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C. Ben Dutton
Indiana University - Bloomington

COMPACTS AND TRADE BARRIER CONTROVERSIES

C. BEN DUTTON*

> "No State shall, without the consent of Congress . . . . . enter into an agreement or compact with another State."[1]

Within the periphery of this modest-seeming clause has been thought to lie the solution to many controversies and frictions that have arisen between the various American states. A brief investigation of the chronology of inter-state compacting[2] discloses that when conflicts between states materialize, settlement by compact is usually suggested[3] and frequently attempted.[4] In keeping with precedent, this inquiry becomes pertinent: Should the device of inter-state compacts be recommended as a solution to the newest of inter-state difficulties—the trade barrier?[5]

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* School of Business, Indiana University.

[1] U. S. CONST. ART. 1, §10.

[2] *See*: Appendix to Report of General Committee on Compacts and Agreements Between States, prepared for the Forty-Seventh Annual Conference of the Commissioners on Uniform State Laws (1937); Dodd, *Inter-State Compacts* (1936) 70 U.S.L. Rev. 557, continued (1939) 73 U.S.L. Rev. 75; Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments* (1925) 34 Yale L. J. 685, Appendix.

[3] *See*: Burke, *Inter-state Compacts* (1936) 29 Pa. Bar Assoc. Q. 25; Johnson, *Interstate Compacts Affecting Labor* (1934) 24 Am. Lab. Leg. Rev. 71; Stevens, *Uniform Corporation Laws Through Interstate Compacts and Federal Legislation* (1936) 34 Mich. L. Rev. 1063; Donovan, *State Compacts as a Method of Settling Problems Common to Several States* (1931) 80 U. Pa. L. Rev. 5.

In at least one case the United States Supreme Court has authored the suggestion. *See* Mr. Justice Brewer, in Washington v. Oregon, 214 U. S. 205, 218 (1909).

Interestingly enough, solution by compact has been suggested occasionally even before the need actually materialized. Witness the predilections of Frankfurter and Landis re the inter-state transmission of power, *supra* note 2, at 685 § V.

[4] See materials cited *supra* note 2.

[5] If compacts are used to remove trade barriers it is apparent that these compacts would have to be drawn by conferences or commissions organized for the purpose, and then submitted to the state legislatures for ratification. Compacts can be affected, however, through the medium of reciprocal legislation. On this latter method of compacting, *see*: Dodd, *supra* Note 2, 70 U. S. L. Rev. 557, 73 U. S. L. Rev. 75; Chamberlain, *Legislation Through Compacts* (1923) 9 A B A J 207. *See also*: Mackay v. New York, N. H. & H. R. R., 82 Conn. 73, 72 A. 583 (1909); State v. Joslin, 116 Kan. 615, 227 P. 543 (1924); Fisher v. Steele, 39 La. Ann. 447, 1 So. 882 (1887).

The Traditional Function of the Inter-state Compact

Having thus posed the question, it is necessary to examine the *type* of problem to the resolution of which inter-state compacts have been directed in the past. The findings are not encouraging. Compilations of compact efforts have been made by various authorities;[6] in no case has the problem involved been comparable to that of the trade barrier.[7] Boundary, water control, and criminal jurisdiction quarrels are typical subjects of the usual compact. Such problems are centralized and are peculiar to a relatively small number of (normally two) adjoining states. The areas afflicted by the trade barrier pestilence are large, often embracing many states. Moreover the trade barrier is not merely an inter-state obstacle, it is also inter-regional. Some trade barriers involve states that are not adjacent or contiguous to each other, but far removed.[8] Even where adjacent states are concerned, the entire area affected by the particular type of barrier shifts when the focal point is shifted from one state to another.[9]

With these considerations in mind, enthusiastic approval of the compact as a solution to the trade barrier problem is immediately precluded. Before even a qualified commendation can be advanced, a careful appraisal of all operative limitations upon the use of compacts is necessary.

LEGAL LIMITATIONS UPON THE USE OF COMPACTS

The Compact Clause and Its Context

The compact clause is found in Article one, Section ten, Paragraph three of the Constitution. In paragraph one of

[6] See note 2, *supra*. Usual types of inter-state controversies to which the compact has been applied are boundary disputes, control of navigation, river improvements, flood control, criminal jurisdiction, financial settlements, conservation, soil erosion, reclamation, pollution, labor, prison labor, etc.

[7] Most closely related is that of inter-state truck operation commented on in Dodd, *supra* note 2, 73 U. S. L. Rev. 75.

[8] Thus a trade barrier found particularly disadvantageous to an industrial region in the New England area might be erected by a competing region in the South, or far West.

