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OHIO VALLEY PANORAMA

Albert S. Abel

The past and present applications of the Compact Clause of the United States Constitution have been explored elsewhere so clearly and amply that their further investigation would be unrewarding. The stated ground of decision in West Virginia ex rel. Dyer v. Sims opens up for the interstate compact a promising future as a device for co-operative government. A contrary decision would have seriously, indeed almost fatally, weakened the clause. Adoption of proposed alternative reasons could have made its strength a matter of more menace than promise. The former conclusion is fairly obvious, the latter perhaps less so. The task of this discussion is to unravel the language and implications of the opinions to show what has been attained and what has been avoided.

The litigation originated in a refusal of Sims, the state auditor, characteristically astute and pertinacious in resisting disbursements, to honor the requisition for the amount currently appropriated by the legislature as the State's contribution to the Ohio River Valley Water Sanitary Commission. At the instance of the state's representatives on that commission and of members of the State Water Commission, an original mandamus proceeding in the Supreme Court of Appeals was thereupon instituted to compel payment of the requisition. A majority of the court sustained the auditor. A formal constitutional contention, based on an asserted defect in the title of the statute expressing the state's assent to the Ohio River Valley Water Sanitation Compact, of which the commission

* Professor of Law, West Virginia University.
2 Zimmermann & Wendell, The Interstate Compact Since 1925 (1951), an excellent general survey, appeared after the Sims case had been decided by the West Virginia Supreme Court of Appeals and while it was pending before the United States Supreme Court.
3 U. S. Const. Art. I, § 10, cl. 3 ("No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . .")
4 131 U.S. 22 (1951).
5 W. Va. Acts 1949, c. 9, § 1, at page 50. The appropriation, Account No. 474, was immediately preceded by appropriations for the Commission on Interstate Co-operation and for the Interstate Commission on Potomac River Basin, the three being grouped (with others) under the classification, "Business and Industrial Relations".
was the operating agency, and a formal pleading contention, based on the petition's failure expressly to allege that the appropriation was for a public purpose, were rejected without difficulty. There remained claims of repugnance between the Compact and substantive limitations of the West Virginia Constitution. On these state constitutional issues, the invalidity of the appropriation and of the underlying Compact in furtherance of which it was made was unambiguously rested by the decision. The Compact was deemed objectionable in two respects—one, under the express inhibition of Article X, Section 4, against the creation of state indebtedness, the other based on a judicial construction, not ascribed to anything stated in the text of the instrument, that the state constitution forbids delegations of legislative, and specifically of "police", power to non-West Virginia authorities. Although the assumed binding commitment to recurring appropriations, deemed offensive to the terms of the anti-debt section, might seem independently sufficient to vitiate the Compact and everything resting on it, "the most important question" was the effect of the unwritten constitutional impediment to delegation deduced from notions as to "the police power" and the inherent restraints on legislative authority occasioned by the state's sovereign status. In so pronouncing, the court was clearly correct for that consideration would seem capable of affecting all the states alike, unlimited by the accident of the phraseology of the several state constitutions because unrelated to anything therein expressed. Both the merit of the river basin project and the need for interstate co-operation to effectuate it were recognized and the advisability of taking whatever futile steps for co-operation might remain available was judicially recommended as a sound legislative policy. But recognition and preservation unimpaired of the state's sovereignty were felt to require that West Virginia be held impotent to commit herself to this co-operative endeavor, practically capable of effectuating that sound policy. Seemingly accepting and certainly not challenging the majority's

9 Contentions that the act contravened W. VA. CONST. Art. X, § 3, requiring payments of state funds to be subject to appropriations, and id. § 6, prohibiting loans of state credit, were found untenable.
10 This appears not only from the language of the opinion, but from paragraphs 4, 5, and 6 of the syllabus, which is locally regarded by many as having peculiar significance in defining the scope of decision.
11 "No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war . . . ."
inference of unalienability and extrastate non-delegability of "police power", attributed to the state constitution, the dissenters reached their different conclusion, that neither that nor Article X, Section 4, rendered the Compact or the ensuing appropriation invalid, because of a different construction of the Compact terms to which the state had assented. In several detailed clauses, the Compact preserved to the assenting state a large hegemony, in the nature of a continuing partial veto power.\textsuperscript{13} The essential difference between majority and minority was whether these were enough to prevent the legislative assent from being a binding engagement either to transfer regulatory powers to the commission or to make future appropriations. It was their different interpretation of the Compact, that it involved no binding and hence no offensive commitment to anything, which the dissenters urged—not any difference as to the operation or meaning of the state constitution if the majority's reading of the Compact were accepted.

The decision of course could not stand and of course it did not. In voting for reversal, the justices of the United States Supreme Court were unanimous. The choice of a ground presented perplexing and fundamental problems, however. Three views were expressed, resting in large measure on radically incompatible premises; and at least three were entertained.\textsuperscript{14} Mr. Justice Frankfurter,

\begin{itemize}
\item \textsuperscript{13} Art. V ("... 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"); Art. VII ("Nothing in this Compact shall be construed to limit the powers of any signatory State, or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory State, imposing additional conditions and restrictions to further lessen or prevent the pollution of waters within its jurisdiction"); Art. IX ("The Commission may ... after a hearing, issue ... orders upon any ... person discharging sewage or industrial waste into the Ohio river or any other river ... which constitutes any part of the boundary line between any ... signatory States, or into any stream ... which flows from ... one signatory State through ... another ... 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 ... person ... 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").

\item \textsuperscript{14} Black, J., concurred in result. This may perhaps suggest his unreadiness to endorse unreservedly the reasoning of any of the opinions, perhaps even a preference for some of the variant reasons suggested in argument of counsel which were not reflected in any of the opinions. On the other hand, it may merely mean that he wavered between the reasons of the opinion writers and saw no need to declare an election. Having been recently re-admonished to infer nothing from denials of certiorari, see Maryland v. Baltimore Radio Show, 338 U.S. 919 (1950), we may prudently apply the counsel by analogy to con-
writing for the Court, placed reversal on the ground that while a state court of last resort "is for exclusively State purposes, the ultimate tribunal in construing the meaning of her Constitution ... we are free to examine determinations of law by State courts in this limited field where a compact brings in issue the rights of other States and the United States" and that the West Virginia Constitution, as independently construed by the United States Supreme Court, did not preclude effective legislative assent to the Compact. Mr. Justice Reed "disagree(d) with the assertion of power by this Court to interpret the meaning of the West Virginia Constitution" but concurred because "the execution, validity, and meaning of federally approved state compacts" present federal questions under the Compact Clause and "(t)he interpretation of the meaning of the compact controls over a state's application of its own law through the Supremacy Clause." Mr. Justice Jackson also thought that "(t)he legal consequences which flow from the formal participation in a compact consented to by Congress is a federal question for this Court" but, avoiding resort to the broad reaches of the Supremacy Clause, rested his concurrence on the narrower ground that, following approval by Congress and the other participating states, "West Virginia should be estopped from repudiating her act ... whatever interpretation she may put on the generalities of her Constitution." Even these alternatives—Supreme Court determination of the meaning of state constitutions in special situations, Supremacy Clause abrogation of state constitutional limitations, and estoppel—do not exhaust the possibilities, as will appear in the course of the discussion. The concurrence of at least six justices, being more than a majority of the Court, in Mr. Justice Frankfurter's exposition does seem to settle what the law is, on the conventional understanding as to the scope of case holdings. But a comparative analysis of the several alternatives, both as to their basis in logic and authority and as to the corollary consequences involved in their adoption, is still in order.

On the principle of saving the best till last, it is proposed to commence with an examination of the Jackson opinion and of

\begin{footnotes}
\footnote{15 \textsc{341} U.S. 28.}
\footnote{16 \textit{Id.} at 33.}
\footnote{17 \textit{Id.} at 35.}
\footnote{18 \textit{Id.} at 36.}
\footnote{10 \textsc{Goodhart, Essays in Jurisprudence and the Common Law} 22 (1931).}
\end{footnotes}
some other alternatives which won no justice's adherence. Mere
mention may here be made of the doctrinal obstacle which the con-
curring justices seem\textsuperscript{20} to have found an insurmountable barrier
to joinder in the opinion, reserving critical consideration of it
until later. It has always been, even during and indeed before the
days when the doctrine of \textit{Swift v. Tyson}\textsuperscript{21} held sway, the orthodox
rule that the interpretation of state statutes and at least equally
strongly of state constitutions is ultimately a matter for the state
courts and that the federal courts, including the United States
Supreme Court, will take them as meaning what the states say they
mean. The West Virginia Supreme Court of Appeals having based
its decision explicitly and exclusively on an interpretation of the
West Virginia Constitution, no other meaning could be given that
constitution unless the Supreme Court was prepared to depart
from, or at least erect an exception to, that established postulate.
Something had to give; but the concurring justices could not bring
themselves to have it be the rule as to finality of state court inter-
pretation of state constitutional provisions.

The estoppel line of reasoning, advanced by Jackson, proposes
what is prima facie the most special and confined ground for deci-
sion. It is not quite clear that he rejects the position of either of
the other two opinions or, if either, of which;\textsuperscript{22} but it is plain that
he regards estoppel as both an available and the preferable basis for
reversal. What results is in many ways the tidiest, trimmest, and at
first blush the least ambiguous of the opinions. Unfortunately it
seems also to be the most questionable on formal legal grounds.

A total failure to cite any authority even argumentatively sup-
porting the analysis suggests, though of course it does not establish,

\textsuperscript{20} Sed \textit{quaere}, as to Jackson, J. The grounds for uncertainty are elaborated
\textit{infra} note \textsuperscript{22}. As to the position of Black, J., see \textit{supra}, note \textsuperscript{14}. Only as to
Reed, J., is it unequivocally clear that the obstacle was insurmountable.

\textsuperscript{21} 16 Pet. 1 (U.S. 1842).

\textsuperscript{22} His statement, 341 U.S. 35, that "West Virginia, \textit{for internal affairs}, is
free to interpret her own Constitution as she will" (emphasis supplied), by
insertion of the italicized qualification admits of, if indeed it does not suggest,
the notion that she may not be similarly free as to non-"internal affairs", which
is a version of the Frankfurter position. But later in the same paragraph, he
says, "The legal consequences which flow from the formal participation in a
compact consented to by Congress \textit{is a federal question} for this Court"
(emphasis supplied) which smacks of the Reed position. His further state-
ment, \textit{id.} at 36 "West Virginia should be estopped. \textit{For this reason, I consider
that} ... she is bound ... and, \textit{on that basis}, I concur ... ." (emphasis supplied)
clearly shows that he discards both as a basis for the particular decision but
from his winking at both doctrines ambiguity remains as to what he thinks
about them as propositions of law.
the difficulties of the estoppel thesis. A graver difficulty is sought to be forestalled by frank recognition that "Estoppel is not often to be invoked against a government". Indeed, the proposition that estoppel is not available as a basis for claim or defense against the states when they are acting governmentally rather than proprietarily is about as much a commonplace with the courts as the doctrine that state courts are the ultimate interpreters of their own state constitutions. Even so, if decision depended on an election which venerable maxim to sacrifice, it would be hard to quarrel with the Jackson choice. The root notion of no estoppel against states is the idea of regal impeccability, to which original sinlessness the states have succeeded. In recent years the central notion has met with dwindling favor and the Supreme Court has not been behindhand in viewing it coldly. The maxim about finality of state court interpretations derives from quite different policy considerations, more appealing to modern intellectual tastes. They will need to be set forth in the proper place; but it may be said, by way of anticipation, that they are enough weightier to entitle them to the preference if decision involved only an election between maxims for purposes of partial abandonment in the special situation of interstate relationships.

The fundamental difficulty is to find any estoppel in this picture even if the state were out of it and private persons were involved. The Jackson opinion is not at all explicit as to which aspect of that protean concept is regarded as being present. We plainly do not have to do with an estoppel rested on a verdict or judgment, on pleadings or muniments of title. If we have to do with estoppel at all, as distinguished from one of its swarm of light armed auxiliaries, it would seem perhaps that estoppel by misrepresentation, alias equitable estoppel, is being invoked.

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23 Ibid.
24 For a collection of cases, consult 21 C.J. 1186 (1920); 31 C.J.S. 412 (1942).
27 Borchard, supra note 26, at 37; Maguire, State Liability for Tort, 30 Harv. L. Rev. 20 (1916).
supposition derives some color from language about “sister States (having) been induced to alter their positions” and about “plac(ing) an unforeseeable construction upon what other States were induced to believe” was within West Virginia's powers. This hypothesis requires that the situation be examined to determine whether the standard elements of an equitable estoppel were made out.

There seems to be a consensus that as a very minimum there must have been (a) something by way of assertion or concealment amounting to misrepresentation chargeable to the party against whom the estoppel is asserted and (b) a change of position by the person asserting the estoppel, which change of position (c) must have occurred in consequence of a reliance on the representation and (d) normally, at least, have been a source of benefit to the party against whom the estoppel is urged or of detriment to the party urging it or both. Other elements, such as scienter and intent or expectation of inducing action, have been suggested by many authorities; but, as they are not universally accepted as requirements for estoppel by misrepresentation, consideration will be confined to those matters enumerated which are.

It is hard to find any representation made by West Virginia either actively or passively. No doubt publication as a statute of the state may fairly be regarded as amounting to a representation of sorts that it had been enacted in the prescribed manner by the duly qualified legislators and governor. True, West Virginia has steadily rejected the enrolled bill doctrine and her court has specifically stated that even authentication of an enrolled bill “does not preclude question”. Still, it is agreed that “the printed acts are presumed to be valid enactments” and, a fortiori, the enrolled bill is strengthened by presumption. One cannot, however, in the

29 341 U.S. 35, 36.
30 Or who has succeeded to his position. The qualification is omitted from the text statement as not relevant to anything in the present situation.
31 EWART, ESTOPPEL BY MISREPRESENTATION 10 (1900); BIGELOW, ESTOPPEL 604 (6th ed. 1913); 2 STREET, FOUNDATIONS OF LEGAL LIABILITY 246 (1906); see RESTATEMENT, TORTS § 894 (1939) (accord); RESTATEMENT, CONTRACTS § 476 (1932) (accord).
33 Ibid. note 33, at 443.
34 Ibid.
35 Charleston National Bank v. Fox, supra note 33, at 443.
situation as presented, properly read the Jackson opinion as denying West Virginia the right to make its own choice in connection with the enrolled-bill conflict of decisions\(^{37}\) (although extrapolation of his reasoning might lead to that result under an appropriate state of facts), because at no time was it contended that there was any irregularity in enactment. So the representation must be sought elsewhere.

Could it be said that in the fact of enactment there was an implicit representation by the legislature that it had either an unlimited authority to commit the state or else adequate authority to make the commitment here involved and that, by virtue of such representation, the state is precluded from questioning its obligation? In private law, of course, it is not the principal who is held to the agent's warranty of authority\(^{37}\) and the agent's assurances respecting the powers possessed will not prevail against the disclosed terms of his power of attorney.\(^{38}\) One might, indeed, hark back to the obsolescent rule that judicial notice need not be taken of the laws of sister states\(^{39}\) to argue by analogy that the legislatures of other states were not charged with official knowledge of the contents of the West Virginia Constitution or that such constitution had been construed as capable of ever invalidating legislative action or even that the state had a written constitution. Her possession of such a basic instrument of government conforms to a standard American pattern\(^{40}\)—and one which I assume, admittedly without

\(^{37}\) RESTATEMENT, AGENCY § 329 (1933) ("Except as stated in § 332 a person who purports to make a contract, conveyance, or representation on behalf of a principal whom he has no power to bind thereby becomes subject to liability to the other party thereto upon an implied warranty of authority, unless he has manifested that he does not make such warranty or the other party knows that the agent is not so authorized"); id. §§ 332 b, c. See Abel, Some Spadework on the Implied Warranty of Authority, 48 W. VA. L.Q. 96 (1942).

\(^{38}\) RESTATEMENT, AGENCY §§ 167, 168 (1933).

\(^{39}\) S Wigmore, EVIDENCE § 2573 (2d ed. 1923) ("The State law of another of the States of the United States is in theory that of an independent sovereign; hence its law, equally with the laws of another nation, will in theory not be noticed by the Courts of another of the United States. But this theory is now antiquated hypocrisy, as applied in this field, and there is a wholesome tendency to abandon it.") Rejection of the doctrine is recommended by the American Law Institute, see MODEL CODE OF EVIDENCE, Rule 802 (d) (1942) and incorporated in the Uniform Judicial Notice of Foreign Law Act which has been adopted in over half the states. In West Virginia, the rule has not been in force since the very early days of statehood, having been discarded by W. VA. CODE 1868, c.13, § 4.

\(^{40}\) See 1 Cooley, CONSTITUTIONAL LIMITATIONS 79, 80 (8th ed. 1927); HURST, THE GROWTH OF AMERICAN LAW 199 (1950).
bothering to check, prevails in all the other compacting states. So
does the doctrine, firmly established in West Virginia,\footnote{1} that the
legislature is not the ultimate arbiter of its own powers or, in
general, of the meaning of the constitution, the function appertaining
rather to the courts with only a presumption and not an
assurance of constitutionality attaching to a statute by virtue of
its enactment.\footnote{2} In both respects, West Virginia's position is so
orthodox that those dealing with the state could hardly be suffered
to credit contrary representations even though expressly made,
let alone raise them by implication from the mere fact of action.
Yet just that fantastic consequence lurks in the estoppel rationale.
Very possibly its presence is attributable to the conventional rhetor-
ical personification of the state.\footnote{3} The form of speech obscures
the reality that certain agents of the political entity, the state of
West Virginia, who exercise the legislative function took action
which other agents, entrusted with the judicial function and
thereby with the determination, at least "for internal affairs", of
the powers conferred on all agents of the state by their power of
attorney, the state constitution, concluded was unauthorized. It is
not believed that Mr. Justice Jackson intended to advance the truly
momentous proposition that every assumption of power to act, by
a state legislature, involves so authoritative a representation of the
possession of the power that its existence can not thereafter be
questioned.

But, if not, the only conceivable representation remaining
available must be a representation that this particular legislative
action was within the scope of the agent's, \emph{i.e.}, the legislature's

\footnote{1}{"The Constitution of this State is not a grant to, but an express limitation
of the powers of, the legislature; and while it divides the government into three
coor-dinate departments (the legislative, executive, and judicial), and provides
that they shall be separate and distinct, so that neither shall exercise the powers
properly belonging to either of the others (Const. Art. V, sec. 1), it imposes
on the judiciary the duty of deciding the constitutionality of a law, without
limitation. . . . There is no such comity between the separate departments of
the state government as would require submission to the alleged acts of each
other in violation or defiance of the express requirements of the Constitution",
so clearly articulated in this case is illustrated by every one of the rather
numerous cases in which the Supreme Court of Appeals has held state statutes
unconstitutional.}

\footnote{2}{Marbury v. Madison, 1 Cranch 187 (U.S. 1803) is the leading case. The
classic critical discussion is Thayer, \emph{The Origin and Scope of the American Doc-
trine of Constitutional Law}, 7 Harv. L. Rev. 129 (1899).}

\footnote{3}{Variants of the third person singular feminine pronoun ("she", "her",
"herself") are used eighteen times in the concurring opinion not quite a page
in length.}
authority on a justified reading of the terms of this particular power of attorney, i.e., state constitution. Some such notion is suggested by the statement that "West Virginia points to no provision of her Constitution which we can say was clear notice or fair warning to Congress or other States of any defect in her authority to enter into this Compact." To be sure, if other states are chargeable with the West Virginia Constitution, it does impose on them the consequence of official notice of her laws, contrary to traditions about judicial notice adverted to earlier. So to do, presents no practical difficulty, however, for the document has long been published and readily available for inspection with copies on hand probably in every state capitol in the country. Not to do so would involve a logical dilemma; for the official notice which would impute knowledge of the terms of the state constitution to other state legislatures is also the means by which they are informed of the adoption of the assenting legislation on which a representation is predicated. Whatever the representations implicit in the legislation, it would seem that they and the constitutional text by which the legislature's power is to be measured must be treated as having been contemporaneously and similarly present for the consideration of everyone to whom the representations were addressed.

What is left is an inquiry whether limitations on the agent's authority were specified with sufficient precision to put others on notice. That branch of the state court decision relying on non-delegability of the "police power" rested wholly on judicial constructs without any supporting constitutional text. No prior West Virginia decisions were cited by the state court for this phase of the decision. It may hence fairly be assumed that there were none very clearly in point. Indeed, certain earlier cases sanctioning delegations whose validity was treated as dependent on a reference to federal programs might plausibly be read as meaning that collabo-

44 341 U.S. 35.
45 See, with respect to the interpretation of ambiguous authorizations, Restatement, Agency § 44 (1933); with respect to the effect of notice to third persons of written authorizations which limit the agent's authority, id. § 167.
46 The majority opinion cites Cooley, Blackstone, and American Jurisprudence for general remarks about "police power", State ex rel Dyer v. Sims, 58 S.E. 2d 766, 775 (W. Va. 1950) and refers to no authorities on the delegation point, id. 776. The dissent simply accepts the majority view on the point as a premise, of course without supporting citation, id. 777.
rative intergovernmental enterprises are not constitutionally objectionable in West Virginia. So far, there would only be involved the proposition that, where nothing in the text of the state constitution (perhaps supplemented by such existing judicial materials as would suffice under *Erie v. Tompkins*48 to fix the law of the state?) adumbrates pertinent limitations on the scope of the legislature's authority to act, the fact of legislation implies a representation as to the scope of authority which the courts can not thereafter belie so as to defeat expectations based on it. Even this would seem to be a pretty significant shrinking of judicial review worth pondering carefully, with substantial arguments on either side.49

What dispenses with their exploration is that the decision was not placed by the state court just on the delegation proposition. True, that was regarded as "the most important question." Still, that court held the assenting legislation independently invalid under Article X, Section 450, an express provision of the state constitution. The text-related constitutional objection was fatal to the legislation, even though not so fatally fatal as the silent one. Only by disregard of this alternative holding can the estoppel rationale be confined to cases where a limitation on legislative authority is of pure judicial creation unassisted by language in the constitution. It may, of course, be urged that the connection between the assigned constitutional provision and the limitation there found is so tenuous and bizarre that it could not reasonably have been anticipated. This raises issues as to justified reliance which will receive consideration in their proper place. But, preliminary to any question of reliance, is a representation, active or passive, to be relied on. Unless the opinion means, contrary to the

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48 304 U.S. 64 (1938).

