2011 HOUSE ENERGY AND NATURAL RESOURCES

HB 1287

2011 HOUSE STANDING COMMITTEE MINUTES

House Energy and Natural Resources Committee
Pioneer Room, State Capitol

HB 1287
02/03/2011
13919

☐ Conference Committee

Committee Clerk Signature

Minutes:

Rep. Porter: We will open the Hearing on HB 1287.

Rep. Kasper: I represent district 46 in Fargo I am passing out an amendment to HB 1287. My amendment hog houses HB 1287 and changes the scope of the bill, but it continues to deal with the Environmental Protection Agency. In the United States Constitution it reads "no state shall without the constant of Congress enter into any agreement or compact with another state." So no state shall without the consent of Congress enter into another agreement with another state. If states do agree to enter into the compacts with the consent of Congress they can do so.
I have been in contact with Legislatures of Montana Representative Cindy Smith and Senator Sylvia Allen in Arizona. We are working on putting together a compact for the state of North Dakota almost identical to the compacts that are being introduced in the states of Montana and Arizona. I do have the Arizona compact that I will hand out at the end of my testimony.
We are proposing in the hog house amendment to put in place in North Dakota and intra-state freedom debris compact as it says on the top of page one under section one. I would like to refer the committee to the top of the handout where in the top of page it Goldwater Institute. The Goldwater Institute is a think tank set up by Senator Barrry Goldwater back in the 60's or the 70's I believe the chairman of the board is his son who spoke at Fargo in December.
Nick Dranias is who offered the article in front you is a Constitutional Attorney who I heard speak with Rep. Thorsen, Rep. Headland, and a number of others in the Washington D. C. at the Alli Conference in December. He spoke about the power of compacts and the wiseness in his opinion of states beginning to adopt compacts to challenge the Federal Government encroachment under the Constitution of States Rights. That is what the States Compact is intended to do. I would like to read the top of page 1 (see attachment 1)
We have learned that there is a congressional law in place where we have 100 compacts across the United States in place preapproved. What the preapproval by Congress says is that any state or states that enter into the multistate compact, two or more will have the power to supersede Federal Law if it has Criminal penalties in the compact. I have a copy of those compacts I will provide to the committee.
What this bill does it forms any intrastate compact and it would be the, intend of North Dakota to join with Arizona and Montana. We did pass a health Interstate compact out of IBL Committee yesterday, with the same concept as this compact only dealing with health

insurance. It would be the intend to pass the compact and then join the Multistate Compact with Arizona and Montana and possibly Missouri. The Governors authorize, so once the Legislature would pass this compact, then the Governors authorize to enter into this compact by signatory, there is a formal process to go through that. (see attachment 2)
What this bill will do in this amendment is provide our states standing under the United States Constitution to say our laws regarding regulation of our air in our state is regulated by our state and nobody including the Federal Government can tell us what to we can do with our laws.
The bottom line result of this bill is would be that the Federal Government and the EPA would be restricted from coming to North Dakota and saying " we will come to North Dakota and impose EPA Greenhouse Laws on the state either thru the EPA or through the Congressional act of Congress," because the United States Constitution guarantees our law would be sovereign in and above what Congress has passed in the past or might pass in the future or what any agency may want to impose on the State of North Dakota
That is what amendment does. I believe it is a far reaching and powerful tool for the State of North Dakota. I will be meeting with the Governors and Attorney General's Office in the next few days to go through the parts of the compact I have with you.

Rep. Kelsh: This sounds like coming close to succession. What is the recourse for the states that don't agree with the provisions in the compact? Minnesota for instance or other states, that may have a problem with the provisions? Where do they go for recourse?

Rep. Kasper: What we are doing under the clause of the bill, is we are dealing with intrastate air within our borders. This compact if passed applies only to the State of North Dakota and our rights and protects our rights under the Government and its Constitution.

Rep. Kelsh: As you know air doesn't remain within one state borders. It goes beyond the state borders.

Rep. Kasper: Yes

Rep. Kelsh: What is the recourse?

Rep. Kasper: Let me explain again. This deals with the boundaries of North Dakota and our right to regulate our air and gas in our state.

Rep. Kelsh: That is my question. What is the recourse?

Rep. Kasper: There recourse is to go to court.

Rep. Kelsh: You testified that on a separate bill that the local Government didn't know what they were doing when they were voting on taxes and local property taxes and therefore the state should step in and put some regulations on what they are allowed to levee. What is the consistency between that kind of thinking and telling the Federal Government that they have no right to tell locals what to do?

Rep. Kasper: First let me say my testimony in the other bill is not germaine to the testimony in this bill. My testimony on that bill had to do with state issues and property taxes.

Rep. Hunskor: What is in it that has brought this bill before us.

Rep. Kasper: Under Federal Law and under the reaches of EPA, there many of us myself included who believe that the Federal Government has gone beyond what the Constitution says and there are encroaching on the sovereign of the various states of the United States. We do not want them interfering in North Dakota Law.

Rep. Nathe: Does this amendment force the Governor into this compact or is it up to him?

Rep. Kasper: This language is identical to the other states languages. The governor is authorized and we are asking him too.

Rep. Damschen: Have you visited with the Attorney General on this? What are the feelings there?

Rep. Kasper: I will be meeting with Tom Trenda sometime this week.

Rep. Nelson: Do you have legislation in the process of providing what that freedom debris law is going to be? And the changes to the state laws into compliance to this?

Rep. Kasper: This is the law.

Rep. Porter: Are there any further questions? What are the penalties? Is it an infraction? Is it a misdemeanor?

Rep. Kasper: That is addressed on page 2 line 4 under penalty. The Attorney General would determine what the penalty might be.

Rep. Nelson: Is the emission of carbons a harmless intrastate emission?

Rep. Kasper: We are looking at "Intrastate" emission and the bill defines whatever it defines as harmless. The bill is clear.

Rep. Clark: Where do other states stand in this process?

Rep. Kasper: Arizona's bill has been introduced. Montana's bill has been prefilled. Missouri they want a copy of what we are doing.

Rep. Damschen: Is there further testimony in favor of HB 1287?

Paul Sorum: I am an attorney and architect. I have become a political activist because of the crises that our county is in. Our state is part of this crisis as well. Last fall I encouraged Rep. Kasper to put together such as this to help protect businesses and farms and our energy industries in the state from an overreaching Federal Bureaucracy.
As we have seen in other parts of the country Federal Agencies and the Federal Government can overreach their Constitutional bounds and cause great destruction in other states economies. About a year ago I was running for a nomination for the Senate and

traveled the state. When you are state wide candidate you learn what is going on around the state, both the good things and also the challenges people have. Some of the things I heard were things like "I am really afraid that we are losing our freedom" I feel like our business or farms are being attacked by the EPA or other Federal Agencies. We feel unsafe, we are afraid of the Federal Government and what is going on in this country. I heard say things like "If we could for Washington what we did for North Dakota the crisis would be over. I heard other Candidates say things like " if in Washington they spend less money than they took in taxes like we do in North Dakota things would be better in this country."

I would like to bring a little clarity to the situation we are in our state. We are being asked in to leave the country out of this crisis. In order to do that we have to define clearly what the crisis is. Is it an economic crisis? Yes it is caused by deaths spiraling out of control. First and foremost it is a crisis of freedom it is a Constitutional crisis. I have heard that from citizens and also from legislatures and others all across the state. I think we really to look at first the idea that the individuals in our country are designed to be free. That is how our founding fathers put together our country that is how it is structured. In other words if they are free the sovereign power lies with them and only them our founding fathers knew for that to be maintained and true over time power has to be decentralized not centralized.

The Government has centralized power and ultimate control there can be no freedom and that is why our Constitution which is the instrument of our compact just as Rep. Kasper describes as compact with other states. Our State Constitution correctly describes our agreement with the Federal Government to be state in part of this union as a compact.

It is a mutual beneficial agreement that we have voluntarily entered in and so has our Federal Government. It is very important to realize that because this means that we both have, if you have ever entered an agreement and I do because I do a lot of contracting. If you enter an agreement because it is mutually beneficial, and both sides have an equal responsibility to interpret the instrument of that agreement whether it is a contract and in this case it is our U.S. Constitution because of one side of the agreement has in reserve for itself as the EPA has now done the exclusive right that determined the extend of their power in authority over the other party. It is no longer a mutually beneficial agreement it is more of a master slave arrangement. As a state we have a responsibility as outlined by some of our founding fathers especially Jefferson and Madison when the resolutions of 97 and 98 stated at the rightful solution when the Federal Government or part of the Federal Government usurp power out of that outside of the enumerated powers of our in our Constitution. Rightful remedy is for states to nullify and to fine void those laws which the Federal Government does not have the power to execute. This is really important this is succession this is a responsibility we have to maintain a Civil Union in our country. It is quite the opposite of succession it is our responsibility as a state to make sure power is not centralized in a fashion outside what is specified in the US Constitution.