[9] To illustrate: State A is adjoined by States B & C, and has trade barrier friction with each. State B has this barrier problem not just with State A, but also with States D and E, and has had no trouble with State C. State C has barrier trouble with State A and also with States F and G, but not with State B, or with B's neighbors D and E.

the same article and section is found this flat prohibition: "No state shall enter into any treaty, alliance or confederation." Thus although in some of the cases and materials dealing with the compact problem, the words "treaty" and "compact" are used almost interchangeably,[10] this loose usage is inaccurate. The states are denied power to enter into treaties,[11] and this denial constitutes a limitation upon the use of compacts.

The difference between compacts and treaties has been the subject of debate at various times. The distinction that has been pricked out seems to be that agreements between states that would effect an increase in state power in direct derogation of Federal authority, e.g., compacts creating military alliances, compacts of secession, and compacts for state performance of a recognized Federal function would be treaties.[12] Compacts and agreements, on the other hand, are simply arrangements *not* of the type, *nor* involving matters, which are found to comprise treaties, alliances, or confederations.[13] The difference is essentially one of degree,[14] and the exercise of the treaty power is appointed to the Federal government.

Obviously, the prohibition against states entering into

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[10] *See*: People v. Central R. R. of New Jersey, 42 N. Y. 283 (1870); Soule, *Back to States Rights* (1935) 171 Harpers Magazine 484.
It should be noted that the constitution also uses the terms "agreement or compact." Apparently a compact is merely a formalized agreement. *See* Virginia v. Tennessee, 148 U. S. 503 (1893); Holmes v. Jennison, 14 Pet. 540 (U. S. 1840); Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts."* (1936) 3 U. Chi. L. Rev. 453.

[11] *See* U. S. v. Rauscher, 119 U. S. 407 (1886); STORY, COMMENTARIES ON THE CONSTITUTION, (4th Ed. 1873) 1402; Burke, *supra* note 3, at 25; Note *Legal Problems Relating to Inter-state Compacts* (1938) 23 Iowa L. Rev. 618.

[12] This definition is substantially that suggested by Story. STORY, *op. cit. supra* note 11, § 1403. See *Union Branch R. R. v. E. T. & Ga. R. R.*, 14 Ga. 327 (1853), to effect that the framers of the Federal Constitution intended "to prohibit the several states from exercising their authority in any way which might limit, or infringe upon a full and complete execution by the General Government of the powers intended . . . ."

[13] *Cf.* STORY, *op. cit. supra* note 11, § 1873.

[14] The bestowal of congressional consent to an inter-state compact does not make the compact either a statute or a treaty of the Federal government. Hinderlider v. La Plata R. and Cherry Creek Ditch Co., 304 U. S. 92 (1938), 37 Mich. L. Rev. 129.
To the effect that no compact has yet been held invalid as constituting a treaty, *see* note, *Legal Problems Relating to Inter-state Compacts* (1938) 23 Iowa L. Rev. 618.

compacts or agreements without the consent of Congress implies that the states *may* enter into compacts *with* consent. This raises three questions: (1) When and in what manner can consent be extended? (2) Is consent always necessary? (3) Does the extension of consent preclude further attack on the validity of a compact?

In answer to the first question, congressional consent is appropriately given[15] either by statute or resolution.[16] It may be expressly extended or it may be implied from other legislative action.[17] It may be given either before or after the formation of the compact.[18] The remaining questions are not so easily answered.

Apparently there are in existence between various states, compacts to which congressional consent has not been granted.[19] Whether these compacts are invalid, and needful only of a proper ligitation to be expressly declared unenforceable is an interesting question. By a curious pyramiding of dicta, the rule seems to have become established that the consent of Congress is not necessary to certain types of compacts. An early expression of this feeling is made in a New Hampshire case of 1845.[20] Although no compact was found to exist under the facts there presented, the court found occasion to observe that the Federal Constitution probably was not meant to require the consent of Congress to boundary agreements and other matters of purely local concern, and to opine that if states might agree to these things without

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[15] Tatum v. Wheeler, 180 Miss. 800, 178 So. 95 (1938). "The Federal Constitution recognizes the right of the state to negotiate with the federal government, and to make treaties or arrangements with other states of the Union affecting in some respect their respective powers, provided it is done with the consent of the Congress, given in an appropriate manner."

[16] State v. Cunningham, 102 Miss. 237, 59 So. 76 (1912).

[17] Virginia v. West Va., 11 Wall. 39 (U. S. 1870); Virginia v. Tennessee, 148 U. S. 503 (1893); STORY, *op. cit. supra* note 11, § 1405; Burke, *supra* note 3, at 25.

In *Rhode Island v. Massachusetts*, 12 Pet. 657, 724 (U. S. 1838) Justice Baldwin makes this observation: "If Congress consented, then the states were in this respect restored to their original inherent sovereignty."