49 It would be consonant with the spirit of judicial self-denial expressed in the early statement that "A reasonable doubt must be solved in favor of the legislative action, and the act be sustained. The courts must be guided by the express words of the constitution and not by its supposed spirit," Osburn v. Staley, 5 W. Va. 85, 91 (1871). It is not here contended that the court has actually followed this announced principle in recent years; indeed, the second branch of its opinion in the Sims case itself manifests its desuetude.

50 That the court intended this as a ground of decision is plain from its inclusion in the syllabus, see *State ex. rel Dyer v. Sims*, 58 S.E.2d 768 (1950), syllabus #5.
usual practice, to reject one of the express alternative grounds for decision, it must envisage binding the state by the legislature's representation either that that body possesses authority beyond the boundaries of the specified limitations stated in the constitution or else that it is qualified to be the ultimate arbiter of the meaning of the constitutional provisions, not subject to the contingencies of judicial review. The terms of the constitution were certainly open to view. Either presupposition is revolutionary. Something more than a lawyer's technical quibble about the elements of estoppel supports the reluctance to accept the existence of an estoppel representation of either tenor.

Let us pass from the representation riddle to the question of change of position, which may conveniently if not wholly logically be considered along with the benefit-detriment problem. It is the element of estoppel which the opinion seems to be adverting to in its statements that "West Virginia officials induced sister states to contract with her and Congress to consent to the Compact" and that "After Congress and sister states had been induced to alter their positions and bind themselves to terms of a covenant, West Virginia should be estopped." What warrant there may be for the intimation in the former quotation that West Virginia took the initiative in proposing or pushing the matter is not apparent from any materials which have come to my attention. But, accepting it on the authority of the distinguished writer of the opinion, the gist of the statements seems to be that the expressions of assent to the compact were the requisite change in position. "Alter their positions and bind themselves to terms of a covenant" does not, indeed, say with utter clarity "alter their positions by binding themselves to terms of a covenant." Grammar will admit of reading the statement as one of apposition rather than of conjunction, however, and, unless so read, there is a complete blank as to how there was a change of position. Even reading it so, the language is tolerably astonishing in its linking of Congress with the states as having bound itself. Is one to suppose that Congress having once assented to an interstate compact is incapable thereafter of withdrawing the

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51 Paton and Sawyer, *Ratio Decidendi and Obiter Dictum in Appellate Courts*, 63 L.Q. Rev. 461, 470 (1947) ("It is generally agreed that, where a court bases a decision squarely upon two grounds, each is part of the ratio decidendi").
52 341 U.S. 35.
53 Id. at 36.
assent? and, if not, in what way can Congress be said to have bound itself?

The one thing clear is that nothing except the formation of a contract is specified as having been done. There is no statement that any steps were taken, acts performed, or commitments made in fulfilment of the contract or on the faith of it. There is no statement that any opportunities were foregone as an incident to its formation, any alternative agreements scrapped or autonomous state programs abandoned. No mention is made of any such prejudicial consequences anywhere in the five opinions in the *Sims* case nor are any hinted at in the published epitome of the contentions of counsel. The procedural setting of the case, coming up as it did by way of disposing of a demurrer to a mandamus proceeding, tends powerfully to negative any supposition that any such factors were presented by the record. It is possible that some of the states may have done something more than legislate assent, together with the corollary organizational and appropriations provisions, but it is certain that no showing to that effect appears in any of the materials generally available for professional scrutiny and it seems highly probable that nothing of the sort was in the record.

The problem must be appraised, under the circumstances, as one of the sufficiency of simple reciprocal exchanges of assent to make out the change of position requisite for an estoppel. The very novelty of the suggestion militates against the discovery of direct authority. Certainly in private law, if the doctrine that an enforceable bilateral contract resulted from the offeree's exchanging the requested promise with an agent unauthorized to make the offer, on the basis that such a change of position was involved as

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54 ZIMMERMAN & WENDELL, *op. cit. supra*, note 2, at 90, considers the matter of revocation by the states but the discussion immediately afterward of national consent, *id. at 91-94*, does not advert to the matter of withdrawal of Congressional assent.

55 See 95 L. ed., 715-720 (1951) for a resume of the contentions of counsel for the parties and for others appearing as amici curiae.

56 Mandamus lies to compel the performance of a ministerial duty, resting on a clear legal right, and not to control the discretion of an official in determining the existence in fact of the circumstances giving rise to such corollary right and duty; it may not require of an officer the performance of an act not imposed on him as an unequivocal duty by law. *HIGH, EXTRAORDINARY LEGAL REMEDIES* 15 (3d ed. 1896); *Miller v. Tucker County Court*, 34 W. Va. 285, 12 S.E. 702 (1889) (*accord*). Matter *dehors* the pleading challenged by demurrer, even such matter as might be judicially noticed, is not to be considered in the determination and disposition of the demurrer, whose operation is confined to attacking the legal sufficiency of the matter pleaded. *Harner v. Harner*, 116 W. Va. 590, 182 S.E. 291 (1935).
would preclude the principal from showing the lack of authority, a substantial reorientation would be required in a law of agency such as ours, which prescribes that even performance by the third person because of his belief in the authority assumed will not render the principal liable on the contract. Yet in every respect except that the supposed case involves private persons and the Sims case states, as principals, the situations are identical. And, if that difference results in estopping a state, we seem to be confronted with the result that estoppels are to be invoked more rather than less readily against states. Again, the well-known and somewhat controversial Section 90 of the Restatement of Contracts, which propounds, without manifest antiquarianism, the standard formulation of "promissory estoppel" limits its scope to declaring the enforceability of a "promise which . . . does induce . . . action or forbearance of a definite and substantial character". Neither in the Restatement comments and illustrations nor in Williston nor Corbin is there explicit consideration of whether a promise, when it has induced another promise and nothing more, thereupon becomes enforceable; but it is submitted that the tenor of the discussions is uniformly against that conclusion. Would not a re-molding of the law of contracts result from recognizing an offeree's expression of assent per se as a change of position adequate to generate a promissory estoppel, as great as the reorientation of agency law to which attention has hitherto been directed? Here again, of course, the doctrine might be limited to situations involving a state—but only at the expense of rendering states more susceptible to estoppels than private persons instead of less so as usually stated.

Moreover, even if giving a promise is a change of position, a distinction may be observed between a promise absolute in terms and a contingent promise. In the instant case, there was a tissue of conditional promises, some compacting states indeed making their assents expressly dependent upon West Virginia's participa-

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57 Restatement, Agency § 182 (1933).
59 See I Corbin, Contracts, c. 8 (1951). The discussion in § 199 of the distinction between enforceability of a promise before and after performance of a valid promise given in exchange for it rather militates against the hypothesis that the making of a promise may constitute the requisite change of position.
60 For a resume of the network of conditions annexed to state assents to the Compact, see Zimmerman & Wendell, op. cit. supra note 2, at 88, n. 320.
tion. As to them, at least, the question turns into one not merely of whether promissory estoppel may rest on reciprocal promises but whether it may so rest where the induced promise specifies the inducing promise as a prerequisite. If it be supposed that the object was to condition commitment upon the making of a valid and binding promise by West Virginia, it is hard to derive from a withholding of assent until such promise was received the basis for a claim of change of position which would preclude that state from denying that one was given. An undertaking with reservation of rights until after described action has been taken seems ill-adapted as an abandonment of those rights on the assumption that the stated condition has been met.

If adequate change of position be assumed, it is not obvious what is the detriment to other states or the benefit to West Virginia. Their internal powers over the subject matter affected by the compact are in terms preserved to them undiminished and may be exercised compact or no. Their capacity to agree among themselves is not dependent on West Virginia's joining the arrangement and the preliminary resolution under which negotiations proceeded makes it plain that Congress did not contemplate imposing such limitation or condition. Some states did, it is true, expressly make her consent a condition, a qualification whose relevance to negative interim change of position has just been considered. Probably it is just as relevant to show that some others thought that without that state's participation, the compact would not be worth the bother of forming it. But, while a West Virginialess compact might be futile, it is hard to see how it could be harmful in view of the provision preserving freedom of internal controls. That the hoped-for advantages to the compacting states were frustrated by West Virginia's nonparticipation does not demonstrate that their actual position suffered by their agreeing among themselves. Although action taken pursuant

61 See OHIO GEN. CODE § 14881-3 (Page 1939); PURDON'S PA. STATS., tit. 32, § 816.7 (perm. ed. 1949).
63 See 49 STAT. 1490 (1936), a general enabling act authorizing negotiation of river basin compacts between fourteen named states, eight of them eventually involved in the Ohio River compact, "or any two or more of them".
64 In theory, the compacting states might assent to projects injurious to them and each of them with the object and effect of benefiting West Virginia; and the power to act jointly in that manner might be said to be a consequence of the compact. Can any one seriously suppose as a practical matter that it would ever be done?
to the Compact might well be less extensively beneficial without than with her, yet her absence would hardly convert the benefit to detriment, the plus to minus.\textsuperscript{65} Surely the absorption of some legislative time and attention in consideration and enactment of the assents at the expense of other proposed legislation is one of those circumstances too trivial to serve as a serious basis for a claim of either change of position or detriment, to support an estoppel.\textsuperscript{66}

"Change of position will not estop unless it can be attributed to faith in the representation complained of".\textsuperscript{67} This element of reliance poses as grave questions as those considered in connection with representation, change of position, and detriment. For one state a party to the Compact, circumstances rather clearly suggest that its assent was related rather to its general policy on pollution abatement than to incentives found in the legislation of West Virginia or any other.\textsuperscript{68} What may have animated the others to agree is lost in that limbo which is the general fate of state legislative history. Still the tentative conclusion may be hazarded that it was not the allurements of West Virginia's statute which occasioned their action. One assent is found to have preceded West Virginia's\textsuperscript{69} and, though only slightly antecedent, it just plain could not have been a result of reliance on West Virginia legislation which had not yet been and might never be enacted. It is only a trifle less unlikely that three other assents adopted nearly contemporaneously\textsuperscript{70} were induced by West Virginia legislation. The pre-

\textsuperscript{65} Even if one abandoned the requirement that "the change of position to effectuate estoppel must have been prejudicial to the estoppelasserter. If he really benefited by the change or was in no way hurt by it, he has really nothing to complain of", Ewart, \textit{op. cit. supra} note 31, at 146, and, by analogy to alternatives familiar in connection with contract doctrines of consideration, permitted benefit to the promisor as an equivalent, it is submitted that the increment of advantages accruing on account of the Compact to West Virginia, particularly in view of its geographical situation relative to other states in the river basin, would be inconsiderable in amount, inconsequential in character, and in both respects a frail support for estoppel.

\textsuperscript{66} The authorities are uniform that the change of position and resultant prejudice must be substantial, see, \textit{e.g.}, Williston, \textit{op. cit. supra} note 58, at 503; Bigelow, \textit{op. cit. supra} note 31, at 202.

\textsuperscript{67} Ewart, \textit{op. cit. supra} note 31, at 140; \textit{cf.} Corbin, \textit{op. cit. supra} note 59, at 674.

\textsuperscript{68} See Zimmerman & Wendell, \textit{op. cit. supra} note 2, at 91.

\textsuperscript{69} In West Virginia, the statute was passed March 11, 1939, see W. Va. Acts 1939, c. 38. In Indiana, it was passed March 4, 1939, see Ind. Laws 1939, c. 35.

\textsuperscript{70} 1939 legislative approvals, besides those referred to in the preceding note, are evidenced by Ill. Laws 1939, p. 310; N.Y. Laws 1939, c. 945; Ohio Laws 1939, p. 447. The New York statute was passed June 8, 1939, but I have not
occupation with what was transpiring in the legislatures of all other states where the compact was pending (or, alternatively—and inexplicably—in West Virginia alone) and the intimate and constant awareness of the current status of the legislative calendar in sister states, presupposed in viewing the nearly contemporaneous assents as a response to West Virginia's, is believed not to correspond with the realities of legislative behavior, all the more so when the assumption is to be made not merely for one but for three sister state legislatures. Nor is it illogical to find in the practice of some states in stipulating for West Virginia's assent, as a condition to the effectiveness of their own,\textsuperscript{71} negation of reliance. Such language appropriately expresses an election to postpone commitment until she should assent but not a purpose to enter into a commitment on the faith that she had assented. One might even argue, though perhaps speciously, that omission of similar language in legislation elsewhere betokened indifference whether West Virginia in particular joined in the compact.

Besides these indications that at least some other states did not in fact act on the faith of West Virginia's having assented, there is the further difficulty that all save Virginia assented while West Virginia's assent was still, so to speak, inchoate.\textsuperscript{72} The West Virginia legislation had imposed the express condition that it was not to be operative until after the assent of, \textit{inter alia}, Virginia.\textsuperscript{73} The latter had not been included among the states originally authorized by Congress to negotiate and agree and became so only by the Congressional act approving the compact, which was subsequent to ratification by all the participating states except Pennsylvania.\textsuperscript{74} Any reliance others may have placed on West Virginia's action was, therefore, reliance on an undertaking by its terms inoperative and to become operative only on contingencies not certain to occur. Is one to conclude that the opinion would allow estoppel where reliance is rested on a promise by its terms inoperative because the

\begin{itemize}
\item \textsuperscript{71} See note 61 supra.
\item \textsuperscript{72} Virginia approved in 1948, see \textsc{Va. Code} 62-67 (Michie 1950). This was subsequent to all other assents except that of Tennessee, passed February 16, 1949, see \textsc{Tenn. Code} § 5753 a-i (Supp. 1951) which, being conditioned on assents by North Carolina and Alabama, may even yet not be effective since there seems to be nothing in their published statutes showing approval.
\item \textsuperscript{73} \textsc{W. Va. Acts} 1939, c. 88, § 6. Adoption by New York, Pennsylvania, and Ohio also was a stated condition.
\item \textsuperscript{74} See \textsc{54 Stat.} 756 (1940) (reciting assents by six states, in two of them conditionally).
\end{itemize}
party relying conjectures that in the future it will become binding? or does it mean that, having contingently assented, a promisor is bound and can not withdraw the assent even prior to occurrence of the contingency? The dilemma appears inescapable yet either alternative seems unacceptable. This may be quibbling but the estoppel rationale compels quibbles. Estoppel postulates reliance and reliance, like guilt, is personal, not to be established vicariously or by association. Even if reliance might justifiably be inferred as to some compacting states, circumstances negative it more or less forcefully as to others. Differentiation is inescapable; but differentiation between compacting states as to the binding force and effect of an interstate compact is frustrating. A factor as casually variant as that of reliance is not an appropriate ingredient for determining the congeries of relationships clustered in interstate compacts yet it is one of the most characteristic and essential features of estoppel.

The very text of the Compact in one important particular indicates, rather than reliance on a supposed absence of state constitutional limitations, a draftsman's prudent care to anticipate and circumvent constitutional objection. What credence might reasonably be accorded to legislative assertions, whether express or inferred from the fact of enactment, that statutory undertakings did not violate constitutional restrictions as to indebtedness has already been queried. The concluding paragraph in Article V of the Compact\textsuperscript{75} shows, however, that in the drafting and consideration of the Compact, there was a conscious awareness that constitutional provisions of that character were relevant. It was no doubt hoped and thought that the language of that paragraph was sufficiently explicit to render the Compact compatible with the constitutional command (as, indeed, the dissenting judges in the Supreme Court of Appeals thought it was). Nevertheless its presence is demonstrative not of ignorance that such limitations existed or of trust in representations that they had no bearing but of apprehensions aroused by them which the paragraph was calculated to allay in the opinion of the draftsmen and, probably, of the assenting legislatures. Yet reliance on one's own opinion or on the opinion of third persons, instead of on the assertions of the one sought to be estopped, is traditionally incompatible with the raising of an estoppel,\textit{ a fortiori} where the opinion is with respect to a

\textsuperscript{75} See the quoted excerpts from the Compact, \textit{supra} note 13.
\textsuperscript{76} EWART, \textit{ESTOPPEL BY MISREPRESENTATION} 140 (1900).
question of law. The diversity in the terms and in the judicial applications of the rather common state constitutional provisions inhibiting creation of state indebtedness would seem to leave little basis for assured conviction as to the status of any arrangement obligating the state to future fiscal outlays in situations not already judicially sanctioned. West Virginia courts were not claimed to have passed upon any arrangement identical with or even closely analogous to that resulting from the Compact. The only prior decisions as to Article X, Section 4, had, it is true, sustained the challenged legislation but in contexts so different that they give no guidance. There were enough restrictive interpretations of the analogous limitation on indebtedness of governmental subdivisions to give notice that the court was not disposed to be unreservedly complaisant as to the undertakings of the policy-making instrumentalities of government. They are, of course, distinguishable; but, weighing everything together, occasion for genuine constitutional doubt cannot be said to have been eliminated by anything the West Virginia court had held or said. The language of Article V evidences an election to risk a known danger on the faith of the efficacy of the contractual provisions therein expressed designed to avert it—a different thing from proceeding in the simple faith (induced or otherwise) that no such peril exists.

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77 Even representations of law are not usually an available basis of estoppel, because of their being matter of opinion, id. at 72.

78 Ratchford, Constitutional Provisions Governing State Borrowing, 32 Am. Pol. Sci. Rev. 694 (1938) contains a useful survey of the variations among the states, including a tabular exhibit of the constitutional provisions then prevailing. For discussion of cases involving typical problems arising out of such clauses, see Comments 47 Harv. L. Rev. 701 (1934), 20 Va. L. Rev. 701 (1934).

79 See Bates v. State Bridge Comm'n, 109 W. Va. 186, 153 S.E. 305 (1930) ("special fund" doctrine); Dickinson v. Talbott, 114 W. Va. 1, 170 S.E. 425 (1933) (extent of legislative discretion to determine existence of conditions establishing "casual deficit" exception to constitutional limitation).


82 Perhaps some weight should also be given to the fact that other states neglected to avail themselves of the West Virginia statute, W. Va. Acts 1941, c. 26, W. Va. Code c. 55, art. 13 (Michie, 1949) adopting the Uniform Declaratory Judgments Act. The proceeding's function for stabilizing future relationships and declaring legal rights to arise in the future, see Borchard, DECLARATORY JUDGMENTS 414 (2d ed. 1941), would seem to support the conclusion that the requisite justiciable controversy was present even before the time when the last of the assents upon which West Virginia's legislative approval was
Of course, Mr. Justice Jackson does not quite say that the estoppel involved is estoppel by representation though certain of his statements rather suggest as much. Even if detailed examination has disclosed that there was neither representation nor change of position nor detriment nor reliance (unless one is prepared to make a radical redefinition of one or more of these elements) and even though the lack of any one of them would exclude any estoppel by representation, if some different sort of estoppel with different elements is contemplated, the estoppel rationale may still stand unshaken. Estoppels by record and by deed are too alien to the situation to justify consideration. Obviously if estoppel is involved, it is some sort of estoppel in pais. Besides estoppel by representation, there is one other generally recognized category of estoppel in pais, namely, estoppel by contract. The standard formulation of this branch of estoppel includes as a condition for its application the existence of a lawful binding contract so that.

By definition, it would seem not to comprehend a situation where the very question at issue is whether there is such a contract. To conditioned had been given. But cf. South Charleston v. Kanawha County Board of Education, 50 S.E.2d 880 (W. Va. 1948). Furthermore, the provisions of the Uniform Act have been held available in other states, under decisions antedating its adoption in West Virginia, to determine the constitutional or other validity of statutes and ordinances at the instance of officials and governmental units interested in removing declared or anticipated objections to them, Borchard, supra at 774. Although there would seem to be no obstacle to allowing appropriate officials representing other compacting states to maintain the action as plaintiffs, the state's immunity from suit, see W. Va. Const., Art. VI, § 35, raises difficulties in designating a party defendant but probably not insuperable ones; and the somewhat niggardly approach to the statute which has characterized the Supreme Court of Appeals might also reasonably discourage resort to it. Still the existence of a statutory proceeding aptly devised to present for determination the validity of the Compact under the antiindebtedness provision of the West Virginia Constitution and the neglect to use it is a factor which ought not be overlooked. The hypothesis is, of course, that disregard of an available authoritative source of information for learning the accuracy of a representation tends to show that reliance on it was not justifiable and hence militates against an estoppel; but I cannot find that this problem of the consequences for estoppel claims of the existence of declaratory judgment proceedings has anywhere been explored. Its adequate development would require an article of its own.

