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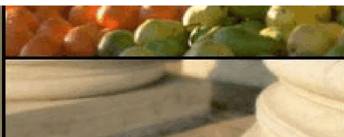

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An Agricultural Law Research Article

The Interstate Grain Marketing Compact—Should Washington Be a Parner

by

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THE INTERSTATE GRAIN MARKETING COMPACT—SHOULD WASHINGTON BE A PARTNER?

In recent times the grain industry has been in a quandary concerning control over the marketing and production of its product in today's complex economy. The United States' present method of marketing has been unorganized and inefficient. A recent Government Accounting Office (GAO) study[1] reported that the United States export policy is to facilitate rather than to manage production. The result of this policy has been vast fluctuation in prices, massive surpluses of grain, and heavy government regulation with a small number of firms controlling the world grain trade.

Different proposals have been made to solve the present grain industry problems. One proposal is that the United States follow Canada's example of establishing a minimum price for wheat producers, creating prices below those of the world market for domestic users.[2] A second proposal is to follow Australia's approach of establishing a wheat board which uses a wheat stabilization fund to tie wheat prices to grower's production costs.[3] A third approach would allow the federal government to set prices and be a clearinghouse for all wheat sales, completely removing such sales from the private sector. Conversely, the private sector could operate wheat marketing which would have the effect of relegating price setting to the marketplace.

The solution which has been gaining the acceptance of the wheat-producing states is an interstate agricultural grain marketing compact.[4] The compact's purpose is to enhance production for

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1. Statement of Philip J. Thomas, International Relations Specialist, United States General Accounting Office, before the Interstate Conference on Grain Marketing on Agricultural Exports in a Changing Environment, Topeka, Kan. (Oct. 2, 1978) (on file with the Gonzaga Law Review).

2. *Id.*

3. *Id.*

4. Preliminary Minutes of the Agricultural Grain Marketing Committee (Dec. 18, 1978) (on file with the Gonzaga Law Review). The fourteen wheat-producing states organizing the compact are: Colorado, Idaho, Indiana, Kansas, Kentucky, Minnesota, Nebraska,

the economic and general welfare of the citizens of the compacting states.[5] This Comment will discuss possible difficulties that the compact may encounter under antitrust laws and the commerce clause as well as possible challenges to the compact under the compact clause of the United States Constitution.

I. The Interstate Grain Marketing Conference

The proposed interstate grain compact was the result of a series of conferences of legislators, public officials, farm organization members, and other interested parties. The conferences were held so that representatives of other major grain-producing states could study grain marketing practices, procedures, and controls, and their effect on state agricultural economies. The goal of the conference was to make recommendations for solving problems in the present marketing system or developing marketing alternatives.[6] Speeches were made by a cross-section of interested representatives of the grain industry. The speakers were from different farm organizations, the General Accounting Office, the Federal Grain Inspection Service, an independent grain marketer, the Commodity Futures Trading Commission, and Cargill Corporation.[7]

The problems found in the present system were wide-ranging. Farm organizations were primarily concerned with aggressively seeking new foreign markets, supporting effective market development, and keeping channels of communication and commerce open. One organization's members believed the role of the federal and state government should be to initiate and support programs to help farmers obtain needed crop market information, research,

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New Mexico, North Dakota, Oklahoma, South Dakota, Washington, and Wisconsin.

5. A brief look at grain industry statistics in the United States shows its magnitude. In 1977 there were 2.7 million farms in the United States. The grain-growing farms produced 30 billion tons in food grains, feed grains, and oil seeds. Two-thirds of these products were consumed domestically and one-third was exported. In 1974 60% of the grain produced was handled by seven large firms. The United States has now obtained three-fourths of the growth in world grain exports. Its share of the world market has grown from less than 40% to its present 50%. Statement of Roy Frederick, The Structure of the United States Grain Marketing System—Today and Tomorrow, Topeka, Kan. (July 26, 1978) (on file with the Gonzaga Law Review).

6. Memorandum to Public Officials from States Attending the Agricultural Grain Marketing Conference, Topeka, Kan. (Oct. 16, 1978) (on file with the Gonzaga Law Review).

7. *Id.*

and credit.[8]

The GAO representative discussed the exporting system and its shortcomings.[9] The system's accuracy has been marginal because of the amount of cancellations and deferrals in grain exports. The GAO recommended mandatory reporting of present and future wheat exports to the Department of Agriculture by exporters. It also recommended that the Department of Agriculture establish an agricultural export policy defining the nation's policy goals. This report indicates the GAO's belief that more government intervention is necessary. The Department of Agriculture, however, contends there is no evidence to support additional government intervention.[10]

The GAO study reveals inconsistency in governmental export policy. The government's official policy has been to keep its involvement in the export process at a minimum. The GAO report, however, revealed twenty-six governmental agencies which have a significant impact on agricultural policy-making. Thus, while more intervention may not be the best response to this problem, there is a need for a more coherent and concentrated government policy on grain exporting.

At the conference the Federal Grain Inspection Service (FGIS) pledged its support and cooperation to the compact.[11]

The independent grain producer[12] was most concerned with the lack of opportunities to sit in on purchase negotiations with foreign countries, transportation shortage problems, and complex

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8. Paper presented by John Junior Armstrong, Agricultural Commodity Marketing: Roles and Responsibilities for Many, Topeka, Kan. (Oct. 3, 1978) (on file with the Gonzaga Law Review).

9. Statement by Phillip J. Thomas, note 1 *supra*.

10. *Id.* at 16. The statements by the two executive agencies show that the government cannot agree on how to proceed with the agricultural export policy.

11. Remarks by Leland E. Bartlet, Administrator, Federal Grain Inspection Service, United States Department of Agriculture, Topeka, Kan. (Oct. 2, 1978) (on file with the Gonzaga Law Review). The FGIS was created in 1976 as a result of the grain weighing scandal in 1974 which threatened the credibility of the United States grain marketing system both here and abroad. The FGIS established a uniform weighing system and a method for its enforcement.

12. Comments by Orville Fisher, independent grain marketer, vice-president and general manager, Topeka Mill & Elevator Co., Topeka, Kan. (Oct. 2-3, 1978) (on file with the Gonzaga Law Review).

government regulations. He stated that the flow of information in the grain industry is inconsistent and that multinational firms have taken advantage of this uneven flow of information to the detriment of independent marketers and producers.

The multinational firm's viewpoint was given by representatives of Cargill Corporation.[13] Cargill rebutted the general charges of the independent marketers, arguing that prices are set by supply and demand and that Cargill is a price-taker, since it must accept the price set by the marketplace and has no substantial influence over the setting of the market price.

The participants of the conference revealed the major obstacles the grain industry must overcome and possible solutions to its problems. First, there must be full disclosure of information on grain sales. Second, the industry needs price and weighing standards. Third, a general policy reflecting the different interests must be established and enforced. The conference's final solution was that a compact between the states would best effectuate these goals. The success of the interstate compact, however, will depend upon its validity under the compact clause of the Constitution. A conference speaker recognized possible limitations on the compact by stating that the road to its development may be long and tortuous through the halls of Congress. In addition, the compact may encounter difficulties under antitrust laws and the commerce clause.

II. The Compact Clause

A. *Introduction*

The idea of the states negotiating between themselves to reach joint ends is not a modern constitutional innovation. Even before the signing of the Constitution, the states had agreed in the Articles of Confederation[14] to limit their ability to form exclusive units. The framers of the Constitution incorporated this idea into the compact clause.[15] In ratifying the clause, the states granted some

13. Statement of Roy Frederick, note 5 *supra*.

14. Articles of Confederation art. IV, cl. 2. *See generally* Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts?"*, 3 U. Chi. L. Rev. 453 (1936).

15. U.S. Const. art. I, § 10, cl. 3.

of their sovereignty to the legislative branch of the federal government.[16] The focus of decisions concerning the compact clause has changed; while the first challenges to the clause involved disputes between individuals, later actions arose between the states themselves and then between the states and the federal government. The kind of compacts that states may enter into has changed; with these changes have come the interpretation of the constitutional mandate that "no State shall, without the consent of Congress . . . enter into . . . [a] compact with another State."