[18] Virginia v. Tennessee, 148 U. S. 503 (1893); State v. Joslin, 116 Kan. 615, 227 Pac. 543 (1924); Dodd, *supra* note 2, 70 U. S., L. Rev. 557; Donovan, *supra* note 3, at 5.

[19] *See* Dodd, *supra* note 2, 70 U. S. L. Rev. 557.

Congressional consent is not the only requirement in the compact clause. Implicit also, is the requirement of consent to, or ratification of, compacts, by the states involved.

[20] Dover v. Portsmouth Bridge, 17 N. H. 200 (1845).

congressional consent, they might agree upon some other matters, as well.[21] In 1893 the United States Supreme Court articulated the same thought, Justice Field declaring that only those compacts which increase a state's political power require consent.[22] The actual decision rendered, however, was that Congress had, by implication, consented to the compact under attack. In 1900 the substance of Field's dictum was reiterated in *Louisiana v. Texas*,[23] a case which *did not* involve a compact at all. The theory has been seconded by some of the state courts.[24]

There are, however, at least two cases which rise to the dignity of decisions to the effect that non-political compacts between the states do not require congressional consent.[25] If we accept the argument advanced by some of the writers on compacts, that the dicta of the cases first referred to is erroneous,[26] these latter cases will have to be overturned.[27] The ideal clarification of this precedent probably would be to require the consent of Congress to *all* compacts and agreements, but for the courts to be astute in finding tacit congressional consent to compacts touching matters of relatively small Federal significance.[28] This would

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[21] *See* Dover v. Portsmouth, 17 N. H. 200, 223 (1845).

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

[23] 176 U. S. 1 (1900).

[24] Again, however, purely by way of dicta. See: State v. Joslin, 116 Kan. 615, 227 Pac. 543 (1924).

[25] Dixie Wholesale Grocery v. Martin, 278 Ky. 705, 129 S. W. (2d) 181 (1939); Union Branch R. R. v. E. T. & Ga. R. R., 14 Ga. 327 (1853). In these cases, however, the courts seem to confuse the consent-no consent distinction with the treaty-compact distinction.

[26] Note, *A Reconsideration of the Nature of Interstate Compacts* (1935) 35 Col. L. Rev. 76; Bruce, *Compacts and Agreements of States with One Another and with Foreign Powers* (1918) 2 Minn. L. Rev. 500, the author writes at page 516, "Perhaps the true rule is that all compacts or agreements which increase or decrease political power are void, but that all others are voidable merely. At the option of the national government and that a consent thereto may be inferred from silence and acquiescence."

Cf. The Swiss Constitution *prohibits* political agreements between the cantons, but *permits* non-political agreements *if* there is Federal consent. See Note, *Inter-state Compacts As a Means of Settling Disputes Between States* (1922) 35 Harv. L. Rev. 322.

[27] The opinion in favor of such a course is not unanimous. See Note, *Legal Problems Relating to Interstate Compacts* (1938) 23 Iowa L. Rev. 618, suggesting that there may be some justification for the rule.

[28] Comment, *The Power of the States to Make Compacts* (1922) 31 Yale L. J. 635. The states, of course, would still be forbidden to enter into treaties, alliances, and confederations.

cause no serious change in the existing cases, but would realign authority with earlier Supreme Court compact doctrine.[29] In the case of inter-state barrier compacts, however, the safest course, if not a necessary one, would be to secure congressional approval.[30]

It remains to consider the effectiveness of congressional consent once it is given. Is the withholding of consent the only limitation upon inter-state compacts? In *Wharton v. Wise*[31] the Supreme Court intimated that a compact between the states, although properly formed, would be invalid to the extent it conflicted with the Federal Constitution.[32] Other authorities have expressed the same opinion.[33] Attacks upon compacts, alleging unconstitutionality of various sorts are reported, but instances of successful attack are rare.[34] Specific inquiry into the weight of constitutional attack upon compacts, with an eye to their potentiality against anti-trade-barrier agreements, therefore, is very much in order.

Other Constitutional Limitations

Leaving the discovery of all the possible bases of compact unconstitutionality to the lawyers who try the cases, it may be assumed that the most available grounds will be (1) conflict with Federal power over inter-state commerce, (2) denial of due process of law, (3) impairment of the obligation of contracts, (4) attempting to achieve extraterritoriality, (5) assumption of the Federal treaty power, and, (6) unlawful delegation of power.

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[29] Green v. Biddle, 8 Wheat 1 (U. S. 1823); Virginia v. West Virginia, 11 Wall. 39 (U. S. 1870).

[30] Consent could be given by a so-called blanket consent act as typified by 49 STAT. 1895 (1936). Even though trade barrier compacts be found to be non-political and thus not demanding of congressional consent, there can be little doubt that Federal co-operation, and stimulation is desirable. In principle at least, such co-operation agrees with that urged by Strong, *Cooperative Federalism* (1938) 23 Iowa L. Rev. 459.

