CONSTELLATING HISTORY: AN INVESTIGATION INTO THE SUPREME COURT'S TREATMENT OF CONGRESSIONAL CONSENT UNDER THE COMPACT CLAUSE

by
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The Supreme Court cases of U.S. Steel Corp. v. Multistate Tax Commission *and* Wharton v. Wise*, decided over 80 years apart, set forth different narratives for the evolution of the nonliteral test for consent under the Compact Clause. This Note investigates these competing historical claims in order to reconcile incompatible understandings of how the test evolved, ultimately identifying a more complex origin of the test than the one articulated in* U.S. Steel*. In so doing, this Note sheds light on the ability of the Court to not only bring history to light, but also to obscure it.*

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INTRODUCTION

Through the promulgation of judicial opinions and the development of caselaw, courts collectively engage in the creation of an historical record. As a case winds its way through the adjudicative process, an interpretation of its particular facts and contexts is produced, and this interpretation is further refined as the opinion is recycled through the process of precedent. Over time, the Supreme Court's treatment of facts can become synonymous with the truth of the matter, regardless of how it compares to the actual events that unfolded. As a result, two cases—applying the same legal test—may nonetheless assign conflicting historical origins and justifications for the development of that test. It is important to continually interrogate the Court's interpretations in order to identify the deficiencies in its treatment of the historical record and reconcile those interpretations that appear to conflict with each other.

The Compact Clause of the U.S. Constitution, read literally, requires states to obtain the "consent" of Congress prior to entering into any compact with another state or a foreign power.[1] Interstate compacts, existing somewhere between individual state action and comprehensive federal action within the federalism framework, allow states to exert a degree of political power greater than otherwise attainable by acting in concert with other states on a particular matter. At first, it appears as if the Founders predicted that some compacts entered into by a collection of states would allow those states to exercise quasi-federal powers—hence the complete bar on interstate compacts without federal congressional consent. However, subsequent Supreme Court decisions have interpreted the consent provision of the Compact Clause nonliterally to require consent only in certain circumstances: when the political power of the compacting states encroaches on federal supremacy.[2]

U.S. Steel Corp. v. Multistate Tax Commission represents the Supreme Court's seminal decision solidifying the nonliteral test for consent under the Compact Clause, holding that the Multistate Tax Compact's administrative body did not sufficiently encroach on federal supremacy to require the consent of Congress. Substantively, *U.S. Steel* upheld a more practicable and intuitive interpretation of the Compact Clause.[3] However, the case is also widely known for its robust analysis surrounding the historical origin of the test for consent it ultimately codified. Justice Powell, delivering the opinion of the Court, identified Justice Catron's separate opinion in the Court's 1940 *Holmes v. Jennison* decision[4] as the progenitor of the

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[1] U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . .").

[2] U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978).

[3] *Id.* at 459–60.

[4] Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840).

nonliteral reading of the consent provision.[5] As state courts began to confront questions related to interstate compacts, they too appeared to adopt a less restrictive reading of the Compact Clause, identifying areas where they could act outside federal control.[6] According to Justice Powell, "precisely this approach"[7] culminated in the Court's 1893 decision in *Virginia v. Tennessee*, where Justice Field articulated the Supreme Court's first express affirmation of the nonliteral test for consent under the Compact Clause.[8] Despite making these comments in "extended dictum,"[9] Justice Field's "functional view"[10] of the Compact Clause was reaffirmed on numerous occasions until the Court expressly applied the nonliteral test in *New Hampshire v. Maine* in 1976.[11]

The narrative in *U.S. Steel* implied that the nonliteral test for consent under the Compact Clause evolved in a clean line: beginning with Justice Catron's reservations in *Holmes* and culminating in its adoption as the majority view in *New Hampshire v. Maine*. But, by "telling the sequence of events like the beads of a rosary,"[12] the Supreme Court missed the key ways in which the nonliteral test for consent constellates with historical practices prior to and under the Articles of Confederation. *Wharton v. Wise*, decided in 1894 just after *Virginia v. Tennessee*, contains language suggesting that a nonliteral understanding of the test for consent began much earlier, with compacts made between the fledgling states during the early days of the Union.[13] Writing for the majority in *Wharton v. Wise*, Justice Field explained how:

> Various compacts were entered into between Pennsylvania and New Jersey and between Pennsylvania and Virginia, during the Confederation, in reference to boundaries between them, and to rights of fishery in their waters, and to titles to land in their respective states, *without the consent of congress, which indicated that such consent was not deemed essential to their validity*.[14]

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[5] *U.S. Steel*, 434 U.S. at 464–65.

[6] *Id.* at 465–66 (citing Union Branch R.R. Co. v. E. Tenn. & Ga. R.R. Co., 14 Ga. 327 (1853)).

[7] *Id.* at 467.

[8] *See* Virginia v. Tennessee, 148 U.S. 503 (1893) (postulating that some interstate compacts did not involve the federal government in any way and thus did not require congressional consent to be valid).

[9] *U.S. Steel*, 434 U.S. at 467.

[10] *Id.* at 468.

[11] *Id.* at 469–71 (citing New Hampshire v. Maine, 426 U.S. 363 (1976) and listing the cases in which the Court expressed approval of the nonliteral test for consent articulated in *Virginia v. Tennessee*).

[12] WALTER BENJAMIN, *Theses on the Philosophy of History*, *in* ILLUMINATIONS 245, 255 (Harry Zorn trans., Hannah Arendt ed., The Bodley Head 2015) (1955).

[13] Wharton v. Wise, 153 U.S. 155 (1894).

[14] *Id.* at 170–71 (emphasis added).

If, as Justice Field asserted, states already tacitly understood that not all agreements amongst themselves required congressional consent, it follows that the Supreme Court in *U.S. Steel* misidentified the origin of the nonliteral test for consent.

This Note seeks to investigate the Supreme Court's competing historical claims in *Wharton v. Wise* and *U.S. Steel* in order to reconcile incompatible understandings of how the nonliteral test for consent under the Compact Clause evolved. Part I lays out in more detail the *U.S. Steel* chronology in juxtaposition with the *Wharton v. Wise* remarks on historical practice and discusses whether the two cases truly establish incompatible interpretations of history. Part II examines several interstate compacts and agreements made under the Articles of Confederation and shortly after the adoption of the Constitution, as well as historical commentary and treatment of those compacts in order to verify and expand upon the practices outlined in *Wharton v. Wise*. Through this examination, Part II identifies a more complex origin of the test for consent than the one articulated in *U.S. Steel*. In addition, Part II investigates the nature of colonial boundary agreements prior to American independence, making the case that the colonies practiced a rudimentary form of the nonliteral test for consent.

Even though the Crown exercised much broader control over intercolonial agreements in the early days of the colonies,[15] under the Articles of Confederation, states carried over an implicit understanding that certain agreements made between themselves did not require congressional consent despite textual proscriptions.[16] Contrary to the origin asserted in *U.S. Steel*, the nonliteral understanding of the consent provision of the Compact Clause existed in practice much earlier than the Court's first consideration of the issue in *Holmes v. Jennison*. Thus, *U.S. Steel* upholds an incomplete reading of history. In general, while such a revelation does not have a significant impact on interstate compact caselaw as applied today,[17] it pushes back against the established canon and provides a fascinating view into colonial attitudes and the inherent flexibility of our system of government. Through its flattening of history, the Supreme Court did not accord enough credit to the organic development of our unique federalist system. A fictional historical record is codified

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[15] EDWARD JENKS, THE GOVERNMENT OF THE BRITISH EMPIRE 68 (1918).

[16] *See* ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1 ("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 . . . .").

[17] *See also* Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071, 1074 (2008) (suggesting that the lack of congressional involvement in defining the scope of its Compact Clause oversight implies that similar limits exist on the need for consent cover state–foreign compacts, as well). This Note's reading of the history underlying interstate cooperation therefore could have an influential effect on the ways in which state-foreign compacts are treated by courts in the future, especially if the historical practices surrounding state–foreign compacts parallel interstate compacts.

as the supreme law of the land, and it would benefit us as jurists and scholars to remember the law's ability to not only discover the truth, but to mask it.

