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THE LEGAL BASIS FOR A SOUTHERN UNIVERSITY— INTERSTATE AGREEMENTS WITHOUT CONGRESSIONAL ASSENT

By Jo M. Ferguson*

September, 1949, marked the beginning of an extensive program of higher education on a regional basis, in which twelve Southern States have so far become active participants.[1] The necessity for an expanded educational program in the South in the professional and graduate fields became increasingly apparent with the influx of returning veterans into the colleges after the war. The South was more than ever dependent upon institutions in other regions for the training of its leaders in many fields, with the inevitable result that many of these potential leaders were lost to Southern States.[2] And yet the Southern States were faced with the prospect that the establishment of the requisite number and quality of graduate and professional schools by each one of them would not only be beyond their individual means, but would result in wasteful duplication.[3] The answer was the regional approach, which had been advocated by various educators and statesmen for some years.[4]

At the instance of the Conference of Southern Governors, meeting in Asheville, North Carolina, on October, 1947, a compact was drawn up, which was signed by the Governors early in 1948.[5] This compact[6] provides for a Board of Control consisting of the Governor and three members from each participating State. The Board is authorized to establish and operate regional universities, but its policy has been to use and strengthen existing public and private institutions by contracting with them to accept a certain number of students from each State participating in the particular graduate or professional course

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[1] Alabama, Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Virginia; I *Regional Action In Higher Education* (1949) No. 3.

[2] *Regional Cooperation in Higher Education*, a Report of the Board of Control for Southern Regional Education, Atlanta, Georgia, July, 1949, pp. 7-8.

[3] *Id.* at 9.

[4] Dodd, *Interstate Compacts*, 70 U. S. L. Rev. 557, 572, n. 17 (1936); Note (1948) 13 Mo. L. Rev. 286, 287; *Hearings Before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 80th Congress, 2nd Session, on S. J. Res. 191*, Statement of Holland, p. 4, and of Gov. Caldwell, p. 18.

[5] *Supra*, n. 2, pp. 1-2.

[6] For complete text, see Note (1948) 13 Mo. L. Rev. 286, 298.

being supplied by the contracting school.[7] Courses offered for the school year 1948-1949 included only medicine, dentistry, and veterinary medicine.[8] The Board appoints a permanent staff to direct the program, and this and other costs are met from appropriations made by the participating States.

It was at first proposed to secure the assent of Congress to the compact, and resolutions were introduced in both the Senate and House of Representatives to give Congressional approval. The House passed its resolution,[9] but after extensive hearings, the Senate took no action.

The Problem of Congressional Assent

A question is raised, therefore, as to the validity of the compact, in view of the requirement of Article I, Section 10, Clause 3, of the Constitution, that "No State shall, without the consent of Congress enter into any agreement or compact with another State ..."

This clause, when read alone and out of context, would seem to prohibit any sort of contractual relationship between two States, and this interpretation has not been without proponents, especially during the uncritically centralizationist period between the two World Wars. Thus, it has been said that the position holding that not all interstate agreements require Congressional assent, extends a "judicial gloss on the words of the compact clause," and "such a result is unwarranted, for the Constitution requires Congressional consent to any interstate compact or agreement."[10] Another writer says, "Judicial authority for this position consists, however, of the repetition of an erroneous dictum in *Virginia* v *Tennessee*, and a group of cases in state courts, which either involve no interstate transactions, or are concerned with no state promise or grant."[11] One authority, stressing the desirability and convenience of compacts entered into without the cumbersome requirement of consent, advocates "restoration" of this power to the States by Constitutional amendment.[12] Also "the plain words of the Constitution mean what they say and ... all compacts require consent."[13]

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[7] *Supra*, n. 2, p. 4; see also I *Regional Action in Higher Education* (1949) No. 2, p. 4.

[8] *Supra*, n. 2, p. 15.

[9] Note 13 Mo. L. Rev. 286, 287 n. 6 (1948); 94 Cong. Rec. 5407 (1948).

[10] Note, 45 YALE L. J. 324 (1935).