[31] 153 U. S. 155 (1894).

[32] The court found no conflict, however.

[33] See Donovan, *The Constitutional Authority of Several States to Deal Jointly with Social and Labor Problems* (1936) 20 Marq. L. Rev. 78.

[34] For example, the Colorado Supreme Court held a compact to be in violation of due process, only to be reversed by the United States Supreme Court. La Plata River and Cherry Creek Ditch Co. v. Hinderlider, 93 Colo. 128, 25 P. (2d) 187 (1933), 2 Geo. Wash. L. Rev. 242 (1934), affirmed 101 Colo. 73, 70 P. (2d) 849 (1936), reversed 304 U. S. 92 (1938).

Among all these obstacles attempts to reduce barriers through compacts among the states seem most likely to run afoul of the interstate commerce clause. Just how much weight such an argument will carry remains to be seen. Voicing optimism, one writer declares, " . . . legislation by a single state, applied only to the problems of commerce within that state, is wholly ineffective from the standpoint of large scale economic planning. States, therefore, that wish to cope with commercial and economic matters that cross their boundaries may do so by means of compacts to which they become parties, and the assent of Congress required by the constitution, would take the place of a federal law on the subject. Since Congress may regulate all matters of interstate commerce, it should be able to give its assent to a compact among states pertaining thereto."[35]

Throwing gloom on this optimism are opinions of the Supreme Court like that found in *Pennsylvania v. Wheeling and Belmont Bridge Co.*[36] where the court after remarking that compacts between the states cannot operate as restrictions upon the constitutional power of Congress to regulate inter-state commerce says, "Otherwise Congress and two States would possess the power to modify and alter the constituition itself." Of course, the *Wheeling and Belmont Bridge* case[37] was decided shortly after the decision of the *Cooley* case[38] which ruled that on matters of national scope, the Federal government has *exclusive* jurisdiction. Later decisions, particularly those coming after *Plumley v. Massachusetts,*[39] have greatly enlarged the area of state action affecting interstate commerce.[40]

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[35] Burke, *supra,* Note 3, at 25. Melder, *Trade Barriers and States Rights* (1939) 25 A. B. A. J. 307 observes that "Free trade does not require that commerce and transportation are to go unregulated. It requires only that healthful, honestly represented, economically useful goods and services shall be admitted into any state or local market without discrimination . . . . "

[36] 18 How. 421, 433 (U. S. 1855).

[37] *Ibid.*

[38] Cooley v. Board of Port Wardens, 12 How. 299 (U. S. 1851); *Accord,* People v. Central R. R. of New Jersey, 42 N. Y. 283 (1870).

[39] 155 U. S. 461 (1894). Despite the fact that the issues are of national scope, the states retain their police power and may exercise it. State policing measures may, of course, be superceded by Federal action. See, in general, WILLIS, CONSTITUTIONAL LAW (1936) 307 ff.

[40] This has been true not only in the field of policing regulation, but in tax law. Witness, for example, the recent cases of *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U. S. 33 (1940) and *McGoldrick v. Felt & Tarrant Mfg. Co.,* 309 U. S. 70 (1940).

Whatever the effect of these principles may be, it is difficult to see why a compact tending to reduce or eliminate barriers to trade should be found unconstitutional for encroachment upon federal power over interstate commerce. In the first place, congressional action in the field in which the compact operates can be held to revoke congressional consent, and to supersede the compact.[41] In the second place, and this is more important, *a compact entered into to remove a trade barrier does not burden or interfere with interstate commerce.* On the contrary it would operate as an unburdening, a decisive unshackling of interstate trading and traffic. Trade barriers, whatever their nature, fall into one of two classes: (1) Barriers created by legislation[42] or by activity which could be found unconstitutional by the courts if test cases are brought. (2) Barriers created by legislation or by activity which is not unconstitutional but which is nevertheless discriminatory in an economic sense.[43] Barriers of the first class probably should be subjected to judicial scrutiny, and given short shrift.[44] But if the barrier be eliminated by compact before judicial action is brought to bear, there appears to be little reason why the courts should invalidate the compact simply because its indirect effect is to do the work of the courts.[45] Barriers of the second class seem eminently susceptible of compact determination, for, if the courts are unable to eliminate the barrier as unconstitutional, the only possible remedies are extra-judicial. Cer-

[41] *See* Note, *Legal Problems Relating to Interstate Compacts* (1938) 23 Iowa L. Rev. 618.

[42] As used here, "legislation" includes city ordinances.

[43] Melder, *supra* Note 35, at 307, states, "The leading forms of state and local trade barriers permitted by the courts, under the constitution, are based on the spending power, the taxing and licensing power and the police power. Under the exercise of their spending power political units may exercise preferences favoring residents in the purchase of institutional supplies, public printing, building materials, contracts for public works, and employment on public payrolls. These practices are exercised without the restraint of the federal courts."