The first cases examining the compact clause resolved claims to title.[17] In these cases the Supreme Court was asked to determine the intent of the framers relating to the rights of citizens affected by states compacting together. In *Wilson v. Mason*[18] the Court held that a state could compact to preserve titles when new states and boundaries were created, but that the compact could not determine which state court should decide the case, since the Constitution had vested exclusive jurisdiction in the federal courts.[19] In deciding whether Virginia or Tennessee law should apply in an ejectment action where the land had been a part of Virginia but was in Tennessee at the time of the action, the Court in *Robinson v. Campbell*[20] found that it was not the "intention of the legislatures of either state . . . to vary the application of the rule in cases within the compact."[21] Thus, states could agree to changes in boundary without seriously affecting the rights of the state's citi-

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16. "This provision [art. I, § 10] is obviously intended to guard the rights and interests of the other states, and prevent a compact or agreement between any two states which might injuriously affect the interest of the others. The right and duty to protect these interests is vested in the general government." Florida v. Georgia, 58 U.S. (17 How.) 478, 494 (1855).

17. Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823); Robinson v. Campbell, 16 U.S. (3 Wheat.) 212 (1818); Wilson v. Mann, 5 U.S. (1 Cranch) 45 (1801).

18. 5 U.S. (1 Cranch) 45 (1801).

19. The *Wilson* court stated: "The constitution of the United States, to which the parties of this compact had assented, gave jurisdiction to the federal courts . . . ." 5 U.S. (1 Cranch) at 91. The Court also pointed out that any other interpretation would mean that "the legislatures of any two states [could], by agreement . . . annul the constitution . . . ." *Id.* at 92.

20. 16 U.S. (3 Wheat.) 212 (1818). In *Robinson* the plaintiff claimed the 1802 compact between Virginia and Tennessee left Virginia law applying. The Court held the compact applied the decision of title, but remedies were to be decided by the law of the forum. *Id.* at 219.

21. *Id.* at 219-20.

zens to enjoy clear title.

Early compacts were also used to resolve boundary disputes between states.[22] In *Poole v. Fleeger's Lessee*[23] Justice Story compared the rights of states to set boundaries by compact to an independent nation's right of sovereignty "belonging equally to the States of this Union, unless it has been surrendered, under the Constitution of the United States."[24] The Court recognized that the relationship between two states is a fragile one. It then pointed out that because of this fragile relationship the states had at least partly surrendered their power to Congress. The states had given to Congress the right and responsibility to consent to any compacts entered into. Most boundary disputes were settled in the last century. Although some boundary agreements are still to be clarified, less emphasis is placed upon state compacts as a resolution of the disagreements.[25]

Although there are fewer boundary disputes between states today, increased interdependence between states has created new uses for compacts. Regional problems are best resolved by those who are most directly affected and who can most efficiently carry out the solutions required.[26] Compacts provide an alternative to a highly centralized government, and also provide a method of avoiding the inefficiency often attributed to state government.[27]

The Supreme Court has shown approval for interstate agreements, whether or not they are technically compacts. In *West Vir-*

22. In fact, most compacts until the 1900's were settlements of boundary disputes. *See* Comment, *Some Legal and Practical Problems of the Interstate Compact*, 45 YALE L.J. 324 (1935).

23. 36 U.S. (11 Pet.) 185 (1837).

24. *Id.* at 209.

25. New Hampshire v. Maine, 426 U.S. 363, 370 (quoting Virginia v. Tennessee, 148 U.S. 503, 522 (1893)). In *New Hampshire* the two states had signed a consent decree which had resolved an action to locate a lateral marine boundary. Disagreeing with the special master, the Court held the consent decree to be a valid reaffirmation of the 1740 decree of King George II fixing the boundary. The Court found no need to invoke the compact clause since there was no effort on the part of either state to encroach upon the supremacy of the federal government. *Id.* at 370.

26. West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 27 (1951); Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925). These authors specifically consider the New York Port Authority as an example of these new regional compacts. *See also* Leach, *Interstate Authorities in the United States*, 26 LAW & CONTEMP. PROB. 666 (1961).

27. *See* Frankfurter & Landis, *supra* note 26, at 704.

ginia ex. rel. Dyer v. Sims[28] the Court characterized a compact as a more "supple device for dealing with interests confined within a region."[29] In addition to compacts, states have entered into reciprocal and uniform laws to deal with common problems.[30] The Court has held that these statutes are not precluded by the Constitution on matters where there is "no grant of power to Congress and as to which the range of authority restricted within an individual state is inadequate."[31] Congress itself has encouraged regional compacts and alliances, sometimes by offering research and logistical support,[32] other times by becoming active in forming the compact.[33]

B. Requirements for a Compact

1. Parties to the Compact

The number of parties to a compact is irrelevant in determining whether the compact should be submitted to Congress for its consent.[34] The test for congressional consent is the potential for impact on the federal structure, not the number of states agreeing to the compact. Certainly, collective action can be stronger than individual action; the number of states involved, however, does not alone require congressional approval.

Boundary disputes, the subject of early compacts, were usually settled by compacts between two states. Early regional compacts, such as the New York Port Authority, were truly regional and thus

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28. 341 U.S. 22 (1951).

29. *Id.* at 27. In *Sims* the compact was an agreement between eight states to control pollution on the Ohio River.

30. *See, e.g.*, UNIFORM CONTROLLED SUBSTANCES ACT, 9 U.L.A. 187 (1979); UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9A U.L.A. 643, 747 (1979); UNIFORM PARTNERSHIP ACT, 6 U.L.A. 1 (1969).

31. New York v. O'Neill, 359 U.S. 1, 11 (1959). The statute in *O'Neill* was the UNIFORM LAW TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHIN OR WITHOUT A STATE IN CRIMINAL PROCEEDINGS.

32. *See* Leach, *The Federal Government and Interstate Compacts*, 29 FORDHAM L. REV. 421, 430 (1961).

33. *See, e.g.*, 16 U.S.C. § 552 (1976) (forest conservation). *See also* Leach, *supra* note 32, at 429.

34. United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472 (1978); Engdahl, *Characterization of Interstate Arrangements: When is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 69 (1965).

limited in size.[35] The Multistate Tax Compact, at the time it was challenged, had twenty one party states.[36] Some uniform laws are agreed to by almost every state. Thus, signers of the compact need not worry that number alone will require that they seek congressional consent.

2. *Form of the Compact*

The descriptive label placed on an agreement between states is not dispositive to the issue of whether such an agreement requires congressional consent.[37] The clause refers both to agreements and compacts. In one of the earliest cases interpreting the clause, Chief Justice Taney declared: "The constitution [looks] to the essence and substance of things, and not to mere form. It would be but an evasion of the constitution to place the question [of constitutionality] upon the formality with which the agreement is made."[38] Because each compact is formed to accomplish specific purposes, it would be irrational to require one form to which each compact must adhere.

In addition to the compact provisions proposed by the originators of the compact, Congress can require additions to the compact. For instance, Congress can condition its acceptance on its own right to alter, amend, or repeal the compact so that it can deal with any national change which might affect, or be affected by, the compact.[39] It can also require other conditions—such as annual reports, or changes in the compact or its duration before it will consent.[40] As with the initial form of the compact, these provisions will depend on the nature of the compact and, perhaps, on how close the compact comes to "encroaching on federal supremacy."

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35. The New York Port Authority is a compact between New York and New Jersey. *See* Leach, *supra* note 32, at 422.

36. 434 U.S. at 454. *See* text accompanying notes 54-58 *infra*.

37. United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. at 470.

38. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 573 (1840).

39. Celler, *Congress, Compacts and Interstate Authorities*, 26 LAW & CONTEMP. PROB. 682, 685 (1961). Representative Celler points out that Congress nearly always conditions consent on this right to amend, but that this right is unnecessary within the scope and purpose of the compact clause. *Id.* at 688.