[11] Note, 35 COL. L. REV. 76 (1935).

[12] Carman, *Should The States Be Permitted To Make Compacts Without the Consent of Congress*, 23 CORN. L. Q. 280 (1938).

[13] Note 34 VA. L. REV. 64, 66 (1948); see also note 35 HARV. L. REV. 322 (1922); and opinion of U. S. Attorney General's office, *Hearings Before a Subcommittee of the Committee on the Judiciary*, supra, n. 4, at p. 58, holding that Congressional consent is necessary.

Many Agreements Already Exist Without Assent

In the face of all these broadsides against coordinated interstate action and responsibility, it is somewhat surprising to find that states and their agencies have been entering into all sorts of agreements and compacts with each other, entirely disregarding this allegedly rigid Constitutional requirement. It is doubtful if the ordinary state official, conferring with his colleague in a neighboring state on reciprocal legislation or some mutual problem, is ever aware that each time he agrees with his confere, he is violating the Constitution of the United States in the eyes of the centralizationist school.

And yet agreements, oral and written, formal and informal, have been made between our States since the Constitution came into existence, without one having been declared invalid by the Supreme Court for lack of Congressional assent. In an article by Frankfurter and Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments"[14] eleven interstate agreements made without any congressional act of assent are listed, some of which have been expressly approved by the Supreme Court. Dodd states that there are seventeen compacts which, having been ratified by the States, have been put into operation although they have never received the consent of Congress.[15] Even at an early date in our Constitutional history, the authority of one State to contribute money to a project carried through by another state for their joint benefit, was not questioned.[16] These lists of agreements which became operative without assent were almost certainly incomplete when compiled, even if we include only agreements resulting from or recognized by formal legislative action. If reciprocal laws, jointly supported organizations, and executive agreements and contracts are included, the number of congressionally unrecognized agreements between States will run into the hundreds. Reciprocal legislation is certainly an "agreement" of a sort between States, one of which "agrees", for instance, to recognize a license issued by another, in return for the latter's agreement of a similar nature.[17] Chief Justice Taney is authority for the idea that

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[14] 34 YALE L. J. 685, 749 (1925).

[15] Dodd, *Interstate Compacts* 70 U. S. L. REV. 557 562 (1936).

[16] Abel, *Interstate Cooperation As a Child*, 32 IOWA L. REV. 203, 216 (1947), citing 1 Dig. La. Acts 558 (1804-1827) for the statement that contributions for the opening of the navigation of the Pearl River were being made by Mississippi.

[17] See Carman, *Should The States Be Permitted To Make Compacts Without The Consent of Congress*, 23 CORN. L. Q. 280, 282 (1938), n. 7, for the opinion that a Minnesota law "reciprocally permitting citizens of adjoining states and of adjoining Canadian provinces to operate their motor vehicles tax free—if like privileges—are extended to Minnesota vehicle owners," is probably unconstitutional, without the consent of Congress.

even the extradition of a criminal is an agreement, and for the proposition that:

> "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'."[18]

The number of unapproved agreements has enormously increased during the very years in which writers for legal periodicals have almost unanimously construed the "compact" clause most strictly

Perhaps the greatest expansion has occurred in the field of interstate organizations jointly supported and sponsored by the several States. Chief among these is the Council of State Governments,[19] a self-styled "joint governmental agency established by the States, for service to the States, supported by the States. The Council is composed of Commissions or Committees on Interstate Cooperation established in each of the 48 States. Legislation establishing these commissions provides that 'The Council of State Governments is hereby declared to be a joint governmental agency of this State and of the other States which cooperate through it' "[20] Despite the fact that this organization has been in existence since 1925,[21] apparently no attack has ever been made on the constitutionality of the appropriation acts of the various States, or their acts authorizing participation, on the ground that Congress has never assented to its formation or existence.[22]

Still in the field of jointly supported organizations, it would appear that Utah and Wyoming already incarcerate their women prisoners in Colorado,[23] and that a model act has been prepared for adoption by interested western States authorizing the State authority in the field of prisons to contract with any other State for the detention and care of female prisoners during the term of their imprisonment.[24] This act was prepared as a means of avoiding the use of the formal, Congressionally approved, compact, and as a part of the

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[18] Holmes v. Jennson, 14 Pet. (U. S.) 540, 572, 10 L. Ed. 579, 595 (1840).