I. *U.S. STEEL* AND *WHARTON V. WISE*: HISTORICAL JUXTAPOSITION

Consistency on the face of issues decided over time by the Supreme Court often belie substantially different justifications and theories underlying the Court's conclusions. Two cases decided 100 years apart may result in the same legal conclusion, but chart radically different origins for such a result. This phenomenon occurs prominently when the Court takes up the role of quasi-historian, summarizing and consolidating years of case law and other authorities into a singular coherent legal corpus.

U.S. Steel and *Wharton v. Wise* discuss similar issues surrounding the scope of the Compact Clause but differ in their views on the origin and development of this aspect of interstate compact jurisprudence. Both cases uphold, or at the very least suggest support for, the nonliteral test for congressional consent, where consent is only required for interstate compacts that "are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'"[18] The discrepancy between the opinions arises with *U.S. Steel*'s characterization of how the nonliteral test for consent came to be the controlling interpretation. Rather than referring to historical state practices prior to and during the adoption of the Constitution, *U.S. Steel* suggested that the nonliteral test for consent evolved as a judicial construction in both state and federal courts.[19] Contrary to this characterization, *Wharton v. Wise* expressly referred to historical practices under the Articles of Confederation as predecessors to the lenient interpretation of consent under the Compact Clause, implying that *U.S. Steel*'s historical record is not as comprehensive as it ought to be.[20]

A. U.S. Steel *and the Judicial Construction of Nonliteral Consent*

Speaking for the Supreme Court in *U.S. Steel*, Justice Powell expressly affirmed the Court's use of the nonliteral test for consent under the Compact Clause in *New Hampshire v. Maine*, the first "occasion expressly to apply it in a holding."[21] Appellants in the case—U.S. Steel Corporation and other multistate taxpayers threatened with audits pursuant to the Multistate Tax Compact—argued for the abandonment

[18] U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 471 (1978) (quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893)).

[19] *Id.* at 464–71.

[20] Wharton v. Wise, 153 U.S. 155, 170–71 (1894).

[21] *U.S. Steel*, 434 U.S. at 459–60 (citing New Hampshire v. Maine, 426 U.S. 363, 369 (1976)).

of the test articulated in *Virginia v. Tennessee* and a return to a "literal reading of the Compact Clause."[22] While Justice Powell could have summarily affirmed the long line of cases expressing approval of the nonliteral consent test, he instead took it upon himself to examine "the origin and development of the Clause, to determine whether *history* lends controlling support to appellants' position."[23] By drawing attention to the particular importance of the historical record, Justice Powell properly framed judicial interpretation of the Compact Clause in terms of historical practice.[24] The Court's own precedent on early agreements and compacts between states supported the independent validity of a subset of interstate compacts, and Justice Powell relied heavily on past cases in supporting his eventual holding.[25] However, curiously absent from the majority's reasoning in *U.S. Steel* was any substantive discussion of these historical examples of compacts or agreements made during the early years of the nation. In dissent, Justices White and Blackmun noted that "[t]here is much history from the Articles of Confederation" surrounding compacts made without the consent of Congress.[26] Yet, despite the majority's own framing of the issue, this history is ignored in favor of a conception of the nonliteral test for consent as judicially constructed.

Spurred on by an historical record supposedly devoid of any indication as to the scope of agreements governed by the Compact Clause, Justice Powell began with Justice Catron's separate opinion in *Holmes v. Jennison*, describing it as "[t]he Court's first opportunity to comment on the scope of the Compact Clause."[27] Even though the agreement at issue in *Holmes* involved a state and a foreign power (Canada), Justice Catron "expressed disquiet" over the majority's literal reading of the Compact Clause precluding the arrangement sans federal government "supervision."[28] Justice Catron notably recognized the contradiction between historical practice and a strict reading of the Compact Clause, writing:

> The Constitution equally cuts off the power of the states to agree with each other, as with a foreign power: yet, it is notoriously true, that for the fifty years of our existence under the Constitution, the states have, in virtue of their own

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[22] *Id.* at 460.

[23] *Id.* (emphasis added).

[24] *Id.*

[25] *Id.* at 468–69.

[26] *Id.* at 482–83.

[27] *Id.* at 464–65 (citing Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840)).

[28] *Id.* at 465; *Holmes*, 39 U.S. at 578–79. Similarly, Senator James Buchanan characterized the majority opinion in *Holmes* as "latitudinous and centralizing beyond anything I have ever read, in any other judicial opinion," and was particularly perturbed by the opinion's dire implications with regards to state sovereignty. 5 JAMES BUCHANAN, *Speech on the United States Courts, May 9*, *in* THE WORKS OF JAMES BUCHANAN: COMPRISING HIS SPEECHES, STATE PAPERS, AND PRIVATE CORRESPONDENCE 205, 238 (John Bassett Moore ed., 1908).

> statutes, apprehended fugitives from justice from other states, and delivered them to the officers of the state where the offence was committed.[29]

These comments sought to drive home the point that despite the Constitution's prohibitive language, states routinely acted in concert with other states. Acknowledging Justice Catron's reservations in theory, Justice Powell nevertheless failed to link the examples of past historical practice—those "agreements between States theretofore considered lawful"—to the validity of a nonliteral reading of the Compact Clause.[30] Instead, Justice Powell found solace in state courts "faced with the task of applying the Compact Clause" and, unsurprisingly, their reluctance to invalidate newly emergent interstate agreements on consent grounds.[31]

Used by Justice Powell to illustrate state courts' treatment of the Compact Clause, *Union Branch Rail Road Co. v. East Tennessee & Georgia R.R. Co.*, a Georgia Supreme Court decision rejecting a challenge to an interstate agreement between Tennessee and Georgia, appears to have independently developed and applied the nonliteral test for consent with no reference to the Supreme Court's decision 13 years earlier in *Holmes*.[32] Because the Georgia court relied on Justice Story's limited characterization of the state treaty clause[33] in his Commentaries, Justice Powell in *U.S. Steel* advanced the narrative that the nonliteral test for consent evolved as a judicial construction and concluded that "precisely this approach"—an application of Justice Story's analysis of the constitutional text—formed the basis for the formal adoption of a nonliteral interpretation of the Compact Clause in *Virginia v. Tennessee*.[34] What each of these previous decisions had in common was their treatment of Justice Story's commentary on the Compact Clause, which the *U.S. Steel* Court asserted as catalyzing the doubts surrounding its scope. Ignoring the fact that Justice Story joined the majority's literal reading of the Compact Clause in *Holmes*,[35] and that Justice Catron's concerns rested on separate grounds, the historical record laid

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[29] *Holmes*, 39 U.S. at 597.

[30] *U.S. Steel*, 434 U.S. at 465.

[31] *Id.*

[32] 14 Ga. 327 (1853).

[33] U.S. CONST. art. I, § 10, cl. 1.

[34] *U.S. Steel*, 434 U.S. at 465–66 (referencing Justice Story's "observation that the words 'treaty, alliance, and confederation' generally were known to apply to treaties of a political character"). Again, seemingly contrary to Justice Powell's professed historical approach, the *Wharton v. Wise* decision is relegated to a single sentence in the main text, despite introducing an alternative conception of the test for consent in contrast with the Georgia court's purely theoretical approach.