That is really important here because if we are going to prosper we have to make sure individuals have freedom and self Government. We have seen examples of parts of the Federal Government go bad on people. Less than two years ago the Federal Government decided a two inch smelt minnow in Northern California delta was an endangered species shortly after that a Federal Judge said" we are going to have turn off irrigation pumps from that water source that go down the Central Valley of California to save the minnow however that wasn't the only way to protect the minnow but a Federal Judge in Washington decided they were just going to do it. Now those farms that are in the Central Valley of North Dakota in the Central Valley of California have dried up. They are not raising food. Today

the highest unemployment rates are in the communities of California Central Valley. There is starvation among the farmers who use to feed the world in that part of our country because our Federal Government stepped outside of its Constitutional authority. The State of California did not fill their responsibility to protect those individuals.

What I am getting at is freedom and prosperity are cause and effect while we have been prosperous and the rest of the country is not, it is because we have maintained the freedom and our rights of individuals herein the state. Let me tell you just like to Central California if we let the Federal Government or a branch of the Federal Government while it is a judicial branch or an agency such EPA ran over individuals in our state our prosperity can disappear in months like it did in Northern California and the Central Valley.

It is very important if we want to be a leader in this country which we asked to be that we stand up for freedom and we stand up for self Government our God given right as documented in our Constitution so that we can continue to be prosperous and implement policies that will shine around the country, will show how it is done, demonstrate how it is done, demonstrate how our funding principles work when they are followed.

We are in North Dakota unique to do that. I have handed out some information from some of the leading scholars today on these issues relating on these issues relating to our Constitution.

If you want to google either Thomas Woods or Brain McClanahan or go to the Tenth Amendment web sites you can read much more about these subjects.(see attachment 3)

Rep. Damschen: Are there any questions for Mr. Sorum? Is there any further testimony in favor on HB 1287? Is there any testimony is opposition of HB 1287?

Kris Kitko: I am a folksinger/ songwriter and public commentator living in Bismarck. (see attachment 4) I urge you to recommend" Do Not Pass" on this bill.

Rep. Damschen: Are there any questions? Is there further opposition to HB 1287? We will close the hearing.

2011 HOUSE STANDING COMMITTEE MINUTES

House Energy and Natural Resources Committee
Pioneer Room, State Capitol

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☐ Conference Committee

Committee Clerk Signature Emmette

Minutes:

Rep. Porter: We will open HB 1287.

Rep. Kasper: I represented an amendment to HB 1287 which would have established an interstate compact called the Freedom Debrief Compact. This compact was brand new, I have been working with the state of Montana, Arizona, Missouri and Texas and other states that are joining the compact idea. What the amendment would have done is established a Freedom Debrief Compact in the state of North Dakota, it would have said "The state of North Dakota is claiming our right to regulate our air quality in our state." It would have put a small criminal penalty for anyone that violates the compact. I have been in contact with a number of coal companies in the state of North Dakota and they at this time are reluctant to support the bill. This would be a bill that would fly in the face of the EPA and a lot of times the states don't want to be first. Being we did not adopt the amendment that I was hoping for Iam asking to not consider the amendment. There is another bill in the Senate that is similar to HB1287 that has a statement of in tend regarding the environmental protection agency. I would like to move a DO Not Pass on HB 1287

Rep. Keiser: Second.

Rep. Porter: Is there any discussion? We will call a roll on HB1287 for a Do Not Pass.

YES 15 No 0 Absent 0 Carrier: Rep. Kasper

Date: 2-11-11
Roll Call Vote #: 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1287

House House Energy and Natural Resources Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☒ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep Kasper Seconded By Rep Keiser

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep. Hanson	✓	
Vice Chairman Damschen	✓		Rep. Hunskor	✓	
Rep. Brabandt	✓		Rep. Kelsh	✓	
Rep. Clark	✓		Rep. Nelson	✓	
Rep. DeKrey	✓				
Rep. Hofstad	✓				
Rep. Kasper	✓				
Rep. Keiser	✓				
Rep. Kreun	✓				
Rep. Nathe	✓				
Rep. Anderson	✓				

Total (Yes) 15 No 0

Absent 0

Floor Assignment Rep Kasper

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1287: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends **DO NOT PASS** (15 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1287 was placed on the Eleventh order on the calendar.

2011 TESTIMONY

HB 1287

Attachment 1

Prepared by Nick Dranias
Director, Center for Constitutional Government
at the Goldwater Institute

GOLDWATER INSTITUTE

The Power and Promise of Interstate Compacts

States can organize collectively to resist the federal government through interstate compacts.[1] 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.[2] 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.[3] 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."[4] 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."[5]

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."[6] 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.[7] 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,"[8] 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),

and education and child welfare compacts (13).[9] The average state is a party to 25 interstate compacts.[10] Perhaps the most aggressive effort to coordinate multistate regulatory power is the Regional Greenhouse Gas Initiative, in which 10 states have agreed to apply "cap and trade" carbon regulations to themselves.[11]

Interstate Compacts Can Powerfully Coordinate Collective State Action

As their proliferation suggests, interstate compacts are a powerful tool for exerting state sovereignty. Each state to a compact has the power to enforce the compact through the remedy of specific performance because the enforceability of compacts is guaranteed under the Contracts Clause and an exception to the rule that one legislature cannot bind future legislatures.[12] Thus, the coordinated action that interstate compacts make possible a unified front among the states and help overcome collective action problems.

Compacts, for example, could require states to coordinate litigation efforts and to require state officials to refuse to cooperate with federal agents or agencies—rejecting "regulatory primacy" en masse to ensure that federal resources cannot be targeted to punish specific states. Compacts could be used for collectively resisting conditional federal grants—to minimize the fear of the unequal loss of federal funds, states could devise an interstate compact that would preclude all states from taking any conditional federal money only after a certain threshold number of states enter into the agreement. Under *U.S. Steel,* interstate compacts like these would be binding on the states with or without congressional consent because they would only exercise the state's inherent sovereign powers without attempting to increase those powers relative to those of the federal government.

The Power of Congressionally-Approved Interstate Compacts to Trump Federal Law

Significantly, *U.S. Steel*'s requirement that congressional consent must be obtained for interstate compacts that increase the sovereign powers of the states relative to those of the federal government implies that *congressionally-approved* interstate compacts *can* increase the powers of the states relative to those of the federal government. Indeed, well over 100 years ago, Joseph Story's *Commentaries on the Constitution of the United States* emphasized that "the consent of Congress may be properly required in order to check any infringement on the rights of the national government."[13] In fact, if congressional consent is secured, an interstate compact can be a vastly more powerful tool for protecting state sovereignty.

The power of congressionally-approved interstate compacts is best illustrated by a review of the fine print, authorizing statutes, and history of interstate compacts. An examination of a wide range of congressionally-approved compacts reveals a common feature: provisions that prevent the compact from altering the rights, obligations, or powers of the federal government. For example, the Colorado River Compact of 1922 provides, "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."[14] Likewise, looking to federal laws that have given preapproval and subsequent approval to interstate compacts, one repeatedly discovers artful efforts to impose variants of the following caveat to congressional approval: "Nothing contained in this Act or in the compact consented to hereby shall be construed to affect the

jurisdiction on, powers, or prerogatives of any department, agency, or officer of the United States Government."[15] Even the Weeks Act of 1911, which otherwise gives blanket consent to states entering into compacts for the purpose of forest protection, provided that the compact must not conflict with any law of the United States.[16] Such caveats evidence an awareness of the risk that interstate compacts could expand the power of the compacting states in such a way that federal supremacy is challenged. Indeed, Congress has long been aware of the potential for compacts to expand the powers of the states relative to the federal government. Such awareness is evidenced, for example, by the act giving congressional consent to the Gulf States Marine Fisheries Compact of 1951, which states nothing contained in the agreement should be construed to limit "or add to" the powers of the states over fisheries.[17]

Digging deeper into our nation's history, one discovers a series of clashes over interstate compacts during the 1930s and '40s, triggered by state-based efforts to displace federal jurisdiction and regulatory authority. When the four states of the Connecticut and Merrimac valleys tried to enter into flood control agreements, for example, the Federal Power Commission saw the possibility of interference with its jurisdiction over hydroelectric power generation and objected to Congress in a memorandum, stating:

> The signatory states will have a veto power over national policy with respect to the power so developed since the terms and conditions under which any such signatory state shall make available the rights of power development herein reserved shall be determined by separate agreement or arrangement between such State and the United States. Under this provision, for example, the Federal Government would not be free as it is now, to give the preference to municipalities and public power districts in the disposition of these water power resources which it has been the Congressional policy since 1920 (Federal Water Power Act) to provide.[18]

Based on this objection, President Roosevelt threatened to veto the compact, which prevented the compact from receiving approval.[19] Later, Roosevelt found it necessary to act on his veto threats.