83 Bigelow, op. cit. supra note 31, at 491; Ewart, op. cit. supra note 76, at 2.
84 Bigelow, op. cit. supra note 31, at 495 (“Stated in full, the general rule of law appears to be this: A fact agreed or assumed to be true, as the basis of a contract, must be taken to be true specifically, until the contract itself is lawfully impeached by plaintiff or by defendant, or until some legal proceeding is taken to impeach the truth of the (supposed) fact; assuming that the contract itself is not contrary to law. In other words, supposing the contract to be lawful and binding, the party or parties . . . pledging or justly assuming the fact in question will be estopped from taking any position, to the detriment of other parties, inconsistent with the special fact . . .”)
be sure, Bigelow discusses under this head the preclusion of a corporation to set up the *ultra vires* nature of its acts and undertakings.\textsuperscript{85} The situation has a superficial similarity to that involved in the *Sims* case; but, without at least a substantial if not a full performance of the contract by the other party, even a private corporation is not ordinarily barred from using the defense of *ultra vires*.\textsuperscript{86} The almost wholly executory status of the Compact obligations thus becomes pertinent. Still more important, the *Sims* case involved no claim that the state of West Virginia was exceeding its powers as a state but a claim that the legislature was exceeding the powers conferred on it by the state constitution. The true analogy would seem to be not the *ultra vires* acts of corporations but their estoppel to deny the authority of their agents to act for them. In that connection, bylaws limiting an agent's authority will not, indeed, usually be binding on those who deal with them, not being "open to and intended for inspection";\textsuperscript{87} but this simply returns us to the question of the extent to which the other compacting states were affected with knowledge of the West Virginia constitution and of the respective roles of court and legislature in interpreting it.

Analogy, not analysis, may be the real answer to how the notion of estoppel injected itself. However much the situation lacks the standard requisites for estoppel, it has an evident similarity, as an expression of agreement to associate for achieving a mutual objective, to both charitable subscription contracts and stock subscription agreements. Each has on occasion been treated in terms of estoppel.\textsuperscript{88} The likeness is only apparent; for in neither connection has estoppel been invoked to determine whether a commitment has been made but in both the argument has been used only to ascribe a binding character to concededly subsisting promises. No charitable subscription case, for instance, goes so far as to decide that the promissory estoppel concept either establishes the principal's liability for the charitable promises of an admittedly unauthorized agent or is relevant to determine whether the agent was authorized. In the critical particular, the analogies diverge.

\textsuperscript{85} Id. at 501.  
\textsuperscript{86} See COOK, PRINCIPLES OF CORPORATION LAW 456 (1925).  
\textsuperscript{87} See RESTATEMENT, AGENCY § 167, comment b (1933).  
\textsuperscript{88} As to charitable subscriptions, see WILLISTON, *op. cit.* supra note 58, at § 116; CORBIN, *op. cit.* supra note 59, at § 198, and as to stock subscriptions, WILLISTON, *id.* at 413, n. 6; BIGELOW, *op. cit.* supra note 31, at 499.
The exploration of the opinion so far has proceeded largely on the basis of testing the conformity of the situation presented in the *Sims* case with the technical requirements of a technical legal concept—essentially an exercise in legal semantics. It is conceded herewith that that is not a wholly sufficient way of dealing with constitutional problems. A result which polity compels must be attained, however many requisites for estoppel may be found to be lacking and however unparallel the analogies. Estoppel may serve as the basis for attaining it if no better explanation is available and if its use is not attended by potentially grave consequences. This is not to condone the much-decried tendency to sloppiness in the way the term "estoppel" is sometimes bandied about. It is merely to recognize that estoppel need not mean the same thing for public, as for private, law purposes. It should, however, mean either the same thing or a different thing. It should mean something. Its total indefiniteness, as used in the Jackson opinion, involves alternative dangers. If, as some of the expressions referring to elements in private estoppel hint is the case, estoppel in private and public law are being assimilated, there is serious risk both of (a) distorting the concept as developed in private law by furnishing a precedent for dispensing with or radically revising the essential components of an orthodox estoppel and (b) importing into public law applications considerations which are (1) inappropriate, e.g., reliance, which makes it operate fortuitously and differentially, and (2) fundamentally disturbing, e.g., representations of legislative capacity to make ultimate binding interpretations of state constitutional provisions. If, on the other hand, they are being differentiated, no ascertainable content is given the public law use of the term, which merely summarizes an amorphous admonition to the states that a vague residue of controls remains available to the Supreme Court to be applied when it pleases. Without disputing the Court's power to formulate special meanings for borrowed terms in constitutional contexts, it is submitted that creation of a viable body of interstate expectations and relationships requires some explicitness, where that is done. Even an utter absence

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89 See, e.g., Corbin, *op. cit. supra* note 59, at 663 ("The word estoppel is so widely and loosely used as almost to defy definition"); Pound, Foreword at vi, to Ewart, *Waiver Distributed* (1917) ("Having previously looked into the use of that much-enduring word 'estoppel', Mr. Ewart now takes up another slippery word worn smooth with overuse").

90 But cf. U.S. Const. Amend. X.
of other rational grounds for decision would demand that much. Only their utter absence would recommend resort to as inapposite and potentially hazardous a doctrine as estoppel. The other opinions show that they were not absent, as indeed Jackson does not unequivocally assert they were.

The most obviously astonishing thing is that no justice saw fit to embrace the view of West Virginia's dissenters that, accepting the state constitutional limitations as read by the majority below, the Compact left the State such freedom of action as to be unaffected by them. This solution was available to the Court, even though its appellate jurisdiction is ordinarily not extended to the pedestrian matter of differences of opinion with state courts as to the proper interpretation of contract language; for Delaware River Joint Toll Bridge Comm'n v. Colburn, where only a question of interpretation was decided, had settled that construction of a compact involves a federal "right, title, privilege, or immunity" reviewable on certiorari. It would have had only minimal consequences under the doctrine of stare decisis, both because it would have been addressed to the particularities of the terms of one compact and because almost trivial and almost formal verbal alterations, e.g., the insertion of a separability clause and a slight enlargement in terms of the members' already conferred power substantially to prevent the implementation of the compact terms, which might easily be spelled out in subsequent compacts, could without manifest illogic be implied in the actual one. It would have complied with the familiar canons about construction to avoid constitutional doubts.

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91 310 U.S. 419 (1940).
92 28 U.S.C. 1257 (1948) authorizes review of final judgments or decrees in the highest available state court "(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity. (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States." The accompanying Reviser's Note traces the section from its inception in substance in 36 Stat. 1156 (1911).
93 See Zimmerman & Wendell, op. cit. supra note 2, at 98-101, for suggestions as to drafting which might obviate the objections raised by the West Virginia court. The book was published intermediate the Sims decision in the state court and that of the United State Supreme Court.
94 See 1 Cooley, Constitutional Limitations 376 (8th ed. 1927). Intimation of this principle antedates even the establishment, by Marbury v. Madison,
and about refraining from resting decision on constitutional grounds where more modest alternatives are available. Under all the circumstances, one must suppose that the easy out afforded by the contract construction approach was not taken because the justices wanted not to take it—or, otherwise stated, that, whatever their differences of view, they were agreed in deliberately choosing to use the opportunity presented them to map the uncharted terrain of the compact clause in the world of federalism. If this assumption, that the case represents a deliberate and not merely inadvertent avoidance of the facile solution proposed by West Virginia's dissenters, is correct, its landmark significance in the law of inter-state relations specifically and federal relations generally is manifest.

The Court was as reluctant, however, to decide more than it ought to as it was to decide less than it wanted to. In the Frankfurter opinion for the Court, two proposed approaches were deliberately excluded from consideration, in the following language:

"Briefs filed on behalf of the United States and other states, as amici, invite the Court to consider far-reaching issues relating to the Compact Clause of the United States Constitution. The United States urges that the Compact be so read as to allow any signatory State to withdraw from its obligation at any time. Pennsylvania, Ohio, Indiana, Illinois, Kentucky and New York contend that the Compact Clause precludes any State from limiting its power to enter into a compact to which Congress has consented. We must not be tempted by these inviting vistas."

The Reed opinion makes no explicit reference to these contentions.

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1 Cranch 137 (U.S. 1803), of the doctrine of judicial review of legislation, see Hylton v. United States, 3 Dall. 171 (U.S. 1796).

95 See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346, 347 (1936) (dissenting opinion of Brandeis) ("2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it' . . . 'It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case' . . . 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground on which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter"). The Brandeis statement of these and related policies of judicial limitation has been widely accepted as the classic formulation, see Dowling, Cases on Constitutional Law 82 (3d ed. 1946); Note, Avoidance of Constitutional Issues in Civil Rights Cases, 48 Col. L. Rev. 427 (1948); 27 N.C.L. Rev. 221 (1949); cf. Rottschaefer, Handbook of American Constitutional Law 26 (1939).


Its conclusion is certainly incompatible with the first. The second may conceivably be at the bottom of Mr. Justice Reed's thinking, as will appear more fully hereafter, but it is not necessarily so, since, whatever the implication of certain expressions, his position can be explained on narrower grounds.

The solution, alluded to as having been proposed by the United States, to read the Compact to allow any signatory state to withdraw at will does not seem much different, as stated, from the ground taken by the West Virginia dissent. Something more than this is hinted at, however, by its characterization as a "far-reaching" issue and by the resolute resistance to wandering into its "inviting vista." How much more is perhaps best indicated by the cases cited in support of the proposition. From the constraints imposed on state action by the Contract Clause of the United States Constitution,98 Newton v. Comm'r's99 exempted statutes relating to the status of local government units on the ground that they dealt with "governmental subjects", "public interests", Illinois Central R.R. v. Illinois100 relieved statutes granting submerged lands, deemed to be held by the state as trustee for the common and public right therein. Their common element is an incapacity of the state to undertake binding obligations in some areas, not a mere inadequacy of the agreement under consideration to express such an obligation. If the state could withdraw at will by virtue of the principle on which those decisions rested, it would be not because it had reserved that power but because it could not surrender it. This is of course a much more pregnant doctrine than that of the dissenting state judges. Its adoption would make every engagement incorporated in any interstate compact only an illusory promise or, at the very least, would expose them all to be so treated without regard to the terms of the particular compact and without any disclosed basis of differentiation, between those which are binding and those which are merely precatory. The whole course of decision applying and enforcing the provisions of compacts argues against any such phantom promises, though perhaps no single opinion is unequivocally and indistinguishably authority to the contrary.101 More important,
the devitalization of the compact as a basis for reciprocal expectations between states could have grave consequences. If a compact is an instrument of futility, not of utility, the incentive to resort to it for the solution of multi-state problems nearly or totally disappears. For the interstate compact to retain efficacy as a tool of federalism it must be capable of being so fashioned as to have a cutting edge. Awareness of this soundly prompted the Supreme Court to eschew such reasoning, whatever the allurements of the speculative subtleties of state sovereignty or of the elaborated ingenuities of contract clause doctrine.

The Pyrrhic victory which the United States would have won if, to sustain the validity of the Compact, it had frittered away the effectiveness of the compact system, would be a major triumph compared to what would be involved for the states appearing as amici had they prevailed in their contention. The advocate's keen impulse to gain his immediate objective must charitably be taken as accounting for the almost incredible fact that so many states had attorneys general capable of urging that even the most express provisions of their fundamental charters were and could be only so many hollow phrases in the face of legislative assent to a compact.

Taken out of context, Mr. Justice Reed's statement that "Since the Constitution provided the compact for adjusting interstate relationships, compacts may be enforced despite otherwise valid restrictions on state action"\(^{102}\) smacks of assent to this wholesale overthrow of state constitutions. His grounding of the conclusion on expressions in *Hinderlider v. La Plata River & C.C. Ditch Co.*\(^{103}\) and *Rhode Island v. Massachusetts*\(^{104}\) focussing on the significance of the Congressional action involved and his repeated invocation\(^{105}\) of the Supremacy Clause\(^{106}\) admit of a less sweeping reading of his opinion. Analogy is supplied

\(^{102}\) *341* U.S. 34.

\(^{103}\) *304* U.S. 92, 106 (1938).

\(^{104}\) *12* Pet. 657, 725 (1838).

\(^{105}\) *341* U.S. 33, 35.

\(^{106}\) *U.S. CONST.* Art IV, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".)
perhaps by the Commerce Clause which has been understood, since
_Cooley v. Board of Wardens_,\(^{107}\) not to vitiate of its own force every
state regulation of interstate or even foreign\(^{108}\) commerce but to
permit continued state regulation of matters local in character and
appropriate for diverse regulation until Congress occupies the field
and supersedes the state regulation.\(^{109}\) It becomes the task of the
Court, when state legislation or constitutional provisions\(^{110}\) are
challenged to determine whether there is valid existing federal
regulation\(^{111}\) and to construe it to determine what field has been
occupied, preliminary to determination that state regulation, in
matters otherwise within state competence, has been superseded.
The particulars of Congressional action are relevant to the extent
of displacement of state law in every such case. Conceivably the
Compact Clause might be thought to operate similarly. This would
mean that the clash of federal and state measures and the subordina-
tion of the latter prescribed by the Supremacy Clause would require
the Court to decide, in each instance, the meaning of the federal
measure (in this connection, the Congressionally sanctioned agree-
ment) and also its validity. Logically that would involve a deter-
mination that there had been presented for Congressional approval
something accurately answering the description of an “Agreement
or Compact with another State”. This would seem to require a

\(^{107}\) _12 How. 299_ (1851).


\(^{109}\) See Rutledge, _A Declaration of Legal Faith_, c. II (1947); Rot-


\(^{110}\) The Supremacy Clause deals with state constitutional provisions in terms

strictly parallel to those applicable to state statutes and their subordina-
tion to federal laws is similarly enforced when the Court finds an appropriate situa-
tion for supersedeure; _cf_. _e.g_., _Roberts v. Northern Pacific R.R._, 158 U.S. 1

(1895) (Congressional charter rendered state constitutional prohibition of pub-
lic aid to corporations invalid). Indeed it would even seem that state-created
rights deriving a status superior even to state constitutional guaranties from
the contract clause of the United States Constitution are not immune from the

\(^{111}\) While constitutional objections to the validity of Congressional acts are
theoretically available to exclude certain subjects from the range of permissible
federal action and thus reserve them for state regulation, _cf_. _The Abby Dodge_,
223 U.S. 165 (1912), it is safe to assume that challenges of statutory validity
have little if any prospect of being sustained in the foreseeable future. As to
statutes, the technique employed to limit the operation of supersedeure has
been and probably will be almost wholly that of interpretation. As to federal
administrative controls, however, contesting their validity as not being within
the authority delegated is not quite so hopeless a proposition, _cf_. _North Carolina
v. United States_, 395 U.S. 507 (1945); _FTC v. Bunte Brothers_, 312 U.S. 349
(1941), thus leaving scope for effective state regulation until and unless there
is a valid administrative regulation.
proposal to which assent of the states purportedly participating could be and had been effectually given. That might be treated as a “political question” on which the Congressional judgment was final, although the considerations in which the political question doctrine is usually taken to be grounded are lacking in the situations normally and appropriately within the range of compact coverage. Unless so treated, there will necessarily be reserved to the Court the determination, in every case, whether effectual state assent was present or was lacking, by reason of constitutional incapacity or otherwise. Independent interpretation of state constitutional provisions and their total disregard as inconsequential would be among the alternative techniques for making the determination; but they would not exhaust the alternatives. There would be another possibility of leaving to the states the decision as to the meaning of their own constitutional provisions but saving to the Supreme Court the judgment whether, however construed, the provision was capable of vitiating essentially the state’s purported assent. Without altogether cancelling state constitutions and without undertaking their construction, the Court would thus exercise a differential appraisal of them incident to its function of

112 Developed in such cases as the recognition of foreign governments and other phases of foreign relations, the application of the “republican form of government” guaranty, the composition of the legislative branch of the government, and similar sensitive questions of large public import, where the court has felt that, because of the preponderance of extralegal elements, it possessed no special competence and that, in view of the peculiar interest of the co-ordinate, political branches of the federal government with the problems involved, judicial supervision might create undue risk of disharmony or of disturbing the functioning of such other branches, see Finkelstein, Judicial Self Limitation, 37 Harv. L. Rev. 338 (1924); Weston, Political Questions, 38 id. 296 (1925; Finkelstein, Further Notes on Judicial Self-Limitation, 39 id. 221 (1926); Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. Rev. 485 (1924), extension of the political question doctrine to situations which are (1) wholly domestic, (2) largely concerned with the interpretative co-ordination of constitutional and statutory language, where the courts do possess special competence, and (3) not, however important, of critical interest to Congress or the executive, which are the characteristics of situations involving interstate compacts, would seem inappropriate. Moreover, the doctrine has heretofore been applied under circumstances where, the contingency of constitutional amendment excepted, there was no third alternative to the Court’s assuming ultimate authority or renouncing it in favor of the political branches, whereas the subjects with which interstate compacts deal will often and perhaps typically be within the ambit of congressional control under enlarged conceptions of the commerce power and the general welfare clause currently prevailing, should the initial approach through the interstate compact fail.
deciding the federal constitutional question whether the state was party\textsuperscript{113} to an “Agreement or Compact”.

It is not claimed that this refined, if not tortuous, course of reasoning is spelled out in the Reed opinion; but it is consistent with at and in part obscurely suggested by its general drift. The thesis of state constitutional debility may be the correct, as in some respects it surely is the natural, reading of that opinion. If, however, Mr. Justice Reed has not firmly committed himself to the soundness of that thesis, his position is not necessarily subject to strictures which may be addressed to it.

The statement that “the Constitution provided the compact for adjusting interstate relationships.”\textsuperscript{114} is so manifestly inexact that it cannot be suspected of being meant literally. Constitutional text and constitutional context show the contrary. The reference to interstate compacts is grammatically cast in terms of limitation and not of grant. It is located in a section devoted to detailing the restrictions on state power imposed by the Constitution. It follows immediately a comparable section specifying limitations on Congressional power which, in turn, immediately follows that conferring on Congress its granted powers, the two in juxtaposition thus establishing and qualifying Congressional authority. As to state powers, however, there is no such conjoint grant and limitation but merely a limitation, compelling one to go outside the text of the Constitution to find the state powers to which the restrictions apply, which consequently can hardly be powers tracing to the Constitution.

The rhetoric of the Constitution is confirmed by antecedent history. It is common learning that there was an analogous provision in the Articles of Confederation.\textsuperscript{115} Indeed the Constitu-

\textsuperscript{113} Of course, determination of existence of a compact would involve only a determination that at least two states had validly assented and, that determined, the validity of assent of any others could be said not to be relevant to the existence of an “Agreement or Compact” and so not open to inquiry. One hesitates to suppose, however, that the Court would hold that, states A and B having validly agreed so that there is an interstate compact for Congress to approve, the purported adhesion of state C, although so defective that it would not have sufficed to make out an agreement had none otherwise existed, is not open to question because the other states did agree among themselves.

\textsuperscript{114} See note 102 supra.

\textsuperscript{115} Articles of Confederation, Art. VI (“No state without the Consent of the united states in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any King, prince, or state. . . No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the united states in congress assembled, specifying accurately the purpose for which the same is to be entered into, and how long it shall continue”). The language was abridged and paraphrased in Art. XI of the Pinckney draft, see 1 Elliot’s
tional Convention itself was simply the fruition of a series of more limited conferences among some of the states looking initially to the settlement by compact of questions relative to Chesapeake Bay and the Potomac River. Pre-Constitutional Compacts have been involved in Supreme Court litigation in a number of cases including *Rhode Island v. Massachusetts*, one of the authorities on which Mr. Justice Reed principally relied. The existence of a capacity in the states to enter into contracts *inter se* anterior to the Constitution is unquestionable.

One might concede this and yet contend that the constitutional reference extinguished the old power and converted it into a new one, of comparable extent but of constitutional derivation; but such a suggestion would be both novel and untenable. It is going too far surely, to assert that mention of state activities in the Constitution makes the basic authority for them flow from it. The full faith and credit clause mentions "public Acts, Records, and judicial Proceedings" of the states; does that make the Constitution the generating source for all state acts, records, and proceedings? The supremacy clause refers to state judges and to state constitutions and laws; does that convert these state institutions into matters of federal constitutional provenance? The very section wherein interstate compacts are mentioned speaks, in an earlier clause, of state "inspection Laws"; they were plentiful when the Constitution was framed and it was clearly the sense of the time that power as to them was not being conferred on the states but originated

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Debates 149 (2d ed. 1836), whose clauses were by the Committee of Detail separated into Articles VII and XIII, 5 id. 381, of which the latter containing the essence of the present compact clause was approved without recorded debate, id. 548. Despite differences in phraseology, therefore, the substance of the clause seems to derive from the provision quoted.

116 See note 106 supra.
118 The agreement of 1718 involved in that case of course went far back into colonial days, substantially antedating even the Articles of Confederation.
119 U.S. Const. Art IV, § 1.
120 See note 106 supra.
121 U.S. Const. Art. 1, § 10, cl.2.
122 For a list of such acts in force at the time of the Constitutional Convention of 1787, see *Turner v. Maryland*, 107 U.S. 50, n.1 (1882).
extraneously and was recognized and restricted thereby.  

It would tax ingenuity to distinguish mention of these and like matters from the mention of interstate compacts. The Court itself said, in the very passage from *Rhode Island v. Massachusetts* quoted by Mr. Justice Reed, that the constitutional provision confined itself to imposing the condition of congressional consent and that "if Congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent, when given, . . . left the states as they were before". The Constitution did not provide, it only recognized, the compact device. The states employ it in the exercise of a continuing, although curtailed, power, not of one received by them from the Constitution. It is necessary to set this straight so that decisions which have held that powers, such as the amending power, were vested in the states by the Constitution, may not be thought to be relevant.