40. *Id.* at 689. *See also* Leach, *supra* note 32, at 428-29.

3. Congressional Consent

The compact clause requires that Congress give its consent to any agreement or compact between states or between a state and a foreign government.[41] Such congressional consent is a prerequisite to state action.[42] Although there is no history to interpret the intent of the clause,[43] congressional consent is a useful tool to protect the balance between the states and the federal government. One commentator has suggested that some of the purposes for requiring consent are to make the federal government a joint participant in the venture, to secure federal assistance, and to preclude the operation of preemption.[44] Tension between the states and the federal government through the doctrine of preemption and the operation of the commerce clause is solved at least partially by a clear statement of state intentions and of federal acquiescence to those intentions.

Although congressional consent is required by the compact clause, the form of such consent has been at issue throughout the nation's history. In *Green v. Biddle*[45] the Supreme Court addressed the argument that the 1797 compact between Virginia and Kentucky was unconstitutional because there had been no express congressional consent. The Court held that "the constitution makes no provision respecting the mode or form in which the consent of congress is to be signified."[46] It required only that Congress validate the compact "by some positive act."[47] The compact in *Green* created Kentucky as a separate state; congressional consent to the compact came indirectly when Congress received Kentucky into the Union.[48]

The Supreme Court adopted the notion of implied congressional consent in another case involving separation and statehood. In *Virginia v. West Virginia*[49] the Court was asked to decide

41. U.S. CONST. art. I, § 10, cl. 3.
42. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 401 (1978).
43. *See* Weinfeld, note 14 *supra*.
44. Engdahl, *supra* note 34, at 103.
45. 21 U.S. (8 Wheat.) 1 (1823).
46. *Id.* at 85-86.
47. *Id.* at 86.
48. *Id.* at 87.
49. 78 U.S. (11 Wall.) 39 (1870).

whether Congress had consented to a compact between the two states which permitted the admission of West Virginia into the Union as a separate state.[50] As in *Green*, congressional consent was indirect, through West Virginia's admission. The Court held that consent may be inferred "[u]nless it can be shown that the consent of Congress . . . can only be given in the form of an express and formal statement . . . ."[51] The Court drew an inference from West Virginia's admission that there was an intent to consent, and that West Virginia's boundaries were as set out in the final Virginia statute supporting statehood.

The Court, in dicta, also supported the idea of implied consent in the leading case of *Virginia v. Tennessee*.[52] *Virginia v. Tennessee*'s importance, however, lies not in its pronouncement of implied consent but in its establishment of a test for when congressional consent to interstate compacts is necessary. The Court first pointed out that not all agreements need the consent of Congress. For example, if one state owning land in another state contracts to sell that land, the contract of sale is not an agreement within the compact clause and does not require congressional consent. The Court limited the circumstances when such consent is required: "[I]t is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[53] Thus, if the joining together of

50. The secession of West Virginia from Virginia was a result of Virginia's decision to separate from the United States in 1861. The population of the northwestern part of the state refused to act in accordance with the state legislature's decision; instead they held a constitutional convention and then ratified their own constitution. Four counties, however, could not take part in the ratification process since they were in the hands of confederate forces. Virginia consented to allow those counties which had ratified and, later, the four counties which had not ratified the constitution to become a part of West Virginia. By 1865 it had retracted its consent. Meanwhile Congress had agreed to admit West Virginia to the Union. *Id.* at 40-49.

51. *Id.* at 59. Justice Field joined in the dissent. In *Virginia v. Tennessee*, however, Justice Field, writing for the majority, reversed his earlier position and pointed out that the Constitution does not mandate when consent should be obtained. It will sometimes be appropriate before the agreement is made, and sometimes after the extent and quality of the agreement is determined. Either form is constitutionally permitted.

52. 148 U.S. 503 (1893). *Virginia v. Tennessee* did not rely on *Virginia v. West Virginia* in reaching its conclusion. Instead it cited *Story's Commentaries*. "Story says that consent may be implied, and is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them . . . ." *Id.* at 521.

53. *Id.* at 519. One commentator has suggested that this rule is paradoxical: "[I]f con-

states might interfere with the power of the federal government to deal with common problems, then Congress has the right, and indeed the responsibility, to prohibit such an agreement.

The Supreme Court again considered the test established by *Virginia v. Tennessee* for determining when a compact between states requires congressional consent in *United States Steel Corp. v. Multistate Tax Commission.*[54] In that case the Court was asked to consider the validity of a multistate tax compact which had been adopted by seven states.[55] The compact established a commission, composed of one member from each state, to administer the compact. It gave the commission authority to study state and local tax systems, to recommend proposals for increased uniformity and compatibility of tax laws, and to publish information to assist party states in implementing the compact.[56] The plaintiffs in *United States Steel,* multistate taxpayers, challenged the compact as being invalid because Congress had not consented to its formation.[57] The district court granted summary judgment to the commission.[58]

The Supreme Court affirmed the district court's judgment. The Court reiterated its holding in *Virginia v. Tennessee* that the test is one of "impact on the federal structure."[59] It refused to read the compact clause literally "to circumscribe modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy."[60] The Court upheld the compact because it

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sent is required it cannot be given; and if it could be given, it is not required." Engdahl, *supra* note 34, at 68.

54. 434 U.S. 452 (1978).

55. *See* Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). In *Northwestern States* the Supreme Court upheld the constitutionality of state income tax laws which allowed corporations engaged in interstate commerce to be taxed by the states in proportion to their business activities within the state. The states responded to this holding by forming the Multistate Tax Compact to aid in the collection of such taxes. Washington joined the compact in 1974. WASH. REV. CODE § 82.56.010 (1979).

56. Multistate Tax Compact, art. I. *See* WASH. REV. CODE § 82.56.010 (1979).

57. Congress at this time was considering its response to the *Northwestern States* decision. It passed a statute which set forth minimum standards for the exercise of the state's taxing power. Act of Sept. 14, 1959, Pub. L. No. 86-272, 73 Stat. 555 (codified at 15 U.S.C. § 381 (1976)). The Congress also authorized a study to recommend uniform legislation in this area. 434 U.S. at 455.

58. 417 F. Supp. 795 (S.D.N.Y. 1976).

59. 434 U.S. at 470.

60. *Id.* at 460.

was unable to find any clause in the compact which encroached upon federal rights.[61] The Court applied the *Virginia v. Tennessee* test of impact on federal supremacy to the kind of compact which is more often seen today: a compact based upon multistate interests rather than dispute resolution.

This interplay between state and federal interests is the touchstone of congressional concern. Congress' role in consenting or refusing to consent is that of a watchdog for the interests of the federal government, as well as those states not party to the compact but affected by it.[62] The test is whether the potential effects of the compact "encroach upon . . . the just supremacy of the United States." If they do, then states must go to Congress for approval.[63] It is this difference between potential and actual effects that distinguish the compact clause from the commerce clause.[64] While the actual effects of an individual state's impact on interstate commerce is small, the effect of a group of states will often be large. A compact's potential for impact on federal supremacy is so great that Congress should at least consider and approve it.[65]

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61. The dissent did not disagree with the majority's reading of the compact clause. They argued, however, that the majority, while stating a test of "potential impact" used a test of actual harm to federal interests. *Id.* at 481. It also pointed out that there could have been harm both to the federal government and to noncompact states; it is to protect just such interests that congressional consent is required. *Id.* at 496.

62. The constitutional requirement of consent by Congress to a compact between the States was designed for the protection of national interests by the power to withhold consent or to grant it on conditions of appropriate safeguard of those interests. The compact may impair the course of interstate commerce in a way found undesirable by Congress. Or the national interest may derive from the necessity of maintaining a properly balanced federal system by vetoing a compact which would adversely affect States not party to the compact.