Fearing displacement of federal jurisdiction and regulatory authority, President Roosevelt vetoed a statute giving open congressional consent in advance to fishing compacts for states bordering on the Atlantic Ocean.[20] Likewise, in 1943, Roosevelt vetoed the Republican River Compact, which explicitly precluded the United States from exercising "such power or right ... that would interfere with the full beneficial and consumptive use" of waters from the Republican River Basin,[21] stating:

> It is unfortunate that the compact also seeks to withdraw the jurisdiction of the United States over the waters of the Republican Basin for purposes of navigation and that it appears to restrict the authority of the United States to construct irrigation works and to appropriate water for irrigation purposes in the basin. The provisions having that effect, if approved without qualification, would ... unduly limit the exercise of the established national interest....[22]

All of these seemingly disparate facts evidence that "during periods of national government activism, interstate compacts have been seen as ways to safeguard state authority in the face of potential federal preemption."[23] Among federal officials, in particular, there is a profound awareness

that interstate compacts can increase the power of the states relative to the federal government. And there is also the concomitant recognition that interstate compacts could impact, alter, or even displace federal law and the power of federal agencies. Indeed, as President Roosevelt anticipated (and those who drafted the boilerplate caveats found in most interstate compacts and their authorizing statutes), congressionally approved interstate compacts are now clearly recognized as equivalent to federal law under the Supremacy Clause and as a potential source of vested rights that are protected against federal regulatory action.[24] This is despite the longstanding competing theory that an interstate compact is not equivalent to a federal statute, but merely an agreement between states that becomes an enforceable contract with congressional consent.[25]

The road to the current state of the law has been circuitous. In 1851, for example, the Supreme Court held that a "compact, by the sanction of Congress, has become a law of the Union."[26] Nearly a century later, however, the Court in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*[27] ruled that a compact was *not* the equivalent of a federal statute. But only two years later, the Court in *Delaware River Joint Toll Bridge Commission v. Colburn*[28] held that an interstate compact created a federal right and privilege. This led one commentator to declare in 1965 that "it seems abundantly clear that the doctrinal basis chosen by the Court for the *Coburn* rule was that a compact, by sanction of Congress, has become a law of the Union."[29]

As predicted, modern precedent now holds that a congressionally approved interstate compact is indeed a "law of the United States."[30] In 1981, *Cuyler v. Adams* explained how the Supreme Court arrived at this conclusion:

> Although the law-of-the-Union doctrine was questioned ... any doubts as to its continued vitality were put to rest in *Delaware River Joint Toll Bridge Comm'n v. Colburn* ... where the Court stated: "... [W]e now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal 'title, right, privilege or immunity'".... This holding reaffirmed the law-of-the-Union doctrine and the underlying principle that congressional consent can transform interstate compacts into federal law. The requirement of congressional consent is at the heart of the Compact Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority.[31]

It is now so well established that congressionally approved interstate compacts constitute federal law that the regulatory bodies some interstate compacts create have even sought certification as federal agencies.[32] Lawsuits brought against agencies created by interstate compacts under state law have been dismissed based on the determination that any state law that conflicts with the authority conferred by an interstate compact "is preempted under the Supremacy Clause of the United States Constitution."[33] In fact, congressionally approved interstate compacts not only displace state law under the Supremacy Clause but have been held to supersede prior federal law as well. For example, the Circuit Court of Appeals for the District of Columbia held that the liability provisions of the previously enacted Federal Employee Liability Act were displaced by the contrary provisions of the Washington Metropolitan Area Transit Authority (WMATA) interstate compact.[34] Additionally, it is

reasonable to expect that the rights, guarantees, and obligations congressionally approved interstate compacts create are likely protected from deprivation by the federal government as vested rights under the Fifth Amendment's Due Process Clause.[35] For example, water rights protected by the Colorado River Compact have been protected against a federal agency's efforts to undermine those rights by enforcing an inconsistent federal law.[36] In short, states can leverage congressionally approved interstate compacts to supersede prior federal laws and to protect themselves and their residents against the reach of future federal laws through the creation of vested rights protected by interstate compact.

Congressional Consent Does Not Require Presidential Approval

Given that congressionally approved interstate compacts have the force of federal law, the next question is: How should states secure the requisite approval? The Constitution speaks only of securing the "Consent of Congress."[37] If granting the consent of Congress were regarded as an exercise of Congress' normal lawmaking process, then each house would be required to pass a resolution consenting to the compact, whereupon the joint resolution would be sent to the President for his approval or veto.[38] But if granting the consent of Congress were regarded as the exercise of a power conferred exclusively upon Congress, such as Congress' power to propose constitutional amendments,[39] then each house would need only to approve an interstate compact by passing a concurrent joint resolution, which does not require presidential presentment.[40]

No case holds that congressional consent to an interstate compact requires presidential approval.[41] Scholars are divided on whether the requisite congressional consent requires presidential presentment, even though there is a history of vetoes and threatened vetoes of interstate compacts during President Roosevelt's term in office, as well as a custom of presenting interstate compacts to the President for approval.[42] But it is clear that granting consent of Congress to an interstate compact is *not* an exercise of Congress' normal lawmaking process. This is because the Supreme Court has long held congressional consent to interstate compacts can be *implied* both before and after the underlying agreement is reached.[43] This rule of law treats the consent of Congress very differently from the normal lawmaking process, insofar as laws obviously cannot be enacted by mere implication. It also compels the conclusion that presidential presentment is unnecessary to garner the requisite consent of Congress for an interstate compact. After all, if an actual vote on specific legislation approving a specific interstate compact is not necessary to secure the requisite consent of Congress, it follows that presidential presentment is not necessary. Prevailing precedent thus justifies concluding that the Compact Clause confers an exclusive power upon Congress to approve interstate compacts that can be exercised without presidential presentment. This conclusion is also consistent with the original meaning of the Constitution.

From an originalist perspective, the text of the Compact Clause is the starting point for analysis. The fact that Congress has long had a means of manifesting its consent without presidential presentment—the concurrent joint resolution—precludes the claim that the meaning of the phrase "Consent of Congress" *necessarily* implies the requirement of presidential presentment. And while it has been argued that the Compact Clause was not meant to provide an alternative means of legislation,[44] the substantive power of an interstate compact could be alternatively sustained under

the doctrine of estoppel by acquiescence, or "quasi estoppel," which would bar the federal government from changing its position on an interstate compact.[45] Moreover, the structure and purpose of the Constitution does not require the President to have the power to veto congressional consent for interstate compacts. This is because the President's role in presentment is to defend the executive branch from incursions by the *federal* legislative branch and to act as the representative of *all* of the people of the nation.[46] Fulfilling this role does not require the President to have the power to veto interstate compacts, which directly affect only the compacting states—especially in view of the Founders' robust conception of state sovereignty and strong preference for decentralized government.

Significantly, those who claim that presidential presentment is necessary have never made the case that the original meaning of the phrase "Consent of Congress" entails the requirement of presidential presentment. Instead, they have declared, "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."[47] But the claim that presidential presentment is "settled usage" disregards the longstanding court-sanctioned phenomenon of "implied consent" to interstate compacts. This phenomenon alone disproves the assertion that "settled usage" requires presidential presentment for effective congressional consent to interstate compacts.

It is not unusual and perhaps even "settled usage" for the exercise of conferred powers under the Constitution to have the effect of law *without* following the ordinary lawmaking process. Treaties, for example, create federal law under the Supremacy Clause despite conferring treaty powers only upon the Senate and the President.[48] It is natural to similarly regard congressional consent to an interstate compact as excepted from the normal lawmaking process, given that the Compact Clause mirrors the treaties clause of the Articles of Confederation,[49] and may be regarded as aimed at a similar purpose.[50] Moreover, where the Constitution specifically confers a power upon a named legislative assembly, as it does in the Compacts Clause, action by that assembly, without presentment to the executive branch, has been repeatedly sustained.[51] The theory underpinning this rule is that the exercise of a specifically conferred power, such as the power to consent to an interstate compact, is not an exercise of the lawmaking apparatus; instead, the exercise of a conferred power is the exercise of a power that was meant to be exercised exclusively by the designated body.

Binding precedent, original meaning, and "settled usage" thus justify the conclusion that presidential presentment is unnecessary to securing effective congressional consent to an interstate compact. Without a presentment requirement, states would be able to form viable interstate compacts that displace federal power within their jurisdiction without having to grapple with an antagonist in the executive branch. For example, an agreement between two or more states to allow insurance companies reciprocal access to intrastate markets, to allow for the portability of existing medical insurance coverage, or to protect the right to pay directly for health care services in either state could serve as a vehicle for superseding conflicting federal laws regulating insurance companies or precluding free choice among medical providers and insurance issuers—such as the Obama Health Care Program. A compact among the states to protect, recognize, and mutually enforce the rights created by the Firearms Freedom Acts or the Health Care Freedom Acts could

establish vested rights protected against prior or subsequent federal law. To test the boundaries of the extent to which congressionally approved interstate compacts supersede contrary federal law, states could devise interstate compacts that (1) directly displace contrary federal laws that affect the reserved powers of the states, (2) redefine compliance with the terms of conditional federal grants to prevent recapture of federal funds that are appropriated to serve state and local priorities, and (3) redirect federal tax revenues to custodial accounts and shield taxpayers from federal tax liability.