Not the clearly rebuttable claim that the states' power in this connection is of federal constitutional parentage, however, but assumptions about one of the most elusive concepts of political theory are the most likely postulate of the notion that the state constitutions are to be disregarded. Nothing Mr. Justice Reed says entangles him in that quagmire; but the summarized briefs, when asserting the irrelevance of state constitutions, are replete with references to "inherent power", "attributes of sovereignty", and "inherent sovereign power", which rather clearly suggest that the old bloodstained problem of state sovereignty and its inkstained associate, the nature of sovereignty, are seeking recognition. This article will not venture to explore the esoteric niceties of how far sovereignty is divisible, the sense in and extent to which the states of the Union may be described as sovereign, and the attributes which by the law of nations are deemed to be implied in the concept of sovereignty. It may not be amiss to note the irony that this promiscuous abstraction was capable of being invoked by the West Virginia Supreme Court of Appeals to prove that the State could not commit itself to the engagements of the Compact and

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123 Id. at 52; see Abel, *Commerce Regulation before Gibbons v. Ogden: Trade and Traffic*, 14 Brooklyn L. Rev. 219 (1948) (use of inspection laws in the early federal period).
124 Emphasis supplied.
126 See the abridgment of arguments of counsel for West Virginia and for the states appearing as *amici*, 95 L. ed. 715-719 *passim.*
by others to establish that it could not limit its powers of commit-
ment, a divergence of conclusions which might make one doubt
whether the major premise possesses the proper precision for
cohherent use.

Further consideration of the sovereign status of the states and
of the state of sovereign status may well be omitted; for, whatever
one concludes on those points, the conclusion can have no applica-
tion within the framework of traditional American constitutional
dogma about the role of the written constitution. There are, it
is true, modern jurists, mainly Continental, who conceive of the
state as a collective entity distinct from its citizenry, a doctrine
which would admit of treating the state's sovereignty as a property
of the entity independent of and illimitable by the will of the
people. Throughout our national existence, the prevailing view
in the United States has been quite the contrary one that the
sovereignty of the state signifies the sovereignty of the people.
They prescribe the extent and manner of permissible governmental
action by the provisions of their constitutions—subject, all agree,
to controlling federal laws (and a few have contended to "natural
law" also) but not subject to any intrinsic qualities of statedom
transcending the constitutionally expressed popular will. It was at
the outset so "self-evident" that "Governments . . . deriv(e) their
just powers from the consent of the governed" that the draftsman
who said so has been thought to deserve no credit for creativeness

127 The position has been especially associated with the school of French
jurists of whom Duguit was perhaps most prominent. The most readily avail-
able statement of his position in his book-length article, The Law and The State,
31 HARV. L. REV. 1 (1917).
128 James Wilson did anticipate the entity theory of the state, speaking
of it as a "moral person", but he identified it with the citizenry, see 2 WILSON,
WORKS 6 (1896) ("In free states, the people form an artificial person or body
politic, the highest and noblest than can be known. They form that moral
person . . . ").
129 STORY, COMMENTARIES ON THE CONSTITUTION §§ 337-339 (5th ed. 1891);
cf. de Tocqueville, Democracy in America, c. IX (1835).
130 Cooley, Treatise on Constitutional Limitations 81 (8th ed. 1927)
("The theory of our political system is that the ultimate sovereignty is in
the people, from whom springs all legitimate authority. The people of the Union
created a national constitution, and conferred upon it powers of sovereignty
over certain subjects, and the people of each state created a state government,
to exercise the remaining powers of sovereignty, so far as they were disposed
to allow them to be exercised at all. By the constitution which they establish,
they not only tie up the hands of their official agencies, but their own hands
as well; and neither the officers of the state, nor the whole people as an aggre-
gate body, are at liberty to take action in opposition to this fundamental law");
1 Kent, Commentaries *449 (14th ed. 1896).
131 Declaration of Independence, Preamble (1776).
in voicing the sentiment.\textsuperscript{132} Locke's "social compact"\textsuperscript{133} was a political truism of the Constitutional era.\textsuperscript{134} The discussions attending the formation of the Constitution assumed\textsuperscript{135} and the provisions of contemporary state constitutions asserted\textsuperscript{136} the de-

\textsuperscript{132} Cf. \textsc{Dunning}, \textit{History of Political Theories from Rousseau to Spencer} 91 (1920); see \textsc{Bowers}, \textit{The Young Jefferson} 149 (1945) (quoting Jefferson's comments on the point).

\textsuperscript{133} \textsc{Locke}, \textit{Of Civil Government} 164 (Everyman's ed. 1924). For analyses of Locke's views on the social contract, see \textsc{Dunning}, \textit{History of Political Thought from Luther to Montesquieu} 349 (1943); \textsc{Catlin}, \textit{The Story of the Political Philosophers} 278 (1939); \textsc{Sabine}, \textit{History of Political Theory} 531 (1937).

\textsuperscript{134} \textsc{Parrington}, \textit{Main Currents in American Thought} 269 (1927); \textsc{Beard}, \textit{The Rise of American Civilization} 240 (1930); \textsc{Hurst}, \textit{op. cit. supra} note 40, at 200.

\textsuperscript{135} See, \textit{e.g.}, \textsc{The Federalist}, No. 46 (Madison) ("The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and intended for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies but as uncontrolled by any common superior... These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people."); \textsc{Elliott's Debates} 419 (2d ed. 1836) ("The state governments do not derive their power from the general government; but each government derives its power from the people and each was to act according to the powers given it"); John Marshall in the Virginia ratifying convention; \textsc{cf.} \textit{2 Life of the Bench\textsc{ of James Iredell}} 172 (1857) (asserting the propriety of judicial review of legislation, in 1787 letter, on the ground that "The (North Carolina) Constitution appears to me to be a fundamental law, limiting the powers of the Legislature, and with which every exercise of those powers must necessarily be compared..."). The experience of the evils which the American war fully disclosed, attending on absolute power in a legislative body suggested the propriety of a real, original contract between the people and their future government, such, perhaps, as there has been no instance of in the world but in America"). The passages quoted are selected more or less at random from many contemporary statements of like tenor.

\textsuperscript{136} \textsc{Mass. Const.} 1780, Preamble ("... The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good"); \textsc{Declaration of Rights}, Art. IV ("The people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right which is not, or may not hereafter be by them expressly delegated to the United States of America in Congress assembled"); \textsc{Art. V} ("All power residing originally in the people and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents and are at all times accountable to them"); \textsc{N. Y. Const.} 1777, Art. I ("This convention, therefore, in the name and by the authority of the good people of this state, DOETH ORDAIN, DETERMINE, AND DECLARE that no authority shall on any pretence whatever, be exercised over the people, or members of this state, but such as shall be derived from and granted by them"); \textsc{Va. Declaration of Rights} 1776, ("2. That all power is vested in, and consequently derived from, the people; that Magistrates are their trustees and servants, and at all times amenable to them"). These provisions, from the organic acts of a New England, a Middle, and a
pendence of the state governmental authorities on the people's will which, integrated in state constitutions, was the state will. There was no trinity of government, people, and state nor was the appropriate duality that of the state and the people; rather, it was that of the government and the people, who were the state. Its sovereignty was their sovereignty and its definitive expression of will was embodied in the state constitution. Such a view does not admit of inherent attributes of sovereignty exercisable by the government in derogation or disregard of the sovereign's own will thus authoritatively expressed. Whether more sophisticated political thinking finds this approach naive and deems it obsolete is rather beside the point. The notion, be it myth or otherwise, that the sovereignty of a state means the sovereignty of the people, to which, as constitutionally expressed, the conduct and powers of its governmental organs are subordinate, has persisted in respectable quarters. If a shift to the opposing view is now to be made under the high authority of the United States Supreme Court, at least it should be clearly announced and not suffered to creep in through innuendo, by casual allusion to the attributes of sovereignty as justification for dismissing the limitations declared by state constitutions.

Southern state, currently in force at the adoption of the United States Constitution are representative of provisions in many, though not all, the then existing state constitutions, see McLoughlin, Constitutional History of the United States 115 (1935).

137 See McClain, Unwritten Constitutions in the United States, 15 Harv. L. Rev. 534 (1902) (recognizing the practice of referring to the people as sovereign but stigmatizing it as a fiction and suggesting that, under written constitutions of the American type, there is no such thing as a sovereign in this country); cf. Kelsen, General Theory of Law and State 255 (1945); Laski, The American Democracy 550 (1948).

138 Texas v. White, 7 Wall. 700, 720 (U.S. 1868); Peerce v. Kitzmiller, 19 W. Va. 564, 572 (1882); for a collection of cases see 16 C.J.S. § 66 (1939); cf. Beard, American Government and Politics c. 26 (10th ed. 1949); 1 Bl. Comm. *49, n. 34 (Lewis' ed. 1900); Turnbull, The Crisis 100 (1827). Express provisions so declaring appear in many state constitutions, see Stimson, Federal and State Constitutions of the United States 191 (1908) and the Model Constitution, drafted in 1921 for the National Municipal League provides, 'Section 1. [Popular sovereignty] All political power of this State is inherent in the people, and all government herein is founded on their authority'. The concepts of the constitution as fundamental law and of popular sovereignty, identifying state and people, with corresponding subordination of government, seem indeed to be out of fashion with the political science profession, partly because of the emphasis on institutionalism and partly perhaps because of a reaction against excessive and inappropriate exercise of judicial review which for a time prevailed, cf. the articles on "Constitutional Law", "Constitutionalism", "Constitutions", in 4 Encyc. Soc. Sci. (1931), so that, while seldom explicitly rejected, they have been substantially abandoned to the lawyers. They have not, however, heretofore been abandoned by lawyers.
A current collateral contingency makes it especially important to get the record straight on this matter. The United States is now a member of the United Nations. In connection particularly with proposed conventions on "human rights", there has been recently a very articulate disagreement as to how far treaties entered into by the United States are capable of superseding some or all of the provisions of the United States Constitution as well as of state constitutions. This controversy, centering mainly on the supremacy clause mention of treaties, is left to others to pursue. More immediately pertinent is the fact that the United Nations Charter contains a clause authorizing regional agreements, roughly comparable to the compact clause of the United States Constitution.

In any sense in which the states may be described as sovereign, the United States is at least as fully sovereign. If that sovereignty be dissociated from the citizens and located essentially in an extrinsic entity, with inherent attributes and properties which render constitutional guaranties and limitations nugatory, there is real occasion for alarm. It is true that the Court has said that the sovereign status of the United States as a member of the family of nations gives to those charged with the conduct of foreign affairs authority appropriate to the function which need not be traced to any specific elaboration in the Constitution. So, for that matter, the conventional view of the powers of state governmental organs, particularly legislatures, has involved reading the state constitutions as instruments of limitation rather than of grant, with authorization

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140 U.N. CHARTER Art. 52; cf. id., Art 102.

to act correspondent to their status except as it is curtailed.\footnote{443 Railroad Company v. Otoe County, 16 Wall. 667 (U.S. 1872); State ex rel. Thompson v. McAllister, 38 W. Va. 485, 18 S.E. 770 (1893); Cooley, \textit{op. cit. supra} note 130, at 12; Dodd, \textit{Implied Powers and Implied Limitations in Constitutional Law}, 29 \textit{Yale L.J.} 137 (1919).} Dispensing with an expressed grant is very different from disregarding an expressed restriction, however, and it is the latter for which the inherent-attributes-of-sovereignty rationale, if accepted, would afford a precedent. If, because of it, interstate compacts render the constraints of state constitutions irrelevant, it seems logically inescapable that regional agreements under the United Nations Charter would, for the same reason, make every provision in any American constitution, state or federal, at most a tenant by sufferance. As to any matter covered by a regional agreement, the discussion as to constitutional limitations on the treaty power would become academic, for they at least would take precedence over anything in the Constitution. In avoiding the creation of a precedent to that effect, the Court has acted prudently and many will think wisely.

Mr. Justice Frankfurter was indeed right in considering that the argument of the \textit{amici} opened up a "vista", though perhaps, in peering down it, one might not find "inviting" the aptest adjective. If Mr. Justice Reed toyed with the notion, one trusts that his deliberated judgment represents its rejection rather than its elliptical acceptance. The inherent attributes of sovereignty are tricky and potentially explosive materials to be used as an ingredient of decision, alien to the orthodox American idea that the people are the sovereign, speaking authoritatively as such in their constitutional instruments, and as a precedent subversive of federal constitutional guaranties. Nonacceptance of that reasoning has as much to commend it as has avoidance of the caprices of estoppel or the mockery of collapsible compacts.

The Frankfurter and the Reed\footnote{444 The remainder of the discussion will proceed on the assumption that the Reed opinion is not to be read as denying state power to impose effective limitations on the state legislature but in the more limited sense discussed above, of which it will admit.} positions are both free from the more radical flaws of these other views. Their common escape seems largely attributable to their common point of departure, that inquiry is to be addressed to the interrelation of the provisions of state constitution and interstate compact, not wandering outside to circumstantial details of extrinsic conduct or spacious gen-
eralities about sovereignty or revocability. Their difference is on how the state constitutional provisions are to be dealt with. The Court, speaking through Mr. Justice Frankfurter, in effect says:

In so far as they relate to an interstate compact, we construe them, sustaining the compact if on our construction there is no impediment to the state's consent (with nothing stated as to the result if the construction discloses a conflict although the clear inference would seem to be that the state in such a case is not bound). Mr. Justice Reed says: In such cases, we accept the state court construction of them but if conflict results with the provisions of an instrument which constitutes an interstate compact, within the meaning of the United States Constitution, (the existence and meaning of such an instrument being for our determination) the state constitutional provision must yield because of the supremacy clause. Each view seems tenable; but, being fundamentally irreconcilable, they cannot be alternatively valid.

Each opinion stressed a pair of earlier Supreme Court decisions. They agreed in emphasizing Hinderlider v. La Plata River & Cherry Creek Ditch Co. but with variant readings of its holding. In addition, the Court's opinion relied primarily on Kentucky v. Indiana, the concurrence on Rhode Island v. Massachusetts. Analysis of these cases discloses that none is quite on all fours with the Sims case.

Kentucky v. Indiana was a specific performance suit, brought in the Supreme Court under its original jurisdiction of controversies between states, to compel Indiana's construction of a bridge across the Ohio River. The arrangement between the states appears to have been an administrative agreement effected between officials of each, assuming to act under authority derived from their general statutes dealing with the construction of interstate bridges. Their legislatures seemingly had not addressed themselves reciprocally to a specific proposition and certainly had not enacted or ratified a negotiated, integrated agreement identically phrased. Nor had Congress authorized or confirmed any such agreement, its action being instead a provision, in the statute granting Indiana permission to erect a structure in an interstate navigable waterway, which looked to Kentucky's acquisition of an interest in the bridge

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145 U.S. 163 (1930).
and to its thereupon becoming a free bridge.\textsuperscript{147} Thus, there was no conventional Congressional assent; neither was there an agreement of the sort whose validity depends on such assent.\textsuperscript{148} In this respect, of not raising questions about a "compact or agreement" of a character within the ambit of the compact clause, \textit{Kentucky v. Indiana} differed from the \textit{Sims} case. Moreover, Indiana's defense, instead of resting on a claim that its concurrence was ineffective, conceded and indeed asserted its validity but set up, as a reason for not proceeding to fulfill the agreement, that an injunction suit against its performance was pending in a state court. The complainants in that suit having been joined by Kentucky as respondents in the United States Supreme Court and having failed to show any special interest beyond their general interest as citizens and taxpayers, the Court dismissed them, as parties represented, like all others similarly circumstanced, by the state, appearing equally in behalf of all its citizens and taxpayers, and bound, like all those others, by the decree entered in the suit.\textsuperscript{149} There was, therefore, no party before the Court contesting the authority of Indiana to contract as it had done, an authority which instead stood admitted by the pleadings of both parties. Here again, in not presenting any issue as to the validity of the state's action, the case was radically different from the \textit{Sims} situation. Indeed, while it is stated that "the validity of the contract had been drawn in question in the state court"\textsuperscript{150} and the complaining taxpayers were there asserting that "the contract" was "unauthorized and void",\textsuperscript{151} it is not said that their contention posed any problem of Indiana's constitutional authority. Rather, there is some suggestion that the asserted want of authority was in respect to the sufficiency of the terms of the statutory delegation to confer on the Indiana admin-

\footnotesize{\textsuperscript{147}44 STAT. 1338 (1927) ("SEC. 5. At any time before or after the completion of such bridge, the State of Kentucky may acquire any such interest in such bridge . . . as it may elect to acquire, but not exceeding a one-half interest therein, upon such terms as may be agreed upon between said States; and upon failure to so agree, may acquire such interest by paying to the State of Indiana such sum as shall equal the actual cost of that proportion of such bridge so acquired by it. And if at any time, said State of Kentucky shall acquire a full one-half interest in such bridge, then the right to take tolls for the use of such bridge shall immediately cease. . .").}

\footnotesize{\textsuperscript{148}As to interstate agreements needing no Congressional assent, see \textsc{Zimmerman \\& Wendell}, \textit{op. cit. supra} note 2, at 37. \textsc{But cf.}, Note, 35 \textsc{Col. L. Rev.} \textit{76} (1935).}

\footnotesize{\textsuperscript{149}Kentucky \textit{v. Indiana}, 281 U.S. 163, 174 (1930).}

\footnotesize{\textsuperscript{150}Id. at 171.}

\footnotesize{\textsuperscript{151}Id. at 169.}
istic officials the power to contract as they had assumed to do. If this is a correct reading of the case, surely a claim of invalidity predicated on statutory grounds is significantly different from one resting on the scope of the legislature's constitutional capacity and its disposition less evidently a direct authority when the latter is thereafter urged.

Distinguishable as it is in important particulars, Kentucky v. Indiana did, like the Sims case, require the Court to determine whether it would defer judgment, in a matter requiring construction of the positive law of a state, to the conclusions of the state's judicial organs as to that law's meaning or whether it would proceed to dispose of the case without reference to state court views. With states as parties, jurisdiction of the cause was established and with it the power to pass on all questions requisite for decision. The crux of the case was not the Court's competence but the propriety of its deciding without awaiting state interpretation of the state law. The postponement of decision to have the benefit of state court clarification of state measures, a practice of earlier inception but not yet as much in the forefront of the Court's consciousness as it has since become, was recognized as frequently

152 Cf. the language in the abstract of argument for Indiana's counsel that "the contract was entered into by the State Highway Commission of Indiana with authority" and that "there is now pending in the Indiana state courts . . . a case involving the interpretation of Indiana statutes", id. at 168, and the statements of the Court, paraphrasing the complaint as setting up "that the State of Indiana as well as its Commonwealn of Kentucky had full authority to enter into the contract under the state statutes cited", id. at 170 and the answer of the individual defendants as setting up "that the proceedings involved the interpretations of the statutes and laws of Indiana", id. at 171, and expressing the Court's own view that "Indiana admits . . . the authority of its officers to make it [the contract] under the applicable legislation", id. at 175, and that "On such a record as we have in this case, it is unnecessary for the Court to search the legislation underlying the contract in order to discover grounds of defense", id. at 178. Statutes of the two states and of Congress were cited, id. at 169, but there is nowhere in the report any citation of any state constitutional provision.


154 Cf. Alabama Public Service Comm'n v. Southern Ry. 341 U.S. 341 (1951); Rescue Army v. Los Angeles Municipal Court, 331 U.S. 549 (1947); Specter Motor Service v. McLaughlin, 323 U.S. 101 (1944); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941); Young, Discretion to Deny Federal Relief against State Action, 28 Tex. L. Rev. 410 (1950); Note, 50 Col. L. Rev. 710 (1950). The policy of withholding action to await state determination seems to be of comparatively modern origin. In earlier days, at least in cases originating in the federal courts and at least where the statute was regarded as valid under the state constitution, the practice seems to have been to make such determination with no suggestion of reference to the States, cf. e.g. Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); Railroad Co. v. County of Otoe, 16 Wall. 667 (1872).
valuable but not as invariably or essentially demanded. In the case at hand, counterbalancing considerations of the inadequacy of legal remedy for the injury which would be occasioned by postponement, the agreement of the litigant states as to the sufficiency of Indiana laws to authorize the interstate contract, and the impolicy of exposing the execution of programs promotive of public interests, as conceived and agreed to by the states, representing their people, to harassing delay at the instance of discontented individuals united against and overcame the considerations supporting postponement. It is not clear whether the last element alone, absent the other two features, would have sufficed. It is clear that the nature of the contracting parties was relevant. Where the engagements are between states, the situation was manifestly regarded as special and the ordinary policy of reference to state decisions for interpretations of state enactments as appreciably weakened. That falls short of establishing an outright rule of law that the interpretation of state constitutional provisions in cases arising out of compacts, within the Constitutional purview, is for the Supreme Court, just as the circumstances of the case fell short of calling for the declaration of any such rule. It does, of course, look in that direction and to that extent inferentially supports such a doctrine or, at least, is more in line with it than with the notion of undeviating adherence to state judicial interpretation.