Petty v. Tennessee-Missouri Comm'n, 359 U.S. 275, 288-89 (1958) (Frankfurter, J., dissenting). In *Petty* the widow of a ferryboatman sued the Commission, which owned a boat on which he was working, in federal district court. The Commission claimed it was a state agency and thus immune from suit under the eleventh amendment. The compact, as consented to by Congress, included authorization for the Commission "to sue and be sued." The Court held that this authorization acted as a waiver of immunity. Justice Frankfurter's dissent pointed out that such a clause would not have waived tort immunity in either suit and that congressional consent to a compact does not imply "changes in the law of the Compact States of merely local concern . . . ." *Id.* at 289. For a discussion of the jurisdictional issues in compact law, see Comment, *Federal Question Jurisdiction to Interpret Interstate Compacts*, 64 GEO. L.J. 87 (1975).

63. 434 U.S. at 472; Engdahl, *supra* note 34, at 69.

64. U.S. CONST. art. I, § 8. "The Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several States . . . ."

65. While some commentators have suggested the test depends at least in part on

III. The Interstate Grain Marketing Compact

A. *Is Consent Needed for the Grain Marketing Compact?*

The purpose of the grain marketing compact is to enhance the welfare of the people of the compact states, to enhance the economies of the compact states, and to continue to produce enough grain to feed the increasing world population. To effectuate these purposes the commission is empowered to "conduct comprehensive and continuing studies and investigations of agricultural grain marketing practices, procedures and controls and their relationship to and effect upon the citizens and economies of the member states."[66] From these studies and investigations the commission is empowered to make proposals for actions. This implies a passive role for the commission since its sole authority is to make proposals rather than to act on them. The first question, then, is whether this proposal power would violate the compact clause if no congressional consent is obtained. Secondly, if the commission were to act to effectuate its proposals would the compact clause be violated if there were no congressional consent. The power to act can arguably be found in Article IV of the compact which grants the commission the authority to do all things necessary to administer the compact.[67] The active role of enhancing the economies of the member states could cause an increase in grain prices and generally discriminate against other states.

The main inquiry, then, is when and whether congressional consent is required and, if it is required, in what form it must be obtained. *United States Steel Corp. v. Multistate Tax Commission*[68] sets forth the modern test to determine whether consent is needed. The Court in *United States Steel* held that a compact cannot "impair the sovereign rights of non-member states."[69] The Court held that such sovereign rights may be impaired when a

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whether the states are bargaining as adversaries or as partners, it would seem that it is as partners that the states provide the most threat to the federal government's control over interstate commerce. L. Tribe, *supra* note 42, at 401.

66. Interstate Compact on Agricultural Grain Marketing art. IV(a). *See* Appendix *infra*.

67. *Id.*

68. 434 U.S. 452 (1978).

69. *Id.* at 477. The *United States Steel* Court realized that if an individual state could take the same action without the compact then the action could not be impairing the sovereignty of the nonmember states.

compact attempts to invest member states with powers they would not otherwise have. When the effect of these powers puts other states at a disadvantage by placing an extra burden on them the compact is invalid.

The *United States Steel* Court held that one of the reasons the multistate tax compact did not violate the compact clause was because the membership was open to all states. Since any state could join the compact if it wished, no state was being discriminated against. Any state, then, could benefit from the compact if it wished. The grain marketing compact limits its membership to grain marketing states. In order to join the compact, a state must produce grain for the nation and for the world.[70] Many states would be precluded from joining the compact because they do not produce grain. Limited membership alone, however, will not invalidate the compact. Its validity will instead be dependent upon whether the effect of limited membership will harm nonmember states. This in turn depends upon the effect that the compact has on the grain market. If the effect would be to raise grain prices above what they would be without the compact, the compact would infringe upon the nonmember states, and consent of Congress would be necessary. This increased price would infringe on noncompacting states because they would be subjected to harm caused by the artificially inflated grain prices. If, on the other hand, the effect of the compact is to lower or stabilize prices, the compact would be for the benefit of all the states. Consent, then, would not be required.

The need for consent will, therefore, depend upon whether the grain compact should move from its present, apparently passive role of studying and investigating the grain market to an active role as provided for in the commission's grant of power to do all things necessary to administer the compact's purposes.

The grain compact also gives the commission the power to

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70. Interstate Compact on Agricultural Grain Marketing art. II states:
As used in this compact:
(a) "State" means any state of the United States in which agricultural grains are produced for the markets of the nation and world.
(b) "Agricultural grains" means wheat, durum, spelt, triticale, oats, rye, corn, barley, buckwheat, flaxseed, safflower, sunflower seed, soybeans, sorghum grains, peas and beans.

conduct studies and investigations of grain marketing, make proposals for correction of grain marketing problems and seek subpoenas. This authority is well within the *United States Steel* standard.[71] The states alone could conduct these activities and would not violate this standard because they are acting as a group.

The compact's provision vesting the commission with authority to require, by subpoena, attendance of a person when it is conducting an investigation may be subject to attack because it infringes on other states' powers. The commission is given the power to "apply by majority vote of all the members of such commission to any state or federal court . . . for an order by subpoena . . . any person or records it needs."[72] Strictly construing the word "apply" would indicate that it would be a mere request for the subpoena, not a demand. If the clause gives the commission power to demand a federal or nonmember state issuance of a subpoena, it would infringe upon either the federal government's or nonmember state's power by imposing upon either body the necessity of complying with the commission's demand. If the subpoena power is such an infringement, consent of Congress would be necessary.

In *United States Steel* the Court made specific note that the member states of the multistate tax compact had the right to withdraw from the compact at any time.[73] A member state of that compact had only to enact a repealing statute in order to withdraw. The lack of an absolute right to withdraw could be an infringement on state power by imposing the will of the member states upon the withdrawing state. The grain compact allows withdrawal after a repealing statute has been enacted, but puts a further restriction upon withdrawal.[74] The state must wait one year before such withdrawal is effective.[75] This one-year waiting period may be an impermissible infringement upon the member state's withdrawal right under *United States Steel* because it would enhance the other member state's powers to the detriment of the withdrawing state. This detriment could occur by the remaining compact states authorizing a change in grain marketing or in price. Although the

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71. 434 U.S. at 473. *See* note 69 and accompanying text *supra*.
72. Interstate Compact on Agricultural Grain Marketing art. IV(c).
73. 434 U.S. at 457.
74. Interstate Compact on Agricultural Grain Marketing art. VI.
75. *Id.*

United States Steel Court did not directly address this issue, it implied that impairment of the absolute right of withdrawal may make it necessary for a compact to have congressional consent.[76]

Whether or not the interstate grain compact is constitutionally valid without congressional consent is a close question. Congressional consent will not be necessary if the compact states adhere to the general principles established by *United States Steel.* The compact cannot injure the national interest or interests of noncompacting states; congressional consent will be necessary if the compact has the effect of controlling the grain market and increasing grain prices since this will harm all the states. Furthermore, an attempt to control worldwide grain sales by the compacting states could infringe upon Department of State or Department of Agriculture duties.

In short, the compact cannot act to do that which the states could not do separately. There would be no need for the consent of Congress if the compact commission functions in a purely investigatory or advisory manner by determining and reporting on problems such as grain shortages, agricultural research, and dissemination of information on international grain sales without taking part in the sales themselves. The compact will not need congressional consent if it benefits the country and not the compacting states at the expense of either the nonmember states or the federal government.

B. How Will Consent, If Needed, Be Obtained?

The advantages of congressional consent may influence the compacting states to obtain it even if it is not necessary. Once congressional consent is given there will be less chance of federal preemption. Congress and the executive branch will be aware of the compact and recognize the need to cooperate with it. Cooperation may include financial support through grants, loans, or even subsidization of its programs. Furthermore, the Departments of Agriculture and State may be more available as sources of information if the compact has Congress' approval. Consent may legitimize the compact in the eyes of the federal government.

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76. 434 U.S. at 473.

The form of consent given by Congress may be formal or informal. If consent is formal, Congress will consider the impact of the compact and issue its consent. Informal consent may come in many forms. Congress could pass legislation funding the compact commission, either directly or through grants for research in marketing grain production, or storage, thus impliedly consenting to the compact. Congress may also request the Departments of State and Agriculture to keep the compact commission informed of grain dealings and current research. In doing so the commission would have a direct line of communication to any pending foreign wheat transactions. This increased communication would stimulate competition when foreign wheat sales occur by allowing a greater number of dealers to enter the bidding process. Informal consent may be revoked by Congress at any time, either by revoking its funding or by expressly revoking its implied consent. If such a revocation occurs, the compact will be in violation of the compact clause and therefore subject to legal action.