[35] In fact, Justice Story wrote a letter expressing his view of the *Holmes* opinion as "a masterly one" which he "entirely concurred in . . . with all [his] heart; and was surprised that it was not unanimously adopted," further solidifying his endorsement of a literal reading of the Compact Clause in contrast to what *U.S. Steel* suggests. SAMUEL TYLER, MEMOIR OF ROGER BROOKE TANEY, LL.D., CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 290 (1872).

out by Justice Powell sought to situate Justice Story's theory that "congressional consent was required . . . in order to check any infringement of the rights of the national government" as the origin of Justice Field's "functional view" of the Compact Clause in *Virginia v. Tennessee*.[36]

Justice Catron's opinion in *Holmes* explicitly referenced historical practices under the Articles of Confederation. So, why did Justice Powell not make any substantive reference to this fact in his majority opinion in *U.S. Steel*? Furthermore, Justice Story's comments on the Compact Clause, upon closer examination, do not reach as far as Justice Powell and the Georgia Supreme Court proclaim. In his Commentaries, Justice Story merely drew attention to the functional difference between the terms "treaties, alliances, and confederations," which "generally connote" political agreements, and "compacts and agreements," which cover "private rights of sovereignty."[37] According to Justice Story, the Constitution requires congressional consent for the latter types of agreements, "in order to check any infringement of the rights of the national government."[38] But this statement cannot be construed to mean that Justice Story felt that consent was less necessary in situations where no national government rights are implicated, particularly in light of his joining the majority opinion in *Holmes*. In fact, Justice Story explicitly recognized the workability of the Compact Clause, remarking that "a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief."[39] The Supreme Court cites to this line multiple times in apparent support of a nonliteral reading of the Compact Clause, even though the Compact Clause is not a "total prohibition" and rather represents a more lenient modification of the total prohibition found in the Articles of Confederation.[40] Therefore, independent from the accuracy of *U.S. Steel*'s historical record, separate justifications in favor of the nonliteral test for consent asserted by the Supreme Court appear flawed, as well. The Court's decision to focus solely on a conceptual justification for a nonliteral reading of the Compact Clause in *U.S. Steel* was wholly unnecessary in light of the concordant practical justification advanced in *Wharton v. Wise*.

B. Wharton v. Wise *and the Natural Evolution of Nonliteral Consent*

In contrast to the judicially constructivist conception of the test for consent asserted in *U.S. Steel*, the Court in *Wharton v. Wise* perceived a much more natural origin for the test, grounded in the same Articles of Confederation agreements noted

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[36] *U.S. Steel*, 434 U.S. at 464, 468.

[37] *Id.* at 464.

[38] *Id.*

[39] Wharton v. Wise, 153 U.S. 155, 170 (1894) (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519–20 (1893)).

[40] *See id.*; *Virginia*, 148 U.S. at 517–19.

by the *U.S. Steel* dissent. Examining the "object evidently intended by the prohibition of the Articles of Confederation," the *Wharton* Court read an inherent limitation into the substantially similar consent provision found in the Articles of Confederation.[41] Since the Articles of Confederation provision simply prevented states from entering into a "treaty, confederation, or alliance," the Supreme Court interpreted the Virginia–Maryland Compact of 1785 to not fall within the meaning of those terms.[42] Thus, the Virginia–Maryland Compact, being valid under the Articles, survived the transition to the Constitution insofar as its terms were not inconsistent with the Constitution.[43]

The *Wharton* Court looked primarily to historical practice to identify whether the Virginia–Maryland Compact fell within the meaning of the Articles' prohibition, applying the newly formulated *Virginia v. Tennessee* encroachment analysis in the process. While the Court did rely in part on a faulty reading of Justice Story's Commentaries, as noted above, the bulk of its factual analysis was directed at examining the nature of the Virginia–Maryland Compact and its historical counterparts.[44] Noting that Congress at the time "never complained of the compact" and that "Virginia and Maryland were sovereign States with no common superior and no tribunal to determine for them the true construction and meaning of its provisions," the *Wharton* Court concluded that "[i]ts execution could in no respect encroach upon or weaken the general authority of Congress under" the Articles.[45] Looking to similar compacts entered into between Pennsylvania, New Jersey, and Virginia under the Articles of Confederation, the *Wharton* Court found that the mere existence of these agreements without congressional consent "indicated that such consent was not deemed essential to their validity."[46] By applying the *Virginia v. Tennessee* test retroactively to compacts formed under the Articles of Confederation, the *Wharton* Court solidified the role of historical practice in upholding the validity of this test. And, unlike the shaky reasoning and precedential deference deployed by the Court in *U.S. Steel*, the historical basis for the nonliteral test for consent rests on a much stronger foundation.[47]

Even though the reasoning in *U.S. Steel* did not get fully fleshed out, the juxtaposition of the two origins for the nonliteral test for consent show how they are

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[41] *Wharton*, 153 U.S. at 170.

[42] *Id.* at 171.

[43] *Id.* at 172.

[44] *Id.* at 170–72.

[45] *Id.* at 170–71.

[46] *Id.* at 171.

[47] *See* Jacob Finkel, Note, *Stranger in the Land of Federalism: A Defense of the Compact Clause*, 71 STAN. L. REV. 1575, 1586 (2019) ("Justice Powell's opinion for the Court in *U.S. Steel* . . . used confused logic and unclear reasoning to uphold the MTC without congressional approval and effectively consigned the Compact Clause to irrelevance.").

not necessarily incompatible. However, in order for the conceptual basis to more accurately reflect the purposes of the Compact Clause and its influence on the federalist structure, analysis and development of this basis needs to track the history of interstate compacts more accurately. Both the natural origin asserted in *Wharton* and the judicially constructed origin asserted in *U.S. Steel* for the nonliteral consent test under the Compact Clause are two sides of the same coin and are much more interrelated than they initially appear.

II. TAKING ANOTHER LOOK AT HISTORY

Examining agreements and commentary from the colonial period through the adoption of the Constitution engenders the conclusion that early colonies and states deployed a version of the nonliteral test for consent in practice and understood the difficulty of seeking out federal sovereign consent for every arrangement with neighboring entities.[48]

During the early colonial period, colonial governments not only adopted many boundary agreements as conflicts arose, but also engaged in other forms of intercolonial cooperation as regional conditions fluctuated. While colonial governments formally petitioned the Crown and the King's Privy Council for approval of boundary agreements and for the resolution of accompanying disputes, these grants of "consent" were routine and not consistently applied, particularly as the colonies moved more toward independence.[49] In fact, some instances of intercolonial cooperation occurred specifically because of the Crown's failure or inability to adequately provide for the affected colony.[50] Under the Articles of Confederation, a similar conditional prohibition on interstate cooperation was included in the text—however, despite this prohibition sans consent, not all compacts under the Articles received congressional consent. Furthermore, the uncertainty surrounding allowable forms of interstate cooperation, evolving in parallel with concerns about the power of the national government relative to the states, played a significant role in the

[48] For the sake of brevity, this Note will use the phrases "interstate compact" and "compact" to denote agreements or cooperation between states during the colonial era that share many features with modern interstate compacts, though they may have been called other things at the time like "treaty" or "alliance."

[49] *See* Committee Report regarding John Merrill's appeal (Mar. 26, 1754), *in* 4 GT. BRIT. PRIVY COUNCIL, ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES 239, 243 (James Munro & Sir Almeric W. Fitzroy eds., 1911) (characterizing an appeal to the Privy Council surrounding a boundary dispute as "intended to settle a general Question of Right" with regards to affected individuals rather than resolve the dispute as a whole).

[50] *See* 5 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA, FROM THE ORGANIZATION TO THE TERMINATION OF THE PROPRIETARY GOVERNMENT 204 (AMS Press 1968) (1851) ("Having no Cannon we have wrote to England for some, & for fear of disappointment we have in the most pressing manner apply'd to the Neighboring Governments to be furnish'd . . . .").

adoption of the Constitution as a whole. The negotiations and debates spiraling out of the Maryland–Virginia Compact of 1785 shed light on why the Compact Clause exists in its current form. Finally, the treatment of interstate compacts during the early years of the Constitution helps solidify the view that, even immediately after its adoption, the states still did not read the Compact Clause strictly.