The analogy of Rhode Island v. Massachusetts is still more remote. Again involving a suit between states and as such brought as being within the Court's original jurisdiction, it was a pioneer case in construing that clause of the judiciary article of the Constitution. The case turned on whether the court had jurisdiction, not on the materials and techniques of decision once that was found. As a bill for the settlement of boundaries, it involved the very kind of interstate controversy most prevalent when the Constitution was framed and perhaps the only kind then existing, a historical fact which the Court regarded as strongly indicative that the clause was meant to apply. The technical decision was a denial of Massachusetts' motion to dismiss the bill for want of jurisdiction. It is to be observed that the agreement set up was not conceivably one

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155 See Kentucky v. Indiana, 281 U.S. 177 (1930).
156 There were additional procedural issues, relating to the Court's power to award process for enforcement of its decrees against a state, not relevant to the Reed opinion or to the present discussion.
under the compact clause, dating as it did from early colonial days long before there was any Constitution to affect the conduct of the states and indeed before there were, by virtue of the Declaration of Independence, any states. All the Court's remarks about the compact clause were thus in a strict sense dicta, although, confined to their context as illustrating how relinquishment of the variety of devices open to independent nations for dealing with boundary disputes and retention uniquely of the constitutionally envisaged compact imposed on the Court, as a necessity, the resolution of disputes about compact construction,\(^\text{158}\) they afforded an argument logically relevant to the case of boundaries settled by pre-Constitutional agreement. Not only was there no compact between states. There was no question raised about the validity under its domestic laws of any action that either state had taken. Rhode Island did indeed deny the existence of a binding contract but denied it on the ground that either there had never been any manifestation of assent by representatives of hers or, if there had been, it was induced by vitiating misrepresentation or mistake of fact; Massachusetts controverted that claim; but there was no suggestion that there had been an assent expressed which was ineffective because of limitations exceeded by Rhode Island's representatives. So there was no occasion for considering the manner of resolving conflicts between the terms of interstate agreements and those of state laws affecting the assumed authority of state representatives, no such exercise of authority having been established. Of course, Mr. Justice Reed did not cite Rhode Island v. Massachusetts for its holding but for certain broad language, quoted at length in his opinion, as revealing the meaning of the Hinderlider case. Nevertheless, analysis which reveals that the language was used in a case not involving an instrument under the compact clause, not involving any dispute about capacity to enter on behalf of a state into an agreement, and consequently not involving any problem of the location of authority for determining such a dispute shows how very foreign was the context in which it appeared to the situation presented by the Sims case where that was the central circumstance. Rhode Island v. Massachusetts is precedentially inadequate and persuasively inconclusive.

\(^{158}\) See id. at 725. It is this passage which Mr. Justice Reed quotes in his opinion, see 341 U.S. 34, as being quoted in and explanatory of the Hinderlider case.
Hinderlider v. La Plata River & Cherry Creek Ditch Co. comes very near West Virginia ex rel. Dyer v. Sims. Like the latter, it did involve a compact between states within the constitutional provision; it did arise procedurally in a controversy where the parties were not states and the determination of the incidents of Supreme Court jurisdiction in such causes would not be decisive; it did present the claim that provisions of a state constitution rendered the terms of a compact nugatory, at least as applied to La Plata. Originating in the Colorado courts as a bill for a mandatory injunction to recognize water rights resting on La Plata's status as prior appropriator before the compact allocating stream use between Colorado and New Mexico, without enforcement of the diminution resulting from its application, the matter had twice been before the Colorado Supreme Court which had twice construed the state constitution as sustaining the attack on the compact; but, despite the state holding, the United States Supreme Court held the provisions of the compact to be controlling and applicable.

There are differences, however. Some commentators have regarded the Hinderlider case as resting on an application of the "interstate common law" principles applicable to apportionment between riparian states of the waters of interstate streams, an interpretation which is justified if not sustained by explicit language in the opinion. The main theoretical difficulty with that position is that the Court very positively pronounces that the compact, though having congressional assent, is not a statute of Congress.


100 The state court also held that there was a violation of the contract clause of the United States Constitution, the construction of which is of course ultimately for the United States Supreme Court, but it did rest its decision alternatively upon the provisions of the Colorado Constitution. If there is an independent state ground adequate to support the decision, it is the Court's practice not to take jurisdiction to correct misconceptions of the state court as to federal law, see Murdock v. Memphis, 20 Wall. 590 (U.S. 1874); Herb v. Pitcairn, 324 U.S. 117 (1945); Note, Supreme Court Review of State Court Decisions Involving Multiple Questions, 95 U. OF PA. L. REV. 764 (1947). The discussion of the federal constitution by the Colorado court is, therefore, not believed to differentiate its action significantly from that of the West Virginia court in the Sims case, though the latter relied exclusively and the former only alternatively and independently on state constitutional grounds.


and the idea that state statutes, even though reciprocal and even though conforming to the spirit of Supreme Court teachings can prescribe federal law, "common" or otherwise, is a bit startling. The particular provisions of the Colorado Constitution urged in opposition to proposed enforcement of the compact were two. The due process clause, which though appearing very commonly in state constitutions, deals with a notably misty concept, is about as subject to strictures about unpredictable operation as the gloss about police power delegations with which the Supreme Court of Appeals supplemented the terms of West Virginia's constitution and in some ways resembles such a judicial addendum to the constitution more than it does the more vertebrate express clauses. The constitutional recognition of prior

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165 Cf. Arkansas v. Mississippi, 250 U.S. 39 (1919). Johnson, Federal and State Control of Natural Resources, 4 Vand. L. Rev. 739, 744 (1951), suggests that the "apportionment of interstate waters is a function of the Supreme Court" which "it may exercise . . . by giving effect to a compact entered into by the states", and reads this branch of the opinion as so holding. The reading is ingenious and plausible but would, of course, mean that the states were operating really as surrogates of the Supreme Court and only formally under the compact clause. It would also confine the relevance of the Hinderlider case, as the writer expressly recognizes, to a limited subgroup of compacts dealing with a special subject matter.

166 COLO. CONST. Art. II, 25.

167 STIMSON, op. cit. supra note 138, at 169.

168 See STONE, THE PROVINCE AND FUNCTION OF LAW 249 (1950) (". . .(T)he phrase 'without due process of law' . . . became a drastic limitation on the legislator's power of enacting substantive law, no less real because it was in itself quite indeterminate beyond the procedural field. In the wide range of operation of the due process clause, under which numerous statutes of major importance have been struck down, it is not the clause itself which wholly determines decision. Scholars show wide agreement in the conclusion that such decisions have depended upon content being given to the clause by the social, economic, and political assumptions of the courts and public opinion for the time being."); cf. the comments of Holmes, 2 HOLMES-POLLOCK LETTERS 196 (ed. Howe, 1941) ("The Fourteenth Amendment is a roguish thing"); id. 268 ("My adieu to the last term was a dissent to the requirement in the 14th Amendment of due process of law from the States. Of course, it is too late to prevent the extension of the phrase to an artificial meaning but the Court has gone farther than I can possibly believe to be warranted").

169 "We are not here concerned, and so need not deal, with specific language in a state constitution", Frankfurter, J. in West Virginia ex rel. Dyer v. Sims, 341 U.S. 30; "West Virginia points to no provision of her Constitution which we can say was clear notice or fair warning to Congress or other States", Jackson, J., id. at 55; cf. Note, 26 IND. L.J. 455 (1951). The obscurity of due process as applied in the Hinderlider case was so great that the state dissent apparently could not even decipher whether it was substantive or procedural due process that the majority was concerned with and addressed himself to both of them successively, see Hinderlider v. La. Plata River & C.C. Ditch Co., 95 Colo. 140-143, 25 P.2d 191, 192 (1933).
appropriation as the basis of water rights in the state had the firmer contours which also characterized the West Virginia provision against state debt. In thus invoking one inchoate and one relatively specific constitutional bar, Hinderlider resembled Sims. But there is a notable difference. The West Virginia objections were calculated to establish legislative impotence in the premises and so to vitiate the agreement totally, at least as one to which West Virginia was a party. The clauses adduced in Colorado did not go to show legislative paralysis but to render the compact inapplicable as against La Plata’s rights claimed to be constitutionally protected, leaving at least a fragmentary hypothetical area of operation for the compact, as witness the pains the Colorado court took to insist that “we do not decide ... that this compact is void for all purposes as between any possible parties”. In the one case, there would have been no compact at all, at least quoad West Virginia and so no plurality of measures whose precedence might be settled by the supremacy clause, whereas, in the other, there would be in existence a compact, though of disputed effect, and therewith a situation of dual regulation where the supremacy clause could apply. The Hinderlider case will admit of Mr. Justice Reed’s interpretation as well as of Mr. Justice Frankfurter’s. Which is proper is less certain than that either is permissible. The Sims case is another story. A gap in reasoning must be filled in before a decision applying the supremacy clause to determine priority between conflicting instruments can serve as precedent for giving life to one of the measures and then determining the conflict so created.

Superficially it might seem that the assent by Congress elevates the proposal into a “Law of the United States . . . made in Pursuance” of the Constitution, to which the supremacy clause would in terms apply. It has been squarely held not to do so, however, a holding in line with that as to such other instruments as initial state constitutions submitted for and receiving Congressional as-

170 Colo. Const. Art. XVI, § 6 (“The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose. . .”).
172 Hinderlider v. La Plata River & C.C. Ditch Co., 304 U.S. 92 (1938); People v. Central R.R., 12 Wall. 455 (U.S. 1870).
sent at the time of admission to statehood. Naturally the Court has the same power to overrule these as any of its other decisions and probably could do so with less displacement of basic constitutional postulates than would be involved in adopting some of the suggested grounds for decision already discussed. The wisdom of doing so is an aspect of the larger problem of choice between the consequences of the Reed rationale and those of the majority opinion and as such will be considered later. The origin and development of the doctrine that this Congressional assent does not make a compact a federal law ought to be traced to show the matrix of jurisdictional issues which has shaped much of the Court's consideration of interstate compacts, a clear and steady awareness of which is almost indispensable for appraisal of what historical warrant the supremacy rationale may have.

It is, of course, the Constitution, laws and treaties of the United States whose superior status is decreed by the supremacy clause. Somewhat parallel language in Article III, the judiciary article, defines the judicial power to include “Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority”. This is only one kind of judicial power, however. Jurisdiction may be vested in and exercised by the federal courts, including the Supreme Court without the Constitution or any federal law or treaty being questioned. Thus, issues relating to interstate compacts have been presented in controversies between states, an independently stated head of Supreme Court jurisdiction, and determined incident to disposition of the case, quite aside from any question as to the federal status of a compact. Moreover, the meaning or validity of state action may present a “case . . . arising under” the federal question jurisdiction itself, without such action being in any sense a provision of the United States Constitution or a law or treaty of the United States. Some cases have involved claims that state enactments posterior to a com-

173 See Coyle v. Smith, 221 U.S. 559, 568 (1911) ("A constitution thus supervised by Congress would, after all, be a constitution of a State... Its force would be that of a state constitution, and not that of an act of Congress") cf. Prudential Ins. Co. v. Benjamin, 228 U.S. 408, 438 (1916) (McCarran Act, removing commerce clause impediments from state regulations of insurance, did not convert state tax on insurance company into federal tax).

174 Virginia v. West Virginia, 246 U.S. 565 (1918); Virginia v. West Virginia, 206 U.S. 290 (1907); Virginia v. West Virginia, 11 Wall. 39 (U.S. 1870); accord Kentucky v. Indiana, 281 U.S. 163 (1930); Rhode Island v. Massachusetts, 12 Pet. 657 (U.S. 1835).
pact were laws impairing the obligation of a contract,\textsuperscript{7} and hence have been cases arising under the Constitution but under the independently sufficient contract clause without need for exploring the capacities of the compact clause as an autonomous basis of jurisdiction.\textsuperscript{76}

The exercise of jurisdiction depends of course upon statute as well as Constitution, the latter serving merely to define the outer limits and the former being competent to define the particulars within them as to which the federal courts may take jurisdiction\textsuperscript{77}

Beginning with the Judiciary Act of 1789, the Supreme Court has been entrusted with "exclusive jurisdiction of all controversies of a civil nature where a state is a party"\textsuperscript{78} and with jurisdiction to review final judgments or decrees in state courts appropriately invoking rights asserted under the Federal Constitution, laws, or treaties.\textsuperscript{79}

In \textit{Green v. Biddle},\textsuperscript{80} coming before the Court on a certificate of division below, and \textit{Pennsylvania v. Wheeling & Belmont Bridge Co.},\textsuperscript{81} brought by a state as plaintiff under the original jurisdiction of the Court, the contention was advanced that the Supreme Court was functioning under the special circumstances in lieu of, and

\textsuperscript{75} \textit{Green v. Biddle}, 8 Wheat, 1 (U.S. 1823); see Allen v. McKean, 1 Fed. Cas. 489 (C.C. Me. 1833) (opinion by Story, J.). \textit{But cf.}, Note, 35 Col. L. Rev. 81 (1935) (arguing against the contract clause as affording a basis for compact jurisdiction).

\textsuperscript{76} Other special bases for jurisdiction have included claims of land under grants from different states, Poole v. Fleeger, 11 Pet. 185 (U.S. 1837); Lessee of Marlatt v. Silk, \textit{id.} 1; due process of law, Kentucky Union Co. v. Kentucky, 219 U.S. 140 (1916); Central R.R. of New Jersey v. Jersey City, 209 U.S. 473 (1908); Wharton v. Wise, 153 U.S. 155 (1894) \textit{sembie}; and full faith and credit, Wedding v. Meyler, 192 U.S. 573 (1904).

\textsuperscript{77} \textit{Ex parte} McCordle, 7 Wall. 506 (U.S. 1868); Kline v. Burke Construction Co., 260 U.S. 226 (1922); Bunn, \textit{Jurisdiction and Practice of the Courts of the United States} 10 (5th ed. 1949).

\textsuperscript{78} 1 Stat. 80 (1789).

\textsuperscript{79} \textit{Id.} at 85 ("SEC. 25. And be it further enacted, That a final judgment or decree, in any suit in the highest court of law or equity of a state in which a decision in any suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . . ").

\textsuperscript{80} 8 Wheat. 1 (U.S. 1823).

\textsuperscript{81} 13 How. 518 (U.S. 1852).
should act in the manner prescribed for a circuit court, being as such bound by the rules of decision provision of the Judiciary Act. Hence it would have to decide on the basis of the substantive position of the parties as they stood under state law and to exclude any consideration of federal rights predicated on the compacts involved. While the argument appealed to a minority in each case, in neither would the majority accede to the proposed bar to consideration of the consequences of the compact. In each case, the assumption seems to have been that the rules that would be applied by the state (hence by the circuit) courts were unaffected by the compact, so that inferentially the latter must not have been supposed to be a law of the United States within the operation of the supremacy clause. In the *Wheeling Bridge* case, Mr. Justice McLean, writing for the court, did indeed say that the compact "by the sanction of Congress, has become a law of the Union"; but the remark was an alternative makeweight to overcome the objection that the Court was assuming a jurisdiction under the commerce clause where Congress had made no commercial regulation, aimed at allaying commerce clause difficulties and hardly

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182 1 STAT. 92 (1789) ("SEC. 34. And be it further enacted, That the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply").

183 See the language of Johnson, J., concurring in Green v. Biddle, 8 Wheat. 94 (U.S. 1823) ("... (T)he duty now imposed upon us is, to decide, according to the best judgment we can form, on the law of Kentucky. We sit, and adjudicate in the present instance, in the capacity of Judges of that State"), and that of Taney, C.J., dissenting in Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 579 (U.S. 1852) ("The State, in this controversy, has the same rights as an individual, and nothing more. And the court is bound to administer to the State here the same law which would be administered to an individual suitor, suing for a like cause, in a circuit court of the United States, sitting in the State where the bridge is erected").

184 13 How. 566.

185 The impact of the commerce clause on state laws was still almost totally unexplored. At the same Dec. 1851, Term, when the Wheeling Bridge case was decided, the Court had just handed down the decision in Cooley v. Board of Wardens, 12 How. 299 (U.S. 1851). Mr. Justice McLean, who wrote the Wheeling Bridge opinion for the Court had there dissented, along with Wayne, J., resisting any qualification of the doctrine of Gibbons v. Ogden, 9 Wheat. 1 (U.S. 1824), that the grant of power to Congress was a preclusion of the states. He had the chore, in the Wheeling Bridge case, of writing an opinion in which the majority, fresh from the Cooley case, could join, without betraying himself into inconsistency. Not until later was it established that states could authorize erection of bridges across interstate commerce waterways, see Gilman v. Philadelphia, 3 Wall. 713 (U.S. 1866) and still later that peculiar significance was ascribed to the compact clause to distinguish the Wheeling Bridge case from the Gilman line of authority, see Willamette Bridge Co. v. Hatch, 125 U.S. 15 (1888). At the time of the Wheeling Bridge decision itself,
expressing a deliberated judgment about the nature of compacts. In any event, both cases, by treating the consequences of the compact as available for consideration despite the rules of decision argument, did accept the instrument as in some manner appropriately included among the materials pertinent for decision. That did not require it to be a law of the United States, however. It had already been settled that the interpretation of compact terms was not governed by state law but was for the federal judiciary, in cases where neither jurisdiction nor the scope of the issues before the court was questioned. This doctrine was easily extended to a holding that relevance of the compact to affect the respective claims of the parties was for the federal courts, once jurisdiction was somehow established.

The nature of the compact becomes critical when jurisdiction itself has to rest on the circumstance that rights are claimed under a compact, without aider by other elements in the case. That almost necessarily presupposes a case originating in a state court, and going for review to the Supreme Court. Writs of error to state courts were available, under varying contingencies as to the disposition below, where either the validity of a federal statute, treaty, or authority, or of a state law assertedly repugnant to such a federal measure, or the construction of the federal measure claimed to control "the title, right, privilege or exemption specially set up or claimed . . . under such clause of the . . . (federal) Constitution, treaty, statute, or commission" were drawn in question. involved a prosecution whose outcome was dependent on the construction of the New Jersey-New York Compact of 1834, set up as a defense. The Supreme Court dismissed a writ of error to a state court conviction for want of jurisdiction, on the ground that congressional assent did not make the compact a law of the United States and so there was no "title or right set up under"

it was an open question whether the crossing of interstate streams by bridges might not be within the sphere of action foreclosed to the states by reason of the commerce clause itself, absent any relevant federal legislation; but McLean could not assert that hypothesis without accepting the distinction rejected by his own current dissent in the Cooley case or returning to Gibbons v. Ogden, which his brethren had just got through qualifying.


157 See note supra.

158 12 Wall. 455 (U.S. 1870).
“any Act of Congress.” No consideration appears to have been given to whether, notwithstanding that, there might not have been a “title or right set up under” the Constitution. Next followed Wedding v. Meyler, where Mr. Justice Holmes, writing for a unanimous court, quoted Mr. Justice McLean's characterization of a compact as “a law of the Union” and, rather brusquely refusing to be “curious or technical . . . in inquiring precisely what legal conceptions shall be invoked”, proceeded to construe and apply a compact. It will be observed, however, that denial of full faith and credit to a sister state judgment was in issue, so that jurisdiction was made out independently of any compact. Not quite a year later, the Court, with unchanged membership and again unanimously, was presented with its second case where the dependence of asserted rights on construction of a compact was urged as a basis for jurisdiction to review by writ of error. Returning to the Central Railroad doctrine and not referring to its remarks in Wedding v. Meyler, the Court again held that such jurisdiction could not be predicated on the need to construe a compact. Not only that. The Court, whether overlooking or rejecting the refinement in the Central Railroad opinion that the right did not arise out of "any act of Congress", broadly declared that construction of a compact "raised no federal question".

The Hinderlider case returned to the more limited proposition that the Congressionally approved compact was not a law of the United States, which it reaffirmed. In the meantime, statutory change had bifurcated Supreme Court review of state court judgments into proceedings by writ of error and those by certiorari, with only the latter provided in connection with a “title, right, privilege or immunity especially set up or claimed” under federal laws, while both remained alternatively available where the validity of a “statute of . . . the United States” or a state statute or action assertedly in conflict with a federal law was urged. The Supreme

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189 Id. at 456.
190 192 U.S. 573 (1904).
191 Id. at 582.
193 Id. at 413. The Court did not dismiss for want of jurisdiction, however, but, expressly and distinctly because of an independent assignment of error concerning the effect of cession to the United States of land within a state, ruled on the merits.
194 See note 163 supra.
195 39 STAT. 726 (1916); see FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 211 (1928).
Court had made clear that, under the new statute, it was not
enough to assert a title, right, privilege, or immunity under the
Constitution, for the purpose of proceeding by writ of error, even
though the interest asserted would have sufficed under the earlier
procedure.196 It was this far and only this far that the Hinderlider
case went in accepting the earlier decisions of the Court about the
jurisdictional adequacy of claims under a compact. The writ of
error was denied, because the validity of no federal statute was
questioned when the validity of a compact was questioned.197
Certiorari was granted because “the State Court denied an im-
portant claim under the Constitution which may be reviewed on
certiorari by this court”.198 The earlier cases had slid from the
premise that a compact is not a federal law to the unwarranted
conclusion that therefore it will not supply a basis for federal
question jurisdiction. The Hinderlider case corrected the faulty
logic, while maintaining the premise and making it a ground for
dismissing the writ of error, a function which it might appropriately
perform under the changed statute.

Delaware River Joint Toll Bridge Comm’n v. Colburn, failing
to observe carefully the procedural precision which marks the
Hinderlider case, resurrects in its language some of the anterior con-
fusion; but, coming up as it did by certiorari and resting imme-
diately on the proposition that “construction of such a compact . . .
Involves a federal ‘title, right, privilege, or immunity’”,199 it does not
and probably did not intend to repudiate the Hinderlider doctrine.