[19] Caldwell, *Interstate Cooperation In River Basin Development,* 32 IOWA L. REV. 232, 236 (1947).

[20] The Book of the States, 1948-1949, p. 10.

[21] *Id.* at 3.

[22] But see Parker v. Riley, 18, Cal. 2d 83, 113 P 2d 873, 134 A. L. R. 1405 (1941), in which the constitutionality of the act establishing the California Commission on Interstate Cooperation (the body charged with furthering the State's participation as a member of the Council) was attacked on another ground. The act was upheld. In the A. L. R. annotation, supra, at p. 1412, the annotator states: "That the prohibition of Art. 1, Sec. 10, cl. 3, has been construed as referring only to political alliances tending to encroach upon the supremacy of the United States— "

[23] Western Regional Office, Council of State Governments, *Report of the Western Interstate Committee on Institutional Care 1946-1948,* p. 5.

[24] *Id.* at 8, Appendix A.

agreement, the "host" State proposed to adopt a statute admitting women prisoners from outside the State on a "tuition" basis.[25]

One of the most successful interstate agreements has been the Palisades Interstate Park Agreement between New York and New Jersey This agreement was ratified by the legislature of the two States in 1900, and the organization functioned without Congressional assent until 1937 The agreement was readopted by each of the States in 1937 as a formal compact, this time with Congressional approval.[26]

Nation-wide organizations of officials, state agencies, and municipal and other local governmental units are too numerous to trace. Many of them involve some contractual aspect, or governmental financing, and certainly represent "agreements" within Chief Justice Taney's definition of the term.[27] A recognition of common regional interests is increasing, and governmental agencies are being formed to give practical effect to this recognition. At least one instance has been noted in which a Canadian province is included in a regional associattion apparently formed for the purpose of attracting the tourist trade.[28]

Such Agreements Have Long Been Recognized by the Courts

The courts of the United States and of the several States have long recognized the possibility of valid agreements between States made without Congressional consent, or at least without express consent. Undoubtedly the lealing case on this point is *Virginia* v *Tennessee*,[29] which was decided by the Supreme Court of the United States in 1893. This was a suit to establish the boundary line between the two States, and the decision turned on the validity of a compact made between them in 1803, without Congressional assent. The Court upheld the compact, and in its opinion discussed the meaning and effect of the "compact clause" of the Constitution at some length, very logically

[25] *Id.* at 6.

[26] The Book of the States, 1948-1949, p. 30.

[27] Holmes v. Jennison, 14 Pet. 540, 10 L. Ed. 579 (U. S. 1840). These intergovernmental, interstate, cooperative projects are growing in number; in the educational field, for example, a most recent proposal is to establish a school to train police officers of the Southern States at the University of Louisville, a municipal institution (The Louisville, Ky., *Courier-Journal*, Oct. 11, 1948, Section 2, page 3, column 3).

[28] Pacific Northwest Associated, an organization which dispenses travel folders, among other things, and advertises the attractions of the region, under the joint sponsorship of the Washington State Advertising Commission, the Oregon State Highway Commission, and the British Columbia Government Travel Bureau; Holiday Magazine, November, 1949, pp. 12-13.

[29] 148 U. S. 503, 37 L. Ed. 537 (1893).

demolishing as an "absurdity" the contention that no valid agreement is possible without Congressional approval:

> "The terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.
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> There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that state to obtain the consent of Congress before it could contract with New York for the transportation of the exhibit through that state in that way. If the bordering line of two states should cross some malarious and disease producing district, there could be no possible reason, or any conceivable public grounds, to obtain the consent of Congress for the bordering states to agree to unite in draining the district, and thus remove the cause of disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms compact' or agreement' in the Constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?
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> We can only reply by looking at the object of the constitutional provision and construing the terms 'agreement' and 'compact' by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of a doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.
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> Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is 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."[30]

[30] *Id.* at 517, 37 L. Ed. at 542.