A. Colonial Compacts

As a form of sovereign cooperation, formal compacts predated the Articles of Confederation and were implemented as early as 1656, when Connecticut and New Netherlands entered into a boundary agreement—the earliest known interstate compact.[51] Boundary agreements continued to prevail as the most common use of interstate compacts until after the Constitution was adopted, but a closer look at colonial practices reveals many other informal forms of intercolonial cooperation, including agreements for the exchange of military equipment and the aforementioned intercolonial transfer of prisoners. With regards to more formal intercolonial compacts, finalized agreements were sent to England for the approval of the Crown, closely resembling the congressional consent requirement in the Compact Clause.[52] Procedurally, both intercolonial compacts and modern interstate compacts "parallel" each other in terms of requiring approval from a federalized sovereign with plenary authority.[53] However, much like our modern understanding of interstate compacts, historical records show that colonial governments did not feel compelled to present a subset of intercolonial agreements to the Crown for approval—either because it was not practical or because the Crown's adverse conduct spurred the intercolonial cooperation in the first place.[54] Because colonial governments possessed a certain degree of freedom to govern their territories, they implicitly understood that not all forms of intercolonial cooperation required the approval of the Crown and this attitude was perpetuated by the physical distance between the colonies and the federal government.[55]

1. Boundary Agreements

Under current Supreme Court precedent, boundary agreements are considered interstate compacts and not all boundary agreements sufficiently encroach on federal supremacy enough to require congressional consent under the Compact Clause.[56] Many boundary agreements created prior to the adoption of the Articles

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[51] Gerald L. Stapp, *Interstate Compacts and the Federal Treaty Power*, 29 DICTA 211, 211 n.2 (1952).

[52] *Id.* at 211.

[53] *Id.*

[54] *See infra* Section II.A.

[55] *See infra* Section II.A.

[56] Virginia v. Tennessee, 148 U.S. 503, 522 (1893).

of Confederation were presented to the Crown for approval or had resolution commissions specifically appointed by the Crown despite their localized nature.[57] On its face, this fact appears to push back against a conclusion that the early colonies understood royal consent similarly to the nonliteral interpretation of congressional consent under the Compact Clause. But the colonies did not necessarily view royal consent as the only way to resolve these disputes or as conclusively determinative of rights, expressing a general preference for less adversarial resolution of disputes.

a. Connecticut–Pennsylvania Boundary Dispute

Beginning with events in 1754, this example surrounding the early correspondence regarding a boundary dispute between Connecticut and Pennsylvania provides a fascinating perspective into the ways in which the early colonies conceived of these types of agreements. In communications between the Governor of Connecticut and the Provincial Council of Pennsylvania, themes of royal supremacy abounded but the substance of the discussion focused on the best ways to resolve the dispute locally and cooperatively.[58] Only when broader issues of sovereignty and violence between the colonies arose did the Governors begin to seek higher legal authority to weigh in and resolve the dispute. But even then, both parties appeared reluctant to definitively involve the Crown, particularly in light of the long history of friendship and comity between the two colonial populations.

Like many boundary disputes, the conflict underlying the Connecticut–Pennsylvania dispute began when a subset of Connecticut citizens attempted to use private land grants to settle on land purportedly owned by Pennsylvania.[59] Deputy Governor Hamilton, concerned by reports of the impending settlement, sent a letter to the Governor of Connecticut in an attempt to prevent a regional conflict from erupting.[60] Imploring the Governor of Connecticut to avoid "a disorderly and dangerous Way of obtaining the Possession of Lands," Governor Hamilton suggested that the claims be resolved through "a legal Settlement" and offered to speak to other colonies like Virginia on behalf and in favor of the Connecticut settlers.[61] In response, Governor Wolcott expressed his approval of this arrangement, proclaiming that it would "serve" king and country, especially because the settlers had proven to

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[57] Stapp, *supra* note 51, at 211; *see, e.g.*, Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 730–57 (1925) (listing and categorizing interstate compacts since colonial times).

[58] 5 MINUTES OF THE PROVINCIAL COUNCIL, *supra* note 50, at 768; *see* THOMAS PAINE, COMMON SENSE 44 (Peter Eckler Publ'g Co. 1922) (1776) (referencing the Connecticut–Pennsylvania boundary dispute as a justification for his argument that local matters could only effectively be resolved by a local government).

[59] 5 MINUTES OF THE PROVINCIAL COUNCIL, *supra* note 50, at 768.

[60] *Id.*

[61] *Id.* at 769.

be productive citizens.[62] Yet, despite the broader apparent agreement between the local colonial governments, the Connecticut settlers pushed forward with their claim. As the conflict threatened to spiral out of control as a result of the continued encroachment, the governmental parties began to appeal to higher legal authorities. The Pennsylvania Council requested the opinion of the Attorney General, who determined that it was lawful for Justices of the Peace, located in the affected counties, to issue warrants for the arrest of unlawful settlers.[63] The Seven Years' War prevented any timely resolution of the issues.[64]

Interestingly, despite the increasingly confrontational nature of the dispute as a result of the individual Connecticut settlers moving forward with their plans, the colonial governments of Pennsylvania and Connecticut appeared reluctant to immediately involve the Crown. No reference was made to any potential resolution by a higher authority than county-level Justices of the Peace.[65] In fact, the tone and content of the governors' communications suggest that they viewed a locally negotiated solution as the best method for resolving the dispute, particularly in light of Pennsylvania's initial reluctance to use judicial enforcement. After the Seven Years' War, armed Pennsylvanians attempted to oust the Connecticut settlers in the Yankee–Pennamite Wars, a series of intermittent conflicts fought from 1769 to 1799.[66] The confirmation of Connecticut's claims by the Crown in 1771 did nothing to assuage the Pennsylvanian's complaints and this decision was subsequently overturned by the Continental Congress in 1782.[67] Eventually, the Pennsylvania Assembly confirmed the Connecticut settlers' land titles in 1787 and the dispute ended in the years that followed.[68]

From the start, the Pennsylvania–Connecticut Boundary Dispute was so localized and particular that even the colonial governments struggled to resolve the issue in a manner satisfactory to all of the parties.[69] Drawing in higher authorities as an attempt to resolve the conflict only served to further inflame the parties' adversarial

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[62] *Id.* at 772.

[63] *Id.* at 774–75.

[64] *Wyoming Valley*, 28 ENCYCLOPAEDIA BRITANNICA 878 (Hugh Chisholm ed., 11th ed. 1911).

[65] 5 MINUTES OF THE PROVINCIAL COUNCIL, *supra* note 50, at 774.

[66] *Wyoming Valley*, *supra* note 64, at 878.

[67] *Id.*

[68] *Id.* at 878–79; Kathryn Shively Meier, *"Devoted to Hardships, Danger, and Devastation": The Landscape of Indian and White Violence in Wyoming Valley, Pennsylvania, 1753–1800*, in BLOOD IN THE HILLS: A HISTORY OF VIOLENCE IN APPALACHIA 53, 68–69 (Bruce E. Stewart ed., 2012) ("Though the Connecticut settlers faced several more legislative setbacks after the repeal of the Confirming Act, confrontations had again receded into threats . . . Both bloodshed and intimidation faded away by the turn of the century, though individual legal questions remained.").

[69] Instead, King George's involvement and proclamation arguably catalyzed the Yankee–Pennamite Wars.

sentiments and even a resolution handed down by the King proved to be unsatisfactory. As seen by how this case study eventually resolved, the intervention of the authoritative body with plenary power (the Crown) was wholly unnecessary to achieve solvency and may have actually made things worse. This case study serves as an initial representation of how the colonies learned through experience that involving the Crown in the resolution of local disputes did not always help and, contrary to conceptions of royal authority, was not strictly necessary. However, this example is not independently definitive with regards to the colonies' perspectives on their own powers of cooperation.

b. Maryland–Pennsylvania Boundary Dispute

Evolving in a more formal fashion from the prior dispute, the circumstances of the Maryland–Pennsylvania Boundary Dispute between 1722 and 1734 provides a more detailed understanding of the structural relationship between the colonies and the Crown as sovereigns. Unlike the Pennsylvania–Connecticut dispute, the initial Maryland–Pennsylvania negotiations resolved much more nicely.[70] In a way, this dispute represented an ideal situation for the enactment of an intercolonial compact, since both colonial representatives substantially agreed on the initial terms of resolving the boundary line. However, the long history of the boundary dispute precluded a workable agreement as to the line itself, even with the help of a joint commission, and the Crown eventually had to intervene pending resolution of a suit before the Court of Chancery.

