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Extract from Nick Dranias' What is an Interstate Compact (2011) citing Tillman's A Textualist Defense

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Available at: https://works.bepress.com/seth_barrett_tillman/224/
1. What is an Interstate Compact?

An interstate compact is a contractual agreement between states that is similar to a treaty. It binds states contractually and the obligation created by a compact is protected from impairment by the "contracts clause" of the Constitution.

2. What would the Interstate Health Care Freedom Compact do?

The Interstate Health Care Freedom Compact would support a strong legal argument that it is a federal crime for anyone, including federal officials, to interfere with a state's health care freedom laws, such as a law modeled on ALEC's Health Care Freedom Act. Enforcing the individual mandate of the Federal Health Reform law would be illegal within the compacting states.

3. Why an Interstate Health Care Freedom Compact?

Because it can actually work. Unlike efforts to "nullify" the individual mandate of the Federal Health Reform law, the Interstate Health Care Freedom Compact would have the ability to displace the individual mandate as a matter of state and federal law. This is because the Compact is authorized by an existing federal statute that gives preapproval to interstate compacts that coordinate criminal laws. Federal courts have ruled that Congress can effectively pre-approve interstate compacts. Federal courts have also ruled that congressionally-approved interstate compacts are the equivalent of federal law. These court rulings support a strong legal argument that the Interstate Health Care Freedom Compact will trump conflicting federal laws, such as the individual mandate, when the compact becomes effective. The Health Care Freedom Compact combines state sovereignty with the power of federal law to restrain the federal government.

4. What will make the Interstate Health Care Freedom Compact Effective?

For the Health Care Freedom Compact to be effective, a compacting state must a) enact a health care freedom law, b) make it a crime for anyone to interfere with its health care freedom law, c) authorize and direct the Governor to enter into the Interstate Health Care Freedom Compact with at least one other state (both states must agree to identical language), and d) lodge the compact with Congress, when at least two states adopt it. Steps a), b) and c) can take place in any order, but the Compact will be ineffective until they all take place in at least two compacting states.

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34 McKenna v. Washington Metropolitan Area Transit Authority, 829 F.2d 186 (D.C. Cir. 1987).

35 Joseph Zimmerman, Accounting Today: Regulation of Professions by Interstate Compact, The CPA Journal (March 15-April 4, 2004) (observing, "What effect would a new congressional statute with conflicting provisions have on an interstate compact previously granted consent by Congress? The conflicting provisions in the consent would be repealed, with the exception of any vested rights protected by the Fifth Amendment to the U.S. Constitution"); see generally Delaware River Joint Toll Bridge Com., 310 U.S. at 427.

36 Bryant v. Yellen, 447 U.S. 352, 369 (1980) (holding that "nothing ... excuses the Secretary from recognizing his obligation to satisfy present perfected rights in Imperial Valley that were provided for by Art. VIII of the Compact").

37 U.S. Const. art. I, § 10.

38 U.S. Const. art. I, § 7, para. 2.

39 Hollingsworth v. Virginia, 3 U.S. 378 (1798); Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 460 (D.C. Cir. 1982) ("By not mentioning presidential participation, Article V, which sets forth the procedure for amending the Constitution, makes clear that proposals for constitutional amendments are congressional actions to which the presentation requirement does not apply"); Special Constitutional Convention Study Committee, American Bar Association, Amendment of the Constitution by the Convention Method under Article V 25 (1974) ("There is no indication from the text of Article V that the President is assigned a role in the amending process").

40 Zimmerman & Wendell, supra note 2, at 94 (1951) ("On the face of the Constitution, it would seem that the concurrent resolution, over which the President has no control, also should be available as a means of giving consent to compacts").

41 Author's research on www.lexis.com.

42 Compare Zimmerman & Wendell, supra note 2, at 93 & n. 334, 94 ("Virtually without exception, consent to compacts has been given by act of Congress or by joint resolution. It follows that presidential signature or the overriding of a veto has been a necessary part of the consent process ... whatever the original meaning of the consent requirement may have been with regard to compacts, settled usage now has definitely established the President's power to participate in the consent process"); with Michael Greve, Compacts Cartels and Congressional Consent, 68 Mo. L. Rev. 285, 319 n. 138 (Spring 2003) ("Whereas affirmative federal legislation is of course subject to presentment and presidential veto, the state activities listed in Article I, Section 10 are subject only to the consent of the Congress, thus rendering approval of compacts somewhat easier to obtain than ordinary legislation"); Seth Barrett Tillman, A Textualist Defense of Article I, Section 7, Clause 2: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned, 83 Tex. L. Rev. 1265, 1349 n.183 (2005) ("A Congress that acts pursuant to a provision demanding 'consent' of both houses may very well have met the minimum requirement of the clause. However, by bypassing the President, the Congress might thereby have excluded the federal courts from enforcing its edict"); Adam Schleifer, Interstate Agreement for Electoral Reform, 40 Akron L. Rev. 717, 742 (2007) ("The new rule would then be that every time Congress consents to an interstate agreement, the agreement becomes federal law. This seems an eminently reasonable and possible holding. As discussed previously, it is unclear what this concept adds to the regime anyway. The subject matter of the compact itself only seems relevant under a theory of delegation whereby Congress is simply delegating its lawmaking authority to the states. But such a theory would seemingly violate the Presentment Clause in that the President is excluded from the process"); David Engdahl, The Contract Thesis of the Federal Spending Power, 52 S.D. L. Rev. 496, 499 n. 19 (2007) ("Among the powers constitutionally vested in Congress that seem non-legislative in character (even if performed in conventional parliamentary form—i.e., by bill or resolution, and even if with presentment) are those conferred by, e.g., U.S. Const. art. I, § 10, cl. 3 (consent to state 'Agreements or Compacts,' tonnage duties, or state troops or ships, or state engagement in war); U.S. Const. art. IV, § 3, cl. 2 (admission of new states and management and disposal of United States property); U.S. Const. art. V (proposing, or calling conventions for proposing, constitutional amendments); U.S. Const. amend. XXV (determining presidential inability or ability to discharge duties of office). From time to time, some of these have been mistakenly regarded by courts (even by the Supreme Court, and even within the past few decades) as legislative powers; but the historical mainline of the case law, and the principled common sense of the provisions in context, is to the contrary").

43 Virginia v. Tennessee, 148 U.S. 503, 521 (1893) ("The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement, as where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given.

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