It did elaborate and amplify it to the extent of (1) settling that
questions of construction as well as of validity of compacts can
present the requisite claim of federal right, (2) rebutting the notion

196 Compare Rust Land & Lumber Co. v. Jackson, 250 U.S. 66 (1919) (error
dismissed under 1916 Act) with Cissna v. Tennessee, 246 U.S. 289, (1918) (like
claim which was docketed before enactment disposed of on merits).
197 Hinderlider v. La Plata River & C.C. Ditch Co., 304 U.S. 109 (1938) The
Attorney General of the United States, having been notified of the pendency
of the suit and invited to submit views, Hinderlider v. LaPlata River & C.C.
Ditch Co., 302 U.S. 646 (1937), pursuant to the statute, 50 Stat. 751 (1937), 28
U.S.C. § 2403 (1946) relating to intervention by the United States when the
constitutionality of a federal statute is drawn in question, had filed a memo-
randum asserting that the compact was a statute of the United States, which
was resisted both by a brief filed by amici and by respondent’s motion to dis-
mess. Thus it quite clearly appears that the ruling was not made casually nor
without ample deliberation.
198 Id. at 110. The proceeding was retained as an application for certiorari
though coming up as an appeal, under the statutory provision relative to in-
provident appeals from state courts in cases where certiorari is the proper mode
199 310 U.S. 427 (1940).
that the claimed federal right which saved the jurisdiction on
certiorari in the Hinderlider case was not one derivative from the
compact but from some such other source as "interstate common
law". This is indeed irreconcilable with the notion that com-
 pact construction per se raises no federal question. It also would
 seem to overrule the result of the Central Railroad case though
 not the constituent reasoning upon which that case was shakily
 rested, that reasoning having been indeed heavily relied on in the
Hinderlider case, on which the Delaware Toll Bridge case in turn
largely relied. Such cases arise under the Constitution, laws, or
treaties of the United States, else absent some independent ground
set out in Article III, there could be no basis for jurisdiction, what-
ever Congress might provide. They involve a federal "title, right,
privilege, or immunity" and so under the statute are reviewable by
certiorari. They do not involve a federal law whose validity or
whose consequences for the validity of state legislation or official
action are drawn in question, and so are not reviewable otherwise
than by certiorari. But, while the existence of a federal right is
enough for Article III purposes, it is the presence of a federal law
which is significant for supremacy clause purposes and it is pre-
cisely the latter which the course of decision on Supreme Court
review negates.

In styling "the execution, validity, and meaning of federally
approved compacts" "federal questions", Mr. Justice Reed was
thus solidly supported by authority. He instanced none to sustain
the invocation of the supremacy clause. In searching for "the
basis of our holding in La Plata v. Hinderlider Co.", he omits
to notice that half of "our holding" there was dismissal of the

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200 The Hinderlider case involved water rights in interstate streams, the
setting in which the "interstate common law" rationale has had the most in-
fluence. The Delaware Toll Bridge case dealt with a problem in eminent
domain, whether one whose property was "damaged" but not "taken" in con-
nection with the project was entitled to compensation, a matter which is left
to be governed by the policy of the several states, cf. Manigault v. Springs, 199
U.S. 473 (1905); accord, Consolidated Turnpike Co. v. Norfolk & O.V. Ry.,
228 U.S. 320 (1913) and in connection with which, so far as I can find, there has
been no hint of collateral federal rights. The exercise of jurisdiction in the latter,
therefore, tells powerfully against the suggestion sometimes made, see note 160
supra, that the "interstate common law" aspect was the crux of the Hinder-
lider decision.

201 241 U.S. 33.

202 Id. at 34. ("Since the Constitution provided the compact for adjusting
interstate relations, compacts may be enforced despite otherwise valid state
restrictions on state action. This, I think, was the basis of our holding . . . ")
Note the ambiguity as to the antecedent of "This". Does it refer to the de-
pendent clause or to the last half of the sentence?
appeal expressly because no "federal law" was involved. For him, the critical portion of that opinion was a part of it dealing with a theory of the Colorado court that the legislatures203 had chaffered away, for bargaining purposes, constitutionally protected vested rights of individuals. In its context, the language of Mr. Justice Brandeis answering that argument as there applied was apt. As used in Mr. Justice Reed's opinion in the Sims case, however, which inferentially suggests that La Plata had validly vested rights which were infringed but that the compact clause permitted such infringement,204 a peculiar twist is given the Brandeis language, elevating a subordinate branch of the Hinderlider case to a position of primacy which seems unwarranted. Indeed, one may wonder whether on reflection Mr. Justice Reed would want to read the Hinderlider opinion just that way. In so far as the Colorado constitutional protection was peculiar to prior appropriators of water, no awkward federal corollaries could result since there is no comparable federal provision; but, in so far as the vested rights claimed due process protection, if they were valid but defenseless a curious consequence results. If Colorado due process protection must yield to the compact, so it would seem must federal due process. Long ago the argument was made that Congress and the states by their joint assent to a compact could put a quietus on constitutional guaranties—federal constitutional guaranties205—but the Supreme Court prudently refrained from passing on the contention, which might have been supposed to be at rest. That possibility is now

203 The Reed reference, ibid., to Colorado "executive" action is perhaps inadvertent, since the Hinderlider compact was certainly dignified with the approval of the state legislatures and of Congress, and there is nowhere in the case a suggestion that the administrative officials acted otherwise than in strict conformity with their legislative delegation.

204 341 U.S. 34 ("The Supreme Court of Colorado held that compact invalid because it was an executive abandonment by Colorado of a citizen's previously acquired water rights". Italics supplied).

205 In Poole v. Fleeger, 11 Pet. 185 (U.S. 1837), this contention, advanced by Catron as counsel, id. at 206, in connection with a claim that the contract clause of the United States Constitution was inoperative as against a compact was avoided by Mr. Justice Story, in his opinion for the Court, in the following language, id. at 210: "We give no opinion, because it is unnecessary in this case, whether this prohibition of the constitution is not to be understood as necessarily subject to the exception of the right of the states, under the same constitution, to make compacts with each other". No reason is suggested and I can think of none why the status of the contract clause should differ from that of other federal constitutional limitations on state action, in this connection. See Gunn v. Barry, 15 Wall. 610 (U.S. 1872) (impairment of contract obligation by provision of Georgia Constitution of 1868 despite congressional approval of constitution exacted as condition of resumption of exercise of state participation in federal government).
revived if the *Hinderlider* opinion is to be read in the sense suggested. Does Mr. Justice Reed really mean to sponsor the view that the requisite joint legislative action, when had, can abrogate any provision whatsoever of either federal or state constitution? At any rate, the failure of the Court to consider the Fourteenth Amendment claims in the *Hinderlider* case strongly corroborates its procedural aspects in ascribing another meaning to the case than Mr. Justice Reed gives it.\(^{206}\)

There is unquestionably logical difficulty in simultaneously adhering to the earlier cases, annulling such an unpermissible result as the West Virginia Supreme Court of Appeals reached, and rejecting the reasoning of the majority opinion in the *Sims* case. Given those conditions, the most legitimate avenue of escape might seem to be reliance on the supremacy clause. A subtle and somewhat intricate examination is needed to expose the essential inconsistency of that argument with what had gone before and to adumbrate the consequences of its adoption. They might readily elude notice. Even if noticed, they might still be discounted if there are insuperable objections to the view expressed in the majority opinion.

Just how fundamental is the doctrine that the construction of state constitutional provisions is to be left to the states? It is certainly a rule well-settled, frequently applied, and stated over and

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\(^{206}\) The Colorado court having rested its opinion on supposed violations of the water rights section in the state constitution, state due process, and Fourteenth Amendment due process, the two former would constitute an independent state ground and the United States would have no occasion, under orthodox practice, to consider the Fourteenth Amendment claim if its decision was confined to the extent of its own powers under its federal question jurisdiction over compact clause cases, to re-examine and re-appraise that independent state ground. If, however, the holding was that the compact clause sanctioned violations of vested property rights by instruments effectuated pursuant to its terms, it seems to broaden the scope of the issues beyond the merely state grounds and to require decision either that the Fourteenth Amendment rights asserted were non-existent or else explicit declaration that they may be defeated by compacts. The Court's failure to discuss the Fourteenth Amendment claims suggests either (a) that the basis of its holding was not that suggested by Mr. Justice Reed, or (b) that it was approving *sub silentio* the doctrine that the compact clause authorizes infringements of Fourteenth Amendment substantive due process, a proposition so momentous that it seems incredible it would be thus left to inference, or (c) that it in fact did examine the two due process clauses and ascribe to that in the Fourteenth Amendment a meaning different than that which the Colorado court had found it had in common with the Colorado clause, which again it seems hard to believe would be left to inference. Of these alternatives, (a) seems intrinsically much the more probable and in the context of the opinion the only one supportable. Mr. Justice Brandeis' record dispenses with any need to acquit him of either dupery or duplicity, of not understanding or not telling what he was really deciding.
One who proposes departure from a formula so well-buttressed assumes the burden of justification. Yet it is, after all, not part of the order of nature but of the legal order, which admits few if any axioms. Traditional precept tells us that *cessante ratione, cessat ipsa lex* and more recent wisdom advises that general propositions do not decide concrete cases. Firmly grounded as the rule in question is, it is not obviously an absolute exempt from these more fundamental principles. With full recognition how sturdy a growth it is, one may still examine its roots and branches to see whether its essential premises require or its past history records an unvarying application.

State constitutions do not enjoy a peculiar status. They are only one member of a larger family of instances where state courts determine the law which federal courts follow. The generic relationship of all this group, intimated by the frequent undifferentiated joint reference to the states' "laws and constitutions" as matters with respect to whose construction state decisions control and again by those describing state constitutional construction as "a matter of local law", has been expressly proclaimed by the Court. Chief Justice Marshall rejected the distinction and assimilated state court authority in construing state constitutions to other state laws; but perhaps the clearest statement is that of Mr. Justice Curtis, in *Webster v. Cooper*, that

"The question has usually been concerning the construction of a statute of a State. But we think there is no sound distinction between the construction of a law enacted by the legislature of a state, and the construction of the organic law, ordained by the people themselves. The exposition of both belongs to the judicial department of the government of the State, and its decision is final, and binding upon all other departments of that government, and upon the people themselves, until

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207 E.g., A.F. of L. v. Watson, 327 U.S. 582, 596 (1946); Highland Farms Dairy v. Agnew, 300 U.S. 608, 613 (1937); Post v. Supervisors, 105 U.S. 667, 669 (1881). For an extensive array of cases cited to support the proposition, see 25 C.J. 892 (1921); 35 C.J.S. 1247 (1943).


209 E.g., Luther v. Borden, 7 How. 1, 40 (U.S. 1849); Groves v. Slaughter, 15 Pet. 449 (U.S. 1841); see Rotschaefer, *op. cit. supra* note 95, at 116; 6 Hughes, Federal Practice, Jurisdiction, and Procedure § 3692 (1931).

210 E.g., Sterling v. Constantin, 287 U.S. 378, 396 (1932); Curtis v. Arkansas, 15 How. 304, 309 (1853).


212 14 How. 488 (U.S. 1852).
they see fit to change their constitution; and this Court receives such settled construction as part of the fundamental law of the state."

This notion, that a state constitutional provision stands on the same footing as a state statute and its interpretation is for the same reasons and to the same extent within the area of competence of the state courts, has never been disavowed. True, it is rarely articulated, there rarely being occasion to do so after its initial recognition; but it amplifies and gives significance to the habitual forms of expression previously cited.

The Court has offered a variety of approaches to a reason for the rule that the construction of state laws and constitutions is for the state courts which, however, not only are fully reconcilable but supplement each other to establish an integrated rationale. The inconvenience of independent and potentially inconsistent determinations, both to individuals affected by the state ordinances and by the promotion of bickering between state and federal authorities, is an unhappy consequence preventible by unifying the ultimate control over interpretation in one place. In the house of interpretation there can not be two masters. This is the first step logically. The next involves decision whether the state or the federal judiciary should be chosen as the most appropriate repository of the power. In Calder v. Bull, a pioneer case, Mr. Justice Chase, reserving opinion as to whether the Court had power to hold acts of Congress unconstitutional, a matter not settled until five years later, was "fully satisfied that this court has no jurisdiction to determine that any laws of any state Legislature, contrary to the constitution of such state, is void" and that the state courts, which had read their constitution as permitting the challenged legislation, were the proper authority in the matter, whose determination should be respected. To us it seems so incontestably clear that the simple issue of incompatibility between a state's constitution and its statutes is not a basis for federal jurisdiction that we may be surprised at such an iteration of the obvious. But federalism was a novel system in 1798 and parts of the now obvious

\[214\] Id. at 504.
\[215\] See notes 209 and 210 supra.
\[217\] S Dall. 386 (U.S. 1798).
\[218\] Id. at 392.
were still obscure. At any rate, the case settles that construction of state statutes and constitutions is not a routine function of federal courts but can only be incidental to some extrinsic ground of federal jurisdiction. Such would exist fortuitously and probably rather infrequently, in contrast to the situation of state courts, whose general jurisdiction permits a systematic, co-ordinated examination and development of state constitutions and laws without regard to the accidents of federal jurisdiction.

Instead, however, of pursuing the line of reasoning which Mr. Justice Chase pointed out, the Court has usually preferred to stress two purely formal grounds to support the primacy of the states in this connection. It has sometimes been expressly grounded on the command of Congress in the rules of decision provision in the Judiciary Act of 1789 and its successors;\(^\text{219}\) but that, while pertinent, does not seem fully adequate in view of decisions that the operation of that provision was confined to actions at law and did not extend to equity\(^\text{220}\) whereas equitable proceedings have been among those where the doctrine of state construction of state constitutions and statutes has been applied.\(^\text{221}\) In contrast to, though not conflicting with, this argument with its stress on considerations local to the American scene, is one which assigns a reason resting on broad principles of conflict of laws or, in the terminology formerly fashionable, private international law. First advanced by Marshall in *Elemendorf v. Taylor,*\(^\text{222}\) it exhibits his characteristic genius for spacious absolutes and his unconcern with prosaic actualities and has enjoyed the uncritical reception\(^\text{223}\) so often accorded his great authority. Essentially he bases it on comity, on a high professional courtesy by which the judicial branch of every sovereign state claims for itself, and reciprocally accords to judiciaries elsewhere, the office of being the true expeditor of the positive law of the state.\(^\text{224}\) This policy against poaching on one another's preserves

\(^{219}\) See South Ottawa v. Perkins, 94 U.S. 260, 267 (1876); Webster v. Cooper, 14 How. 488, 504 (1852).


\(^{222}\) Cf., e.g., Terrace v. Thompson, 263 U.S. 197 (1923); Douglas v. Noble, 261 U.S. 165 (1923); Pogue, State Determinations of State Law and the Judicial Code, 41 Harv. L. Rev. 623 (1928).

\(^{223}\) This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of
may be valid but its recognition merely acquiesces in and does not search the titles of the occupants. In international affairs, it may be a prudent self-limitation tending to reduce the risk of diplomatic conflicts, even war, but that consideration is not equally cogent as between the common government and the members of a federal union and it is not self-evident why the rule should be extended to their situation. The argument from the Judiciary Act falls short of explaining some of the cases where the rule is applied. As to all of them, that based on private international law is only a formal reason, an elaborated reassertion. Quite probably, although the historical record is silent, the considerations which occasioned incorporation of the rules of decision section in the Judiciary Act were largely the same as those which support the conflicts principle. Reference to either, however, only invokes without disclosing those considerations.

Failure to articulate them does not signify failure to apprehend or accept them, however. The Court has, in various contexts, shown an awareness of and a commitment to the underlying propositions supporting selection of the state courts as the appropriate agency to settle the meaning of state constitutions and laws. The rule that, within the federal judicial hierarchy, especial respect and weight is to be given to decisions of local federal district judges on

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that government. Thus, no Court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the Courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the Courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given by this Court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the Courts of the several States to the legislative acts of those States, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States". Eimendorf v. Taylor, 10 Wheat. 159 (1825).

225 Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923), the completest treatment of the subject, while extremely valuable on many points, has nothing to say about why the section was added relevant to the matter of statutory and constitutional interpretation. In a nearly contemporary argument, counsel, who was probably acquainted with legislators who passed on the Act and perhaps at second hand with the discussions attending its adoption, suggested an attribution to attachment of the people to the laws of their several states and especially a reluctance of lawyers to scrap their vested interest in the state systems in which they were versed in favor of systems prevailing elsewhere or some novel uniform system, see Brown v. Von Braam, 3 Dall. 252 (U.S. 1797). While counsel so arguing was unsuccessful, neither the Court nor opposing counsel disputed the reason assigned for the Act.
questions of state law\textsuperscript{226} affords an obvious analogy. Its strength has been derived from the fact that "that court is composed . . . wholly of citizens of the State familiar with the history of the statute, the local conditions to which it applies, and the character of the State's laws".\textsuperscript{227} Similar considerations have been adduced as justifying a comparable respect for interpretations of administrative agencies in the areas of their special competence.\textsuperscript{228} Familiarity with the whole fabric of the law, intimate personal knowledge of the context juridical and personal in which it operates beget qualification for understanding and expounding it which the uninitiate can not possess. The mention, almost as soon as the Court started to be concerned with state statutory interpretation, of the "more just and accurate view of their own jurisprudence" upon which interpretation by "local state tribunals" presumptively is grounded\textsuperscript{229} dispenses with any need to conjecture that this has been a factor of substance in the choice of the state courts as the proper authority. Furthermore, just as more frequent and intimate contact especially equips them for the task, its performance has a peculiarly local importance with the impact of interpretation falling predominantly on local transactions and local persons, who will conduct their dealings and base their expectations on the regular local applications, not the sporadic incidence of cases within the federal jurisdiction.\textsuperscript{230} The reciprocal interaction of community and court being steadier and more pervasive between the people of a state and its judges than between the people and any other judiciary, in all matters which relate to the internal life and concerns of the state, a firm basis of judgment exists for preferring the state courts in selecting the single source of authority needful to avoid the inconvenience of inconsistent interpretations.

If the reason for the rule defines the limits for its application, inquiry is now in order how far the reasons which underlie state court dominion over construction of state constitutions and statutes


\textsuperscript{227} Thompson v. Consolidated Gas Utilities Corp., supra note 226, at 75.

\textsuperscript{228} Cf., e.g., NLRB v. Hearst Publications, 322 U.S. 111, 130 (1944); Dobb\v s v. Commissioner, 320 U.S. 489, 498 (1943); Gray v. Powell, 314 U.S. 402, 412 (1941); Davis, Administrative Law 248 (1951); Nathanson, Administrative Discretion in the Interpretation of Statutes, 3 VAND. L. REV. 470 (1950).

\textsuperscript{229} See Bell v. Morrison, 1 Pet. 360 (U.S. 1828).

apply where their provisions relate to interstate compacts. The inconvenience of inconsistent decisions is avoidable by an authoritative specification of any single source of authority, as the one to be looked to, by a tribunal in a position to command compliance with its decision. Itself it does not control the choice. It merely requires that a choice be unequivocally made and the scope of control of the chosen instrument precisely marked all of which falls within the jurisdiction and hence the effective potential superintendence of whoever makes the choice and marks the boundary. Not all construction of state constitutions and statutes would satisfy those conditions. Often they present no occasion for jurisdiction under Article III of the Constitution or the federal statutes. But all connected with interstate compacts do, since the "execution, validity, and meaning of federally approved compacts" concededly raise federal questions and there can be no situation affecting them which is not within the Supreme Court's practical capacity of superintendence. Unambiguous selection of the federal courts is as consistent with this consideration as selection of the state courts would be. This also obviates the difficulty noted in *Calder v. Bull* that construction of state constitutions does not itself present a ground for federal jurisdiction. Compacts do; and, whenever compacts and state constitutional provisions are intermeshed in a controversy, the Court will have jurisdiction to deal with the case, not, indeed, because it involves a constitutional provision but because it involves a compact, in connection with which the constitutional provision has become relevant. These threshold considerations do not take us beyond the position that the Supreme Court has the power to consider and a duty to fix for all cases the locus of ultimate interpretative authority. They are equally consistent with its being reposed in either the federal or the state judiciary. Not so the reasoning of *Elmendorf v. Taylor*—and perhaps not that which relies on the rules of decision provision—a rigid mechanical adherence to which would always require designation of the state courts. That is not true if the rule is measured by its substantive justifications. Much as an individual man exhibits as a member of a community behavior and responses which are not adequately judged by those standards alone which would be applicable to individual conduct, the very association of one population (specifically, in this case, that of a state) with others creates a new universe.

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²₃¹ See note 201 *supra.*
of discourse whose terms must relate to the members not disjunctively but in their special community.

In this context, no one state's judiciary has special familiarity with the local needs, the *corpora iurum*, or the historical framework which surrounds the operation of the relevant constitutional and statutory provisions, since by definition they are multistate. Preoccupation with and immersion in the situation of a single state are less calculated to engender the relevant special competence than is the habitual need, which characterizes the federal judiciary, to examine the laws and social institutions of many states, take a conспектus of their claims, and obtain a mastery, as it were, of comparative positive law. Correspondingly the incidence of a compact-linked statutory or constitutional provision does not exhaust itself uniquely or peculiarly upon the state's citizenry. It impinges upon the claims and interests of citizens of the collaborator states to a potentially substantial extent. In no realistic sense can New Mexicans whose orchards parch or Mariettans who drink the dilute industrial wastes of West Virginia be said to be unaffected by the meaning of the Colorado or the West Virginia constitutions. It may well be that, even as to subjects of sufficiently common concern to be dealt with by compact, the interests affected within each compacting state will be principally those of local people; but the very fact of the felt need for a compact is strong evidence that the bearing on outsiders is neither so exceptional nor so tangential as is usually the case. The normal reliance, too, on local rulings as a basis for entering into transactions and forming expectations is weakened in the abnormal case where those transactions and expectations fall within the sphere of influence of an interstate compact. Few will, so in any event the great grist of matters will be unaffected by whatever rule is adopted for this special case. For those few, it is questionable whether such confident reliance on the finality of local rulings has really been reposed and fairly certain that, wherever the power of interpretation is authoritatively lodged, interested persons can be schooled to look there without undue disturbance of their habits of dealing. This assumes, of course, that the maxim about every one being presumed to know the law is not naively confused with a description of fact but accepted in its true character as a precept of policy. The reliance on local law, it is believed, is in any case a reliance on the professional learning of the bar to which the community has access, which learn-
ing can readily adjust itself to treating the special situation subject to a compact as a special situation.