IV. Implementing the Compact

Once the compact is approved by Congress—or Congress decides that consent is not required—the commission can begin implementation of the compact. The purposes of the commission are clear from the compact; as it begins its task, the commission will act as a clearinghouse for information and report both on grain marketing and production. There is, however, enough ambiguity in the administration clause of the compact to allow the commission latitude in meeting its objectives. Other, more active, participation by the commission in the marketing process may give producers in the member states more control over the marketing process.

The commission could become an independent broker of grain, acting as other independent brokers do now, representing only those farmers who choose to contract with it. A second possibility is for the commission to become a mandatory brokerage, supplanting the present marketing system with its own. Finally, the commission could transform itself into a regulatory agency, leaving the system as it now exists, but adding government regulation and oversight to the present process.

With the exception of the clearinghouse, each of these proposed directions for the compact commission raises legal issues

which might be difficult to resolve. The independent brokerage and the regulatory agency could both come under attack as impermissible restraints on trade. Although the Supreme Court has established a state action exemption to the Sherman Act,[77] which would appear to apply to the commission as a quasi-state agency, it has limited application of the exemption when a state agency acts in a proprietary manner.[78] The mandatory brokerage option is relatively free from antitrust attack. It does, however, raise an issue under the commerce clause,[79] as the commission's action in holding the grain for reshipment would be a restraint on interstate commerce.

The problems presented here are hypothetical. There is no authorization for any commission activity beyond the clearinghouse in the compact as it has been proposed. In considering the possible reach of the compact, however, these options should be considered.

A. *The Sherman Act*[80]

1. *The State Action Exemption*

The Sherman Antitrust Act was passed to foster competition in industry. It prohibits restraints of trade[81] and monopolization and attempts to monopolize.[82] While the Act was clearly intended to govern private industry, the relationship of the Act's prohibition on restraints of trade to state action was unclear until the United States Supreme Court decision in *Parker v. Brown.*[83] In *Parker* a raisin grower sought to enjoin a state regulatory agricultural commission from setting prices and controlling distribution of raisins in California as a violation of the Sherman Act.[84] The Court re-

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77. 15 U.S.C. §§ 1-7 (1976).

78. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

79. U.S. CONST. art. I, § 8, cl. 2.

80. A full discussion of antitrust law is beyond the scope of this Comment. It is our intent only to raise issues and provide the reader with some initial thoughts in their resolution. *See generally* J. FLYNN, FEDERALISM & STATE ANTITRUST LEGISLATION (1964); E. KINTNER, AN ANTITRUST PRIMER (2d ed. 1973).

81. The Sherman Act makes illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1 (1976).

82. The Act also forbids persons to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize." *Id.* § 2.

83. 317 U.S. 341, 352 (1943). For a more complete discussion of the case, see text accompanying notes 94-103 *infra*.

84. The California Act was also challenged under the Agricultural Marketing Agree-

versed a district court decision granting the injunction. In doing so it set forth the state action exemption to the Sherman Act.[85]

The *Parker* Court held that where a state "as sovereign, impose[s] the restraint as an act of government" its actitivites are immune from the Sherman Act. Although the Court assumed that the state's activities, if they had been engaged in by private parties, would have restrained trade in violation of the Act, it "[found] nothing in the . . . Act or in its history which suggests that its purpose [is] to restrain a state or its officers from activities directed by its legislature."[86]

The scope of state legislation necessary to establish the state action exemption was further defined in subsequent decisions. In *Goldfarb v. Virginia State Bar*[87] the Court held that a minimum fee schedule for attorneys published by the county bar association and enforced by the state bar association did not fall within the state action exception to the Act. As the state supreme court was the ultimate authority and had not directly authorized the price schedule, the "legislative grant of power [to the state bar association] and the subordinate entity's use of that power [was] too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct."[88] Thus, there must be some form of state compulsion to establish a state action exemption under the Sherman Act.

Cases following *Goldfarb* emphasized that although the legislative enactment need not specifically direct anticompetitive actions, it must be clear that the legislation could not be effectively carried out without such conduct.[89] The Sherman Act is intended to have broad coverage. The state cannot merely consent to anticompetitive activity; authority for the action must be granted by legislation. Additionally, the legislation must be "plainly repug-

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ment Act, 7 U.S.C. §§ 601-21 (1976) and the commerce clause, U.S. CONST. art. I, § 8, cl. 2.

85. 317 U.S. at 352.

86. *Id.* at 350-52.

87. 421 U.S. 773 (1975). The petitioner's assertion was that the minimum fee schedule was price-fixing in violation of § 1 of the Sherman Act.

88. City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434-35 (1976) (footnote omitted).

89. Cantor v. Detroit Edison Co., 428 U.S. 579, 592-97 (1976). *See generally* Kennedy, *Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Laws*, 74 NW. U.L. REV. 31 (1979); Note, 47 U. CIN. L. REV. 469 (1978).

nant" to the Act to establish that the state intended anticompetitive activity.[90]

Although the state action exemption seemed to rest solely on conscious legislative approval the court in *Parker* indicated that the exemption was not unqualified; the Court implied that there may be occasions when states as participants in private agreements may violate the Act.[91] In *Cantor v. Detroit Edison Co.*[92] the Court established that the legality of any program must be tested to determine whether persons have acted lawfully under the Act. "The federal statute proscribes the conduct of persons, not programs . . . ."[93] This concept was the basis of the Supreme Court's decision in *City of Lafayette v. Louisiana Power & Light Co.* In that case the Court held that a municipality was not exempt from the antitrust laws solely because of its status. In a suit for antitrust violations the plaintiff city and the defendant each operated an electric utility system in the same area. The defendant counterclaimed, charging antitrust violations by the plaintiff. The plaintiff moved to dismiss the counterclaim, arguing that the *Parker* exemption established the intent of the antitrust laws to protect the public from private anticompetitive action, not public action taken for the common good. The plaintiff argued that "it would be anomalous to subject municipalities to the criminal and civil liabilities imposed upon violators of the antitrust laws."[94]

The Court rejected the plaintiff's arguments.[95] It compared municipalities with private corporations,[96] stating that decisions "rather than being made on the basis of efficiency in the distribu-

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90. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398 (1978).

91. 317 U.S. at 351-52.

92. 428 U.S. 579 (1976).

93. *Id.* at 601. The lack of a clear majority in *Cantor* makes its exact meaning unclear; the Court suggests that private action may not be exempt from antitrust laws because it "[is] permitted or required by state law." *Id.* at 600.

94. 435 U.S. at 400.

95. The Court based its decision on construing the word "person" in the antitrust statutes to include cities, *id.* at 395, and on the failure of the plaintiff to overcome the presumption against exemptions from statutes. *Id.* at 400.

96. [T]he economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.

Id. at 403.

tion of services, may be made by the municipality in the interest of realizing maximum benefits to itself without regard to extraterritorial impact and regional efficiency."[97] The more closely a municipality's actions mirror those of private industry, the more suspect is its claim that it is acting in the public good.

There is, then, no exemption when the state or its agency acts in a proprietary manner; as the state agency's goals come closer to those of the private sector, its activities come closer to violating the spirit of competition embodied in the antitrust laws.[98] "[T]he Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service."[99]

The cases, then, reflect two primary considerations in determining whether state action will be exempt from Sherman Act action. In the first instance the question is whether the state has authorized the anticompetitive practices.[100] If there has been such an authorization, there will also be an exemption from the Sherman Act.[101] If there has not, and a state agency acts in an anticompetitive manner, the antitrust laws will be violated.[102] The second consideration is whether the "state action" involved is actually private action under color of state authority. In both *Goldfarb* and *City of Lafayette* the Court found that the connection between the state and the agency must be direct to support a state action exemption.[103]

In deciding whether the state action exemption will apply to any possible antitrust actions by the proposed compact commission, these two considerations must be resolved in the commission's favor. First, the authority of the compact must be similar to

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97. *Id.* at 404.

