IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-635

UNITED STATES STEEL CORPORATION, et al.,
on behalf of themselves and all persons
similarly situated,

Appellants,

vs.

MULTISTATE TAX COMMISSION, et al.,

Appellees.

BRIEF OF AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The amici curiae states are concerned by the representations in the Appellants' brief that the interests of the states which are not members of the Compact are adversely affected by its provisions and its operations and that the national interest is not served by the Compact. The amici curiae states are familiar with the Compact. They are in agreement with the basic objectives and goals of the Compact

and believe that it strengthens their basic policies and that of the Nation in the field of state taxation of multistate businesses. They do not believe that the Compact or its operation interferes with their sovereignty and their revenue policies or with the national interest. They believe that it is to their best interests that the Compact be held constitutional by this court. If it is declared invalid by this court for lack of congressional consent, they fear that other comparable interstate agreements for the exchange of information, consultation, adoption of uniform legislation and the issuance of advisory recommendations which have been in existence for a number of years may also be invalid for lack of congressional consent. They also believe that the construction of the compact clause of the Constitution of the United States urged by Appellants will require federal intervention in purely state affairs and weaken the federal system by preventing the states from cooperatively solving common problems without federal control. For these reasons, they file this brief in support of the position of the Appellees which they believe to be valid and proper in every respect.

To the states which join in this brief as Amici Curiae, the critical issue in the case at bar is this:

If two or more states wish to enter into an agreement which is merely cooperative in nature, does Article I, Section 10 of the United States Constitution require that the state must first obtain the consent of Congress?

By an agreement "merely cooperative in nature," we mean an agreement with the following characteristics:

(1) Any commission or other organization which is established by the agreement is entirely advisory, so that any decisions or recommendations which the commission might make can be implemented only by each individual state and at the sole discretion of that state;

(2) Any such commission is acting, in the exercise of any governmental powers, solely as the agent of of a state in a field and in a manner in which the state itself is constitutionally permitted to exercise its powers individually; and

(3) Any substantive law established by the agreement is solely uniform or reciprocal in nature.

The fears of the amici states are not remote or speculative in nature. Each amici state is a party to at least one of the 13 interstate agreements listed at page 121 of Appellants' Brief (Supplement C) which are presently in force despite not having received the consent of Congress. If this court were to adopt the arguments and theories urged by Appellants, it is entirely possible that all 13 agreements would be voided *ab initio*, causing irreparable harm to existing programs of cooperation among the states as well as "nipping in the bud" future cooperation among the states in resolving problems of common concern.

Thus, wholly apart from the narrow issue of

whether this Multistate Tax Compact itself is invalid for lack of congressional consent, the amici states are concerned that the court not adopt a standard for congressional consent which would unduly hamper the ability of states to adopt and implement agreements calling for joint action in resolving joint problems. Not every problem which transcends state boundaries is of national concern; not every such problem is susceptible to a national solution. Yet, by the very nature of congressional consent, any requirement that states obtain such consent elevates that problem to one of national concern and imposes a national solution by means of establishing a congressional "veto power" over state action, in effect allowing Congress to substitute its judgment for that of the party states.

To be sure, there are subjects or areas of concern for which states should be required to obtain congressional consent as a condition precedent to joint action. It is the intention of this brief to demonstrate that a proper balancing of the interests of the Nation and its member states involves a construction of the compact clause, Art. I, Sec. 10, Clause 3 of the United States Constitution, which (1) recognizes the limits of power of each government, (2) maximizes the flexibility of state governments to deal with specific problems, and (3) insures that problems of governmental concern which transcend state boundaries are dealt with expeditiously, i.e., that the test to be applied in determining whether congressional

consent is required be as certain and as cogent as possible.

ARGUMENT

I. **Introduction**

In "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 Yale L. J. 685 (1925), then Professor Felix Frankfurter and James Landis list six instances of what they call "* * * new machinery devised during recent years in the settlement of problems which transcend State lines." 34 Yale L. J. at 688.

The first is adoption of uniform state laws, pursuant to recommendations of the National Conference of Commissioners on Uniform State Laws.

"By this method a vast domain of the commercial transactions of the country which do not respect State lines are sought to be brought under common legal control." Ibid.

> The second method is reciprocal legislation, "* * * whereby the capacity of one State to harm or advantage another, when conflicting interests need adjustment, is exercised by creating immunities or handicaps conditioned upon like treatment by sister States." Ibid.