Interstate Compacts Advance Consent Statute

Even if presidential presentment were required for effective congressional approval of an interstate compact, at least one blanket "consent-in-advance" statute has been on the books for decades.[52] This statute gives blanket consent "to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts."[53] The foregoing statute contains no caveat and no stipulation that the consent it offers is conditional on the interstate compact being consistent with federal law. Such blanket congressional consent contrasts with numerous prior, contemporaneous, and subsequent consent-in-advance laws that only give consent to interstate compacts that do not conflict with federal law.[54] The only reasonable way to construe the omission of such language is to infer that blanket consent was given to future conforming interstate compacts. States should be able to rely on the effectiveness of this consent-in-advance statute because such statutes have been enforced from the earliest days of the Republic.[55]

The foregoing "consent-in-advance" statute provides the legal basis for states to attempt to resist nearly any federal regulatory law by criminalizing related enforcement efforts, reaching agreement with other states on enforcing such criminal laws and establishing "such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts." The Health Care Freedom Act, for example, guarantees the right to free choice among medical providers and insurance issuers. The Firearms Freedom Act establishes a less restrictive regulatory regime for instate manufacturing and sales of firearms. States enacting these laws are free to criminalize the violation of the rights they protect. In fact, Wyoming has criminalized the violation of its version of Firearms Freedom Act.[56] States could then enter into an interstate compact mutually guaranteeing to protect the enjoyment of the rights guaranteed by the Health Care Freedom Act or the Firearms Freedom Act under the protections of their respective criminal laws. Such a compact could then be lodged with Congress under the authority of the foregoing consent-in-advance statute, whereupon the provisions of the compact would arguably become federal law, superseding prior inconsistent federal law.[57]

In principle, states would be able to exert their police powers to define and protect many other types of individual rights from federal encroachment using the foregoing "consent-in-advance" statute to criminal law enforcement statutes. The possible ways in which interstate compacts can be used to resist federal power under the foregoing consent-in-advance statute are nearly limitless. It is up to the states to push the boundaries to determine what is possible. There is no time to lose.

[1] U.S. Const. art. I, § 19 cl. 3.
[2]Frederick L. Zimmerman & Mitchell Wendell, *The Interstate Compact Since 1925*, 88-89 (1951).
[3]Caroline N. Broun, Michael L. Buenger, Michael H. McCabe, & Richard L. Masters, *The Evolving Use and the Changing Role of Interstate Compacts, A Practitioner's Guide* 18 (American Bar Association 2006).
[4] Zimmerman & Wendell, *supra* note 411, at 8.
[5] *Green v. Biddle*, 21 U.S. 1, 39-40 (1823)
[6] *U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452, 459 (1978) (holding that only those interstate agreements that "enhance state power quoad the national government" are ineffective without the approval of Congress).
[7] *Id.* at 472.
[8] Patrick McGuinn, *E Pluribus Unum in Education? Governance Models for National Standards and Assessments: Looking Beyond the World of K-12 Schooling* 10 (Thomas B. Fordham Institute June 2010).
[9] Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent*, 42 Col. J. Law & Social Prob. 511, 519 (2009) (citing William Kevin Voit, Nancy J. Vickers, and Thomas L. Gavenonis, *Council of State Governments, Interstate Compacts and Agencies 2003* (2003), *available at* http://www.csg.org/pubs/documents/2003_compacts_directory.pdf (last visited Dec. 12, 2010)).
[10] McGuinn, *supra* note 8, at 10.
[11] *Id.* at 13-20; *see also* Regional Greenhouse Gas Initiative, "Key Documents," http://www.rggi.org/states (last visited Dec. 12, 2010).
[12] *Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States"); *Kentucky v. Indiana*, 281 U.S. 163, 178 (1930); *Green*, 21 U.S. at 92.
[13] *Virginia v. Tennessee*, 148 U.S. 503, 519-20 (1893) (citing Joseph Story, *Commentaries on the Constitution of the United States* (1st ed. 1833))
[14] *Colorado River Compact of 1922* (Aug. 18, 1921).
[15] An Act Granting the Consent of Congress to a Great Lakes Basin Compact, S. 660 (PL 90-419) (1968); *see, e.g.*, An Act to grant the consent of the Congress to the Tahoe Regional Planning Compact, 94 Stat. 3233, § 5 (1980) ("Nothing contained in this Act or in the compact consented to shall in any way affect the powers, rights, or obligations of the United States, or the applicability of any law or regulation of the United States in, over or to the region or waters which are the subject of the compact, or in any way affect rights owned or held by or for Indians or Indian tribes subject to the jurisdiction of the United States").
[16] 36 Stat. 961, 16 U.S.C. § 552 (1911).
[17] Zimmerman & Wendell, *supra* note 2, at 41 n. 174 (citing P.L. 721, 81st Cong, 2nd Sess.).
[18] *Id.* at 16 & n. 78, 38 & n.162 (quoting Federal Power Commission, Memorandum to the Commerce Committee of the U.S. Senate on S.J. Res. 177, H.J. 430, H.J. 435, and H.J. 436).
[19] *Id.* (citing Franklin D. Roosevelt letter to Governor Cross, in *Connecticut Annual Report Connecticut Society of Civil Engineers* 61 (1938)).
[20] Zimmerman & Wendell, *supra* note 2, at 38 & n.162 (citing August 11, 1939 memorandum of disapproval).
[21] *Id.* (citing Art. XI, Republican River Compact; Republican River Compact, 86 Stat. 86 (1943)).
[22] *Id.* (citing Document No. 690, H.R. 77th Congress 2nd Session (Apr. 2, 1942)).
[23] McGuinn, *supra* note 8, at 10.
[24] *New Jersey v. New York*, 523 U.S. 767, 811 (1988) (holding that congressional approval "transforms an interstate compact within [the Compact Clause] into a law of the United States").
[25] David E. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 Va. L. Rev. 987, 999-1002 (1965).
[26] *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 565-66 (1851).
[27] 304 U.S. 92, 109-10 (1938).
[28] *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U.S. 419 (1940).
[29] Engdahl, *supra* note 434, at 1004-12.
[30] *New York*, 523 U.S. at 811 (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)).
[31] *Cuyler*, 449 U.S. at 439-40 (citing *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S., at 278; *United States ex rel. Esola v. Groomes*, 520 F.2d 830, 841 (3rd Cir. 1975) (Garth, J., concurring); *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517 (9th Cir. 1974), *cert. denied*, 420 U.S. 974 (1975); Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 694-95, 735-48 (1925)).

[32] McGuinn, *supra* note 8, at 14 (referencing "the Interstate Insurance Receivership Compact, Northeast Interstate Dairy Compact, and the Interstate Compact for Adult Offender Supervision"); *see, e.g., Elcon Enterprises, Inc. v. Washington Metro Area Transit Authority*, 977 F.2d 1472 (D.C. Cir. 1992) (noting intra-circuit split and assuming without deciding that WMATA is a quasi-federal agency); *Coalition for Safe Transit, Inc. v. Bi-State Development Agency*, 778 F. Supp. 464 (E.D. Mo. 1991) (Bi-State quasi-federal agency subject to section 702 of federal APA).

[33] *Parkridge 6 LLC v. U.S. Department of Transportation*, 2010 U.S. Dist. LEXIS 34182 * 17-18 (E.D. Va. 2010).

[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 3: 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.

Story says that the consent may be [an] implied act of Congress, admitting such State into the Union, is an implied consent to the terms of the compact"); *see also Cuyler*, 449 U.S. at 441; *Wharton v. Wise*, 153 U.S. 155 (1894); *Green*, 21 U.S. at 39-40.

[44] *See, e.g.*, Engdahl, *supra* note 25, at 1024.

[45] *Simmons v. Burlington, Cedar Rapids & Northern Ry. Co.*, 159 U.S. 278, 290 (1895); *Ritter v. Ulman*, 78 F. 222, 224 (4th Cir. 1897) (holding that "[i]n order to constitute estoppel, or quasi estoppel, by acquiescence, the party, with full knowledge or notice of his rights, must freely do what amounts to a recognition of the transaction, or must act in a manner inconsistent with its repudiation, or must lie by for a considerable time, and knowingly permit the other party to deal with the subject matter under the belief that the transaction has been recognized, or must abstain for a considerable time from impeaching it, so that the other party may reasonably suppose that it is recognized").

[46] *Ins v. Chadha*, 462 U.S. 919, 951 (1983) ("President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws"); *Myers v. United States*, 272 U.S. 52, 123 (1926) ("The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide..."); *The Federalist* No. 73 (Alexander Hamilton) (Gideon ed., 1818), available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=788&Itemid=27 (last visited Dec. 12, 2010).