98. "When these bodies [local government] act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets . . . ." *Id.* at 408.

99. *Id.* at 413.

100. *See* Parker v. Brown, 317 U.S. 341, 350-51 (1943); Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 Nw. U.L. Rev. 71, 95-97 (1974).

101. 435 U.S. at 413.

102. *Id.* at 416.

103. 435 U.S. 389 (1978); Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975).

state legislation for the purposes of finding an exemption.[104] The commission will then be a state agency with similar powers and duties.[105] Since the compact's authority will rise to the level of legislation, the second inquiry to be made is whether the commission is authorized by the compact to engage in specific anticompetitive practices.

2. *The Commission as Clearinghouse*

The compact could effectively be implemented by creating a clearinghouse of marketing information. Through a clearinghouse the compact commission could accumulate and distribute crop information. Additionally, the commission could participate in lobbying and in education. Through these activities the clearinghouse could obtain and disseminate information from foreign and domestic buyers to grain marketers. This would create an even distribution of information throughout the entire industry to all marketers, both large and small. Multinational firms would be entitled to retain their network of information, but independent marketers would be more informed of pending foreign purchases. The compact could be even more effective if all the parties' information on pending buyers of wheat were funneled through the clearinghouse. Furthermore, the compact could strive to develop new markets to enhance the industry.

Even this dissemination of information, however, has antitrust implications. While the exchange of information is helpful to all those in the marketing process, it can also act to restrain and in-

104. The compact, if passed by the legislature, will be enacted as any other statute. *See* WASH. REV. CODE § 82.56.010 (1979) (Multistate Tax Compact). The grain marketing compact was introduced into the 1979 legislative session as H.B. 1134 by Representative Clayton. 46th Legis., LEGIS. DIGEST at 827. It was then referred to the Agriculture Committee. During the first extraordinary session it was reintroduced and retained in its present status. *Id.* For text of the compact, see Appendix *infra*.

105. The Multistate Tax Compact, the subject of the suit in *United States Steel Corp.*, was enacted as a statute in Washington in 1974. WASH. REV. CODE § 82.56.010 (1979). The commission created by the compact thus became a part of the state government, with the chairman of the state tax commission representing the state on the multistate commission, *id.* § 82.56.020. The Washington Supreme Court upheld the provisions of the Multistate Tax Compact and found the compact did not increase the political power of the states at the expense of the federal government. Kinnear v. Hearst Corp., 86 Wn. 2d 407, 545 P.2d 1186 (1976).

hibit competition.[106] The Supreme Court, in considering the implications of data dissemination, has distinguished between activities which merely gather and pass along information[107] and those which use the flow of information to restrain trade, either through "business honor and social penalties"[108] or through agreements to adhere to specific price schedules.[109] The commission as a clearinghouse could certainly distribute information; it could not, however, require that farmers within the commission's authority follow a pricing system set and disseminated by the commission.

It is doubtful that a clearinghouse of information would violate the compact clause. The states would not be challenging the supremacy of the federal government, or expanding their powers in any way. The compact would not challenge the supremacy of the federal government since it would act as any private information service would.

3. *The Commission as Independent Broker*

The compact authorizes the commission to investigate practices and trends in world grain marketing.[110] This information could be utilized by establishing the commission as an independent broker, performing the functions of marketing and distribution. It could act as any other independent broker, buying and selling grain at prices most beneficial to its principals.

The commission's actions as an independent brokerage, however, create the possibility of violating the Sherman Act both because it is acting in a private capacity and not as sovereign and because it has not been specifically authorized by the compact to function as such.

The commission's activities as an independent broker could

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106. "Genuine competitors do not make . . . reports . . . to their rivals . . . ; they do not submit the details of their business to the analysis of an expert . . . [to] obtain from him a 'harmonized' estimate of the market as it is and as . . . it promises to be." American Column & Lumber Co. v. United States, 257 U.S. 377, 410 (1921).

107. Maple Flooring Mfr's. Ass'n v. United States, 268 U.S. 563 (1925).

108. 257 U.S. 377, 411 (1921).

109. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936). The Court has held that any interference with the setting of prices is unlawful. United States v. Container Corp. of America, 393 U.S. 333 (1969).

110. Interstate Compact on Agricultural Grain Marketing art. IV(a).

lead to anticompetitive practices. Because of its superior systems, the commission would have access to marketing information unknown to other independent brokers. Although its mandate is to disseminate that information,[111] the possibilities for profit and aggrandizement of farmers would present conflicts of interest and eventual anticompetitive action. Given the choice of providing information to all, or to its own principals, which would the commission choose? What would be the effects of holding information until it is no longer useful? Such activity by the commission might well lead to charges of antitrust violations. The commission could argue that it was exempt as a state agency. Under *City of Lafayette,* however, its claim might be disallowed.

4. The Commission as a Mandatory Brokerage or Regulatory Agency

Another possible direction for the compact is to have the commission act either as a mandatory brokerage or as a regulatory agency. This could be done by each state acting individually or by the commission acting for all members of the compact as a group. In either case the commission would ensure stable prices and a steady market for all the wheat produced.

As a mandatory brokerage, the commission would require that all grain be marketed through the commission. All private industry would be halted as the commission took over its functions. Although this seems harsh, it is the kind of state activity which is protected by the state action exemption to the Sherman Act.

The states could also utilize the commission as a regulatory agency. This agency would act as other state regulatory agencies, establishing guidelines and controlling the industry through them.

As with the commission acting as an independent broker,[112] the activities of a regulatory agency or mandatory brokerage would be subordinated to the states' interest in ensuring adequate markets for the grain grown. However, the state action defense to the Sherman Act established by *Parker v. Brown,*[113] which would be of

111. *Id.* art. IV(b).
112. *See* Part IV-A-2 *supra.*
113. 317 U.S. 341 (1943). *See generally* Kennedy, note 89 *supra.*

limited use to an independent brokerage,[114] would probably prevail when raised by the commission acting as a regulatory agency or mandatory brokerage.

The legislation in *Parker* was similar to the grain compact in many respects. In *Parker* California had established a commission to oversee marketing of agricultural commodities produced in the state. The purpose of the commission in *Parker* was "to 'conserve the agricultural wealth' . . . and 'prevent economic waste in the marketing of agricultural products' of the state."[115] The grain compact's purpose is to preserve and enhance the agricultural and grain marketing states' economies. In both cases the state's interest in protecting its citizens is of great concern. The commission was empowered to act after it had been requested to do so by at least ten producers within a marketing zone; before establishing a program it held public hearings and made findings of fact. The program was then presented to the producers in the zone for their approval.[116] Those who violated the program were liable both civilly and criminally. The compact commission's function is to study and investigate marketing practices and make recommendations to solve problems it encounters. While no provisions have been made for implementing and enforcing its findings, the compact commission could do so in the same manner as the *Parker* commission without violating the Sherman Act. In *Parker* the commission was appointed and controlled by the executive branch of the state government. The compact derives its membership from both the executive and legislative branches.[117] Thus, with both, there is little chance of anticompetitive action occurring without full public discussion. The grain compact then evidences state command to the same extent as the *Parker* legislation, the state is actively involved in both commissions' activities through review and enforcement, and in both cases a significant state interest is involved. Under this analysis the grain compact fits within the state action exemption established by the Court in *Parker*.[118]

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114. 435 U.S. 389 (1978); Part IV-A-3 *supra*.

115. 317 U.S. at 346.

116. *Id.* at 346-47. The plan had to be consented to by 65% of the producers owning 51% of the acreage in the zone.

117. Interstate Compact on Agricultural Grain Marketing art. III(a)(1).

118. 16F J. VON KALINOWSKI, BUSINESS ORGANIZATIONS—ANTITRUST LAWS AND TRADE REGULATION § 45.17 (1979).