In running through this catalogue of substantive reasons for state finality in the interpretation of state constitutions and statutes, each is seen to shed its validity in the present context. Indeed, to the extent that those reasons afford a guide, they incline to support the choice of the federal and not the state judiciary. The more frequently voiced formal explanations would, it is true, not discriminate between run-of-the-mill situations and those where an interstate compact is interwoven with the state constitutional or statutory provision, remitting them uniformly to state control. At least they would prima facie do so, though if the germ of the Elmendorf reasoning is, as it may be, the notion stated in The Federalist, that

“If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number.”

even that may well envisage a difference in a case, such as that of a compact, where no single state legislature can unilaterally declare the scope of the resultant rights and duties. In any event, formal symmetry remains as the one reason why in these atypical situations interpretation is to be left finally to the state judiciary. Only if it is self-sufficient is there need to balk, with Mr. Justice Reed, at any departure from the well-worn path even when it leads to a quagmire. The substantive reasons are not similarly restrictive. That is not to say, of course, that they compel the majority conclusion but at most that they support it and at least that they permit it.

If dread of innovation rather than devotion to dogma animated the Reed opinion, its groundlessness is equally demonstrable. In comparable situations in the past, the practice of the Court has accorded more with the theory of the majority than with that of the concurrence.

One situation comes instantly to mind where the Supreme Court has regularly construed state statutes and state constitutions, that of cases where the state is claimed to have impaired the obligation of a contract. Mr. Justice Reed, of course, recognizes the

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232 The Federalist, No. 80, at 112 (Bourne ed. 1901).
233 Cf., e.g., Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938); Piqua Branch v. Knoop, 16 How. 369 (U.S. 1853); Willoughby, op. cit. supra note
established practice here and intimates, rather obscurely, the orthodox distinction that the instrument is federally appraised *qua* contract, not *qua* constitution or statute, an appraisal thought to be required if review under the contract clause is to have any reality. Aside from stating that cases arising under the contract clause present questions under the contract clause while cases arising in different contexts do not present questions under the contract clause, his opinion does not undertake any systematic demonstration of the irrelevance of the contract clause cases for the issues in *West Virginia ex rel. Dyer v. Sims*. Of course they are distinguishable; but one is left to grope for any difference flowing from that distinction. Whatever it may be, one thing indisputably emerges from the contract clause cases, namely, that the presence among the ingredients of decision of a state statute or constitution which needs interpretation does not immunize the case or that ingredient from federal disposition. The general rule about state construction of such materials is in any case not an exclusionary rule in the sense that the Supreme Court is barred by their very nature from dealing with issues as to their construction and here it may be well to emphasize that state constitutional provisions

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220 at 1240; Rottschaefer, *op. cit. supra* note 95, at 562; Wright, *The Contract Clause of the United States Constitution* 156 (1938).

234 See *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 33 (1951) ("Examination here, under the Contract Clause, is to enforce the federal provision against impairment and is made only to decide whether under the Contract Clause there is a contract and whether it is impaired").

235 See *Ohio L. Ins. & Trust Co. v. Debolt*, 16 How. 416, 432 (U.S. 1853) ("It has been contended on behalf of the defendant in error . . . that the construction given to these acts of assembly by the State courts ought to be regarded as conclusive. It is said that they are laws of the State, and that this court always follows the construction given by the State courts to their constitution and laws. But this rule of interpretation is confined to ordinary acts of legislation, and does not extend to the contracts of the State, although they should be made in the form of a law. For it would be impossible for this court to exercise any appellate power in a case of this kind, unless it was at liberty to interpret for itself the instrument relied on as the contract between the parties. It must necessarily decide whether the words used are words of contract, and what is their true meaning, before it can determine whether the obligation the instrument created has or has not been impaired by the law complained of. And in forming its judgment upon this subject, it can make no difference whether the instrument claimed to be a contract is in the form of a law passed by the legislature, or of a covenant or agreement by one of its agents acting under the authority of the State"); *Jefferson Branch Bank v. Skelly*, 1 Black 436, 443 (U.S. 1861).

236 See *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 33 (1951) ("There is no problem concerning the binding effect upon this Court of state court interpretation of state law, under the Compact Clause such as there is under the clause against impairing the Obligation of Contracts . . . . This court thus adjudges whether state action has violated the Federal Contract Clause. It does not decide the meaning of a state statute as applied to a state appropriation.

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have been as freely re-examined as have statutes. These impair-
ment of contract cases clearly present genuine examples of con-
struction, not just applications of the familiar principle that
the application of expressions in federal statutes or the United
States Constitution though often sensitive to is not to be con-
trolled by the content of similar concepts as fixed in a state's juris-
prudence. While they involve assertion and protection of a federal
constitutional claim, the occasion for asserting it derives purely
from state law and the Court does not hesitate to form its own
conclusion as to what that state law is. It is not taking the state
law as the state court reads it to determine whether, on that read-
ing, it conflicts with some provision of federal law, the standard
situation for applying the supremacy clause, but is ascribing its
own meaning to the state law to determine not whether the law
is intrinsically inconsistent with any federal provision but whether
it is so far inconsistent with rights rooted in other state action that
the two in juxtaposition warrant the latter's claim to protection
under the contract clause. No doubt the contract clause cases are
fully reconcilable with the general rule that ordinarily construction
of state constitutions or statutes is for the state judiciary. No
doubt they extend only to holding that the rule may be departed
from in extraordinary and limited situations where there is some
special circumstance present calling for construction of the instru-
ment not in its general aspect as a constitution or statute but as an
element in some more comprehensive complex. They do not settle
that the contract impairment situation is unique. They do support
the competence of the Supreme Court, notwithstanding the general
rule, to entertain and enforce its own views as to the meaning of
what a state ordains, in appropriate circumstances and to the ex-
tent that those circumstances operate. They leave unresolved the
question what circumstances are appropriate. Mr. Justice Reed
seems to assume that those circumstances are confined to the single
instance of the contract clause.

Under the Compact Clause, however, the federal questions are the execution,
validity, and meaning of federally approved state compacts")

237 Cf., e.g., Mobile & Ohio R.R. v. Tennessee, 153 U.S. 486 (1894); Louis-
iana v. Pilsbury, 105 U.S. 278 (1881); Northwestern University v. People, 99
U.S. 309 (1878).

238 Cf. NLRB v. Hearst Publications, 322 U.S. 111, 123 (1944); Jerome v.
United States, 318 U.S. 101, 104 (1943); United States v. Pelzer, 312 U.S. 399,
402 (1941); Paul, "The Effect on Federal Taxation of Local Rules of Property" in
SELECTED STUDIES IN FEDERAL TAXATION SECOND SERIES 1 (1938). State laws
which are by reference in the federal statute made applicable of course govern,
The record reveals several instances, where the Court has construed state legislation and constitutions, which can only artificially and by straining be regarded as questions of contract impairment but which can with no trouble be otherwise assimilated.

The rather unusual situation of *Roberts v. Northern Pacific R.R.*\(^{239}\) will serve as introduction. There the railroad, on which county supervisors had undertaken to bestow lands acquired for tax delinquency, in order to induce it to route its line through the county, brought suit to quiet title against subsequent grantees from the county. The defense was the county's claimed constitutional incapacity, under the Wisconsin state constitution, to make donations to railroads. The Wisconsin Supreme Court, in decisions prior to the transaction in question, and which were in force when it occurred, had held that railroad construction was not such a public use as would justify a donation of county property to the road. Counsel for the county, giving a detailed resume of the course of state decision, urged that construction of Wisconsin's constitution was on settled principles for her courts (no contract clause issue being involved since the course of decision antedated the transaction). The Supreme Court however affirmed a decree quieting title in the railroad. Two considerations were suggested to avoid the force of the argument based on state law. One, that the Wisconsin decisions had been handed down in cases involving recurring tax benefits as contrasted with the present executed grant of land, was weakened by the fact that the Wisconsin Supreme Court had, in connection with the instant conveyance, recently rejected that distinction expressly and had put gifts of land on the same footing as the benefits dealt with in its earlier decisions. To the other, says the Supreme Court, "the court's attention does not seem to have been drawn".\(^{240}\) It rested on the character of the grantee. Northern Pacific was a federally chartered corporation, empowered to construct, maintain, and operate a line of communication between Lake Superior and the Pacific Coast; a Wisconsin statute authorized it to exercise within that state the powers which Congress had conferred on it. The Supreme Court reasoned:

"... it may be conceded that, when we are called upon to pass upon the legal rights of a Wisconsin railroad company, we should follow the law laid down by the state courts. But the question now arises whether such a proposition is appli-

\(^{239}\) 158 U.S. 1 (1895).
\(^{240}\) Id. at 25.
cable to the case of a corporation created by the law of the United States, and subjected by its charter to important public duties . . . . 241

"Whatever respect may be due to decisions of the courts of Wisconsin defining the character and powers of Wisconsin corporations owning railroads, the scope of those decisions cannot be deemed to include the case of a national highway like that of the Northern Pacific Railroad Company . . . . 242

". . . it is obvious that the State of Wisconsin . . . could not . . . by judicial decisions of its courts transform a corporation formed by national legislation for national purposes and interstate commerce into one of local character, with rights and powers restricted by views of policy applicable to state organizations." 243

Two negative comments and one affirmative may help put the case in focus. First, no mention is made nor, it would seem, called for of the supremacy clause or of any inconsistency between state and federal measures. Second, with no reference to the contract clause, the Court applies its own interpretation of the Wisconsin constitution, in a manner certainly departing from the tenor of the state decisions though perhaps narrowly reconcilable (as almost all cases are). Third, the differentiating circumstance that the state constitutional provision there was one strand woven into a project by no means local to the state and with an integrated operation under an authority derived in part from another government, here that of the United States, is the residual justification for the Court's resolution of the meaning of the Wisconsin Constitution despite the course of Wisconsin decision.

The situation of federal enclaves — those "Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings" 244—affords another instance of integrally co-ordinated undertakings by independent sovereignties. The well-established general rule, that the law in force in such places remains that of the ceding state as it was at the time of cession, 245 creating a little cultural backwash alongside the stream of institutional

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241 Id. at 19.
242 Id. at 21.
243 Id. at 23.
244 U.S. CONST. Art. I, § 8, cl. 17.
245 James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940); Arlington Hotel Co. v. Fant, 278 U.S. 439 (1929); Comment, Effect of a Cession of Jurisdiction by a State to the United States, 37 YALE L.J. 756 (1928). But see Willis, CONSTITUTIONAL LAW OF THE UNITED STATES 260 (1936).
change until on some off-Tuesday when it has nothing important
to do Congress comes along and drains it, is of no particular
relevance. Nor even is its refinement that, to determine that law,
the Court looks to the statutes of the ceding jurisdiction as then
construed by its judiciary disregarding later evolution of state
judicial doctrine. All this is only specialized application of the
principles of conflicts for settling what outside tribunals will recog-
nize as the internal law of a place for the purpose of attributing
legal consequences to events and transactions occurring there, the
acts of cession and acceptance furnishing indeed the occasion for
it but their "execution, validity, and meaning" not being otherwise
involved. Where they are involved and so are of interest here is
when decision must be made as to who is to construe them and
especially to determine how far state constitutional provisions
limit the scope of the cession. The authority of the federal judi-
ciary to construe the terms of the acts to effectuate the cession has
been consistently assumed by the Supreme Court without discus-
sion. This is of course strictly parallel to the proposition defi-
nitely declared in the Delaware Toll Bridge case, that the con-
struction of compact terms is for the United States courts. Com-
parably analogous to the problem of the Sims case is the question
of construing provisions of state constitutions asserted as imped-
iments to state relinquishment of particular interests, specifically
in connection with taxation. The lower federal courts, in the few
instances where the matter has arisen, have undertaken to construe
the supposedly limiting provisions of the state constitutions
by themselves without allusion to state court holdings. The United
States Supreme Court in the sole case coming before it ducked the
question. The authority is scant and, because it is confined to

240 Cf. Morris v. United States, 174 U.S. 196 (1899) (Maryland law in District
of Columbia); De Vaughn v. Hutchinson, 165 U.S. 566 (1897) (same).
241 Cf., e.g., Collins v. Yosemite Park Co., 304 U.S. 518 (1938); Surplus
Trading Co. v. Cook, 281 U.S. 547 (1930); Hamburg American S.S. Co. v. Grube,
186, 197 (1937) it is said that whether "the State has . . . yielded exclusive
legislative authority to the Federal Government . . . is necessarily a federal
question". This accords with the Hinderlider holding.
242 Cf. Yellowstone Park Transp. Co. v. Gallatin County, 31 F.2d 944 (9th
Cir. 1929) (noticing state construction of constitutional provision dealing with
mechanics of enactment but independently disposing of substantive state con-
stitutional objection without consideration of state authorities); Yosemite Park
was rendered unnecessary because the construction placed on the act of session,
in Yosemite Park & Curry Co. v. Collins, supra note 242, was reversed, so as to
lower courts, not very powerful. But at least it manifests their consistent understanding that in this limited area construction of state constitutions is for the federal courts despite the general rule that it is a matter of state control. It may be observed, too, that the supremacy clause does not give the answer here for, though the federal act of acceptance is undoubtedly a law of the United States, "the Consent of the Legislature of the State" is an expressed condition precedent to the grant of authority to Congress and only those "laws of the United States which shall be made in Pursuance" of the Constitution are within the supremacy clause. Construction of the state constitution to determine the existence of state consent is thus logically anterior to and not an exercise of the supremacy clause. Like the Northern Pacific doctrine, the practice of the lower federal courts here, if proper, must rest on the foundation that a state constitutional provision which is a component in an arrangement with another independent government has a different significance and a different interpreter than in the normal case where the domestic polity of the state is exclusively in issue.

The admission of new states affords another example of federal and state consensus. Although the content of the initial state constitution may be moulded to conform to Congressional directives expressed in the enabling act and although the act of admission may in fact depend on and in language refer to compliance with those directives as a prerequisite to admission, it is well settled that, as embodied in the state constitution, they are not in any sense laws of the United States but simply parts of a state constitution, as completely subject to the state's authority as other state constitutional measures not so generated.250 As this principle necessary implies, the Supreme Court has made no distinction between subsequent constitutions and amendments and provisions submitted as part of the original constitution at the time of admission, applying to the latter the general rule about the construction of state constitutions and statutes being for the state judiciary.251 Nevertheless the effect of the federal inception does not allow the state tax which the lower court had there held there was no reserved authority to demand.


251 Cf., e.g., Coyle v. Smith, supra note 250; Rasmussen v. Idaho, 181 U.S. 178 (1901); Gut v. Minnesota, 9 Wall. 35 (U.S. 1869); Nesmith v. Sheldon, 7 How. 812 (U.S. 1849).
quite disappear. As regards "the right to have and enjoy the same measure of local or self-government, and to be admitted to an equal participation in the maintenance, administration, and conduct of the common or national government", the state does seem unhindered by the terms attending its admission. On the other hand, with regard to the continuing supervision of Indian wards living within the state's exterior boundaries and also with reference to permissible uses of public lands of the United States turned over or agreed to be turned over to the new born state, the usual rule is qualified and the rights are fixed by the terms of the concurrent state-federal enactments, whose content is spelled out by the federal courts independently of state views. Varying opinions have been voiced on whether this is because of the agreement between the United States and the new state or because the United States is merely making explicit on that occasion a jurisdiction which it possesses and might exercise without reference to admission. In any case the result is clear, that the federal judiciary assumes to interpret the language of provisions spelled out in dealings between the United States and the state, and sometimes expressly incorporated in the state constitution, without deferring to the state courts. It does so only in exceptional cases; but the exceptions are those where there is a program in which the state is a participant but which embraces coordinated action on a common policy between separate governments.

Most apropos are cases where the Supreme Court's concern with new state constitutions has involved the unusual phenomenon of a constitutional provision which adopts the terms of a compact with a mother state. Virginia having been a mother of states as well as of presidents, the constitutions of her progeny, Kentucky and West Virginia, have given rise to these cases. The Virginia Act of December 18, 1789, for the separation of the District of Kentucky with a view to its eventual statehood provided "that all pri-

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253 Cf. United States v. Sandoval, 231 U.S. 38 (1913); The Kansas Indians, 5 Wall. 737 (U.S. 1866).
255 Compare Stearns v. Minnesota, supra note 254, at 244 (arguing that "a compact between the United States and the State" is the basis of the reserved authority) with Coyle v. Smith, 221 U.S. 559, 574 (1911) (dictum treating the agreement as not significant and tracing the special force of such situations to the fact that they relate to independent constitutional grants of legislative power other than that over the admission of new states). See Wright, op. cit. supra note 243, at 215.
vate rights and interests in land within the said District derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State and shall be determined by the laws now operating in this State”.

The tangled state of land grants to be expected in a wilderness region occasioned a series of Kentucky legislative measures to unravel them, with resultant protracted litigation. The transaction did not fit the characteristic interstate compact pattern of bilateral expressions of assent by states in being and a Congressional act specifically directed to validating the terms on which they agreed. But, in *Green v. Biddle*, the first case calling for determination of the consequences of the dealings, it was settled that a compact might consist of reciprocal undertakings of a state *in esse* and one *in posse*, at least when reflected in the latter's constitution upon its coming into existence, and the requisite Congressional assent was found in the new state's admission with a constitution so composed.

Mr. Justice Washington, writing for the Court, having found a compact, concluded that the contract clause was thus made applicable, a conclusion which gave a basis both for jurisdiction and for the Court's consulting its own notions as to whether the disputed Kentucky occupying-claimant laws were an impairment of the contract as construed by the Court.

Mr. Justice Johnson, concurring, felt powerless to reach the impairment of contract question in a case, like this, not coming up through the state courts. He rejected counsel’s suggestion, however, that nothing more than a state compact non-justiciable in character had arisen and stressed the status of the provision as a term of the state constitution, as operative as other terms to limit legislative power, proceeding thence to a long examination as to what construction of such constitutional language would be proper in various hypo-

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256 1 Va. Rev. Code c. 19 § 5, cl. 3 (1819).
257 Ky. Const., Art. VIII, § 7 (1792) (“The compact with the State of Virginia, subject to such alterations as may be made therein, agreeably to the mode prescribed by the said compact, shall be considered as a part of this Constitution”).
258 Wilson v. Mason, 1 Cranch 44 (U.S. 1801), which also involved Kentucky land claimed under Virginia grants, had been instituted before and was pending at the time of the compact, which was noticed only for the proposition that its operation did not extend to control the appellate procedure of the federal courts.
259 8 Wheat. 86 (U.S. 1823).
260 Id. at 92.
261 Id. at 96.
The controversies about the measures through which the separation of West Virginia from Virginia was effectuated and the former achieved statehood afford the most notable illustrations of the Court’s dealing with provisions having the dual status of compact and constitutional terms. West Virginians are familiar with the activities of the reorganized or Pierpont government of Virginia, the Wheeling convention of 1861, the popular ratification of the constitution there framed, and the Congressional act of admission and implementing proclamation by President Lincoln by which the state entered the union on the twentieth of June, 1863. They sometimes forget that the counties of Jefferson and Berkeley had not participated in the steps leading to statehood although both the constitution proposed by the Wheeling convention and the legisla-

202 Id. at 98.
203 Id. at 104.
205 Non-West Virginians may consult Sketch of the Erection and Formation of the State of West Virginia from the Territory of Virginia, 1 W. Va. 5 (1866) for an account of the series of events which culminated in statehood.
tion of the reorganized government of Virginia, memorializing its representatives in Congress to procure West Virginia's admission and expressing Virginia's assent, made contingent provision for the adhesion of these (and some other) counties to the new state in case of a favorable popular vote. The election there was not held until after Congress had passed the act of admission. A subsequent Congressional statute in 1866 expressly undertook to confirm the inclusion of these two counties in West Virginia but before its passage the Virginia legislature, after Appomattox, had acted to repeal the whole series of reorganized government statutes expressing Virginia's consent to separation. In *Virginia v. West Virginia*, an original bill to determine boundaries, whose object was to secure the deletion of Berkeley and Jefferson Counties from West Virginia and their award to Virginia, was brought, grounded on the assertion that the assent of Virginia, on which their detachment was constitutionally conditioned, was not subsisting at the time Congress agreed to their joinder with West Virginia and that any purported assent was tainted with fraud; West Virginia demurred; and, the demurrer being sustained, judgment went for her. Just as had been held with Kentucky, Virginia's proposal, West Virginia's draft constitution, and the act of admission were deemed instruments apt to express the assent requisite for formation of a compact. Virginia denied that the condition of Congressional assent had been satisfied; but the Court rested it expressly on the act of admission, emphasizing the multiple references to the peculiar status of the contingent counties in the proposed state constitution and the collateral evidence that Congress had carefully scanned that document, thus rendering irrelevant any consideration of the later federal statute which followed Virginia's attempted repealer. What lends the case its special interest, however, is that it seems to be the only instance until the *Sims* case where a state had denied that its assent to a compact was given and hence argued that no compact came into being. True, no problem as to the meaning of a state constitutional provision was presented. Not West Virginia's assent, constitutionally articulated, but that of Virginia, expressed in legislation, was called in question. Since they were reciprocals,

260 11 Wall. 39 (1870).
267 U.S. Const. Art. IV, § 3 ("... nor (shall) any State be formed by the junction of two or more States, or parts of States, without the Consent of the legislatures of the States concerned as well as of the Congress").
268 11 Wall. 60 (1870).
one may note the incongruity which would result from ascribing a peculiar untouchability to state constitutional provisions if, in an exchange of mutual promises, one were open to federal interpretation as being only a state statute and its fellow barred from such treatment because of being a term in a state constitution. Certainly the Supreme Court did treat the Virginia statutes as legislation whose meaning the Supreme Court could determine for itself, without reference to the Virginia judiciary to find out how they understood them. The initial statute was construed to express Virginia's assent to the contingent separation of the counties, later ones to delegate to the governor full and final discretion for discovering and certifying the will of the people of Berkeley and Jefferson Counties, on which the transfer was conditioned. Fraud was alleged but none was open to proof under the terms assented to by Virginia, as the Court read them, which would avail to vitiate her consent. This was no mere conventional case of construing the terms of an acknowledged compact to settle its meaning, the usual aspect in which state action has been examined. Rather, it was necessary to consider the state action to determine whether it did constitute effective assent, whether there was a compact to be enforced. The case is a square holding that that is a matter to be settled by the Supreme Court and that, in so far as the answer depends on the construction of state statutes, the Court will independently undertake that construction, even though the meaning of state statutes is ordinarily for the state courts.