[47] Zimmerman & Wendell, *supra* note 2, at 94.

[48] *Cf. The Head Money Cases*, 112 U.S. 580, 599 (1884).

[49] Art. Conf. art. VI. (stating that "[n]o two or more states shall enter into any treaty, confederation or alliance whatever between them without the consent of the United States in Congress assembled").

[50] Zimmerman & Wendell, *supra* note 2, at 31 ("It is sometimes said that an interstate compact is a treaty between states. In a number of respects this categorization is apt"); *cf. Hinderlider*, 304 U.S. at 104 (discussing how compact clause "adopts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations").

[51] *Hollingsworth*, 3 U.S. 378; *United States v. Sprague*, 282 U.S. 716 (1931) (bestowal of power on Congress); *Hawke v. Smith*, 253 U.S. 221 (1920) (bestowal of power on state legislature); *see also Hawke v. Smith*, 253 U.S. 231 (1920).

[52] Zimmerman & Wendell, *supra* note 2, at 6 n. 25 (citing the Flood Control Act of 1936, 49 Stat. 1591, 33 U.S.C.A. Sec. 701; Tobacco Control Act of 1936, 49 Stat. 1240, 7 U.S.C.A. Sec. 515, Crime Compact Act of 1934, 48 Stat. 909; Weeks Forest Act of 1911, 36 Stat. 961)).

[53] 4 U.S.C. § 112.

[54] *See* 15 U.S.C. § 1358; 15 U.S.C. § 8201; 16 U.S.C. § 824p; 23 U.S.C. § 129; 23 U.S.C. § 401; 23 U.S.C. § 601; 29 U.S.C. § 2941; 33 U.S.C. § 1253; 42 U.S.C. § 2021d; 42 U.S.C. § 4727; 42 U.S.C. § 7402; 49 U.S.C. § 5303; 49 U.S.C. § 5304.

[55] *Green*, 21 U.S. at 39-40 (congressional consent given in 1791 to support compact entered into in 1797).

[56] *Firearms Freedom Act*, Wyoming House Bill no. HB0095 (signed Mar. 3, 2010), available at http://legisweb.state.wy.us/2010/Engross/HB0095.pdf (last visited Dec. 12, 2010).

[57] Even if the Health Care Freedom Acts or Firearms Freedom Acts are ultimately held unconstitutional, their enactment should be regarded as voidable, not *void ab initio*, because states have the inherent reserved power to enact such laws, subject to invalidation by a court of law. *Cf. Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989) ("An overbroad statute is not void ab initio, but rather voidable, subject to invalidation"). Accordingly, congressional consent to an interstate compact enforcing the Health Care Freedom Act or Firearms Freedom Act should be regarded as a ratification of an otherwise voidable state law that waives any voidness objection under the Supremacy Clause.

[redacted] Kasper

From: Nick Dranias [NDranias@goldwaterinstitute.org]
Sent: Friday, January 21, 2011 5:46 PM
To: Kasper, Jim M.; Jim Kasper
Subject: Educational Materials regarding Interstate Compact
Attachments: What is an Interstate Compact.pdf; Interstate Compact Research Memo.pdf

Dear Rep. Kasper:

It was great meeting you the other day. Per the request of your committee, I have attached the main educational documents that relate to the Interstate Compact concept. Feel free to forward these documents to your colleagues per the chairman's authorization.

Very truly yours,

Nick Dranias
Director - Center for Constitutional Government
Attorney - Admitted under Ariz. S. Ct. R. 38(f); No. 330033
Goldwater Institute | www.GoldwaterInstitute.org
500 East Coronado Road Phoenix, AZ 85004
(602) 462-5000 ext. 221 | fax (602) 256-7045

From: Kasper, Jim M. [mailto:jkasper@nd.gov]
Sent: Friday, January 14, 2011 8:24 AM
To: Kasper, Jim M.; Nick Dranias; Jim Kasper
Cc: 'Jim Kasper'
Subject: RE: Interstate Health Care Freedom Compact Model Legislation--NOW INTRODUCED IN NORTH DAKOTA--FROM REP JIM KASPER==1/13/2011

Nick:

Am resending as I don't know if this went the first time.

Jim

Rep. Jim Kasper
[redacted]ND House of Representatives
District 46
1128 Westrac Drive
Fargo, ND 58103
Office Phone: 701-232-6250
Cell Phone: 701-799-9000

Original message-----
From: Jim Kasper <jmkasper@amg-nd.com>
To: Nick Dranias <NDranias@goldwaterinstitute.org>
Cc: "jkasper@nd.gov" <jkasper@nd.gov>, 'Jim Kasper' <jmkasper@amg-nd.com>
Sent: Fri, Jan 14, 2011 05:30:48 GMT+00:00
Subject: RE: Interstate Health Care Freedom Compact Model Legislation--NOW INTRODUCED IN NORTH DAKOTA--FROM REP JIM KASPER==1/13/2011

Dear Nick:

I have now introduced the ND Health Care Interstate Compact Bill and I need IMMEDIATELY testimony on how the compact would work, why we need it and all other pertinent details.

When we talked in Washington at the ALEC conference in December, you said you would come to North Dakota to testify on behalf of the bill. Can you do this.

If yes, FANTASTIC. If no, I NEED HELP NOW ON THE PROPER TESTIMONY TO EXPLAIN WHY WE SHOULD ADOPT THE BILL AND HOW THE COMPACT WOULD WORK.

I really need your help now. Our chairman has scheduled the hearing for next week Monday. I am trying to get the hearing postponed, but cannot take the chance that he will do so. Therefore, written testimony and handouts are needed immediately.

Please EMAIL TO BOTH OF MY EMAILS ABOVE.

Thank you for your help.

Rep. Jim Kasper

From: Kasper, Jim M. [mailto:jkasper@nd.gov]
Sent: Tuesday, December 21, 2010 9:46 AM
To: jmkasper@amg-nd.com
Subject: FW: Interstate Health Care Freedom Compact Model Legislation
Importance: High

From: Nick Dranias [NDranias@goldwaterinstitute.org]
Sent: Monday, December 06, 2010 8:30 PM
To: Mike.Ritze@okhouse.gov; cary@bresnan.net; Sylvia Allen; rpearce@azleg.gov; dbsdvsatty@yahoo.com; ed.setzler@house.ga.gov; Kasper, Jim M.; Thoreson, Blair; brenda@azbartons.org; spierce@azleg.gov
Cc: Clint Bolick
Subject: Interstate Health Care Freedom Compact Model Legislation

Dear Sen. Pearce (Arizona), Sen. Allen (Arizona), Sen. Pierce (Arizona), Rep. D. Smith (Arizona), Rep. Barton (Arizona), Rep. Setzler (Georgia), Rep. C. Smith (Mont.), Rep. Kasper (ND), Rep. Thoreson (ND), and Rep. Ritze (Ok):

Per your prior requests, I have attached model legislation that, if enacted and executed, I believe would give you winnable legal argument that your state's existing or forthcoming Health Care Freedom laws displace pre-existing federal law; i.e. Obamacare. Please visit this link http://works.bepress.com/nicholas_dranias/1/ and jump to the end, "Tactical Tool #10," to learn about the law governing interstate compacts as I understand it.

[redacted]ou review this model legislation, please understand that I believe there are three essential steps to formulating an [redacted]rstate compact (aside from ensuring your state enacts a Health Care Freedom law! I have cc'd Clint Bolick who [redacted]rafted the original "Health Care Freedom Act" if you need guidance on that).

[redacted]st, you need to enact a statute criminalizing the violation of your state's Health Care Freedom laws by anyone, [redacted]ncluding federal agents (this need not be explicit, but you do not want to exclude governmental officials). I have not provided you with model legislation for this because I am not an expert in criminal law.
Second, you need a compact, which is in the form of a contract between states, that agrees to coordinate and mutually enforce the criminal law enforcement of the foregoing statute. I have provided this model legislation.
Third, you need to enact a statute enabling the governor to enter into the foregoing compact with other states and further providing that the compact shall be effective as the law of your state in accordance with its terms. I have provided this model legislation.

In addition to these steps, you need to ensure that each compacting state executes an appropriate writing agreeing to the compact and that each compacting state transmits such agreement to every other compacting state, as well as Congress. The model legislation for the interstate compact describes that process.

This legal structure may meet with disagreement from your legislative counsel. Some legislative counsel are advising states to simply enact compacts as statutes, without first going through the motions of having states, throug

11.0007.01001
Title.

Prepared by the Legislative Council staff for
Representative Kasper
January 31, 2011

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1287

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to adopt the interstate freedom to breathe compact; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1.

Interstate freedom to breathe compact.

The governor is authorized and directed to enter into a compact on behalf of this state with any of the United States lawfully joined in the compact in a form substantially as follows:

Article I

Findings and Declaration of Policy

1. 4 U.S.C. section 112 gives congressional consent "to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts".

