Ohio Participation in Interstate Compacts

The interstate compact procedure was little used before the twentieth century. From the year 1789 to 1900, only sixteen compacts were adopted by the states. Since the turn of the century however, several times as many compacts have been contracted and the compact procedure is steadily taking on new significance as a means of interstate cooperation.[1]

The United States Constitution[2] absolutely prohibits the entry by the states into any treaty, alliance or confederation. The same section of the constitution conditions the entry by the states into any agreement or compact with another state or with a foreign power upon the consent of congress.

The distinction between treaties, alliances or confederations and compacts or agreements is a very fine one and the differences have never been exactly or concretely defined. Justice Story distinguished them in the following way:

> Perhaps the language of the former clause may be more plausibly interpreted from the terms used, 'treaty, alliance or confederation' and upon the ground that the sense of each is best known by its association (noscitur a sociis) to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political cooperation, and the exercise of political sovereignty; and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges. The latter clause, 'compacts and agreements' might then very properly apply to such as regarded what might be deemed mere private rights of soverignty; such as questions of boundary; interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of states bordering on each other. Such compacts have been made since the adoption of the constitution . . .[3]

As stated before, a state must have the consent of congress to legitimately enter into a compact. This constitutional provision has been interpreted however, as meaning that the congressional consent may be either express or implied from congressional action and either prior or subsequent to the adoption of the compact by the states. In *Virginia v. Tennessee*,[4] the boundary line between Virginia and Tennessee was ascertained and adjusted by commis-

---

[1] Comment, 34 YALE L. J. 684 (1925).

[2] U.S. CONST. Art. 1, sec. 10.

[3] 2 STORY, COMMENTARIES ON THE CONSTITUTION, sec. 1403 (5th ed. 1891).

[4] Virginia v. Tennessee, 148 U.S. 503 (1892).

sioners appointed in the two states. The boundary thus adjusted by the commissioners and confirmed by the two states was treated by congress as the true boundary when congress districted these states for judicial and revenue purposes. Although congress did not expressly give its consent to the adoption of this compact by these two states, the required consent was implied from the congressional action. In *Green v. Biddle*,[5] a promise by a newly formed state to preserve the title to certain lands within its borders was upheld on the ground that congress had given its consent to the states entering into the compact by subsequently admitting the state into the Union.

There is some authority supporting the proposition that congressional consent is not required at all unless the compact or agreement is "political" in nature.[6] The term must have a different meaning in this sense than it has in distinguishing compacts and agreements from treaties, alliances and confederations or the consent requirement would lose all its meaning. The result would otherwise be that congressional consent is required only when the agreement is a treaty, alliance or confederation, in which case it is invalid regardless of congressional consent.

An interstate compact can be terminated in several different ways. The easiest and most definite method of termination is to specifically provide for the termination of the compact after the expiration of a certain length of time from the date of entry. But a compact may also be terminated by subsequent inconsistent federal legislation. In *Pennsylvania v. Wheeling Bridge Company*,[7] Virginia and Kentucky had entered into a compact with the consent of congress regarding the free navigation of the Ohio River. Still, subsequent federal legislation requiring officers and crews of vessels navigating the Ohio River to regulate their vessels so as not to interfere with the elevation or construction of bridges at Wheeling and Bridgeport at their then height and position, was held to be the legitimate exercise by congress of its constitutional power to regulate interstate commerce. This legislation was not invalid by reason of the interstate compact entered into with the consent of congress.

If an interstate compact is terminated by subsequent federal legislation inconsistent with the terms of the compact on the theory that the consent of congress is thereby withdrawn and that the continuing consent of congress is necessary for the existence of a valid interstate compact, congress could terminate a compact merely

[5] Green v. Biddle, 8 Wheat. 1 (U.S. 1823).

[6] Note, 23 IOWA L. REV. 618 (1938).

[7] Pennsylvania v. Wheeling and Belmont Bridge Co., 18 How. 421 (U.S. 1855).

by withdrawing its consent. Inconsistent legislation would be unnecessary. But if congressional consent is only a condition precedent to the existence of a valid interstate compact, congress could not terminate the compact merely by withdrawing its consent.[8] In *Georgetown v. The Alexandria Canal Company,*[9] the supreme court held that citizens of states which were parties to a compact were not parties and could not object to the termination of the compact by the mutual consent of the state parties.

Subsequent inconsistent legislation by one of the state parties cannot terminate an interstate compact. It was held in *Green v. Biddle,*[10] that the legislation was invalid on the theory that interstate compacts are within the contracts clause of the federal constitution.[11]

An interstate compact can be enforced or its validity questioned by the state parties to the compact[12] or by individuals,[13] who would otherwise be injured. Subject to the usual requirements for jurisdiction, an action to enforce or question the validity of an interstate compact may be brought in the state[14] or lower federal courts.[15] The action may also be brought in the United States Supreme Court when the state is a party under the constitutional provision[16] granting original jurisdiction to the supreme court of any suit to which a state is a party.

The Ohio Legislature, in 1937, established the Ohio Commission on Interstate Cooperation.[17] This statute was amended in 1949 and, as amended, the commission consists of the seven members of the senate committee on interstate cooperation, a similar house committee and the seven members of the Governor's committee on interstate cooperation. It is expressly made one of the functions of this commission[18] to endeavor to advance cooperation between Ohio and other units of government whenever it seems advisable to do so by formulating proposals for and by facilitating the adoption of interstate compacts. Also in 1937, Ohio adopted the Pymatuning Lake compact.[19] This compact was the first to which Ohio

---

[8] Note, 23 IOWA L. REV. 618 (1938).