[44] For example, note the fate of the auto-caravaning tax held violative of federal interstate commerce power in *Gray v. Ingels*, 23 F. Supp. 946 (1938), 7 Geo. Wash. L. Rev. 275 (1939).

[45] By way of analogy, the writer finds no cases reported in which a court expresses serious grief over the repeal of an unconstitutional statute before it could be judicially deleted. Even if the courts have been displeased over such a happening, there are no cases in which a repealing act has been found unconstitutional for interference with the judicial prerogative of invalidating the repealed act.

tainly the court should not play dog-in-the-manger and rule, in effect, that since it cannot cope with the problem, neither shall any other agency.

The issues of denial of due process of law and impairment of contract obligations by compact can be examined together, if for no other reason, because no cases have been found in which compacts have been set aside on either ground.[46] It is assumed, nevertheless, that compacts must meet the tests of these limitations,[47] but that difficulties should be no greater in the case of compacts than in the case of ordinary state legislation.[48] In examining into both of these grounds of possible unconstitutionality, the standard is essentially that of substantive due process, i.e., if the purpose for which the compact is formed is, in the eyes of the courts, of sufficient social interest, and if the compact is a proper means by which to advance this interest, an unconstitutional impairment of contract obligations, or an unreasonable deprivation of property will not have resulted.[49] That it is desirable, if not actually necessary, to eliminate interstate trade barriers is scarcely open to question at this late date.[50] Whether the compact is in appropriate means to solve

[46] The fact that no compact has been invalidated as violative of due process is pointed out in note, *Legal Problems Relating to Interstate Compacts* (1938) 23 Iowa L. Rev. 618. Attack has been directed against compacts on the ground of contract impairment, but has failed, usually on the ground that the question was not really involved. For an early instance, see *Poole v. Fleeger*, 11 Pet. 185 (U. S. 1837).

The converse situation arises when *other* state action is alleged to be unconstitutional as impairing the *contract* obligation of a compact. *Hawkins v. Barney's Lessee*, 5 Pet. 456 (U. S. 1831); *Kentucky v. Indiana*, 281 U. S. 163 (1930), or as impairing rights vested under a compact, *Hawkins v. Barney's Lessee, supra.*

[47] Donovan, *supra* note 33, at 78.

[48] "The restrictions imposed by 'due process of law' cannot be considered as constituting any special barrier in the path of interstate compacts. Individual state legislation is so restricted by the Fourteenth Amendment and federal legislation by the Fifth Amendment. Interstate compacts, while enjoying no exemption from the due process requirements, are no more subject to this restriction than any other state or federal action would be." Burke, *supra* note 3, at 25.

[49] The trouble lies not in formulating the principle, but in applying it to specific situations, as the cases arise.

[50] Reference need only be made to the other articles appearing in this issue of the Indiana Law Journal for full confirmation of this theory.

the barrier problem, it is at least a *reasonable* means.[51] As the Kansas Supreme Court said, "This decision [to enter into a compact] of the Legislature, having been made in the exercise of its proper functions and being based upon grounds that the court cannot pronounce to be capricious or without foundation in reason, is beyond judicial interference."[52]

Procedural due process has come into play as a basis of attack on interstate compacts. The alleged failure to give proper notice and hearing, was made the basis of the Colorado court's finding of unconstitutionality in *La Plata River and Cherry Creek Ditch Co.* v. *Hinderlider*.[53] The decision was reversed by the United States Supreme Court,[54] however, and its value as precedent accordingly negatived.

An attempt to secure extraterritorial jurisdiction by compact creates another *possible* ground of unconstitutional attack. Likewise a compact may be an unconstitutional bargaining away of a part of a state's sovereignty. But to dwell on the potentiality of these sources of attack is to create a legal ghost story. The courts have not been impressed by these arguments and have distinguished the boundaries of state sovereignty from those of its geographical territory, and have treated sovereignty, "not as an indivisible unit, but as a sum of legal relations capable of being distributed in part to foreign states."[55] The cases are interesting, but not particularly informative. The Supreme Court, for example, speaking through Justice Holmes, attempted to distinguish a state's area of sovereignty and its area of jurisdiction by stating that

[51] As to the requirement that the means bear some substantial relation to the end to be accomplished, see Lawton v. Steele, 152 U. S. 133 (1894); Weaver v. Palmer Bros. Co., 270 U. S. 402 (1926).

