by New Jersey in 1772,³² and both Acts were confirmed by the Privy Council in 1773.³³

II.

UNDER THE ARTICLES OF CONFEDERATION

(1) *Massachusetts and New York Boundary Controversy of 1784-1786:*

This arose out of the agreement signed by the governors of the States in 1773.³⁴ Commissioners were appointed by New York on March 17, 1783,³⁵ but they failed to reach any agreement acceptable to Massachusetts. Consequently the latter State on June 29, 1785, authorized the Continental Congress to appoint three commissioners to run the line between the two States.³⁶ New York on March 7, 1785, also authorized Congress to appoint three commissioners to run the line.³⁷ A resolution to this effect was made in the Continental Congress and approved on September 29, 1785,³⁸ and on December 2, 1785, three commissioners were appointed.³⁹ New York by the Act of April 28, 1786,⁴⁰ and Massachusetts by the Act of June 27, 1786,⁴¹

²⁸ See 4 Acts of Privy Council (Col. Ser.) 214, 301. New York had submitted the controversy to the King for determination by the Act of Dec. 7, 1754. See 3 N. Y. Col. Laws, 1036.

²⁹ See 4 Acts of Privy Council (Col. Ser.), 686.

³⁰ See Act of Feb. 6, 1768, 4 N. Y. Col. Laws, 1003.

³¹ See 5 N. Y. Col. Laws, 185.

³² See N. J. Acts, 1772, 12.

³³ See 5 Acts of Privy Council (Col. Ser.) 45.

³⁴ See *supra* Appx. A, I, (7).

³⁵ N. Y. Laws, 1777-1784, ch. 28, p. 545, as amended by Act of Nov. 11, 1784, N. Y. Laws, 1785-1788, ch. 2, p. 2.

³⁶ Mass. Laws, 1784-1785, ch. 11, p. 446.

³⁷ N. Y. Laws, 1785-1788, ch. 4, p. 3, and ch. 49, p. 293. Governor Clinton had advised the appointment of commissioners to deal with the claim of Massachusetts before the Continental Congress. See Report of the Regents of the University on the Boundaries of New York, 1873, p. 213. See also Acts of Mar. 7, 1785, April 29, 1786, Mar. 1, 1787, and April 11, 1787, N. Y. Laws, 1785-1788, ch. 28, p. 57, ch. 53, p. 298, ch. 46, p. 443, ch. 79, p. 507. These Acts successively extended the powers of the New York commission in order to enable them to deal with the commissioners of the Continental Congress as well as come to any acceptable agreement with the commissioners appointed by Massachusetts.

³⁸ 10 Journ. Cont. Cong. 237.

³⁹ 11 *ibid.* 10.

⁴⁰ N. Y. Laws, 1785-1788, ch. 49, p. 293.

⁴¹ Mass. Acts, 1786-1787, ch. 8, p. 18. Additional authority was given by the

authorized their commissioners to conclude an agreement. An agreement was negotiated on December 16, 1786.⁴² and a final settlement was made on July 21, 1787.⁴³ They were referred to the legislatures of both States but no action was taken upon them.⁴⁴

III.

SINCE 1789

(1) *Connecticut and Rhode Island Attempted Settlement of 1840:*

Commissioners were appointed by both States in 1839,⁴⁵ and an agreement was reached between them on April 27, 1840. This was confirmed by Connecticut during the same year.⁴⁶ Though the agreement was reported to the Rhode Island legislature, they refused to confirm it.⁴⁷ The controversy was finally settled through compact in 1888.⁴⁸

(2) *Massachusetts and Rhode Island Attempted Settlement of 1848:*

Commissioners were appointed by Rhode Island in 1844,⁴⁹ and by Massachusetts on February 27, 1844.⁵⁰ They were given full powers of arbitration a year later.⁵¹ Two agreements were reached between them, relating to different portions of the boundary line. Massachusetts gave its assent to the first agreement on April 19, 1847,⁵² but on May 10, 1848, repealed this Act of assent.⁵³ Both agreements were assented to and ratified by Rhode Island in 1847.⁵⁴ Massachusetts, however, refused its assent.⁵⁵ A final unsuccessful attempt was made

Act of July 5, 1786, *ibid.* ch. 18, p. 53. The time for reaching an agreement was extended by the Act of Mar. 1, 1787, *ibid.* ch. 70, p. 219.

⁴² Report of the Regents of the University on the Boundaries of New York, 1873, p. 220.

⁴³ A resolution that an agreement bearing this date be recorded was made before the Massachusetts Assembly on Nov. 21, 1787. See Mass. Laws, 1786-1787, ch. 101, p. 794.

⁴⁴ Governor Clinton on Jan. 13, 1787, laid the agreement of Dec. 16, 1786, before the New York legislature. See Report of the Regents of the University on the Boundaries of New York, 1873, p. 224. The same agreement was referred to the Massachusetts Assembly by Governor Bowdoin on Feb. 13, 1787. See Mass. Laws, 1786-1787, ch. 21. A report of the later agreement was laid before the Massachusetts Assembly by Governor Hancock on Nov. 8, 1787. See Mass. Laws, 1786-1787, p. 995.

⁴⁵ 1839 R. I. Acts, 55; Conn. Priv. Acts, 1839, 27.

⁴⁶ Conn. Priv. Acts, 1840, 4.

⁴⁸ See *supra* Appx. A. III, (14).

⁴⁷ R. I. Acts, 1846, 10.

⁴⁹ R. I. Acts, 1844, 69.

⁵⁰ Mass. Acts, 1843-1845, ch. 41, p. 304.

⁵¹ See R. I. Acts, 1845, 3; See Mass. Acts, 1843-1845, ch. 10, 587; Mass. Acts, 1846-1848, ch. 115, p. 239.

⁵² See Mass. Acts, 1846-1848, ch. 51, p. 522.

⁵³ See Mass. Acts, 1846-1848, ch. 75, p. 839. The effect of this repeal was never judicially determined. Cf. *Virginia v. West Virginia* (1870, U. S.) 11 Wall. 39.

⁵⁴ See R. I. Acts, 1847, 85-94. See also R. I. Acts, 1848, 68-78.

⁵⁵ See Mass. Sen. Doc. 1848, No. 14, *passim*.

by Massachusetts to appoint another commission on May 10, 1848.⁵⁶ The provision in this resolution, that upon failure the matter should be submitted to the courts for determination, took effect when Rhode Island instituted suit in the Supreme Court of the United States. However, before decision the matter was settled by a compact between the two States.⁵⁷

APPENDIX C.

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⁵⁶ See Mass. Acts, 1846-1848, ch. 75, p. 839.

⁵⁷ See *supra* Appx. A, III, (7).