Although *Parker* was viewed as setting down a clear rule of exemption from the Act,[119] its precise limits were clouded by the federal statute also at issue. The federal government had passed legislation which authorized the Secretary of Agriculture to control agricultural production.[120] The *Parker* Court found that this power was directed at both establishing federal programs and cooperating with state programs which would effectuate the policy of the Act.[121] The Court found that the California act did no more than the federal government would have established and required in its absence. Thus, it was congressional action which had displaced competition, not state action; the validity of the California program was based on its consistency with the federal program, not its sovereign nature.[122]

This lack of federal legislation is the chief distinction that can be drawn between the facts in *Parker v. Brown* and a similar case which might arise under the proposed compact. There has been no federal legislation attempting to deal with the inequities and uncertainties of current grain marketing practices; the compact is at least in part a response to this inaction by Congress. Lack of legislation in grain marketing practices should, under preemption principles, leave the power in the states to solve these problems. Whether a *Parker* exemption would be allowed where there was no concurrent and supporting federal legislation, however, has not yet been faced by the Court.

Thus, the Sherman Act is a consideration in any implementation of the compact's provisions that goes beyond the passive clearinghouse. While the Supreme Court has enunciated a state action exemption to a Sherman Act charge, the exemption would not apply to an independent brokerage established under the compact since the proprietary nature of the brokerage would not truly be "state action." A regulatory agency or mandatory brokerage, on the other hand, would be able to take advantage of the defense, and thus would be immune to antitrust action. There is still another hurdle, however, a mandatory brokerage or regulatory agency will

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119. 435 U.S. 389, 393 n.8; J. VON KALINOWSKI, note 118 *supra*.

120. 7 U.S.C. § 608 (1976). The statute also exempted the marketing agreements from the antitrust laws. *Id.* § 608(b).

121. 317 U.S. at 354.

122. Kennedy, *supra* note 89, at 42-43.

have to overcome. Because the commission, as either an agency or mandatory brokerage, would have an impact on interstate commerce, the commerce clause implications must also be considered.

B. *The Commerce Clause*

Even if the compact would not be in violation of the Sherman Act because of the state action defense allowed in *Parker v. Brown*,[123] there still is a probable violation of the commerce clause if the commission implements the grain compact through either a mandatory brokerage or a regulatory agency. The commerce clause[124] prohibits state intervention in or regulation of interstate commerce. The Court in *Parker*[125] found that the state's implementation of a market program for raisins did not violate the commerce clause.

The marketing program in *Parker* concerned the farmers' agreement to instigate the program in each geographical area.[126] After the program was approved the raisins produced were placed into different pools whose sale was controlled by the marketing committee. Through this program the raisin prices were stabilized and the farmers received a fair price for their crops. The program in *Parker* was held to not violate the commerce clause since "the regulation [was] imposed before any operation of interstate commerce."[127] The Court distinguished the raisin marketing program from a previous case involving a state Grain Grading Act.[128]

In *Shafer v. Farmers Grain Co.*[129] the Court determined that the state Grain Grading Act was in violation of the interstate commerce clause.[130] The grain was subject to strict state regulation of buyers who purchased the grain with the intent to immediately

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123. 317 U.S. 341 (1943).
124. U.S. CONST. art. I, § 8, cl. 3.
125. 317 U.S. at 368.
126. *Id.* at 346.
127. *Id.* at 361.
128. *Id.* The Court distinguished Shafer v. Farmers Grain Co., 268 U.S. 189 (1925), on its facts.
129. 268 U.S. 189 (1925).
130. *Id.* at 201. The *Shafer* Court stated "[I]n subjecting the buying for interstate shipment to the conditions and measure of control just shown, the Act directly interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules under which an important part of such commerce shall be conducted."

ship it in interstate commerce. The grain regulations included state inspection, grading, bonding, and licensing of buyers. The regulations were found to be an attempt by the state to prescribe rules under which an important part of commerce was conducted. The Court based its conclusion upon the grain being subject to immediate interstate shipment. It noted that grain industry problems were not solely local in nature because grain is grown nationally.[131] The *Parker* Court further distinguished its facts from those in *Shafer* since the wheat in *Shafer* was subject to immediate interstate shipment, while the raisins in *Parker* were in need of further processing before they could be shipped. Furthermore, the *Parker* Court pointed out that the raisin industry was local in nature and best dealt with locally.

> [U]pon a consideration of all the relevant facts . . . it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress.[132]

If the grain compact is implemented as a mandatory brokerage or a regulatory agency it will fall within the facts of *Shafer* rather than *Parker*. In both *Shafer* and the proposed compact, wheat is the commodity sold. As noted in *Parker*, wheat needs no further processing before it is put into interstate commerce. Unlike the raisin industry, which is located almost solely in California, the wheat industry is located in many states. Its problems, therefore, are not local in nature. Thus, if the grain compact is implemented as a mandatory brokerage there is a distinct probability it will be in violation of the interstate commerce clause.

V. CONCLUSION

The interstate grain marketing compact is the result of dissatisfaction with present marketing practices. Farmers, brokers, and government officials all agree that the present system for getting grain to market is inadequate to feed the world and to profit the interests of those who grow the grain. While the compact may not solve these problems, it is a step which takes the grain-producing states, and their citizens, closer to the realization of the compact's

131. 317 U.S. at 361-62.
132. *Id.* at 362.

goals.

States can compact with each other only with congressional consent. Consent can be express or implied and can be granted before or after the compacting states agree to join. Whether this compact will gain the consent of Congress will depend on the possibility that it will "encroach on the just supremacy of the federal government." As the compact has been presented to the Washington State Legislature it should easily gain the required consent. The compact establishes a commission which will investigate current grain marketing practices and recommend solutions to these problems to the states. Accomplishing these purposes will do no more than the states could do on their own, and certainly no more than agencies of the federal government could also undertake. If the compact is implemented as a clearinghouse, there would be no infringement on the supremacy of the federal government. If the commission, however, goes beyond the narrow scope of the compact as it has been proposed, to function either as an independent or mandatory brokerage or as a regulatory agency, there will probably be such an infringement. The compact's actions would also be open to charges of antitrust violation or unconstitutional impact on interstate commerce.

National interests will likely not be protected by an organization of states formed to protect their own interests. If the states were to act singly to do so, congressional authority would not be threatened. The *Parker* rationale of the states acting under implied congressional directive might well hold true. That is not the case, however, with the compact. A regulatory agency established by a group of states would effectively control one of the country's largest exports. This control approaches the situation which gave rise to the compact clause, as expressed in *Virginia v. Tennessee*; it would encroach upon federal supremacy.

The compact commission would no doubt be active in protecting the interests of the citizens of the member states—or at least the farmers in those states. Whether it would be so vigilant in considering the interests of others is open to question. Congress, as protector of the nation's interest, could not consent to the compact in this form as it is Congress' duty to stop just such state control of national issues. If consent is given to the compact, Congress would be compelled to withdraw its consent if the commission went be-

yond the narrow scope set forth in the present compact.

The state legislature should consider an amendment to the compact displacing competition and allowing the commission to act as a broker if the commission established either an independent brokerage or a regulatory agency. This would clearly allow the commission to argue that the state action exemption should apply. The state action exemption of *Parker v. Brown* has been limited in cases similar to those presented; the exemption would probably not protect the commission's action. If the commission established a mandatory brokerage, requiring all grain producers to use its services, the commerce clause violation would be clear under *Shafer v. Farmers Grain Co.*

If Congress does not consent to the compact, the states and farmers would be left in the position they are now in, without the compact; little information about grain deals, little access to the marketing process, little impact on national grain policies. It seems unlikely this loss would be offset by the nation's interest in protecting federal supremacy.

An alternative is for Congress to become a partner in the compact and pass legislation clearly expressing federal purposes and controls of grain marketing practices. This would, then, limit the commission to federally desired ends, and would not be such an invasion of congressional authority as to create a constitutional question of the compact.