2. Pursuant to their police powers to protect public health, safety, welfare, and morals, the party states have enacted or anticipate enacting laws or constitutional provisions to protect and guarantee the freedom to breathe.

3. The party states have enacted or anticipate enacting laws that make it a crime in their state for anyone to interfere with their respective freedom to breathe laws.

4. The party states find it necessary and deem it desirable for making effective their respective current or anticipated freedom to breathe criminal laws, as well as this agreement and compact, to do the following:

   a. Prohibit any governmental agent from depriving any resident of any party state of the rights and freedoms guaranteed under its respective current or anticipated freedom to breathe laws.

   b. Prohibit any governmental agent from penalizing any resident of any party state for exercising the rights and freedoms guaranteed under its respective current or anticipated freedom to breathe laws.

   c. Cooperate with each other and to give each other mutual assistance in the prevention of crimes under the freedom to breathe criminal laws of any party state.

d. Cooperate with each other and to give each other mutual assistance in the criminal prosecution of anyone who violates the freedom to breathe criminal laws of any party state.

Article II

Definitions

As used in this compact, unless the context clearly indicates otherwise:

1. "Compel" includes legal mandates, penalties, or fines.

2. "Freedom to breathe criminal laws" means any state law that makes it a crime for anyone to interfere with the state's respective freedom to breathe laws.

3. "Freedom to breathe laws" means any state law or constitutional provision that:

   a. Protects and guarantees the freedom or right to engage in the harmless intrastate emission of anthropogenic (man-caused) carbon dioxide (CO_2) or other greenhouse substances produced by biological, mechanical or chemical processes, including refuse and agricultural operations; or

   b. Reserves the exclusive power to regulate the intrastate emission of anthropogenic (man-caused) carbon dioxide (CO_2) or other greenhouse substances produced by biological, mechanical or chemical processes, including refuse and agricultural operations to the enacting state.

4. "Penalty" means any civil penalty, criminal fine, tax, salary, or wage withholding or surcharge or any named fee with a similar effect established by law or rule by a government established, created, or controlled agency that is used to punish or discourage the enjoyment of freedoms or rights protected under the state's freedom to breathe law.

5. "State" means a state of the United States.

Article III

Terms

Notwithstanding any state or federal law to the contrary:

1. Each party state shall give full faith and credit to the freedom to breathe criminal laws and freedom to breathe laws of every party state.

2. A governmental agent shall not deprive residents of party states of the rights and freedoms protected under their respective state's freedom to breathe criminal laws and guaranteed by their respective state's freedom to breathe laws.

3. A governmental agent shall not deprive party states of the powers protected under their respective freedom to breathe criminal laws and guaranteed by their respective freedom to breathe laws.

4. A governmental agent shall not penalize residents of party states for exercising the rights and freedoms protected under their respective state's freedom to breathe criminal laws and guaranteed by their respective state's freedom to breathe laws.

5. A governmental agent shall not penalize party states for exercising the powers protected under their respective freedom to breathe criminal laws and guaranteed by their respective freedom to breathe laws.

6. The party states shall cooperate with each other and give each other mutual assistance in the prevention of crimes under the freedom to breathe criminal laws of any party state.

7. The party states shall cooperate with each other and give each other mutual assistance in the criminal prosecution of any person who violates the freedom to breathe criminal laws of any party state.

Article IV

Enforcement

Notwithstanding any state or federal law to the contrary:

1. The chief law enforcement officer of each party state shall enforce this agreement and compact.

2. A taxpaying resident of any party state has standing in the courts of any party state to require the chief law enforcement officer of any party state to enforce this agreement and compact.

Article V

Compact Administrator and Interchange of Information

1. The governor of each party state or the governor's designee is the compact administrator. The compact administrator shall:

   a. Maintain an accurate list of all party states.

   b. Consistent with subsections 3 and 4, transmit in a timely fashion to other party states citations of all current freedom to breathe laws and current freedom to breathe criminal laws of the compact administrator's respective state.

   c. Receive and maintain a complete list of the freedom to breathe laws and freedom to breathe criminal laws of each party state.

2. The compact administrator of each party state shall furnish to the compact administrator of each party state any information or documents that are reasonably necessary to facilitate the administration of this compact.

3. Within ten days after executing this agreement and compact, and thereafter on the close of each of their respective succeeding legislative sessions, the party states shall notify each other in writing and by appropriate citation of each of their current freedom to breathe laws, which shall be deemed within the subject matter of this agreement and compact, unless the compact administrator of one or more party states gives specific

notice in writing to all other party states within sixty days of such notice that it objects to the inclusion of such law or laws in this agreement and compact.

4. Within ten days after executing this agreement and compact, and thereafter on the close of each of their respective succeeding legislative sessions, the party states shall notify each other in writing and by appropriate citation of each of their current freedom to breathe criminal laws, which shall be deemed within the subject matter of this agreement and compact, unless the compact administrator of one or more party states gives specific notice in writing to all other party states within sixty days of such notice that it objects to the inclusion of such law or laws in this agreement and compact.

Article VI

Entry Into Effect and Withdrawal

1. This compact is deemed accepted when at least two states deliver a notice of confirmation, which is duly executed by their respective authorized representative and which acknowledges complete agreement to the terms of this compact, to each other's governor, the office of the clerk of the United States house of representatives, the office of the secretary of the United States senate, the president of the United States senate, and the speaker of the United States house of representatives. Thereafter, the compact is deemed accepted by any state when a respective notice of confirmation, which is duly executed by the state's respective authorized representative and which acknowledges complete agreement to the terms of this compact, is delivered to each party state's compact administrator, the office of the clerk of the United States house of representatives, the office of the secretary of the United States senate, the president of the United States senate, and the speaker of the United States house of representatives.

2. Any party state may withdraw from this compact by enacting a joint resolution declaring such withdrawal and delivering notice of the withdrawal to each other party state. A withdrawal does not affect the validity or applicability of the compact to states remaining party to the compact.

Article VII

Construction and Severability

1. This compact shall be liberally construed so as to effectuate its purposes.

2. This compact is not intended to and shall not:

   a. Prevent any person or association of people from enjoying or enforcing private property rights.

   b. Authorize any activity that ordinarily causes cognizable harm or injury to any person or association of people.

   c. Authorize increased regulation of any peaceful and productive activity of any person or association of people.

3. This compact is intended to operate as the law of the nation with respect to the party states under 4 U.S.C. section 112, to supersede any inconsistent state and federal law to establish vested rights in favor of residents of the party states in the enjoyment of the rights and freedoms protected by their respective freedom to breathe criminal laws and guaranteed by their respective freedom to breathe laws.

4. If any phrase, clause, sentence, or provision of this compact is declared in a final judgment by a court of competent jurisdiction to be contrary to the Constitution of the United States or is otherwise held invalid, the validity of the remainder of this compact shall not be affected.

5. If the applicability of any phrase, clause, sentence, or provision of this compact to any government, agency, person, or circumstance is declared in a final judgment by a court of competent jurisdiction to be contrary to the Constitution of the United States or is otherwise held invalid, the validity of the remainder of this compact and the applicability of the remainder of this compact to any government, agency, person, or circumstance shall not be affected.

6. If this compact is held to be contrary to the constitution of any party state, the compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the affected party state as to all severable matters."

Renumber accordingly

[redacted]e federal government has the exclusive right to judge the extent of its own powers, warned the Kentucky and [redacted]nia resolutions' authors (Thomas Jefferson and James Madison, respectively), it will continue to grow – regardless of elections, the separation of powers, and other much-touted limits on government power."
– Thomas E. Woods

"William Davie, a delegate to the Constitutional Convention of 1787 and 1788, from North Carolina and proponent of the Constitution, responded to attacks levied on the "supremacy clause" by stating that:
This Constitution, as to the powers therein granted, is constantly to be the supreme law of the land. Every power ceded by it must be executed without being counteracted by the laws or constitutions of the individual states. Gentlemen should distinguish that it is not the supreme law in the exercise of power not granted. It can be supreme only in cases consistent with the powers specially granted, and not in usurpations [emphasis added].

Davie wasn't alone in this opinion. Future Supreme Court justice James Iredell of North Carolina argued that, "This clause [the supremacy clause] is supposed to give too much power, when, in fact, it only provides for the execution of those powers which are already given in the foregoing articles....If Congress, under pretence of executing one power, should, in fact, usurp another, they will violate the Constitution [emphasis added]."

Of course, this debate ultimately boils down to loose interpretation verses strict construction. Thomas Jefferson had the best line on this issue. When asked to read between the lines to "find" implied powers, Jefferson responded that he had done that, and he "found only blank space." **– Brion McClanahan, Ph.D from "Who's Supreme? The Supremacy Clause Smackdown"**

"Nullification derives from the (surely correct) "compact theory" of the Union, to which no full-fledged alternative [redacted]ppears to have been offered until as late as the 1830s. That compact theory, in turn, derives from and implies the [redacted]owing:

1) The states preceded the Union. The Declaration of Independence speaks of "free and independent states" that "have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do." The British acknowledged the independence not of a single blob, but of 13 states, which they proceeded to list one by one. Article II of the Articles of Confederation says the states "retain their sovereignty, freedom, and independence"; they must have enjoyed that sovereignty in the past in order for them to "retain" it in 1781 when the Articles were officially adopted. The ratification of the Constitution was accomplished not by a single, national vote, but by the individual ratifications of the various states, each assembled in convention.