The bulk of the dispute negotiations during this time period occurred between Lord Baltimore, proprietor of the Maryland colony, and Hannah Penn, widow of the Pennsylvania proprietor William Penn.[71] On the Pennsylvania Council's advice in 1722 that a negotiation be instantiated between the two colonial governments, the two proprietors agreed upon an appropriate boundary and froze all exercise of jurisdiction over the disputed area.[72] As an initial matter, it is significant to note that the negotiations were characterized by the Pennsylvania Council as being allowed to proceed, "untill [sic] either by powers or Directions from England, [the Pennsylvania colonial government is] sufficiently Enabled or advised to Proceed otherwise."[73]

The Council's characterization of Pennsylvania's abilities with regards to determination of the boundary situated the Crown's approval authority as a negative power, where the colonies could act on their own prerogative until told to stop.

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[70] 3 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA, FROM THE ORGANIZATION TO THE TERMINATION OF THE PROPRIETARY GOVERNMENT 214 (AMS Press 1968) (1852).

[71] *Id.* at 231–32. The Penns and the Calverts (the real surname of the Maryland proprietors) notably had been debating the boundary line from as early as 1681. Paul Doutrich, *Cresap's War: Expansion and Conflict in the Susquehanna Valley*, 53 PA. HIST. 89, 101 n.2 (1986).

[72] 3 MINUTES OF THE PROVINCIAL COUNCIL, *supra* note 70, at 212–14, 232.

[73] *Id.* at 61.

Additionally, the Pennsylvania Council threatened to appeal to the Crown to assert its legal rights in the event that Maryland refused to peacefully resolve the dispute through negotiations.[74] By leveraging the Crown's role in these types of boundary compacts, the Council's actions suggest that intercolonial boundary compacts did not necessarily require royal approval or consent. Neither the colonies nor the Crown viewed royal authority in these situations as an active exercise of power—the Crown's intervention was instead treated as a last resort option in case intercolonial negotiations fell through (which they eventually did).[75]

Representing an attempt at a more civil resolution of a boundary dispute, these early negotiations between Maryland and Pennsylvania further confirm the conclusions engendered by the Connecticut–Pennsylvania boundary dispute example. Again, the colonial officials specifically asserted their desire to resolve the dispute in a manner that did not involve the Crown, implying that they understood the Crown's approval as optional. Even though the Crown was forced to involve itself eventually, it only did so after more than 40 years of local intercolonial negotiation and conflict.[76] Furthermore, like the prior dispute, the Crown's involvement still did not produce a satisfactory resolution of the issue and required subsequent interventions.[77] Significantly, solvency only occurred after the Maryland and Pennsylvania officials contracted with private surveyors from England whose rigorous methods produced a satisfactory line approved by the King in the 1760s.[78] While boundary disputes necessarily implicated colonial sovereignty in relation to the national government, the localized interests of the individual parties regularly outweighed any broader reason to involve the Crown, at least within the commentary and reasoning of the colonial officials at the time.

c. Pennsylvania–Virginia Boundary Dispute

In the prior two examples of intercolonial boundary agreements, the negotiating parties advocated zealously but still respected the ultimate resolution of the dispute when the Crown became involved. This boundary dispute, between Pennsylvania and Virginia, diverged from these norms primarily due to the character of Virginia's last colonial governor, Lord Dunmore, and his partner, Dr. John Connelly.[79] Instead of acquiescing to the joint resolution of the dispute by the colonial governments or by the Crown, Lord Dunmore expressly denounced the Crown's

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[74] *Id.* at 214.

[75] *Id.*

[76] Doutrich, *supra* note 71, at 101 nn.1 & 2 (noting also that many secondary works on this boundary dispute are plagued with inaccuracies).

[77] *Id.* at 101 n. 2.

[78] *Id.* at 100–01 (the infamous Mason-Dixon line).

[79] *See* John E. Potter, *The Pennsylvania and Virginia Boundary Controversy*, 38 PA. MAG. HIST. & BIOGRAPHY 407, 411 (1914) (describing Dunmore as "unscrupulous, arbitrary and cruel" and Connelly as his "willing tool").

authority to resolve the dispute and resisted all attempts to negotiate a resolution. His cavalier efforts to sow chaos and discord amongst the colonies succeeded in part and revealed the limitations inherent in the Crown's supposedly supreme authority.

Lord Dunmore suspected foul play from both Maryland and Pennsylvania, and journeyed into the countryside to "see for himself if [the two colonies] were granting lands beyond the limits of the king's proclamation of 1763 . . . to ascertain if he should grant lands to his own people; and to check the 'aspiring and encroaching spirit of the princely Proprietor.'"[80] While these were the justifications he gave to his constituents, Lord Dunmore's explanation to the Secretary of State for the Colonies, Lord Dartmouth, was much more reserved.[81] During his visit to the disputed region at Fort Pitt, Lord Dunmore found an ally in Dr. Connelly, and learned of the settlers' plights at the hands of Pennsylvania's jurisdiction expansion efforts.[82] After concurring with the Virginia Council, Dr. Connelly published Lord Dunmore's proclamation asserting jurisdiction for Virginia over the disputed area.[83] As a result, Pennsylvania unsurprisingly urged Lord Dunmore to "avoid acts, such as the appointment of officials, which might lead to clashes and disputes, until joint commissioners should agree upon a temporary boundary."[84] Lord Dunmore's response constituted a "haughty refusal to co-operate" and he wrote his own report to Lord Dartmouth justifying Virginia's claims to the land.[85]

Lord Dunmore met the Pennsylvania colony's continued attempts to negotiate with stubbornness and escalation, appointing Dr. Connolly to the head of a militia within the disputed region and encouraging military operations against the Pennsylvanian officials.[86] The colonial assemblies fruitlessly attempted to encourage the fixing of a temporary line and Lord Dunmore continued to decry Pennsylvania's claim, asserting that he would "oppose force with force if necessary" and rejecting the power of "the Crown, of its own Authority, to decide the Controversy."[87] Thus, the issue remained unresolved even as the colonies began to coalesce against the Empire.

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[80] Percy B. Caley, *Lord Dunmore and the Pennsylvania-Virginia Boundary Dispute*, 22 W. PA. HIST. MAG. 87, 89 (1939) (quoting *A Virginian*, VA. GAZETTE, Mar. 3, 1774, at 1).

[81] *Id.* ("To Lord Dartmouth his only explanation was that his journey 'might conduce to the good of His Majesty's service.'" (quoting a letter from Lord Dunmore to Lord Dartmouth dated March 18, 1774)).

[82] *Id.* at 89–90.

[83] *Id.*

[84] *Id.* at 91.

[85] *Id.*

[86] *See id.* at 92 (describing how Dunmore viewed some of Pennsylvania's correspondence as such a "high insult" that it led him to order militia operations to seize disputed land (citation omitted)).

[87] *Id.* at 94, 97 (citation omitted).

As the dispute stretched on and began to encroach on the revolutionary efforts of the colonies, the Continental Congress "begged the partisans of the two colonies to curb their tempers and desires until the greater conflict with Great Britain was settled."[88] But the Virginia militias continued their "bellicose" behavior and rhetoric, and the situation grew "more and more chaotic" until the affected Virginians themselves finally requested a resolution, which was only finalized after the close of the Revolutionary War.[89] During the conflict, Lord Dunmore's true colors as a British loyalist revealed themselves and many subsequently charged him with "instigat[ing] the boundary dispute as a means of distracting the two colonies from the common quarrel with Great Britain."[90] Lord Dunmore's argument against the Crown's plenary authority to resolve local colonial disputes, even as he sought to quash the awakening revolutionary spirit, ought to be remembered in light of these revelations. In claiming so, Lord Dunmore inadvertently provided the most concrete example of how the involvement of the Crown in boundary disputes was not consistent or absolute. It appears that simply by refusing to recognize the Crown's authority, Lord Dunmore was able to circumvent any participation in the royal consent process.