A modern example of this would be the reciprocal legislation involved in *Bode v. Barrett*, 412 Ill. 204, 106 N.E.2d 521 (1952), aff'd 344 U.S. 583 (1953). Pursuant to the Illinois statute, the Illinois secretary of state was authorized to enter into agreements with other states to exempt their residents from the Illinois motor vehicle tax, though they used

Illinois highways, if the other states extended like treatment to Illinois residents.

The third method is the practice of state courts, in certain fields "* * * to base decisions in these fields on grounds of needed harmony between jurisdictions legally independent of each other." Ibid at 689.

For the fourth method, the authors refer to various conferences and associations of governors and other state officials which "have more or less stimulated common state action." Ibid at 689. The National Governors' Conference, the National Association of Attorneys General, and the National Association of Tax Administrators are but the start of the long modern list.[1]

The fifth method is auxiliary federal legislation involving subsidies or grants-in-aid to the states. Ibid at 690.

The sixth method is described as:

> "* * * The regulation of interstate preserves through the practical fusion of distinct State administrative agencies by means of joint sessions and joint action in order to deal as a unit with legally separate parts of a common interest." Ibid.

Summing up, the authors state:

> "These six instances illustrate extra-constitutional forms of legal invention for the solution of problems touching more than one State. They were neither contemplated nor specifically provided for by the Constitution." Ibid. at 691

[1]See, e.g. Council of State Governments, The Book of the States, 1974-75, pp. 257-263. The Council acts as an umbrella organization for the associations listed therein.

Such "extra-constitutional forms of legal invention" have flourished since 1925. Whether they may continue to do so depends in large part upon the decision in the case at bar. For the Multistate Tax Compact here under attack, is but a combination of the first, second and fourth methods of interstate cooperation, all adopted by the legislatures of the member states in a single package labelled "Compact." It contains only uniform or reciprocal legislation coupled with a "commission" composed of state officials to stimulate common state action.[2]

The states which have adopted the Compact could have adopted any single part of the total package without obtaining congressional consent. And they could have adopted all of those parts individually, without combining them into the single package. This too would not require congressional consent.

Neither the decisions of this court nor logic suggest any reason why these "extra-constitutional" devices suddenly become unconstitutional without congressional consent when states agree to tie several of them together in a single package.

II. The Appropriate Test to Determine Whether a Compact or Agreement Among the States Requires Congressional Consent is Set Forth in Virginia v. Tennessee, 148 U.S. 503 (1893).

Not surprisingly, the construction of the compact clause, which the amici states urge upon this

[2]In Appendix A to this brief we analyze each provision of the Multistate Tax Compact and there demonstrate that each such provision is in essence simply one of the traditional "extra-constitution forms of legal invention."

court, is that set forth in *Virginia v. Tennessee*, 148 U.S. 503 (1893), a construction which would require congressional consent only for those compacts or agreements:

> "* * * which may tend to increase and build the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particiular subjects placed under their entire control." (148 U.S. at 518)

The amici states believe that the *Virginia v. Tennessee* test satisfies the three criteria of (1) proper allocation of governmental power, (2) maximum flexibility, and (3) certainty. For these reasons, the amici states urge this court to reject the narrow, strained construction of the compact clause offered by Appellants and uphold the validity of the Multistate Tax Compact under the doctrine of *Virgina v. Tennessee, supra.*

It is submitted that the compact clause of the Constitution of the United States (Article I, § 10, clause 3) does not dictate the drastic surgery on state and local taxation power urged by the Appellants. The compact clause, in our opinion, has been validly interpreted by this court in the early case of *Virginia v. Tennessee, supra.* That interpretation has been upheld by the courts on numerous occasions and was recently affirmed by this court in *New Hampshire v. Maine*, 426 U.S. 363 (1976). The *Virginia v. Tennessee* construction of the compact clause prevents either a shift of political power among the states which

could interfere or encroach upon federal supremacy or a shift of political power from the states to the federal government which could interfere or encroach upon areas of state sovereignty.[3] It strikes a meaningful balance between federal sovereignty and supremacy on the one hand and state sovereignty on the other hand. It prevents the states from exercising their sovereign powers in any manner which would embarrass or impede the powers or work of the federal government delegated to it by the Constitution of the United States. Likewise, it allows the states to freely exercise the powers reserved to them under the United States Constitution without interference from the federal government. This approach allows flexibility among the states to arrive at acceptable solutions to common problems in state and local taxation of multistate businesses without federal intervention and also freely permits federal involvement in this area when Congress finds the need to do so. It allows both the states and the federal government to pursue the means at their disposal to accomplish their common purpose to see that multistate-multinational businesses pay their fair share of state and local taxes in a uniform, equitable and fair manner, without

[3]In applying this test to Multistate Tax Compact, one commentator aptly notes:

> "* * * It is unconvincing to argue that a state becomes more dangerous to the federal government by using its constitutionally reserved powers more efficiently. Strange would be the concept of federalism which protects the supremacy of the federal government by keeping the states more inefficient than itself, or which considers the federal government threatened in its power (i.e., to regulate interstate commerce) when the effectiveness of the threat depends totally on that government's own failure to exercise such power." Sharpe, State Taxation of Interstate Business and the Multistate Tax Compact: The Search for a Delicate Uniformity, 11 Col. J. Law and Soc. Problems 231, at 254 (1976).

duplication and undue compliance requirements.