Of less relevance but greater celebrity is the debt case which kept *Virginia v. West Virginia* a serial story running in instalments in the United States Reports for over a decade. Many of these dealt altogether with procedural problems and their interest is limited to exemplifying the techniques in the exercise of the

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269 Id. at 59.
270 Id. at 62 ("In addition to his position as executive head of the State, the legislature delegated to him all its own power in the premises. It vested him with large control as to the time of taking the vote, and it made his opinion of the result the condition of final action. It rested of its own accord the whole question on his judgment and in his hands").
Supreme Court's original jurisdiction. Others involved the substantive rights of the litigant states inter se, as fixed by the Virginia statutory and West Virginia constitutional arrangements through which statehood was achieved. The Supreme Court did not hesitate to exercise its own judgment as to the terms of the contract which the states had made. This, of course, was the construction of compact terms and as such well within the Court's recognized sphere of competence. It is interesting to note that in the whole series of cases there is no difference taken between the Virginia statutory and the West Virginia constitutional character of the reciprocal contract terms, both being treated on a parity, and that there is no allusion to the domestic law declared by the courts of either state to establish the meaning of either. Instead, the high importance of the parties and of the interests affected is made a justification for not being rigidly bound by considerations which would apply in ordinary cases. In particular, the Court, rejecting a West Virginia contention that sole discretion as to ascertainment of, and provision for meeting, her share in the debt was reposed in the West Virginia Legislature, decry's a rule which would confide to the governmental organ of one party the unilateral decision on a matter of common concern. The context is quite different from that in the Sims case but the antipathy expressed is in principle the same as that which found expression there.

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272 Cf. Virginia v. West Virginia, 238 U.S. 202 (1915) (construction as to time as of which valuations and allocations were to be made and principles applicable in fixing the amounts of various items in the accounting); Virginia v. West Virginia, 220 U.S. 1 (1911) (excluding preliminary proposals of Wheeling ordinance as inoperative to explain meaning of language incorporated in West Virginia constitution and Virginia legislation); Virginia v. West Virginia, 206 U.S. 290 (1907) (construing phrases "public debt", "public liability", "just proportion", "equitable proportion").

273 Note especially the declaration, id. at 320, that "the Virginia ordinance and the West Virginia constitutional provision' are to be read "in pari materia", which makes explicit the equal footing on which they were taken as standing.

274 See Virginia v. West Virginia, 246 U.S. 604 (1918); Virginia v. West Virginia, 220 U.S. 27 (1911).

275 Id. at 30 ("These arguments do not impress us. The provision in the constitution of the State of West Virginia that the legislature shall ascertain the proportion as soon as may be practicable was not intended to undo the contract in the preceding words by making the representative and mouthpiece of one of the parties the sole tribunal for its enforcement").

276 See West Virginia ex rel. Dyer v. Sims, 341 U.S. 28 (1951) ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State", per Frankfurter, J): id. at 35 ("West Virginia, for internal affairs, is free to interpret her own constitution as she will. But if
The case law gives no positive answer as between the Frankfurter and the Reed positions. It certainly does not support, indeed it contradicts, the notion that a compact is a law of the United States and as such within the contemplation of the supremacy clause. The nearest it comes is to hold that compact clause controversies arise under the Constitution, laws, or treaties of the United States and are thus within the federal question jurisdiction, which is not at all the same thing as holding that a compact is a law of the United States. It is the theme of a thousand cases that the construction of state statutes and constitutions is matter for the state courts. The substantial reason for the rule, however, is found in considerations which do not exist, which are in fact the converse of those present, in compact clause cases. If the extent of the rule is to be measured by its reason, therefore, the formula is not applicable in such cases. Had the rule been applied as sweepingly as it has been stated, one might still shrink from innovating; but research reveals a handful of cases where the courts, without repudiating it, have acted contrary to it. Separately regarded they might be viewed as unsystematic aberrations with low potential as precedents. In conjunction they exhibit a common feature—the circumstance that the state statutory or constitutional provision in issue was a component in a situation where the interests affected were not exclusively or primarily of domestic concern to the enacting state but were the shared interests of a plurality of political entities which they had undertaken to adjust by the mechanisms of negotiation and agreement specified in the Constitution. The reappearance of that common feature in cases otherwise so dissimilar and the Court's nonobservance, whenever it did appear, of the orthodox doctrine that state laws are for state courts to construe suggest that it is the inarticulate major premise subsumed in those cases. Its nice dovetailing with the reasons upon which the general rule rests re-enforces the supposition that it is the limiting condition for the application of the rule. Mr. Justice Frankfurter's opinion thus is not only not precluded by the previous cases, though superficially opposed to general expressions commonly employed. It is clearly embraced within the principle which aligns the antecedent maverick cases internally and which harmonizes them with the substantial reason for the general rule which they qualify. The compact system is to have vitality and integrity, she may not raise an issue of ultra vires, decide it, and release herself from an interstate obligation", per Jackson, J.).
first Virginia v. West Virginia\textsuperscript{277} almost squarely supports it, falling short only because a statute, not a constitutional provision was involved, because the Court's reasoning there is phrased with (possibly deliberate) obliquity, and because public law decisions of that era have lost caste by reason of a somewhat pharisaiical feeling that they may unduly reflect public sentiments no longer widely shared.

The net result is that the Sims case is inescapably a case of first impression. The Reed rationale is neither compelled by nor consistent with the prior course of decision. Its root defect is confusion of Article III and supremacy clause notions, kept distinct in the earlier cases. The Frankfurter rationale is not compelled by earlier cases, is obviously inconsistent with general language indiscriminately used in many of them, but is essentially consistent with the premises and applications established by the prior course of decision. Those who need the serene assurances of stare decisis will find no comfort anywhere. The Frankfurter opinion is appreciably more in line with the precedents; but a relatively stronger position is all that it can claim—if precedent is the critical factor.

There is much more involved, however, than an intricate exercise in the evolution of case law. This extended discussion, wearisome alike for writer and reader, would not merit the time spent by either if no more were at stake than an examination of techniques in the use of precedents and a conclusion as to the deftness and accuracy of opinion writers in that branch of the judicial art. It is my sincere conviction that the Sims decision is potentially a landmark for the development of the American constitutional system. It calls for larger criteria than those by which judicial craftsmanship is evaluated. To such a situation Marshall’s admonition that “we must never forget, that it is a constitution we are expounding”\textsuperscript{278} particularly applies.

The critically important problem is the establishment of a principle which will make possible the survival of a functioning federalism. It is not to belittle the seriousness of the river sanitation problem, or its typical extension beyond the boundaries and capacities of single states,\textsuperscript{279} to describe it, the occasion for the Sims decision, as secondary and the federal issue as primary. There is no point in repining for lost boundaries between zones of state

\textsuperscript{277} 11 Wall. 39 (1870).
\textsuperscript{278} McCulloch v. Maryland, 4 Wheat. 407 (U.S. 1819).
\textsuperscript{279} See Eliassen, Stream Pollution, 183 Scientific American, No. 3, March 1952, p. 17.
and federal competence which existed in days before the New Deal, the coming of an industrialized society, the Civil War, the Marshall Court, or any other particular past era. They are gone; and looking back will no more profit us than it did Lot’s wife. Yet responsible men, concerned for the preservation of democratic institutions, recur insistently to the proposition that self-government contemplates and demands the solution of problems at the least possible remove from the individuals governed, that the most localized level of authority which is capable of dealing adequately with them is the best one to do so.280

Increasingly complex social and economic institutions pose problems no longer commensurate with the traditional local-state-federal levels of government. State aid arrangements for municipalities281 and a various array of provisions for novel special districts282 and for voluntary amalgamation of or cooperation by local government units283 have developed as intrastate adaptations to this environment. So, at the other governmental pole, have such regional arrangements as the Tennessee Valley Authority and its proposed congener284 as well as a variety of devices for integrating federal administrative activity with that of groups of states.285 The intermediate range of regional concerns, transcending single states, yet


282 See, e.g., Snider & Garvey, County and Township Government in 1947, 43 AM. POL. SCI. REV. 53 (1949), County and Township Government in 1946, 41 id. 1130 (1947). These are two of the articles in an extensive series by the same authorship, similarly titled and covering annual developments, to all of which reference is made hereby for this point.

283 Kurtz, The Tri-County Regional Planning Commission, 7 PUB. ADMIN. REV. 113 (1947); Reed, Progress in Metropolitan Integration, 9 id. 1 (1949); Stewart & Ketcham, Intergovernmental Contracts in California, 1 id. 242 (1941); Uhl, Administrative Regions in Virginia, 2 id. 50 (1942); White, Town and City Consolidation in Connecticut, 36 AM. POL. SCI. REV. 492 (1942).

284 Pritchett, The Transplantability of the TVA, 32 IOWA L. REV. 927 (1947); Greenleaf, What Kind of a “Valley Authority”? Id. 339; McKinley, The Valley Authority and Its Alternatives, 44 AM. POL. SCI. REV. 607 (1950); Ray, The Influence of the Tennessee Valley Authority on Government in the South, 43 id. 922 (1949); Clark, Proposed “Valley Authority” Legislation, 40 id. 62 (1946).

285 Bosworth, Federal-State Administrative Relations in the Regulation of Public Service Enterprises, 36 AM. POL. SCI. REV. 215 (1942); Watson, State Participation in Gasoline Rationing, 3 PUB. ADMIN. REV. 213 (1943).
less than national in scale, will not and ought not be allowed to present a hiatus of power. If the states are barred from devising effective programs of joint control, federal authority will surely flow in to fill the vacuum. Nobody can seriously expect that either the Tenth Amendment \(^{286}\) or the dogma that the federal government must point to some specific granted power will afford any substantial obstacle. Yet if the predilection for autonomous solutions at the most local level practicable is a valid corollary of the democratic faith, the judicial elaboration of constitutional doctrine must be appraised by the degree to which it tends to paralyze the states and compel federal intervention.

Awareness of the significance of the compact device for permitting the formation and execution of policy at the appropriate government level, while most clearly appearing in the Court's opinion, \(^{287}\) was not confined to it. The Jackson opinion also premises that "the compact system is to have vitality and integrity" \(^{288}\) and the West Virginia dissenters evidence their realization of the implications for the structure of federalism by alluding to the peculiar niche the compact is calculated to fill as one of the bases for sustaining its constitutionality. \(^{289}\) Of all the opinions, only that of Mr. Justice Reed is silent on the matter. Even the West Virginia majority saw that the question involved was of an order of magnitude not subject to control by a single state though, a Canute confronting the waves, it seems to have supposed that the federal power would be stayed from the outer beaches of the state "police power" without provision of dikes. \(^{290}\)

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\(^{287}\) 341 U.S. 27 ("The growing interdependence of regional interests, calling for regional adjustments, has brought extensive use of compacts. A compact is more than a supple device for dealing with interests confined within a region . . . (I)t is also a means of safeguarding the national interest").

\(^{288}\) *Id.* at 25.

\(^{289}\) 58 S.E.2d 777 (W. Va. 1950) ("Such compacts are now so embedded in our form of government as to constitute an essential part thereof. The compact under consideration affords a clear example of the necessity for such compacts. It proposes to operate in a field necessary for the health and general welfare of the people wherein the federal government has not acted, and cannot possibly act at this time, and wherein it is impossible for the individual states to operate efficiently or successfully because of territorial limitations. For those reasons, and because of well-established applicable principles of law . . . , the legislation, under consideration, which includes the compact, should be liberally construed to save its constitutionality"). Italicics supplied.

\(^{290}\) *Ibid.* ("We realize that in this instance the purpose in view can only be worked through co-operation between the states drained in whole or in part by the Ohio River and its tributaries. We would not be understood to stand in the way of such co-operation; but it must be such co-operation as does
The soundness of the doctrines advanced in the various opinions rests, however, on the consequences of their application, not on the clarity with which they saw or expressed those consequences. Thus, the weakness of Mr. Justice Jackson's estoppel rationale is not any blindness to the importance of the compact in the structure of modern federalism but that it gives either no systematic principle at all for its organic integration into that structure, only a melange of casual and haphazard borrowings from private law irrelevant to allocations of government power, or else that it contemplates so pre-eminent a status for the compact as to destroy, with respect to the states, the cardinal principle that the people are the government's masters, speaking authoritatively through their constitutions. Neither a whimsical treatment of compacts nor one which, Saturn-like, eats its parents seems well calculated to fill the gap in our constitutional structure. As with the case law, so with the considerations relevant to the working of the federal system, the real choice is between the majority position and that of Mr. Justice Reed.

A usually perspicacious commentator remarks that "The theory of Mr. Justice Reed that a compact should be given effect by virtue of the supremacy clause would, of course, be more comforting to the states". So it would if the rumored Oriental preoccupation with loss of face is the ruling consideration. Otherwise the proposition is far from self-evident. Either view equally preserves to the states the capacity of effectively joining with other states to provide mutually acceptable controls and fill a void with which only the federal government would otherwise be competent to deal, unrestrained by restrictive views entertained by some state courts. To that extent there is nothing to choose between them, unless one assumes that the state citizenry has preferences between possessing power because the Supreme Court thinks federal legislation gives it to them and possessing it because the Supreme Court thinks their

not surrender or barter away the rights of this State as one of the sovereign states of the Union. . . We cannot in safety surrender any part of that (the police) power to the Federal Government or to other states). Italics supplied. The language may be compared with the result in United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940), which arose in West Virginia. The court's readiness to approve of state participation in interstate palaver, see State ex rel. Commission on Interstate Co-operation v. Sims, 63 S.E.2d 524 (1951), is not responsive to the need of provision of an intermediate regulatory authority of regional scope.

state constitution does not deny it to them—a refinement of social psychology and of sophistication in political theory which is hard to credit. So far as concerns prevention of state impotence, there would seem to be little to choose between the opinions, either of which gives assurance on that score fairly well.

The real difference is that the supremacy rationale exposes the states, if they exercise the power, to a risk, not present under the competing theory, calculated either to discourage action or to turn compacts into traps for unwary states. The fundamental notion of the doctrine of supersedure is generally known—how, if the federal government occupies a field, the states are shut out from applying their regulations, antecedent or subsequent, as to any matter within that field even though in the absence of such federal action it would be subject to state control. The doctrine is ordinarily thought of as one having to do with the regulation of commerce, where it did arise and has most frequently been applied. But its operation is not confined to commerce clause cases. The concept of supremacy, with its focus on contradiction, is of course not identical with that of supersedure but there seems to be a positive enough correlation that otherwise valid state action, though not contrary to federal regulations, will very possibly not be allowed to live in the same neighborhood with them, because of the supremacy clause. The unpredictable application of the supersedure principle gravely imperils any state law which is anywhere in the general proximity of a federal law. In extreme instances, even state laws paralleling federal statutes or providing harmonious regulation in the interval pending the going into effect of federal legislation of postponed effective date have been held

293 Id., c. VIII; Note, Supersedure of State Laws by Federal Regulations under the Commerce Clause, 86 U. of PA. L. REV. 552 (1938).
295 ROTTSCHAEFER, op. cit. supra note 95, at 285 (“The factor that causes the state law to be superseded in such cases is that it interferes with an effective accomplishment of the purposes for which the federal regulation was enacted. The state regulation is enforcible if its enforcement will not interfere with their realization. There is no general rule for determining whether or not its enforcement is compatible with the realization of the national policy expressed in the federal statute”).
bad under the doctrine of supersedure. As for supplementary, corollary, or merely similar state legislation, only a bold if not a foolish man would guess how it will fare under the application of the doctrine.\textsuperscript{208} It seems unlikely that a state which agrees to a compact would want to enforce legislation which is downright inconsistent with its terms.\textsuperscript{209} It is equally unlikely that, entering into a compact, the legislature contemplates a resultant surrender of control over the entire range of matters not covered by but marginal to the compact. Yet just that consequence might well follow from the doctrine of supersedure if applicable; and the supremacy rationale would tend to make it applicable, on the basis that the compact is a federal law projecting state impotence into surrounding areas of regulation.

In contrast, the Frankfurter or majority view tends to expand the competence of the states. The loss in state judicial authority is more than compensated by gain in legislative power. The orthodox explanation of supersedure, that, by occupying a field, Congress has manifested an intention to oust the states from its regulation has had a complementary proposition that, if Congress has indicated a desire not to exclude the states, the Court will respect the manifestation of the Congressional will and will sustain state action within the area thus Congressionally recognized as appropriate for state control.\textsuperscript{200} The opinion has already been recorded that any vacuum in matters of multistate concern will be federally filled, whether by express legislation or by administrative or judicial extensions of the terms of general legislation to meet the felt needs of the situation. Indeed, in the total absence of legislation, the Court has sometimes dealt with this very business of river basin control, while urging the states to handle it by the more responsive device of an interstate compact.\textsuperscript{301} The requisite concurrence of


\textsuperscript{209} Earlier statutes would, of course, be subject to the ordinary rules of construction appropriate in case there is a later expression of the legislative will. Once there have been the requisite expressions of mutual assent by the states and by Congress, so that a contract has come into existence, a state may not repeal the act expressing its assent and work a unilateral revocation of the contract, Virginia v. West Virginia, 11 Wall. 59 (U.S. 1870).

\textsuperscript{300} Panhandle Eastern Pipe Line Co. v. Indiana Public Service Comm'n, 332 U.S. 495 (1947); Cooley v. Board of Wardens, 12 How. 299 (U.S. 1851); cf.
Congress in a regular compact, while not enough to make it a federal law, is surely enough to indicate the Congressional will that the state handle the matter. It should thus suffice to safeguard the compact itself against any objections, of commerce clause or similar derivation, that the regulations therein provided are invasions of Congressional authority beyond the power of the states. Indeed, it might operate more extensively so that, if the compact program fell to be construed in connection with assertions of authority by federal administrative agencies over the subjects dealt with by the compact, the Congressional assent would save the state action as against claims under the supremacy clause which might otherwise prevail.

It may be urged that the majority opinion is, pro tanto, a retreat from the philosophy of *Erie Railroad Co. v. Tomkins* and a return toward the exploded theories of *Swift v. Tyson*, to be resisted lest others follow. But the *Erie* case, however great its significance, should not become a fetish. In any event, it went only to the extent of asserting for the state judiciary a power over state common law equivalent to that possessed over the state's enacted law, without undertaking to fix the boundaries of the latter. Moreover, the vices attributed to *Swift v. Tyson*—continuance by state courts to maintain their own views to the defeat of the anticipated uniformity, and variation in result depending on the fortuitous circumstance of whether a party's citizenship gave him access to a federal forum—have no relevance to the case of an interstate compact, which is always within the jurisdiction of

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203 In this respect it would serve, like the later formulations of the divestiture theory, not to confer a power on the states, nor to delegate power to them, nor to incorporate their laws as laws of the United States, but to define the Congressional will as to the area open for operation of state laws as state laws, cf. Prudential Life Insurance Co. v. Benjamin, 328 U.S. 423 (1946). See Abel, *The Commerce Power: An Instrument of Federalism*, 25 Ind. L.J. 515 (1950), 35 Iowa L. Rev. 644 (1950).

204 If, for instance, in *Oregon-Washington R.R. & Nav. Co. v. Washington*, 270 U.S. 87 (1926), there had been an interstate compact relative to movements of potentially disease-bearing agricultural field products, it seems a fair guess that the case might have reached a different result.

205 *Erie R.R. v. Tompkins*, 304 U.S. 78 (1938) ("... the law to be applied in any case is the law of the state. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern").

206 See id. at 74.
the federal courts under Article III and the implementing statutes. Nor can the claim be supported that the establishment or recognition of a right by the United States Constitution necessarily and always brings the supremacy clause into play to invalidate state legislation bearing on that right, in the manner that the doctrine of supersedure makes federal legislation in an occupied field de-vitalize related state laws. The contrary has been too recently and too expressly settled\textsuperscript{309} to admit of such a claim.

Large constitutional principle, even more clearly than the admittedly equivocal precedents, supports the majority view. Both it, and Mr. Justice Reed's analysis, give to the Supreme Court the means of preventing the states from stultifying themselves through the instrumentality of their judicial tribunals. The latter, however, frees the states from futility only to deliver them to danger. If the cost of compacting is to be potential invalidation of an indefinite mass of state legislation, the incentive for free resort to the device is substantially impaired. Assuming the real importance of encouraging development of a regulatory stage between the state and federal levels, the Frankfurter opinion commends itself as the wisest. As an earlier Court benefited West Virginia by saving for her, over her protest, her fiscal integrity and credit, the present one has, in despite of her highest court, saved the reality of effective political power for her and her sister states. Of course, all the Court can do is give the states the opportunity. It is up to them whether they will exercise it. Before this opinion, it seemed highly possible that commerce clause developments, judicial and congres-sional, were gradually turning the states into mere provinces. The majority opinion in the \textit{Sims} case revives for them a future as genuinely effective agencies of government,\textsuperscript{307} on condition that they avoid both lethargy and parochialism. What will come of it depends on the states; but, whatever they do or fail to do, the opinion is monumental. It has laid the necessary solid foundation for flexible federalism.