

Sec. 10—Powers Denied to the States Cl. 3—Tonnage Duties and Interstate Compacts

make compacts with each other was not surrendered under the Constitution.²¹⁵² “The Compact,” as the Supreme Court has put it, “adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations.”²¹⁵³ In American history, the compact technique can be traced back to the numerous controversies that arose over the ill-defined boundaries of the original colonies. These disputes were usually resolved by negotiation, with the resulting agreement subject to approval by the Crown.²¹⁵⁴ When the political ties with Britain were broken, the Articles of Confederation provided for appeal to Congress in all disputes between two or more states over boundaries or “any cause whatever”²¹⁵⁵ and required the approval of Congress for any “treaty confederation or alliance” to which a state should be a party.²¹⁵⁶

The Framers of the Constitution went further. By the first clause of this section they laid down an unqualified prohibition against “any treaty, alliance or confederation,” and by the third clause they required the consent of Congress for “any agreement or compact.” The significance of this distinction was pointed out by Chief Justice Taney in *Holmes v. Jennison*:²¹⁵⁷ “[A]s these words [‘agreement’ and ‘compact’] could not have been idly or superfluously used by the framers of the constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive. . . . The word ‘agreement,’ does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an ‘agreement.’ And the use of all of these terms, ‘treaty,’ ‘agreement,’ ‘compact,’ show that it was the intention of the framers of the constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a state and a foreign power; and we shall fail to execute that evident intention, unless we give to the word ‘agreement’ its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal[,] positive or implied, by the mutual understanding of the parties.”²¹⁵⁸ But, in *Virginia v.*

²¹⁵² *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185, 209 (1837).

²¹⁵³ *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938).

²¹⁵⁴ Frankfurter and Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments*, 34 *YALE L.J.* 685, 691 (1925).

²¹⁵⁵ Article IX.

²¹⁵⁶ Article VI.

²¹⁵⁷ 39 U.S. (14 Pet.) 540 (1840).

²¹⁵⁸ 39 U.S. at 571, 572.