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INTERSTATE COMPACTS AND THE FEDERAL TREATY POWER

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This article will discuss the power of any state to contract with the several other states of our union via interstate compact. It may be said that the interstate compact, to the extent that it deals with local and regional matters, supplements the federal treaty power. Major concepts of the federal treaty power have been set down elsewhere in this issue. By express permission of the Constitution, though negatively stated, the several states are authorized to enter into compacts or agreements with sister states or with foreign countries, subject to approval of Congress.[1]

Interstate compacts are similar in nature to the treaties executed by sovereign nations in some respects, but there are also striking dissimilarities. In order to properly analyze the scope of the interstate compact power, brief mention of the history and background of interstate compacts must be made.

As earlier indicated, provision was made in the federal Constitution granting the states the right to consumate compacts with Congressional consent. This constitutional proviso does not, however, represent the origin of the concept of interstate compacts. While still in colonial status, the original American states were executing compacts as early as the latter part of the seventeenth century.[2] These compacts generally dealt with what Story has denominated as private rights of sovereignty, such as boundary disputes. When two or more colonies had ratified a compact, the instrument was sent to England for the approval of the Crown. Thus the parallel between early colonial practices and the Constitutional proviso may be easily drawn. It might also be added that the Articles of Confederation contained a similar feature.

While one portion of Section 10, Article I, of the Constitution creates the interstate compact power, another portion of the same section absolutely prohibits the several states from executing any treaties with any of the states or with foreign countries. Thus it is clear that the founding fathers distinguished between treaties and compacts. There appear to be several bases for this distinction. The first and paramount factor was the desire of the framers to prevent the several states from asserting sovereignty and power superior to that of the federal government in certain areas. Alexander Hamilton and his contemporaries were cognizant of the failure of the Articles of Confederation to establish this national superiority, which enabled the several states

[1] Article I, Section 10, Paragraph 3.

[2] Earliest agreement of this type was the Connecticut and New Netherlands Boundary Agreement of 1656.

to pursue their own course of action with little heed paid to the national government estalished by the Articles. The founders further felt that the national government should operate in the field of foreign relations unembarrassed by state meddling and intervention. They also wanted to prevent any political alliances among the states, which might prove embarrassing to the power of the federal government or otherwise disturb the balance of the union. For these reasons the states were prohibited by the Constitution from executing treaties among themselves or with foreign countries, and all such treaty-making power was delegated to the federal government. Yet these same states may execute compacts or agreements!

COMPACT DISTINGUISHED FROM A TREATY

The question still to be resolved is how to distinguish between a treaty and a compact. Generally speaking, a treaty deals with important aspects of the sovereignty of an independent nation, such as political alliances and economic adjustments. Compacts, on the other hand, are the instruments of quasi-sovereign governments which deal with local and regional matters, non-political in nature. Early decisions of the United States Supreme Court have indicated that the states are restored to their original treaty making status when Congress grants its approval to an interstate compact: In the early decision of *Rhode Island v. Massachusetts,* the Court said that when Congress had given its consent to a compact, "then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the Constitution, when given, left the States as they were before, as held by this court in *Poole v. Fleeger,* 11 Pet. 209 . . ." [3]

It is submitted that such construction of the compact phase of the Constitution is erroneous. If such construction were to be accepted, the framers of the Constitution would be represented as first absolutely prohibiting treaties by or among states and foreign countries, and then reversing themselves two paragraphs later. It does not follow that the later provision permitting compacts among the states or with foreign countries supersedes the earlier prohibition. It is clear that the founding fathers wished to distinguish between the two types of agreements.

Such construction of the compact section ignores the intent of the framers to preserve a federal hegemony in the field of foreign relations. It also disregards the past history of compacts executed by the colonies with the consent of the crown. It overlooks the clear language of the Constitution which prohibits any treaty, alliance or confederation among the states. By following this construction, it is conceivable that the states could create an alliance or confederation via an interstate compact, assuming Congress gave its approval. This would be accomplishing by

[3] 12 Pet. 657, 726.

indirection that which is expressly forbidden by the Constitution. Because of the Constitutional prohibition and because all treaty power of the states in the sovereign sense has been delegated to the federal government and cannot be re-delegated by Act of Congress to the several states, it is submitted that Congress hasn't the power to give its consent to a compact which is in essence a treaty.

It must again be said that as a basic distinction between compacts and treaties, the former may concern only quasi-sovereign matters, local or regional in nature, and possess no political features which would disturb the balance of the union or embarrass the federal government in the exercise of its delegated treaty power.

TREATIES ARE OF TWO BASIC TYPES

A further distinction may be found in the effect produced by an executed treaty as opposed to the effect created by consumation of an interstate compact. It is settled law that treaties in the sovereign sense may be of two basic types. The first sets up certain standards which are in themselves self-executing so that assisting national legislation is not required in order to have full force and effect on the country's municipal law. The second type is the treaty which must be assisted by national legislation before it has any force and effect on the country's internal law. If the treaty is self-executing, all prior municipal law, state or federal, is likewise repealed.[4] But Congress may subsequently enact legislation which abrogates an earlier treaty, even though it is a self-executing treaty. In this respect a treaty differs from an interstate compact which, after Congressional consent, repeals all prior inconsistent state legislation *and* prohibits the legislature from subsequently enacting any legislation in conflict with the compact. The latter prohibition is based on an analogy to that type of contract which may not be impaired by any state.[5] A question presents itself as to whether such a compact may even repeal inconsistent provisions in a state constitution. It could probably be successfully urged that the impairment of contract analogy extends to all the law-making function of the state, whether such functions be exercised through the constitution, state statutes, municipal ordinances, or by rules of the regulatory commissions.