[52] State v. Joslin, 116 Kan. 615, 227 Pac. 543 (1924). In *City of New York v. Willcox*, 115 Misc. Rep. 351, 189 N. Y. S. 724 (1921), the court declares, "It is well established that subject to the approval of Congress, any two states may enter into a joint adventure to promote the common welfare of their citizens. . . . "

[53] La Plata River & Cherry Creek Ditch Co. v. Hinderlider, 93 Col. 128, 25 P. (2d) 187 (1933); 2 Geo. Wash. L. Rev. 242 (1934); 43 Yale L. J. 842 (1934). The court thought that the rights of private persons to water for irrigation purposes had been reduced without adequate notice and hearing.

[54] Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U. S. 92 (1938), 37 Mich. L. Rev. 129.

[55] Note, *Legal Problems Relating to Interstate Compacts* (1938) 23 Iowa L. Rev. 618.

the power to tax depends on sovereignty, which is determined by *boundary* lines, not by jurisdictional lines.[56]

The limitation on compacts resultant from the delegation of the treaty power to the Federal government already has been discussed. It is sufficient to add that, even with consent of Congress, the states cannot enter into a compact with a foreign power which amounts to a treaty, alliance, or confederation.[57] But since we are not here concerned with international trade barriers, this limitation is not significant.

Unconstitutionality resulting from a judicial finding that a compact attempts an improper delegation of legislative power was alleged in the recent United States Supreme Court determination of *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*[58] The attack was not there effective, however, as the court found that the delegation of authority to state engineers to decide when the use of water was to be rotated, was a mere matter of detail and clearly within constitutional power. While admitting the inherent danger to trade barrier compacts from this source (for much of the work of detecting and adjusting the barriers must be done by commissioners, both before and after formation of compacts), it can be migitated by carefully drafted standards.[59]

Another possible source of unconstitutionality should be mentioned. [If a state cannot create a barrier which violates

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[56] Central R. R. v. Jersey City, 209 U. S. 473 (1908). Curiously, the court seemed to feel that a state's jurisdiction was something less than its sovereignty. The case involved New Jersey's power to tax land on the New Jersey side of the Hudson river but under water, when by compact New Jersey had agreed that New York had exclusive jurisdiction over the river itself. The court sustained the New Jersey tax. In other boundary controversies, the court has been content merely to pronounce that the general right of sovereignty extends to enable the fixing, or changing of boundaries by agreement among themselves. *See* Poole v. Fleeger, 11 Pet. 185 (U. S. 1837); Rhode Island v. Massachusetts, 12 Pet. 657 (U. S. 1838).

To the effect that procurement of extra-territorial jurisdiction is in certain situations not bad, but actually desirable, see Legis. *Statutory Relief in Extraterritorial Tax Collection* (1935) 48 Harv. L. Rev. 828.

[57] Barron v. Baltimore, 7 Pet. 243 (1833); Holmes v. Jennison, 14 Pet. 540 (1840).

[58] 304 U. S. 92 (1938).

[59] The key, at least in part, is for the compact to embody a proper "standard." *See* Field v. Clark, 143 U. S. 649 (1892); J. W. Hampton Jr. & Co. v. U. S., 276 U. S. 394 (1928). For a decision finding unconstitutional delegation of power for lack of an adequate standard, see *A. L. Schechter Poultry Corp. v. U. S.*, 295 U. S. 495 (1935).

the equal protection clause it seems patent that two or more states could not; even with the consent of Congress.] But could two or more states eliminate a trade barrier between themselves by compact if the compact discriminated against citizens of states not parties to the compact? Would this type of discrimination be unconstitutional under the equal protection clause? We do not know. The way to avoid this problem is to invite all states affected by a particular barrier to participate in its removal by compacts. [But a state's refusal could hardly bar an action by its citizens.]

The Enforcement of Compacts

Although a compact may be entirely valid from a constitutional standpoint, it nevertheless will be of little avail in settling disputes between the states if it is not capable of enforcement. Largely on international law principles, the rule is established that *one* state cannot terminate a compact.[60] This rule would extend, presumably, to a compact entered into between several states to prevent a minority of the signatories from withdrawing.[61]

Even though the power to consent to compacts given Congress by the Constitution may imply Congressional power to enforce compacts,[62] enforcement here, as in the case of ordinary legislation, devolves largely upon the courts.[63] The United States Supreme Court has jurisdiction in suits growing out of compacts between the states,[64] and a compact cannot be construed to limit this jurisdiction.[65]

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[60] See Note, *Legal Problems Relating to Interstate Compacts* (1938) 23 Iowa L. Rev. 618.

[61] Where there are only two parties (states) to a compact, joint action is required to dissolve the compact. Query whether a *majority* of the states signing a multi-partied compact (such as trade barrier compacts of necessity would be) could dissolve it?

[62] See Dodd, *Arbitration via Interstate Compacts* (1939) 3 Arb. J. 314.

[63] "The judiciary enforces the provisions of treaties [compacts] just as they do the statute laws." Couch v. State, 140 Tenn. 156, 203 S. W. 831 (1918).