It is true that the Court went on to say that consent may be implied, and could be implied in this case from long recognition by the federal authorities of the territorial divisions established by the compact.[31] Nevertheless, the quoted passage in the opinion has been so frequently and so favorably mentioned or quoted in succeeding cases[32] as to leave little doubt that it represents the settled opinion of the Court. As recently as 1920 we find the Court inviting two states to solve a particularly vexing problem cooperatively, and no mention is made of congressional approval.[33]

Virginia v *Tennessee* was decided more than one hundred years after the adoption of the Constitution, but it was not decided as an entirely new question. The boundary line established by the Virginia-Tennessee compact had been recognized by the Supreme Court as early as 1818, though there was no discussion or argument concerning the right of the States to agree upon their boundary by compact.[34] Five years later, in the case of *Green* v *Biddle*,[35] the decision turned on the validity of a Kentucky act which was contrary to the Kentucky-Virginia compact under which Kentucky was authorized to seek admission into the Union. Clay, as amicus curiae, argued in support of the Kentucky statute in much the same terms used by present day proponents of the "assent" requirement, saying:

> "Both by the original act of confederation and the existing national constitution, the States are prohibited from treating or contracting with each other, without the consent of Congress. The terms of the prohibition in the constitution are very strong. It extends to all agreements or compacts, no matter what is the subject of them. It is immaterial, therefore, whether that subject be harmless or dangerous to the Union.
>
> In the present case, there is no pretense for alleging a subsequent express assent. Was there a prior one? The act of Virginia did not even profess to ask the consent of Congress to the compact. The act of February 4, 1791, (by which alone the will of Congress on this subject is signified) merely declares the consent of that body to the erecting of the District of Kentucky into a separate and independent state, and its reception into the Union on a certain day."[36]

Despite this argument, the Court held the compact valid and bind-

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[31] *Id.* at 522, 37 L. Ed. at 544.

[32] North Carolina v. Tennessee, 235 U. S. 1, 15, 59 L. Ed. 97, 103 (1914); Stearns v. Minnesota, 179 U. S. 223, 45 L. Ed. 162 (1900); Louisiana v. Texas, 176 U. S. 1, 17, 44 L. Ed. 347, 354 (1899); Wharton v. Wise, 53 U. S. 155, 168, 38 L. Ed. 669, 675 (1893). See also St. Louis & S. F Rwy. Co. v. James, 161 U. S. 545, 562, 40 L. Ed. 802, 808 (1896); Stevenson v. Fain, 116 Fed. 147 (CCA 1902); Belding v. Hebrard, 103 Fed 532, 542 (CAA 1900).

[33] New York v. New Jersey, 256 U. S. 296, 65 L. Ed. 937 (1920).

[34] Robinson v. Campbell, 3 Wheat, 212, 4 Ld. Ed. 372 (U. S. 1818).

[35] 8 Wheat 1, 5 L. Ed. 547 (U. S. 1823).

[36] *Id.* at 39, 5 L. Ed. at 557.

ing on Kentucky, on the ground that it had been communicated to Congress, and that body had impliedly assented to it by admitting Kentucky to the Union.

In *Barren* v *Baltimore*,[37] Chief Justice Marshall recognized the purpose of the constitutional restriction on the States' compact powers to be to "restrain State legislation on subjects intrusted to the general government."[38] The opinion in *Rhode Island* v *Massachusetts* contains dictum to the effect that the intent of the compact clause was to give Congress "the power of dissenting to such compacts to guard against the derangement of their federal relations with other States of the Union and the federal government [39]

The decision of the State courts upholding the power of the States to enter into agreements with each other without Congressional assent, are numerous and unequivocal, and date from an early period right up to very recent cases.[40]