As a final representation of the nature of boundary disputes during the colonial period, the Pennsylvania–Virginia controversy constituted an extraordinary case that called into question many of the assumptions surrounding the Crown's plenary authority. Lord Dunmore had to have known that rejecting the Crown's authority as a colonial governor would not have resulted in any kind of reprimand or demand to appear before the King. Either due to the circumstances of the impending revolution, or simply due to the vast complexity of the British Empire's governmental system, a sentiment prevailed among the colonies that local matters could only substantively be resolved through local process.[91] Lord Dunmore abused this sentiment to create discord within the colonial communities, but nonetheless brought to light the notion that local matters could only be resolved through local processes through his actions.

2. Other Agreements

Boundary agreements constitute the only formal examples of intercolonial compacts, but some informal agreements and arrangements existed between the colonies that can also be appropriately characterized as intercolonial compacts. Two examples—the exchange of cannons and the transfer of prisoners—help shed light on both why these types of agreements were desirable and why the consent or approval of the Crown was not necessary. These particularized agreements, and the

[88] *Id.* at 99.

[89] *Id.*

[90] *Id.* at 98–99.

[91] *See* Potter, *supra* note 79, at 422 (describing how the eventual compact decided locally was wildly successful and led to almost no competing land claims in courts afterwards).

sentiments underlying their enactment, contributed significantly to the colonies' understandings of the limits of their authority which carried over as they transitioned to statehood.

a. Cannons

In part due to the doctrine of discovery's creation of a right to land by conquest and the prevailing attitudes of colonialism, conflict regularly erupted in colonial America between the multitude of competing sovereigns.[92] The British Colonies relied primarily on the national government for military protection, especially against continued encroachment by the French and Spanish.[93] Military cooperation between the colonies themselves was uncommon in the eighteenth century since they did not individually have standing armies and relied primarily on mustering militias from intracolonial volunteers.[94] Absent a visiting royal fleet, the colonies relied on whatever equipment they had on hand and would petition the Crown when new equipment was needed—Pennsylvania's large Quaker population also made it particularly vulnerable.[95] Inevitably, the physical distance between the colonies and access to a reliable supply of defense capabilities resulted in periods where the fate of a defenseless colony was left up to the speed of a ship crossing the Atlantic.

Recognizing the peril inherent in relying on "England for the Supply of the Batteries, the principal thing relied on for the Defence of the City, shou'd not arrive in time," the Provincial Council of Pennsylvania agreed that its only other option was to "apply to Governor Clinton & Governor Shirley for a Loan of Cannon till ours shou'd come."[96] Sending letters to the governors of New York and Massachusetts, Pennsylvania expressed a desire to enter into an agreement with another colony to borrow military equipment because the Crown's process would take too long in light of an impending attack.[97] The colony also justified military cooperation by appealing to a sense of cohesiveness and unity between the British Colonies and the joint interest in "preserving this valuable part of [His Majesty's] Dominions."[98] By situating the benefits of local cooperation in the context of the unity of the national body as a whole, the Pennsylvania Council foreshadowed the evolution of federalism as a result of the revolution.

Governor Shirley's response conveyed similar sentiments to those of the Pennsylvania Council.[99] Shirley apologized for being unable to provide the requested

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[92] *Id.* at 407–08.

[93] 5 MINUTES OF THE PROVINCIAL COUNCIL, *supra* note 50, at 204.

[94] John W. Shy, *A New Look at Colonial Militia*, 20 WM. & MARY Q. 175, 181 (1963).

[95] 5 MINUTES OF THE PROVINCIAL COUNCIL, *supra* note 50, at 172.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 173.

[99] *Id.* at 198–99.

cannons, but informally offered to direct the "Guardships of [his] Province" to protect Pennsylvania's "Coast & River" as best as they were able.[100] The Governor echoed the themes of intercolonial cooperation expressed by Pennsylvania and essentially offered to enter into an informal joint-defense agreement. Independent from boundary disputes, this example serves to show how the colonies concluded many informal agreements amongst each other, particularly in areas with sparse support from the national government.[101]

b. Prisoner Transfers

Within the colonies, the criminal process involved local magistrates who possessed significant discretion with regards to the trial.[102] As colonial governments became more sophisticated, governors appointed county-level sheriffs who managed most aspects of detention and apprehension.[103] However, due to the governmental structure of the colonies, sheriffs and magistrates only had commissions to operate within their respective colonies.[104] As a result, the task of delivering individuals who committed crimes in one colony, but resided in another, fell to the colonial governments themselves to arrange.

For example, in 1732, Lord Baltimore wrote to the Provincial Council of Pennsylvania in order to request the apprehension and transfer of individuals accused of "Riot & Levying War."[105] In making this request, Lord Baltimore included affidavits purportedly proving the conduct of the accused individuals.[106] Normally, this would constitute sufficient justification for Pennsylvania to legally apprehend and hand over the accused to Maryland.[107]

However, in their response, the Pennsylvania Council pointed out that Lord Baltimore's affidavits appeared to greatly exaggerate the crimes allegedly committed.[108] Rather than convicting the accused individuals of inciting a riot and levying war, two very harsh charges within colonial criminal law, the Pennsylvania Council

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[100] *Id.*

[101] *But see id.* at 240–41 (British general describing some of Pennsylvania's efforts as contrary to royal authority and potentially "Criminal" because militia members did not use the formal process for establishing a militia).

[102] *Colonial Period: The Legal Process*, LAW LIBR.–AM. L. & LEGAL INFO., https://law.jrank.org/pages/11880/Colonial-Period-legal-process.html (last visited Mar. 13, 2022).

[103] *Colonial Period: Policing the Colonies*, LAW LIBR.–AM. L. & LEGAL INFO., https://law.jrank.org/pages/11882/Colonial-Period-Policing-Colonies.html (last visited Mar. 13, 2022).

[104] *Id.*

[105] 3 MINUTES OF THE PROVINCIAL COUNCIL, *supra* note 70, at 486.

[106] *Id.*

[107] *See infra* Section I.A (quoting Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 597 (1840) (Catron J., concurring)).

[108] 3 MINUTES OF THE PROVINCIAL COUNCIL, *supra* note 70, at 488.

clarified that the accused individuals were performing a "[r]escue" of an individual on a plantation whom "those People supposed to have been unjustly taken, and carried away from his own house."[109] Despite identifying these discrepancies, the Council nonetheless agreed that "it is evident those Men have committed a gross Mistake, I shall, without delay, give orders for apprehending them."[110] But, at the same time, Pennsylvania offered to arrange a joint judicial proceeding where justices from both colonies would meet, "by which the whole Truth may be impartially collected and Known."[111]

Lord Baltimore's request and Pennsylvania's hedged response convey not only the role of local colonial governments in arranging the initial apprehension and procedure for trying accused individuals, but also the wide discretion provided to these governments in crafting creative procedures when the criminal matter implicates multiple colonies' criminal jurisdiction.[112] In no way could the delivery of accused individuals, convicts, and fugitives be properly managed by the national government, particularly in light of Britain's penal transportation pipeline to the colonies from Europe.[113] The lack of any substantive involvement by the Crown in the intercolonial management and transportation of alleged criminals further solidifies the colonies' implicit understandings of which types of agreements amongst themselves did not require the Crown's consent.

Additionally, the transportation of prisoners is also closely intertwined with the colonial history of slavery.[114] Similar to how the Crown could not play a feasible role in intercolonial criminal procedure, the management and transportation of slaves into and between the colonies also occurred at a particularly local level.[115] "[C]aptive persons were *forced* into patterns of *dispersal*, beginning with the [Slave] Trade itself, into the *horizontal* relatedness of language groups, discourse formations, bloodlines, names, and properties by the legal arrangements of enslavement."[116] Justified through existing property law, this coordinated and insidious system of dehumanization undoubtedly occupied some aspects of intercolonial cooperation, but

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[109] *Id.* at 486–87.