It might also be contended that no state may have a provision in its constitution which prohibits the legislature from delegating any of its police power or authority to an interstate agency created by an interstate compact. Such a contention would be predicated on the theory that the states since early colonial days have disposed of certain phases of their sovereign power through compacts or agreements. One of these compacts enabled New Jersey to grant the State of New York a police jurisdiction over

[4] U. S. v. Belmont, 301 U. S. 324, 57 S. Ct. 758 (1937).
[5] State v. Sims, 341 U. S. 29, 71 S. Ct. 561 (April 1951).

its share of the waters of New York Harbor.[6] Other compacts have ceded portions of territory.

It would be urged that the framers knew the type of powers historically granted under interstate compacts and wished to continue this method of adjusting interstate problems. Since the framers set this proviso down in the Constitution, it may be considered a mandate which the states may not violate. A state may not, therefore, prohibit that which the Constitution authorizes. Just such a view has been adopted by Mr. Justice Reed in his concurring opinion in the case of *Sims v. State*.[7]

STATE MAY NOT WITHDRAW FROM A COMPACT UNILATERALLY

An additional limitation prohibits any state from unilaterally withdrawing from a compact to which it is signatory without the consent of its fellow signers. Contrari-wise, under present international arrangements, a sovereign nation may withdraw from its treaty commitments, subject to certain inherent risks, and may certainly repeal the treaty insofar as the country's own municipal law is concerned.

It is equally clear that no compact may be executed which would interfere with other powers delegated to the federal government, such as in the area of interstate commerce, navigable streams. It is submitted that in these areas Congress may give its consent to interstate operations by enacting a legislative declaration that Congress does not intend to operate in these areas. Thus an impediment is removed and such interstate operations are no longer deterred. This situation differs from the treaty power granted to the federal government, because in that situation, Congress is not granted the latitude or authority to authorize the states to execute treaties. Such treaties, as indicated earlier, are expressly prohibited by the Constitution.

In conclusion, it may be said that the interstate compact power of the states owes its derivation to the treaty-making power of sovereign nations; that Congress may not consent to treaties by the states; nor may a state impair a compact to which it has become signatory or otherwise attempt to withdraw from the compact on a unilateral basis. Thus, it becomes clear that a number of limitations on state power occur when the states ratify a compact which do not occur when a sovereign nation executes a treaty. Perhaps the most basic distinction at the present time is the power of the state to revoke the compact unilaterally. It has been seen that the Supreme Court has ruled the states are without power to unilaterally withdraw from a compact, because of federal constitutional limitations. On the other hand, it cannot be doubted that a sovereign nation can withdraw from its treaty

[6] The first compact was executed in 1833 and was incorporated in the Port of New York Authority Compact of 1923.

[7] 7 Supra, n. 5, at p. 33.

obligations by unilateral action. In the United States there is a framework of government which prevents the several states from failing to keep their bargains. Because there is no such federal government on a world-wide basis, there is nothing to prevent these nations from ignoring their treaty obligations.

Perhaps with the passing of time, this basic distinction between compacts and treaties will cease to exist. Until such time, it may be said that continuing uncertainty will cloud the enforceability of corresponding rights and obligations accruing under treaties executed by sovereign nations. Thus, we think that the genius of the framers of the Constitution has once again been demonstrated.

AMENDMENTS TO RULES OF CIVIL PROCEDURE

Adopted May 2, 1952, by the Supreme Court of the State of Colorado, to become effective May 6, 1952.

RULE 115 (a). STATEMENT OF CASE.

No abstract of the record is required. The plaintiff in error shall set forth in his brief a concise statement of the case containing all that is material to the consideration of the questions presented with appropriate folio references to the record. Pertinent provisions of the pleadings, documentary evidence, instructions given or refused, to which proper objections were made, findings and conclusions of the trial court, and judgment may be set forth in the brief or in an appendix thereto. (From Supreme Court Rules 36 and 38 and Code Sec. 442.)

RULE 115 (b). BRIEFS; WHEN FILED.

Except as provided by Rule 118 (b) and subdivision (k) of this rule, the brief of plaintiff in error shall be filed within 30 days after filing the record or, where application for supersedeas is pending, within 30 days from the date of the determination thereof unless the court makes final determination of the case on such application for supersedeas. The defendant in error shall file his brief within 30 days after service upon him of copies of the brief of the plaintiff in error. The plaintiff in error may file a reply brief within 20 days after service of the brief of the defendant in error upon him. Supplemental briefs shall be filed only upon leave of court. Fifteen copies of every brief shall be filed. (From Supreme Court Rules 38 and 39 and Code Sec. 442.)

RULE 115 (c). BRIEFS; CONTENTS.

Every brief filed in the supreme court, except one filed in support of or in opposition to a motion, shall contain separately in the order following: