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The Power and Promise of Interstate Compacts

States can organize collectively to resist the federal government through interstate compacts. But this effort would be more than a protest movement; it offers a cornucopia of resistance tactics limited by little more than the imagination. Existing legal authority could support state efforts to define and secure individual rights against federal legislation by criminalizing encroachment of those rights by federal authorities. An aggressive interpretation of the law could support carving out entire regions from the reach of federal regulations that invade state sovereignty. If pushed to their limits, interstate compacts could even empower states to completely redesign federal programs that intrude upon their reserved powers.

The Essence of Interstate Compacts

An interstate compact is a contractual agreement among states, typically evidenced by an enabling act authorizing state officials to reach the agreement, a statute that memorializes the agreement and its terms, and a confirmatory writing manifesting the consent of signatory states to the agreement. Like a contract, a compact must involve an offer, acceptance, and consideration in the form of mutual obligations or a bargained-for exchange. Additionally, the subject matter of a compact must also be one over which states have the capacity to contract. The subject matter of compacts between the states may involve the invocation of any sovereign power, including the police power. Compacts thus far have been "classified as follows: boundary-jurisdictional, boundary-administrative, regional-administrative, administrative-exploratory-recommendatory, and administrative regulatory." One of the earliest interstate compacts, for example, reciprocally guaranteed the continued protection of existing property and contract rights from "any law which rendered those rights less valid and secure."

Congressional Consent Is Not Mandatory

Although the Constitution provides that states may not enter into compacts without the "consent" of Congress, the Supreme Court ruled in U.S. Steel v. Multistate Tax Commission that congressional consent is only required for an interstate compact that attempts to enhance "states power quoad [relative to] the federal government." This means that congressional consent is not required for compacts that merely exercise the sovereign powers of the states without purporting to augment those powers relative to those of the federal government. This relaxed rule has opened the door to the formation of numerous interstate compacts, with or without congressional consent. Although "states approved only thirty-six compacts between 1783 and 1920," today there are approximately 200 interstate compacts in effect, including water allocation and conservation compacts (37), energy and low-level radioactive waste disposal (15), criminal law enforcement (18),

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McGuinn v. Washington Metro Area Transit Authority, 197 F.2d 1427 (D.C. Cir. 1952) (noting that the compact is a quasi-federal agency, and the consent of the party to the compact was required for the consent to be valid.

Compare Zimmerman & Wendell, supra note 2 at 93 & n. 334, 94 (“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 provided by the consent of the states to perform the act) can be given to the Congress to perform the act in the capacity of some other government body, in which case the act is not legislative.

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