[110] *Id.* at 488.

[111] *Id.*

[112] *See id.* at 543 (explaining that the proposed arrangements were "fully authorized by [Pennsylvania's] Government" surrounding the intercolonial management of prisoners).

[113] *See* A. Roger Ekirch, *Bound for America: A Profile of British Convicts Transported to the Colonies, 1718-1775*, 42 WM. & MARY Q. 184, 184–85 (1985).

[114] *Id.* ("Next to African slaves, [prisoners] constituted the largest body of immigrants ever to be compelled to go to America.").

[115] Hortense J. Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17 DIACRITICS, Summer 1987, at 65, 71–73 (highlighting the role private traders played in transporting the enslaved into colonies).

[116] *Id.* at 75.

the records in Pennsylvania are sparse on this issue.[117] In one of the few examples where non-white, non-indigenous folk are mentioned in the Pennsylvania records in a criminal context, the minutes do not even deign to acknowledge the individual's name, referring to him instead as "Negroe Man" in a blatant representation of institutional racism.[118] Thus, the dark history of slavery also played a role in the colonies' burgeoning understandings of the scope of their governmental powers,[119] accompanied by purposeful erasures of Black identity within primary sources. In order to avoid advancing a misguided "civic-humanist, rational self-conception" of progress[120] with regards to intercolonial compact formation, recognition of the colonies' successes in acting cooperatively ought to be tempered by acknowledging the role the same state apparatus played in maintaining "the tortures and instruments of captivity."[121]

B. Compacts Under the Articles of Confederation

Article VI, Paragraph 2 of the Articles of Confederation provides that, "[n]o 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." No other provision in the Articles of Confederation addresses interstate cooperation and the term compact or agreement is not used anywhere in a related context.[122] Similar to the colonial period, boundary agreements constituted the most common form of interstate compact entered into under the Articles of Confederation. Many of these boundary agreements never received the consent of Congress,[123] and the Supreme Court eventually held in *Wharton v. Wise* that these agreements did not fall under

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[117] *Id.* at 78 (describing various colonial legal codes, such as South Carolina's, which characterized slaves as "property" and "real estate").

[118] 4 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA, FROM THE ORGANIZATION TO THE TERMINATION OF THE PROPRIETARY GOVERNMENT 243 (AMS Press 1968) (1851).

[119] *See id.* at 244 ("[T]he insolent Behavior of the Negroes in and about the city . . . requires a strict hand to be kept over them, & shows the Necessity of some further Regulations than our laws have yet provided.").

[120] *See* Sylvia Wynter, *Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation—An Argument*, 3 NEW CENTENNIAL REV., Fall 2003, at 257, 282.

[121] Spillers, *supra* note 115, at 67 (noting how these "tortures and instruments" constituted discursive techniques of control along with physical and psychological ones).

[122] *See* ARTICLES OF CONFEDERATION OF 1781.

[123] Finkel, *supra* note 47, at 1581 ("However, during the seven years in which the Articles of Confederation governed, we know that the states routinely refused to submit these agreements to Congress for approval."). *But see Monday, December 27, 1779*, *in* 15 JOURNALS OF THE CONTINENTAL CONGRESS 1410, 1411 (Worthington Chauncey Ford ed., 1909) (recording the single instance of a boundary agreement presented to Congress under the Articles of Confederation).

the Compact Clause in the Articles of Confederation.[124] In fact, even though the Articles appeared to foreclose all interstate cooperation without Congress's consent, the states frequently refused to obtain consent and entered into compacts regardless during this period.[125] This reflects the ways in which the Articles problematically restrained the power of the federal government.[126] As a result, interstate compacts and, in particular, the history of the Maryland–Virginia Compact of 1785, played a significant role in the development of the Constitution and its unique system of federalism. These events simultaneously influenced the development of the Compact Clause.

Under the Articles of Confederation, the federal government was effectively neutered until a majority of the thirteen states agreed to let it exercise any significant form of governmental power.[127] Inverting the current constitutional relationship, "the Articles specifically provided that Congress simply had *no* power to enter into any treaty of commerce which would restrain any state from" exercising its own regulatory powers.[128] Congressional plenary authority simply did not exist in any meaningful form (no Commerce Clause), likely as a result of the states' aversion to the colonial structure of government where the Crown's legal authority was absolute. Viewed in this context, the states' tendency to enter into compacts without the consent of Congress makes more sense as an expression of the states' newly acquired sovereignty and the purposeful construction of the balance of power under the Articles.[129] However, even though the states freely crafted interstate compacts on their own authority, no significant attempts were made to abuse this authority.[130] Instead, the states "suspicion and distrust of each other" and "the fear of alliance between the larger states to obtain control of the new Federal Government or otherwise to

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[124] Wharton v. Wise, 153 U.S. 155, 171 (1894).

[125] *Id.* at 170–71.

[126] Though, Justice Story had a point, too, when he commented on the theoretical differences between "treaty, alliance, or confederation" and "compacts and agreements," characterizing the latter as forms of political cooperation that impermissibly infringe on the authority of the national government—whether states at the time consciously understood this theoretical difference is unclear. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 271–72 (Boston, Hilliard, Gray & Co. 1833) (quoting U.S. CONST. art. I, § 10, cl. 1, 3).

[127] Ronald D. Rotunda, *Life Under the Articles of Confederation*, 75 ILL. BAR J. 544, 545 (1987).

[128] *Id.*

[129] *See* Ernest C. Carman, *Should the States Be Permitted to Make Compacts Without the Consent of Congress?*, 23 CORNELL L. Q. 280, 280 (1938) ("[W]hen the States achieved their independence, they acquired the sum total of all sovereign power to make treaties, compacts or agreements among themselves or with other nations . . . .").

[130] *But see* Rotunda, *supra* note 127, at 546 (describing how early states tried to obtain economic advantages over each other in other ways and how the impact of Shay's Rebellion influenced the movement toward a stronger central government).

destroy the equality which the smaller States sought to make secure" catalyzed a move toward a check on inherent state sovereignty.[131] As the states exercised more sovereign powers, they realized the potential for abuse due to a lack of meaningful limitations written into the Articles. Furthermore, the federal government oftentimes found itself at odds with its own states, especially in the areas of economic and international relations.[132]

"The historical importance of the Compact of 1785 seems to lie chiefly in the fact that it was the prelude to the adoption of the federal constitution in 1787."[133] After the colonies gained independence from Britain and coalesced under the Articles of Confederation, the lack of any economic coordination between the newly formed states led to a nonuniform trade environment that threatened to deter commerce and ruin competition.[134] Delegates for Maryland and Virginia quickly realized that in order to maintain "national solvency," the taxation power exercised by the individual states needed to be ceded to the federal government.[135] Influenced by this "frame of mind," the delegates from both states negotiated a moderately successful compact to help facilitate interstate cooperation over shared navigable waters.[136] Unfortunately, the delegates' concerns over the lack of universal economic cooperation resurfaced due to the complexity of the jurisdictional problems concerning commerce on navigable waterways common to two or more states.[137] In order to remedy the situation and concoct a solution:

> Virginia issued a call to all the States "to meet such commissioners as may be appointed by the other States of the Union . . . to take into consideration the trade of the United States; to examine the relative situation and trade of the United States; to consider how far a uniform system of commercial regulations may be necessary to their common interests and their permanent harmony."[138]

Only five responded. This convention of 1786 agreed to meet again in Philadelphia two weeks later, resulting in the Constitutional Convention and the adoption of its "greatest accomplishment," the Commerce Clause.[139]

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[131] Carman, *supra* note 129, at 280.

[132] Rotunda, *supra* note 127, at 546 ("When Congress under the Articles tried to negotiate with foreign sovereigns, it learned that it had to compete with some of its own states.").

[133] William L. Henderson, Judge, The Maryland–Virginia Compact of 1785, Address at the Soc'y of Colonial Wars in the State of Md. (Mar. 1955), *in* THE MARYLAND–VIRGINIA COMPACT OF 1785, Oct. 5, 1958, at 5, 5.