The only Supreme Court case containing contrary dictum is *Holmes* v *Jennison*,[41] a case involving the extradition of a criminal from Vermont to Canada. The highest court of Vermont had approved the extradition proceedings, and on appeal the Supreme Court was equally divided, in consequence of which the writ of error was dismissed. However, Chief Justice Taney, whose opinion in this case has already been quoted in this paper, gave a very broad interpretation to the meaning of the word "agreement" as used in the compact clause, indicating that the restriction applied to any sort of agreement, oral or written ,formal or informal. Nevertheless, it would appear that his opinion was actually based upon the theory that all powers relating to foreign intercourse were confided to the general movement, and

[37] 7 Pet. 243, 8 L. Ed. 672 (U. S. 1833). For an opinion upholding the rights of the States, as sovereign units, to enter into agreements and compacts subject to constitutional restrictions, see Poole v. Fleeger, 11 Pet. 185, 9 L. Ed. 680 (U. S. 1837).

[38] Barron v. Baltimore, 7 Pet. at 249, 8 L. Ed. at 674.

[39] 12 Pet. 657 726, 9 L. Ed. 1233, 1261 (U. S. 1838).

[40] Parker v. Riley, 18 Cal. 2d 83, 113 P 2d 873, 134 A. L. R. 1405 (1941); Mackay v. N. Y., N. H., & H. R. Co., 82 Conn. 73, 72 Atl. 583 (1909); Union Branch Rwy. Co. v. E. Tenn. & Ga. R. Co., 14 Ga. 327 (1853); Reeves v. Deisenroth, 288 Ky. 724, 157 S. W 2d 331 (1941); Dixie Wholesale Grocery, Inc. v. Martin, 278 Ky. 705, 129 S. W 2d 181 (1939); Fisher v. Steele, 39 La. Ann 447, 1 So. 882 (1887); McHenry County v. Brady, 37 N. Dak. 59, 163 N. W 540 (1917); Dover v. Portsmouth Bridge, 17 N. H. 200 (1845); Russell v. Am. Assn., 139 Tenn. 124, 201 S. W 151 (1918); Searsburg v. Woodford, 76 Vt. 370, 57 Atl. 961 (1904). See also 2 STORY, COMMENTARIES ON THE CONSTITUTION Sec. 1402, 1403 (5th ed. 1891); WARREN, THE SUPREME COURT AND THE SOVEREIGN STATES 75 (1924); 1 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE U. S. Sec. 172, pp. 307-309 (2nd ed. 1929); and 59 C. J STATES, Sec. 11 (2) et seq.

[41] 14 Pet. 540, 10 L. Ed. 579 (U. S. 1840); for a criticism of this dictum, see Frankfurter and Landis, *The Compact Clause of the Constitution -a Study in Interstate Adjustments*, 34 YALE L. J. 685, at 752, Appendix n. 258 (1925).

that the Governor of Vermont was engaging in the conduct of foreign relations when he agreed to the extradition of a fugitive to Canada.[42] This view of the Taney opinion was adopted and approved by the Court some years later in *U S.* v *Rauscher*[43] However, the view is still held in some quarters that some agreements of a contractual nature may be made by individual States with foreign governments or their subdivisions.[44]

Types of Interstate Agreements

Even those who would uphold the principle that Congressional assent is necessary to every interstate agreement very often tacitly admit of exceptions, apparently without any realization of inconsistency Thus, one who says that "the plain words of the Constitution mean what they say," admits that transactions between States of a contractual nature do not require consent if they are such as could be performed by individuals.[45] This would seem to place the author in the extraordinary position of saying that a contract is not an agreement. Again, it is said that acquiescence of one State in the acts of another within the former's borders will not constitute an agreement, and immediately thereafter, that the compact clause applies in terms to all "consensual transactions" between States.[46] It is difficult to see how the performance of an act by one sovereign within the territory of another, with the latter's knowledge and acquiescence, can fail of comprehension within the term "consensual transaction"

Perhaps the reason for this inconsistency lies in the difficulty involved in classification. The possibilities are so multitudinous that an exact classification is probably impossible. In very general terms, however, interstate agreements could be said to fall into three classes:

1. Compacts and agreements ratified by legislative action of the States made party thereto;
2. Reciprocal legislation;
3. Executive agreements and contracts.