There is no doubt that the compact will help the farmers of this state and other grain-producing states to accomplish their general goals while also protecting their economic interests. There should be no problem in gaining congressional consent to the compact. The possible federal assistance and support which will likely follow the congressional consent will also aid farmers and therefore all citizens of the state. As long as the legislature monitors the commission to protect against possible antitrust and commerce clause violations, the benefits to the State of Washington make the compact worthwhile.

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APPENDIX

Interstate Compact on Agricultural Grain Marketing

Article I.—Purpose

It is the purpose of this compact to protect, preserve and enhance:

(a) The economic and general welfare of citizens of the joining states engaged in the production and sale of agricultural grains;

(b) the economies and very existence of local communities in such states, the economies of which are dependent upon the production and sale of agricultural grains; and

(c) the continued production of agricultural grains in such state in quantities necessary to feed the increasing population of the United States and the world.

Article II.—Definitions

As used in this compact:

(a) "State" means any state of the United States in which agricultural grains are produced for the markets of the nation and world.

(b) "Agricultural grains" means wheat, durum, spelt, triticale, oats, rye, corn, barley, buckwheat, flaxseed, safflower, sunflower seed, soybeans, sorghum grains, peas and beans.

Article III.—Commission

(a) Organization and Management

(1) *Membership.* There is hereby created an agency of the member states to be known as the Interstate Agricultural Grain Marketing Commission, hereinafter called the commission. The commission shall consist of three residents of each member state who shall have an agricultural background and who shall be appointed as follows: (1) One member appointed by the governor, who shall serve at the pleasure of the governor; (2) one senator appointed in the manner prescribed by the senate of such state, except that two senators may be appointed from the unicameral legislature of the state of Nebraska; and (3) one member of the house of representatives appointed in the manner prescribed by the house of representatives of such state. The member first appointed by the governor shall serve for a term of one year and the

senator and representative first appointed shall each serve for a term of two years; thereafter all members appointed shall serve for two-year terms. The attorneys general of member states or assistants designated thereby shall be nonvoting members of the commission.

(2) *Voting; binding action.* Each member shall be entitled to one vote. A member must be present to vote and no voting by proxy shall be permitted. The commission shall not act unless a majority of the voting members are present, and no action shall be binding unless approved by a majority of the total number of voting members present.

(3) *Body corporate; seal.* The commission shall be a body corporate of each member state and shall adopt an official seal to be used as it may provide.

(4) *Meetings.* The commission shall hold an annual meeting and such other regular meetings as its bylaws may provide and such special meetings as its executive committee may determine. The commission bylaws shall specify the dates of the annual and any other regular meetings, and shall provide for the giving of notice of annual, regular and special meetings. Notices of special meetings shall include the reasons therefore and an agenda of the items to be considered.

(5) *Officers.* The commission shall elect annually, from among its voting members, a chairperson, a vice-chairperson and a treasurer. The commission shall appoint an executive director who shall serve at its pleasure, and shall fix the duties and compensation of such director. The executive director shall be secretary of the commission. The commission shall make provision for the bonding of such of its officers and employees as it may deem appropriate.

(6) *Personnel.* Irrespective of the civil service, personnel or other merit system laws of any member state, the executive director shall appoint or discharge such personnel as may be necessary for the performance of the functions of the commission and shall fix, with the approval of the commission, their duties and compensation. The commission bylaws shall provide for personnel policies and programs. The commission may establish and maintain, independently of or in conjunction with any one or more of the member states, a suitable retirement system for its full-time employees. Employees of the commission shall be eligible for social security

coverage in respect of old age and survivors insurance provided that the commission takes such steps as may be necessary pursuant to federal law to participate in such program of insurance as a governmental agency or unit. The commission may establish and maintain or participate in such additional programs of employee benefits as may be appropriate. The commission may borrow, accept or contract for the services of personnel from any state, the United States, or any other governmental entity.

(7) *Donations and grants.* The commission may accept for any of its purposes and functions any and all donations and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any governmental entity, and may utilize and dispose of the same.

(8) *Offices.* The commission may establish one or more offices for the transacting of its business.

(9) *Bylaws.* The commission shall adopt bylaws for the conduct of its business. The commission shall publish its bylaws in convenient form, and shall file a copy of the bylaws and any amendments thereto with the appropriate agency or officer in each of the member states.

(10) *Reports to member states.* The commission annually shall make to the governor and legislature of each member state a report covering its activities for the preceding year. Any donation or grant accepted by the commission or services borrowed shall be reported in the annual report of the commission, and shall include the nature, amount and conditions, if any, of the donation, gift, grant or services borrowed and the identity of the donor or lender. The commission may make additional reports as it may deem desirable.

(b) Committees

(1) The commission may establish such committees from its membership as its bylaws may provide for the carrying out of its function.

Article IV.—Powers and Duties of Commission

(a) The commission shall conduct comprehensive and continuing studies and investigations of agricultural grain marketing practices, procedures and controls and their relationship to and ef-

fect upon the citizens and economies of the member states.

(b) The commission shall make recommendations for the correction of weaknesses and solutions to problems in the present system of agricultural grain marketing or the development of alternatives thereto, including the development, drafting, and recommendation of proposed state or federal legislation.

(c) The commission may apply by a majority vote of all of the members of such commission to any state or federal court having power to issue compulsory process for an order to require by subpoena the attendance of any person or by subpoena duces tecum the production of any records in addition to orders in aid of its powers and responsibilities, pursuant to this compact, and any and all such courts shall have jurisdiction to issue such orders. All testimony required by subpoena shall be under oath. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in a state in which the commission maintains an office or a court in the state in which the person or object of the order being sought is situated. The chairperson or vice-chairperson of the commission (or any member thereof so authorized by such commission) may administer oaths or affirmations for the purpose of receiving testimony. Whenever testimony is given by any person subpoenaed under the provisions of this subsection, a verbatim record shall be made thereof by a certified shorthand reporter and the transcript of such record shall be filed with the commission.

(d) The commission is hereby authorized to do all things necessary and incidental to the administration of its functions under this compact.

Article V.—Finance

(a) *Budget.* The commission shall submit to the governor of each member state a budget of its estimated expenditures for such period as may be required by the laws of that state for presentation to the legislature thereof.

(b) *Appropriations by member states.* The moneys necessary to finance the general operations of the commission not otherwise provided for in carrying forth its duties, responsibilities and powers as stated herein shall be appropriated to the commission by the

member states, when authorized by the respective legislatures. Appropriations by member states for the financing of the operations of the commission in the initial biennium of the compact shall be in the amount of fifty thousand dollars ($50,000) for each member state; thereafter the total amount of appropriations requested shall be apportioned among the member states in the manner determined by the commission.

(c) *Incurring obligations and pledge of credit.* 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 member states, except by and with the authority of the member state.

(d) *Accounts; audits.* The commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the commission shall be subject to the audit and accounting procedures established under its bylaws. However, all receipts and disbursements of funds handled by the commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the commission.

(e) *Accounts; examination.* The accounts of the commission shall be open for inspection at any reasonable time.

Article VI.—Eligible Parties, Entry Into Force, Withdrawal and Termination

(a) *Eligible parties.* Any agricultural grain marketing state may become a member of this compact.

(b) *Entry into force.* This compact shall become effective initially when enacted into law by any five states prior to July 1, 1981, and in additional states upon their enactment of the same into law.

(c) *Withdrawal.* Any member state may withdraw from this compact by enacting a statute repealing the compact, but such withdrawal shall not become effective until one year after the enactment of such statute and the notification of the commission thereof by the governor of the withdrawing state. A withdrawing state shall be liable for any obligations which it incurred on account of its membership up to the effective date of withdrawal, and if the withdrawing state has specifically undertaken or committed itself to any performance of an obligation extending beyond

the effective date of withdrawal, it shall remain liable to the extent of such obligation.

(d) *Termination.* This compact shall terminate one year after the notification of withdrawal by the governor of any member state which reduces the total membership in the compact to less than five states.

Sec. 2. This act shall take effect and be in force from and after its publication in the official state paper.