2) In the American system no government is sovereign, not the federal government and not the states. The peoples of the states are the sovereigns. It is they who apportion powers between themselves, their state governments, and the federal government. In doing so they are not impairing their sovereignty in any way. To the contrary, they are exercising it.

3) Since the peoples of the states are the sovereigns, then when the federal government exercises a power of dubious constitutionality on a matter of great importance, it is they themselves who are the proper disputants, as they review whether their agent was intended to hold such a power. No other arrangement makes sense. No one asks his agent whether the agent has or should have such-and-such power. In other words, the very nature of sovereignty, and of the American system itself, is such that the sovereigns must retain the power to restrain the agent they themselves created. James Madison explains this clearly in the famous Virginia Report of 1800:

The resolution [of 1798] of the General Assembly [of Virginia] relates to those great and extraordinary cases, in [redacted]which all the forms of the Constitution may prove ineffectual against infractions dangerous to the essential right of [redacted]e parties to it. The resolution supposes that dangerous powers not delegated, may not only be usurped and [redacted]xecuted by the other departments, but that the Judicial Department also may exercise or sanction dangerous powers beyond the grant of the Constitution; and consequently that the ultimate right of the parties to the Constitution, to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority, as well as by another, by the judiciary, as well as by the executive, or the legislature."
– Thomas E. Woods, from "Nullification: Answering the Objections"

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February 3, 2011

The Honorable Todd Porter

Energy and Natural Resources Committee

RE: Opposition to House Bill 1287

Chairman Porter and Members of the Committee:

My name is Kris Kitko; I am a folksinger/songwriter and public commentator living in Bismarck.

When the government of Iraq did not allow UN inspectors into the country to look for weapons of mass destruction, the United States cried out. "What are you afraid of? Let them in if you have nothing to hide."

The same question must be asked regarding this bill. Why would anyone be so afraid that he would want to put a ban on federal or EPA inspections and make it almost impossible for the EPA to keep track of our health and safety?

This is not a rhetorical question, and I will answer it right now.

A few months back, I wrote and recorded a song criticizing state leadership during our oil boom. Specifically, I sang about problems that developed due to infrastructure neglect. I posted the song on the Internet, and it was viewed by thousands. The email and comments came streaming in—some criticizing me, others agreeing about infrastructure troubles.

And then a very different type of email began showing up in my inbox. Those emails suggest an answer to my question.

Here is what is to be feared:

I'm holding a copy of medical test results sent to me by a farmer living in northwest North Dakota. Since fracking started near the family's home, they have been sick. She says of the results:

"My doctor told me that a normal germanium level on this test would be below 10. Mine is 52, and a second test done later came back at 48. My husband tested at 39. It has been at these levels for months. For arsenic, the doctor said that the highest it should ever be is 50 or less. Mine is 132.4."

They have spent thousands of dollars in ER visits because they often cannot breathe or walk steadily enough to get out and feed the cattle. They are in their forties. They counted

approximately 25 storage tanks or drill sites within a ten-mile radius of their home and a few ponds that contain "produced water"—waste water from fracking. They enjoyed good health before these appeared.

Here's a picture of a mysterious rash that has plagued a family living near more fracking activity in North Dakota. It is shockingly similar to many other stories found in other parts of the country where fracking is occurring.

And then there's the photo of the barn cats and cattle with blood coming out of their eyes and noses. And what about hair falling out on the livestock, towels soaked in blood from inexplicable bloody noses, and other ailments that have racked up thousands of dollars in medical bills for our families in North Dakota?

The emails are still coming. I did not ask for these emails, nor did I sing about—or even imagine—these problems when writing my song about infrastructure.

If the EPA questions the safety of hydraulic fracturing, they will be here. And if the EPA comes here, they will find out what's harming these people and livestock, and the answer may turn out to be hydraulic fracturing. If fracking is interrupted, many people in positions of power will lose out. North Dakota is a big state, but it's just a small town. We all know each other or can trace connections to each other quite easily. But we North Dakotans, including the people who've been telling me their stories and sending photos, have a right to EPA protection.

I urge you to recommend "Do Not Pass" on this bill.

TEXAS PUBLIC POLICY FOUNDATION
PolicyPerspective

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Center for Tenth Amendment Studies

Shield of Federalism: Interstate Compacts in Our Constitution

by Ted Cruz
Senior Fellow, Center for Tenth Amendment Studies

Mario Loyola
Director, Center for Tenth Amendment Studies

Key Points

- As shields, interstate compacts can protect areas of state regulation from federal power.
- Interstate compacts allow States to initiate changes in federal law.
- Interstate compacts are one way that states, working together, can reassert their proper role within the Constitution's ballance of federalism.

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Introduction

The American Republic is facing one of the greatest challenges of our history. In Washington, Republicans and Democrats alike have indulged the runaway spending and regulatory overreach of a federal government that continues to expand the scope of its powers unabated. The Patient Protection and Affordable Care Act ("Obama Care") marks a dramatic new milestone in that expansion. Americans are starting to realize that restoring and protecting self-government requires a return to our founding principles of limited government and local control.

As this nationwide movement gathers momentum, Americans are searching for tools to restore the Constitution's founding principles. Among the most promising is the interstate compact. Its power as a constitutional device to regulate a multitude of regional issues has already been demonstrated: More than 200 interstate compacts are currently in force. And yet, as this paper shows, that power remains largely unexploited.

Under our Constitution, interstate compacts that regulate matters within the enumerated powers of the federal government require congressional consent. That consent can be express (an affirmative majority vote in Congress) or even implied by congressional acquiescence. In the case of express congressional consent, historically that has been accomplished through either a bill or a resolution that typically has been presented to the President for his signature into law.

Critically, once Congress consents to an interstate compact, the compact carries the force of federal law, trumping all prior federal and state law.

Few issues have energized citizens nationally more than the recent federal healthcare legislation – seen by many as a federal power-grab at the expense of state authority and individual liberty. An interstate healthcare compact would present a powerful vehicle for the States to confront Obama Care directly.

Two insights give force to this Policy Perspective, a legal insight and a political insight. First, legally, the problem confronted by most state efforts against federal healthcare legislation is that, under the Supremacy Clause, federal law preempts state law. However, with congressional consent, an interstate compact *is federal law*. Hence, it can supersede all prior federal law – including Obama Care. Second, politically, if States enter into an interstate compact, it becomes very difficult for their elected congressional representatives to deny them consent. It is one thing to vote in the abstract for federal legislation; it is quite another to tell your home-state constituennts that you will not respect their views and expressed desire not to be bound by Obama Care.

More broadly, in the decades ahead, interstate compacts could gain increasing use as a shield against federal overreach. With congressional consent, federalized interstate compacts could shield entire areas of state regulation from the power of the federal government. This Policy

continued on next page

In the decades ahead, interstate compacts could gain increasing use as a shield against federal overreach.

Perspective explores the history and law of interstate compacts, with particular focus on federalized interstate compacts.

Interstate Compacts in Constitutional History

The interstate compact has a long history in America. During the colonial period, interstate compacts were used to regulate inter-colonial affairs. Two centuries later, more than 200 interstate compacts are in force, woven invisibly into the fabric of our society. The Port Authority of New York and New Jersey is an interstate compact; so is the Washington Metropolitan Area Transportation Authority that runs the subways and buses in our Nation's capital; so are a myriad of agreements that regulate criminal background checks, environmental standards, and education benefits, across state lines.

Interstate compacts were born of the uniquely Anglo-American tradition of common law and respect for the solemn obligation of contract—that tradition which has proved such a bountiful source of strength for the American Republic. Indeed, they are at one level just ordinary contracts, governed by the same common law of contracts that applies to private transactions. Historically, because they were agreements among governments, which could bind future governments, they had a quasi-constitutional force. In this sense, both the Articles of Confederation and the Constitution of the United States can be seen as a form of interstate compact.

Both the contractual and quasi-constitutional dimensions of the interstate compact survive to this day. The Constitution expressly provides for them, in Article I, Sec. 10: "No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State." This provision has been very narrowly construed. The Supreme Court has been loath to strike down interstate compacts generally, and has not in fact required congressional consent in many cases. Congressional consent has generally been required only when necessary "in order to check any infringement of the rights of the national government."[1]

Interstate compacts have tended to fall into one of three categories.[2] First and most traditional is the compact dealing with border questions among States. Second is the advisory compact, which is usually set up to study a question and make recommendations. Third is the regulatory compact, which has come into increasing prominence in the last century. The most important for our purposes, regulatory compacts run the gamut of policy areas, from regional transportation to crime, radioactive waste, and environmental regulation.