The first classification would certainly include all written compacts formally entered into as such and adopted by the legislatures of the participating states, and assented to by Congress. It would include

[42] *Id.* at 570, 10 L. Ed. at 594.
[43] 119 U. S. 407, 30 L. Ed. 425 (1886).
[44] McHenry County v. Brady, 37 N. Dak. 59, 163 N. W 540 (1917); Bruce, *The Compacts and Agreements of States With One Another And With Foreign Powers,* 2 MINN. L. REV. 500 (1918).
[45] Note, 34 VA. L. REV. 64 (1948).
[46] Note 35 COL. L. REV. 76, 77 (1935).

much more, however. Organizations jointly established and operated by two or more States, and authorized by their legislatures, and supported by legislative appropriations, must also be included, whether or not Congress has ever consented to their establishment. Agreements establishing boundary lines are included, and here it is certain that such agreements, even though not expressly approved by Congress, may become binding on the States concerned, so that one State may not withdraw by unilateral action.[47]

The second general classification suggested, reciprocal legislation, is self-explanatory It is to be distinguished from the first class of legislative agreements mentioned, in that it does not involve agreements with specific States by its terms, but usually awards some privilege to citizens of any other State which will award a like privilege to citizens of the State enacting the law Even this is an "agreement" within Chief Justice Taney's definition, and such legislation has been questioned as violative of the compact clause.[48]

Executive agreements and contracts are made almost daily by various departmental officials or officials of subordinate political subdivisions. They are sometimes oral, but may also include written agreements. They are none the less "agreements" because they are not adopted formally by the legislatures of the States involved, if the officials concerned are authorized to make them. It is necessary to recognize their existence, although those who have undertaken to complie lists of interstate agreements or compacts have very understandably omitted them from consideration.[49]

Possible Exceptions to "Consent" Requirement

It would appear from the preceding discussion, therefore, that as a matter of practice numerous agreements have been made between and among states and their subdivisions without express congressional consent, and that even those writers who would most strictly construe the constitutional restriction, tacitly acknowledge certain exceptions. The theories advanced to permit these exceptions include:

1. Consent implied from some Congressional act recognizing a situation resulting from a compact;

[47] Virginia v. Tennessee, 148 U. S. 5031, 37 L. Ed. 537 (1893).

[48] Carman, *Should The States Be Permitted To Make Compacts Without The Consent of Congress,* 23 CORN. L. Q. 280, 282 n. 7 (1938).

[49] For lists of interstate compacts, see Bruce, *The Compacts And Agreements Of States With One Another And With Foreign Powers* 2 MINN. L. REV. 500 (1918); Dodd, *Interstate Compacts,* 70 U. S. L. REV. 557 (1936); Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 YALE L. J. 685 (1925); BOOK OF THE STATES (Council of State Governments 1948-1949) 28 (for compacts between 1934-1947).

2. Consent implied from acquiescence over a long period;
3. A compact is valid until disapproved by some affirmative action of Congress (this is practically the same as the preceding);
4. Agreements involving governmental functions require consent, but ordinary business transactions between States do not;
5. Agreements on purely state problems do not require consent.

The "implied consent" doctrine receives support in the leading case of *Virginia* v *Tennessee*, in which the Court said that Congress impliedly consented to the boundary compact because the division of territory established thereby was recognized in the election or appointment of federal officials whose assignments and duties encompassed territory to the state borders.[50] Upon closer examination, however, this doctrine is open to the objection that it is capricious, as the "consent" is as likely as not to be included by some inadvertent and merely incidental mention in a statute on an entirely different matter. Besides, many agreements, particularly executive agreements, are already in operation for which no implied consent could be found in any Congressional act.

Consent implied from long acquiescence is slightly less objectionable, but would obviously raise a question as to the date when the compact actually becomes valid.