Actions can be brought in state courts, in the lower Federal courts, or in the United States Supreme Court (U. S. Const., Art. III, § 2). Note, *Legal Problems Relating to Interstate Compacts* (1938) 23 Iowa L. Rev. 618.

[64] Virginia v. West Virginia, 11 Wall. 39 (U. S. 1870). (The court also held that it was not precluded from hearing boundary dispute cases on the grounds that they involved a political question.)

See *Kansas v. Colorado*, 206 U. S. 46 (1907) in which the court remarks: "In other words, through these successive disputes and decisions (controversies, *not* necessarily involving compacts, between the states), this court is practically building up what may not improperly be called inter-state common law."

The problem of executing or enforcing a judgment against a state is a difficult one, and might become very troublesome as a counterpart of attempted judicial enforcement of compacts. No state, fortunately, has seen fit to defy a Supreme Court ruling of this sort,[66] and this acceptance of and compliance with decisions may be expected to continue. Should the states choose to break their precedent, some method of forced obedience will have to be developed.[67]

ECONOMIC LIMITATIONS UPON THE USE OF COMPACTS

Economic complexities probably are more deterrent to the success of the compact solution than are legal limitations. Moreover, generalizations are not helpful—only by a skilled economist's study of the direct and consequental effects of each proposed compact can prediction be ventured with assurance. Nevertheless, a few economic obstacles to successful compacting against trade barriers must be emphasized and set off against the legal limitations discussed previously.

In a recent article,[68] Spengler suggests that whenever a compact is formed, one or both of these results attend: (1) The compact causes injury to non-compacting states (2) The lack of co-operation in the non-compacting states injures the compacting states. Applied to trade barrier compacts, the consequences are clear.

Assume that Areas A, B, and C have erected trade barriers against each other. Areas A and B appoint commissioners and a compact is entered into by which it is agreed that persons or goods coming into B from A shall no longer be discriminated against, and in return persons or goods entering A from B shall receive similar treatment. Since the

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[65] Wilson v. Mason, 1 Cranch 45 (U. S. 1802).

[66] This statement is made twice by Dodd. See Dodd, *supra* Note 2, 70 U. S. L. Rev. 557 and Dodd, *supra* Note 62, at 314 (1939). See, however, Lay, *Interstate Controversies* (1920) 54 Am. L. Rev. 705 to effect that in three cases the Supreme Court has been defied by a state. It is possible, of course, that Miss Dodd limits her observations to decrees of the court in compact litigations and that Lay in his review refers to interstate controversies of all kinds.

[67] Note, *A Reconsideration of the Nature of Interstate Compacts* (1935) 35 Col. L. Rev. 76 (specific performance of compacts is considered).

State courts can mandamus public officials to effect the carrying out of a compact, but the Federal courts will not entertain such actions on the theory that it would be a suit against a state. Note, *Legal Problems Relating to Interstate Compacts* (1938) 23 Iowa L. Rev. 618.

[68] Note, *The Economic Limitations to Certain Uses of Interstate Compacts* (1937) 31 Am. Pol. Sci. Rev. 41.

barriers remain in force against persons or goods coming from Area C into either Areas A or B, unfavorable discrimination continues against C. This seems a clear illustration of Spengler's first result.

Now, assume that as a result of a compact between A and B, all barrier laws in those two areas are repealed. C, however, refuses to co-operate and continues its discriminatory legislation in full force. The result is obvious—persons and goods from A and B are unable to compete effectively in the markets of C because of the trade barrier. Yet persons and goods from Area C are able to participate freely in the now unrestricted markets of A and B. The compacting areas have created a disadvantage to themselves as Spengler's second conclusion suggests.

Other economic limitations thought to operate against compact settlement of barrier problems have been alluded to previously.[69] Much optimism is expressed concerning the effectiveness of trade barrier compacts because of a misunderstanding of the economics involved. Too frequently it is assumed that a discriminatory barrier of one state produces directly a discriminatory barrier in an adjoining state, and that by a simple compact between the two states the two barriers may be eliminated. Unfortunately, the complexity of modern trade usually produces a more entangled situation. The barrier of state A which injures state B may produce as its counterpart a statute in B which injures competition in state C, where it is possible that state A or a particular economic group in state A finds either a buying or selling market. Thus the barrier agreement requires not two, but the inclusion of three states, and this is the simple picture. More frequently before the circle is run, the expanding effects of the first barrier have created new barriers in not two but perhaps six or more states, each of which must be considered before a complete resolution of a particular barrier can be achieved.