[134] *Id.* at 12.

[135] *Id.*

[136] *Id.* at 11.

[137] *Id.* at 13–15.

[138] *Id.* at 14 (quoting Gen. Assemb. Res. (Va. Jan. 21, 1786)).

[139] *Id.*

But for the Virginia and Maryland delegates positive experiences working together on their interstate compact, the Union itself may have fallen apart. We also ought not forget the significant development and experimentation with intercolonial agreements prior to statehood. Through the negotiation and implementation of boundary agreements and other forms of cooperation, the early states-as-colonies learned the limits of their political powers when working in tandem with each other. Once a complex enough problem arose in the context of an interstate compact, both Virginia and Maryland understood that they could not exercise enough sovereign power alone, lest they be seen as exploiting the other states to their own advantage. Thus, the idea behind the nonliteral test for consent specifically manifested through the behavior of the delegates. At a certain point, Virginia and Maryland realized the states would need the federal government to intervene and exercise its authority to prevent any coalition of states from encroaching on the others.

Historical records pertaining to James Madison confirm a similar understanding and caution with regards to interstate cooperation. Madison recognized at the Federal Convention in 1787 the contradictory behavior of the states under the Articles of Confederation in light of its prohibition against interstate treaties without congressional consent.[140] And earlier, in a letter to Thomas Jefferson:

> [Madison] concluded that it was necessary in every united society to have a means "by which the general authority may be defended against encroachments of the subordinate authorities, and by which the latter may be restrained from encroachments on each other," adding that "[t]he want of some such provision seems to have been mortal to the antient Confederacies, and to be the disease of the modern."[141]

Madison agreed with the perspective of the Virginia and Maryland delegates with regards to the appropriate limitations on state cooperative power and its destructive impact on the federal government's authority. It is difficult to perceive any way these sentiments did not play a role in the development of the Constitution's Compact Clause. The complete prohibition on treaties, confederations, and alliances,[142] and the subsequent requirement of congressional consent for all other types of compacts or agreements[143] are clear expressions of the Founders concerns—developed under the Articles of Confederation—surrounding state cooperative power relative to each other and the federal government. But it is equally difficult to conclude that the same delegates who negotiated a successful regulatory compact between themselves—and the same states who had just escaped absolute governmental control—

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[140] Finkel, *supra* note 47, at 1581–82.

[141] *Id.* at 1582 (quoting Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 5 THE WRITINGS OF JAMES MADISON at 17, 23–25 (Gaillard Hunt ed., 1904)).

[142] U.S. CONST. art. I, § 10, cl. 1.

[143] *Id.* art. I, § 10, cl. 3.

felt that federal government supervision extended to all potential interstate agreements. As George Mason remarked, it would be much too onerous to obtain congressional consent for every single state action.[144]

Interstate compacts under the Articles of Confederation and the circumstances of the Virginia–Maryland Compact leading up to the adoption of the Constitution shed light on the ways in which the Founders perceived the nature of interstate relations within the federalist structure and how these perceptions translated to the final form of the Compact Clause. However, historical evidence similarly supports the nonliteral reading of the Compact Clause and this view was likely present among many of the Founders. Thus, spiraling out of the creation of the Constitution were competing conceptions of how the Compact Clause ought to operate, textured by a complex network of practical experience and theoretical considerations.

C. Early Compacts Under the Constitution

Article I, Section 10, Clause 3 of the United States Constitution states in part, "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power." Not much more is revealed regarding the test for consent upon examining interstate compacts made during the early years of the Constitution. The primary noticeable change from the practices under the Articles of Confederation was a shift to obtaining congressional consent—both prospective and retrospective—for a few boundary agreements.[145] However, the likely reason Congress considered early boundary agreements, unlike many of their predecessors, was because they accompanied statehood acts for admitting new states into the Union.[146] Thus, the grant of consent was a tangential consequence of their association with a specific statehood statute and likely does not imply anything about a shift in understanding of the nature of interstate compacts.[147]

In their seminal article on interstate compacts, Frankfurter & Landis provide helpful lists of all "Compacts with the Consent of Congress Since 1789" and "Interstate Agreements Without Congressional Assent" under the Constitution.[148] A

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[144] James Madison, In Convention Thursday Aug: 23. 1787, *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 384, 390 (Max Farrand ed., 1911) ("Mr. Mason wished to know how the power was to be exercised. Are all laws whatever to be brought up? Is no road nor bridge to be established without the Sanction of the General Legislature?"); *see also* Carman, *supra* note 129, at 281 (requiring consent before every compact is enacted "entails delay that may be fatal to the accomplishment of the object sought and, in any event, imposes upon Congress a needless legislative burden").

[145] *See* U.S. CONST. art. I, § 10; Frankfurter & Landis, *supra* note 57, at 694.

[146] *See, e.g.*, Frankfurter & Landis, *supra* note 57, at 735.

[147] Though, it also makes sense that the newly formed government adhered more strictly to the literal text of the Constitution because of the temporal proximity of its enactment.

[148] *Id.* at 735, 749.

boundary agreement between Virginia and Kentucky constituted the only compact formed in the 20 years after the adoption of the Constitution with express congressional consent.[149] Virginia and Kentucky's compact likely received consent because it was bound to Kentucky's statehood act.[150] With regards to the rest of the early compacts, the Supreme Court either "assumed the validity of the compact" or the question of consent was never addressed.[151] This implies that despite the prevalent concerns during the federal conventions surrounding states exploiting cooperative agreements at the expense of other states, none of these fears manifested and, in fact, the states reverted to their earlier colonial behavior of entering into some interstate compacts without seeking out legislative consent.

CONCLUSION

As courts produce legal precedent, they simultaneously process, interpret, and regurgitate the accompanying factual record of a case. When discussions of longstanding legal or constitutional doctrine arise, a court's interpretive processes must necessarily adapt to the new role of examining the historical record. While minor errors in historical interpretation may not have a substantive effect on the generation of legal doctrine, these errors nonetheless open the door for critiques of the underlying bases of those doctrines.

In *U.S. Steel*, the Supreme Court misinterpreted history and determined that the nonliteral test for consent under the Constitution's Compact Clause evolved as a judicial construction. The Court, relying in part on past precedent, improperly applied constitutional scholarship even though past precedent also provided a practical basis to uphold the nonliteral test. The Supreme Court in *Wharton v. Wise* introduced this practical, or natural, evolution of the test for consent under the Compact Clause, predicated on state and colonial practices prior to the adoption of the Constitution. Instead of simplifying and generalizing the history of the Compact Clause, as the Court does in *U.S. Steel*, the *Wharton* Court's analysis injects layers of complexity into the historical development of the clause.

By constellating interstate compacts and agreements made during the colonial period, under the Articles of Confederation, and during the early years of the Constitution, the *Wharton* Court's interpretation of history is confirmed. Not only did colonies enact an assortment of agreements amongst themselves without obtaining the consent of the Crown, but they continued this practice into statehood despite express prohibitions in the Articles of Confederation and in the Constitution. Therefore, *U.S. Steel*'s reliance on precedent and judicial production of law captured

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[149] *Id.* at 735.

[150] *Id.*

[151] *Id.* at 750.

only a small part of the vast tapestry undergirding modern understandings of Compact Clause consent.

Even though this reinterpretation of history does not substantively affect Compact Clause jurisprudence, it remains significant with regards to identifying omissions and errors in the Supreme Court's warrants for its legal conclusions. Furthermore, it may also help retroactively justify a closely related, but oftentimes neglected, aspect of the Compact Clause—state–foreign agreements. The cooperative practices evolving out of the colonial period are consistent with the lack of regular congressional review of state cooperation with neighboring foreign powers.[152] Properly reciting and interrogating the history behind interstate compacts and congressional consent also sheds light on the structure of the federalist system in general. More than two centuries after the adoption of the Constitution, the contours of our government are still being debated, and this history of interstate cooperation further complicates the "defined" relations between the federal government and states.

[152] *See supra* text accompanying note 17.