The theory that a compact is valid until disapproved by Congress received support in *St. Louis & San Francisco Rwy.* v *James*,[51] which involved a railroad organized under the laws of one State which, with the consent of that State, accepted certain additional authority from another State. There the Court said: "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."[52]

The distinction between agreements involving governmental functions and those concerning ordinary business transactions does not appear to have any basis in the Constitution. A State is a sovereignty, not a municipal corporation.

Finally, the theory is advanced that agreements between States which involve matters of State responsibility only do not require any Congressional assent at all, either express or implied. The dictum already quoted in *Virginia* v *Tennessee* (if dictum it is), and the

[50] 148 U. S. at 522, 37 L. Ed. at 544.
[51] 161 U. S. 545, 40 L. Ed. 802 (1896).
[52] *Id.* at 562, 40 L. Ed. 808.

numerous cases approving it,[53] strongly urge this view, as do most of the cases in the State courts.[54] Basically this is the same view taken by Judge Bruce when he says that compacts which increase or decrease political power are void without consent, but all others are voidable merely.[55] This last statement may go too far, however. There would appear to be no sound reason for permitting Congress to declare an agreement void out of mere caprice, but it could undoubtedly prohibit any agreement, which in its opinion, increased the State's political power to a major degree, or invaded the federal domain.

When the Constitution is considered as a whole, together with its historical background and the careful reservation of powers to the States, it is impossible to believe that it was the intent of the framers to do more than prevent dangerous political combinations among the states. Certainly a generation which has seen executive agreements, joint resolutions, and simple acts of Congress substitute for treaties in our foreign affairs, should have no difficulty in interpreting the compact clause to require Congressional assent only for formal political compacts, or agreements involving the exercise of power concurrently with the federal government.

The scornful comment of the Louisiana Court when faced with an objection to the construction of a levee by one State within the borders of another, is indicative of the realities of the situation:

> "On reading that objection in connection with the constitutional prohibition just quoted, the mind would naturally expect a charge that the State of Louisiana was projecting a treaty of alliance with the State of Arkansas, or contemplated some joint scheme of commercial or industrial enterprise, or perhaps conspiring for the establishment of a new confederacy; but great is the relief when the mind is informed that the purpose which plaintiff resists with such a powerful shield is merely to build a piece of levee in the State of Arkansas, if necessary, and if that state does not object, or consents. It is, indeed, too clear for argument that such a transaction is no more a prohibited compact between two states than is contained in the requisition of one governor for, and the consent of another to, the capture and arrest of a fugitive from justice."[56]

Finally, it is submitted that practical necessity urges an interpretation of the compact clause which will allow the States the greatest possible freedom in dealing with each other for their common good.

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[53] *Supra*, n. 32.
[54] *Supra*, n. 40.
[55] Bruce, *The Compacts and Agreements of States With One Another and With Foreign Powers*, 2 MINN. L. REV. 500, 516 (1918).
[56] Fisher v. Steele, 39 La. Ann. 447 454, 1 So. 882, 888 (1887).

As long as Congress retains the power to declare a "political" compact inoperative, and the Supreme Court sits as a guardian of federal prerogatives,[57] it is submitted that there is no danger of any misuse of the States' sovereign powers in their agreements with each other.

> "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. 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 unequivocably national responsibilities. As to these regional problems Congress could not legislate effectively. Regional interests, regional wisdom, and regional pride must be looked to for solution."[58]

Conclusion

The field of public education having been reserved to the States by the Constitution as their exclusive responsibility, it is submitted that the Southern States were acting within the scope of their authority in reaching agreements among themselves for the purpose of promoting education by their joint efforts. The compact entered into for this purpose is valid without Congressional assent.

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[57] For the view that the Supreme Court will always uphold the powers of the government of which it is a part, as against the States, see WILTSE, JOHN C. CALHOUN, NULLIFIER, 1829-1839.

[58] Frankfurter and Landis, supra n. 14, at 708. This article has been cited for the proposition that all compacts must receive Congressional assent, but it would seem to go no further than to set out the method suggested by the Constitution for adoption of formal compacts, without discussing the possibility of interstate agreements made solely by State action concerning matters entirely within the responsibility of the States. It presents a very powerful argument in favor of interstate agreements.