In some instances the effect of the original barrier does not produce specific barrier legislation which may be met and discussed directly through official governmental channels but rather produces indirect agreements among the purchasers of certain goods to refrain from dealing in products of the barrier state. For example, it frequently has been said that the purchasers of manufactured products made in a dairy state which has been responsible for much of the oleomargar-

[69] See notes 8 and 9, *supra*.

ine legislation have banded together and agreed to refrain from purchasing manufactured goods produced in the dairy state until such time as the barrier restrictions are removed. Although the purchasers of the manufactured articles have no direct interest in margarine at all, they realize that the producers of most materials from which butter substitutes are made provide their state a substantial portion of the spendable income. In this situation no compact between the two states can be written. It can only be hoped that if compacts are entered into between dairy producing states which have adopted anti-butter substitute legislation that the gentleman's agreement to boycott the manufactured goods of those states will be forgotten when the cause no longer exists.

POLITICAL LIMITATIONS UPON THE USE OF COMPACTS

It is not intended to appraise the political, governmental, or administrative difficulties involved in the removal by compact of inter-state trade barriers. It would be impossible. But the question of political desirability or undesirability of the compact approach to the problem cannot be ignored. There may be substance, for example, in the words of George Soule: "But interstate compacts present difficulties. They are a clumsy attempt to duplicate the Federal government itself, when the Federal government is prevented from acting. The States originally got together and formed a national government to serve their common needs. Now they are obliged to come together again and make treaties with one another, instead of having the legislature of their Federal government pass the desired laws. The negotiation of a treaty is a delicate and difficult matter. It has to be ratified by the separate legislatures. In order to be effective, it requires the unanimous consent of the states involved; whereas in legislatures a majority is sufficient. No government anywhere ever worked well by unanimous consent. . . . In a case like this the interstate compact is even more clumsy and difficult than a Constitutional amendment, which can be ratified by three-quarters of the States. If the people of this country must rely on separate Constitutional amendments for every addition to important economic legislation, we are sunk. To rely on interstate compacts is even more hopeless than that."[70]

[70] Soule, *Back to States Rights* (1935) 171 Harper's Magazine 484.
Set off against those advocates like Mr. Soule should be some of the quieter arguments favoring compact settlements. See, for example, Wilson, *Industrial & Labor Adjustments by Interstate Compacts* (1935) 20 Marq. L. Rev. 11.

Certainly this much may be said. "Politics" in the newspaper sense of the word, must be allowed to play no part in the working out of anti-trade-barrier compacts. And if this is impossible, then a successful compact arrangement seems doubtful.[71]

CONCLUSION

Out of this mass of mixed considerations, of comingled law, economics, politics, opinion, and guess work, one emerges still confronted with the original question: Should the device of interstate compacts be recommended as a solution to the newest of interstate difficulties—the trade barrier?

The answer is by no means clear. It may not be said that the compact holds out no hope as a resolvent. Yet its handicaps are many, and there are other solutions perhaps equally promising.[72] This much we do know. The compact has institutional support,[73] as well as the confidence of most of its commentators.[74] Perhaps it is wisest to leave the question answered in this manner: The interstate compact is an available, and a moderately promising, agency for the reduction or elimination of interstate barriers. Its use on a wide scale, however, seems inadvisable until *all* possible methods have been investigated and their merits evaluated.

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[71] See Donovan, *The Constitutional Authority of Several States to Deal Jointly with Social and Labor Problems* (1936) 20 Marq. L. Rev. 78. Dodd, *supra* Note 2, 70 U. S. L. Rev. 557, pointed out that both major political parties had expressed themselves as in favor of compact settlement of state controversies. Yet the same author, *in Interstate Compacts, Recent Developments* (1939) *supra* note 2, 73 U. S. L. Rev. 75, notes that compact efforts of certain kinds have met Federal disapproval. Miss Dodd indicates that one of the biggest drawbacks to settlement of disputes by compact is the length of time required to consummate them.

[72] National Legislation, for example, is advocated by some writers. See Spengler, *Economic Limitations to Certain Uses of Interstate Compacts* (1937) 31 Am. Pol. Sci. Rev. 41; Soule, *Back to States Rights* (1935) 171 Harper's Magazine 484.

[73] See Report of General Committee on Compacts and Agreements between the States to National Conf. of Com'rs. on Uniform State Laws, at the 4th Ann. Convention (1937); Feibelman, *Uniform State Legislation Through Inter-state Compacts* (1937) 12 Notre Dame Lawyer 127.

[74] In view of the extensive citation of authority elsewhere in this article, a complete list is not attempted here. See, Dodd, *supra* Note 62; Donovan, *supra* Note 3, at 5; Donovan, *supra* Note 33, at 78; Frankfurter and Landis, *supra* Note 2, at 685; Wilson, *Industrial and Labor Adjustments by Interstate Compacts* (1935) 20 Marq. L. Rev. 11; Note, *Interstate Compacts as a Means of Settling Disputes Between States* (1922) 35 Harv. L. Rev. 322.