[9] The Mayor, Recorder, Alderman and Common Council of Georgetown v. The Alexandria Canal Co. and William Turnbull, 12 Pet. 91 (U.S. 1838).

[10] Green v. Biddle, 8 Wheat. 1 (U.S. 1823).

[11] U.S. CONST. Art. 1, sec. 10.

[12] South Carolina v. Georgia, 93 U.S. 4 (1876).

[13] Green v. Biddle, 8 Wheat. 1 (U.S. 1823).

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

[15] Aicheson v. Endless Chain Dredge Co., 40 Fed. 253 (E.D. Va. 1889).

[16] U.S. CONST. Art. 3, sec. 2.

[17] OHIO GEN. CODE §§ 1379-1 to 1379-12.

[18] OHIO GEN. CODE § 1379-6.

[19] 117 Ohio Laws 508 (1937-1938).

was a party.[20] It was entered into with Pennsylvania for the purpose of establishing a recreation district with concurrent penal jurisdiction and also to conserve water. On September 17, 1937, Ohio entered into another compact.[21] Under the terms of this compact, the judicial and administrative authorities of a state, a party to the compact, are to permit a person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact under certain conditions contained in the compact. All the states except Nevada, North Carolina and Texas adopted this compact. Congressional consent was previously granted on June 6, 1934.

Since 1937, Ohio has adopted two other compacts. One was entered into with the twenty oil and gas producing states to prevent the physical waste of oil and natural gas from any cause.[22] This compact was to expire September 1, 1947, but was extended for four years to September 1, 1951, by the Governor who was authorized in the original bill to extend the expiration date of the compact. The other was the Ohio River Valley Water Sanitation Compact,[23] the purpose of which is the control of future pollution in and the abatement of existing pollution from the rivers, streams and water in the Ohio River basin which flow through or border upon any of the states, parties to this compact. Congress authorized the adoption of this compact on June 8, 1936. Conditioned on the adoption by New York, Pennsylvania and Virginia, Ohio entered this compact on August 31, 1939. Ohio, West Virginia, New York, Illinois, Pennsylvania, Kentucky and Virginia are the parties to this compact.

In the case of *State v. Sims*,[24] the Supreme Court of West Virginia rendered a decision in connection with this compact which could make it practically impossible to achieve interstate cooperation by use of the compact procedure. This was a mandamus action to compel the auditor of West Virginia to honor a requisition for West Virginia's contribution to the Ohio River Valley Water Sanitation Commission which was appropriated by the legislature of West Virginia. The majority of the court held that legislation authorizing West Virginia to become a party to this compact was invalid as violative of the West Virginia Constitution because the state by entering the compact would delegate to the commission a substantial part of the state's police power and the compact, if valid, would create a contract binding on future legislatures.

Judge Given, in a strong dissenting opinion, stated that inter-

[20] Comment, 73 U.S. L. REV. 75 (1939).

[21] OHIO GEN. CODE § 108.

[22] 120 Ohio Laws 203 (1943-1944).

[23] OHIO GEN. CODE § 14881.

[24] State *ex rel.* Dyer et al. v. Sims, 58 S.E. 2nd 766 (1950). Certiorari to U.S. Supreme Court.

state compacts are an essential and often-used part of our form of government. He argued that granting to the commission the power to enforce its orders as to the disposition of sewage against municipalities, corporations, persons and entities of the member states was not an unconstitutional delegation of the state police power because of the following limitation on this power in Article 9 of the Compact: "No such order shall go into effect unless and until it receives the assent of at least a majority of the commissioners from each of not less than a majority of the signatory states; and no such order upon a municipality, corporation, person or entity in any state shall go into effect unless and until it receives the assent of not less than a majority of the commissioners from such state." The commissioners from each state are representatives of that state, responsible only to the authority of that state and are subject to removal as such commissioners by the governor of that state.

It was also argued by Judge Given that entering the compact did not "create a debt" or bind future legislatures to make appropriations since the last clause of Article 5 of the compact provides:

> The commission shall not incur any obligations of any kind prior to the making of appropriations adequate to meet the same; nor shall the commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof.

The majority opinion states that the creation of a state commission which requires an appropriation of public funds to carry out its purpose is usually not treated as the creation of a "debt" within the constitutional provision that no debt shall be contracted by the state except to meet casual deficits and other specified situations, although the continuation of such commission for an indefinite period necessarily involves future appropriations. In the majority opinion however, they held the compact to be entirely different because it was between sovereign states and the Federal Government, treating it as a contract which the Supreme Court of the United States, in a suit between states has power to enforce. They said it was a contract binding on all the parties thereto, the obligation of which continues so long as that contract exists.

Although late in initiating its participation in interstate compacts, Ohio may still become a leader in the field due to the establishment of the Ohio Commission on Interstate Cooperation unless Ohio follows the decision of the Supreme Court of West Virginia in *State v. Sims.* This is not likely however, due to the fact that interstate cooperation is becoming increasingly more important because of improved methods of transportation and communication and the greater complexity of our society. The future will probably see interstate compacts, along with uniform and reciprocal state legislation, take on greater and greater significance.

John Duffy