Understandably, the states desire to develop their own tax systems and administer their own tax laws without federal interference, and the federal government desires the states to do so if it can be accomplished within an acceptable framework which does not conflict with overriding federal policy in the area of state and local taxation of multistate-multinational businesses. All the states are seeking by enactment of the Multistate Tax Compact is to carry forward these mutual desires.

Appellants would destroy the meaningful balance dictated by *Virginia v. Tennessee* by *requiring* federal involvement with the reserve powers of the states if they seek to exercise those powers by the adoption of uniform legislation which is coupled with an advisory mechanism for the uniform interpretation and enforcement of the uniform legislation.

CONCLUSION

Therefore, we respectfully submit that this court should apply the *Virginia v. Tennessee* test in this case and affirm the judgment of the three-judge district court below.

Respectfully submitted,

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APPENDIX A

ANALYSIS OF THE OPERATIVE PORTIONS OF THE COMPACT

The Appellants contend that "* * * the Multistate Compact should be declared invalid unless and until the consent of Congress is obtained." (Appellants' Br. 52) The issue, they imply, is the validity or invalidity of the Compact *in toto*.

However, Article XII of the Compact contains a standard severability clause.[1] Accordingly, even though one portion of the Compact may be declared invalid as requiring the consent of Congress, the other portions may be declared valid. This provides an additional reason for scrutinizing each portion of the Compact to determine whether the consent of Congres is necessary for that specific portion.

A. **Article sI and II (App. E, pp. 54a-56a)**

These are simply statements of purpose and definitions. They are operative only in relation to other parts of the Compact, and therefore require no separate discussion.

B. **Article III, § 1, and Article IV (Taxpayer option to use Uniform Division of Income for Tax Purposes Act) (App. E, pp. 56a-65a)**

These provisions allow interstate taxpayers an option under which, if the taxpayer is subject to a net income tax in a party state, the taxpayer may elect to divide his income in accordance with the provisions of the Uniform Division of Income for Tax Purposes Act, promulgated by the National Conference of Commissioners on Uniform State Laws[2] or to divide his income in accordance with otherwise applicable state law. Clearly, a state could independently, apart from any compact, provide an interstate taxpayer with this same option.

[1]The text of the Compact is contained in Appendix E, pp. 54a-79a, of the separately bound Appendix A-F to the Jurisdictional Statement, and references will be to the text as contained therein.

C. **Article III, § 2 (Taxpayer option-short form) (App. E, p. 57a)**

This provision allows another option to interstate taxpayers. It provides that each party state or any subdivision thereof which imposes an income tax must allow a taxpayer meeting certain requirements to file a "short form" and to compute income tax liability simply on the basis of a percentage of sales volume within the state. The qualifying requirements for this option are designed to alleviate the necessity of the small businessman complying with the complications of an apportionment and allocation statute.

Again, like Article III, § 1, and Article IV, this option is essentially a uniform act, and could be adopted by any state independently of any compact.

D. **Article V (elements of sales and use tax laws) (App. E, p. 65a)**

This article adopts certain substantive provisions relating to sales and use tax laws, designed to prevent double taxation and promote ease of compliance by taxpayers. Again, the provisions of this article are essentially a uniform act.

E. **Article VI (the commission) (App. 3, pp. 65a-71a)**

Sections 1, 2 and 4 of this article involve the internal management of the Multistate Tax Commission and are essentially comparable to

[2]See, Vol. 9A, Uniform Laws Annotated, p. 448.

embodied in the uniform interstate arbitration of death taxes act, under which disputes between states as to the domicile of a decedent are to be settled by arbitration.[6]

I. **Articles X (entry into force and withdrawal), XI (effect on other laws and jurisdictions) and XII (construction and severability) (App. E, pp. 78a, 79a)**

These provisions are mainly "boiler plate," and require no separate discussion.

[6]This act is in force in 13 states. See p. 338, Vol. 9B, Uniform Laws Annotated.