Regulatory compacts usually (but not always) establish a regional agency of some kind. These vary as much in size and function as the compacts themselves, from three-person commissions to the Washington Metropolitan Area Transit Authority, which employs 10,000 people. The key thing to note about these agencies is that they (like the compacts which create them) "are neither federal in nature nor state in scope. Administrative compacts have created powerful governing commissions appropriately described as a "third tier" of government, a tier that occupies that space between the sphere of federal authority and the sphere of individual state authority."[3]

Legal Effect of Interstate Compacts

Impact of interstate compacts on state law.

In keeping with their general purpose, the most basic effect of an interstate compact is to bind the member States. As one court put it, "The law of interstate compacts as interpreted by the U.S. Supreme Court is clear that interstate compacts are the highest form of state statutory law, having precedence over conflicting state statutes."[4] Indeed, an interstate compact necessarily involves a giving up of some state sovereignty by entering into a restraining arrangement with other States. For this reason, courts have imposed limits on what the States can do with compacts: The "reserved powers" doctrine holds that certain attributes of sovereignty cannot be contracted away.[5] Courts have also held that the

surrender of a State's power in a compact must be "in terms oo plain to be mistaken."[6] These limitations, however, are ·ere caveats to bear in mind when considering the fact at interstate compacts not only trump existing state law, they bind all future state governments. Most compacts provide for withdrawal and dissolution; but they are otherwise deemed permanent.[7]

Federalism and interstate compacts with congressional consent.

From the point of view of federalism the most important effect of interstate compacts is on federal law—and on the balance of federal-state powers. Here a crucial distinction must be drawn between those interstate compacts that require congressional consent and those that do not. Courts have typically required congressional consent for two kinds of compacts: first, when the compact would change the balance of power between States and the federal government or diminish the power of the federal government; and second, where the compact intrudes on an area of specific federal authority. If the area of regulation is federally preempted, congressional consent is generally required.

'ongressional consent transforms 'erstate compacts into federal law.

Cuyler v. *Adams* (1981) the Supreme Court said: "[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress *transforms the States' agreement into federal law under the Compact Clause.*"[8] A moment's reflection suffices to see the enormous power that this gives interstate compacts within our constitutional system. Note that in *Cuyler* the issue was the effect of congressional consent given in advance to interstate compacts "for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal law and policies ...."[9] Some commentators have expressed concern that interstate compacts that go further than implementing the precise terms of a *prior* congressional approval stand on questionable ground. Regardless, the merits of those concerns, it is abundantly clear that congressional approval given to an already existing interstate compact "transforms the States' agreement into federal law under the Compact Clause."

Just how deeply a compact can intrude on federal law has not been precisely established, chiefly because compacts generally try to have as little impact as possible on federal law, in order to eliminate potential political hurdles in Congress.

An interstate compact cannot impact federal law beyond the :ders of the member States. But just how deeply a compact can intrude on federal law has not been precisely established, chiefly because compacts generally have tried to have as little impact as possible on federal law, in order to eliminate potential political hurdles in Congress. The outer boundaries have not been explored. But we can assume, and proponents should argue, that interstate compacts can cut a considerable swathe into federal law—assuming that congressional consent is given to do so. This is because, "[w]hen it approves a compact, Congress arguably exercises the legislative power that the compact threatens to encroach upon and declares that the compact is consistent with Congress's power in that area. [...] *Congress, in effect, consents to the states' intruding on its traditional domain.*"[10]

Thus, congressional consent transforms a compact into a "law of the Union," as Justice McLean put it in the seminal *Pennsylvania* v. *Wheeling* (1852).[11] Most of the federal cases involving interstate compacts turned on fairly minor questions of federal law; but if a congressionally approved interstate compact can trump pre-existing federal law on a minor issue there is no legal bar to its doing so on a major issue as well. Hence the importance of the "law of the Union" doctrine as applied in cases such as *McKenna* v. *Washington Metropolitan Area Transit Authority* (D.C. Cir. 1987).[12]

In *McKenna*, the plaintiff sued for wrongful death on the basis of the Federal Employers' Liability Act (FELA) after her husband (an employee of WMATA) was killed in an accident while on the job. The Court of Appeals for the D.C. Circuit ruled that FELA was unavailable to her because the WMATA Compact has its own liability scheme and specifically provides (in sec. 77 of the Compact) that its transit services "shall [...] be exempt from all rules, regulation and orders of [...]

The interstate compact is the one ɔol through which the States as States can directly initiatite changes to federal statutory law.

the United States otherwise applicable to such transit[....]" The court also pointed to sec. 5 of the Compact, which provides that "the applicability of the laws of the United States, and the rules, regulations, and order promulgated thereunder, relating to or affecting transportation under the Compact ... is suspended, except as otherwise specified in the Compact, to the extent that such laws, rules regulations and orders are inconsistent with or in duplication of the provisions of the Compact."

Such compact provisions, and court decisions confirming them, have not drawn a great deal of attention, but they suggest that interstate compacts have enormous unexplored potential to shape the contours of federal power and of federalism. As one commentator noted (proposing a Pacific States environmental regulatory compact after the Exxon Valdez spill in 1989), "the states have never used an interstate compact explicitly to circumvent existing federal regulations. There does not seem to be any obstacle, however to using the interstate compact in this manner."[13]

One treatise notes the evolving uses of interstate compacts and the potential for further expansion:

> Today, interstate compacts govern a wide variety of issue areas, ranging from health, education, taxation and transportation to corrections, child welfare, energy, and the environment to name just a few[....] The substantive breadth of these initiatives clearly demonstrates that the interstate compact mechanism may be readily adapted for use in almost any field. The possibilities are truly limitless, and as recent developments suggest, the range of subjects covered by such agreements is likely to continue growing in the years to come.[14]

> One interesting possibility is that, because Congress may consent in advance to a compact, it may perhaps delegate the equivalent of administrative rulemaking authority to any regulatory body established by the compact. Thus, in the abstract, the interstate compact has as much potential as a "policymaking" device as the regulatory agencies of the federal government.

Congressional consent and presentment.

Although no court has so held, a strong argument can be made that presentment is required for congressional consent. As an initial matter, the text of the Compact Clause (Art. I, Section 10) requires only the "consent" of Congress, and makes no reference to the President. Moreover, as noted in Cuyler, the Supreme Court's cases establish that "Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined." And if Congress can consent impliedly, through mere aquiescence, then a credible argument could be made that Congress may also consent by means of a form intermediate between express legislation and implied acquiescence, such as a concurrent resolution expressing consent, without the need for presentment to the President.

However, as a matter of historical practice, in virtually every case, express congressional consent has taken the form of an act of Congress, signed by the President. Both the second and third clauses of Art. I, Section 7 (Presentment) of the Constitution provide a strong basis for arguing that the President's signature is required for congressional consent.[16] Indeed, President Franklin Roosevelt vetoed at least two resolutions of congressional consent presented to him for signature: one, related to fisheries, in 1939, and another, the Republican River Compact (later adopted in modified form) in 1942. On the basis of these two examples, one commentator writes, "[w]hen congress gives its consent to a compact by an act or joint resolution, it is subject to Presidential veto."[17] No Court has ever so held, and the Compact Clause is silent on the issue, but as one comentator urges, "[u]sage has brought the President into the compact process."[18]

If it were litigated, the matter would be largely one of first impression for the federal courts, because no interstate compact has ever been challenged for insufficient congressional consent on the grounds that the claimed consent lacked the signature of the President.

Even assuming that presentment to the President is in fact required, however, the interstate compact is a powerful device for shaping the balance of state and federal power. If it were adopted by a number of States and consented to by Congress, a President would face perilous challenges refusing to allow an interstate compact to go into effect. And a federalized compact (whatever the form of consent) has full force of federal law. It is the one tool through which the States as States can directly initiate changes to federal law.

Withdrawal of congressional consent; legislative modification.
Subsequent legislation can modify or withdraw congressional consent. In cases where the compact impinges on preempted federal regulatory area, and therefore required congressional consent to start with, the operative federal law can subsequently be modified by Congress.

Technical and Tactical Considerations

Several observations bear keeping in mind.

- Congressional consent can take a variety of forms. Congress can consent to an existing compact (after-the-fact) either through resolution or legislation. Courts have held that it can consent to a compact in advance, and its consent can be inferred from its acquiescence to a compact, as occurred in the classic case of *Virginia* v. *Tennessee* (1893).[19] The deference courts have shown to clear statements of congressional consent suggests a flexibility that may have significant unexploited potential.

- Congressional consent can be conditional and limited in any way Congress sees fit. In cases where this is a concern, the compact can expressly provide that it will go into effect only when Congress consents unconditionally.

- Congressional consent can also delegate wide powers to the compact, including the power to change the terms of the compact subsequently. The Washington Metropolitan Area Transit Regulation Compact provides: "This Compact may be amended from time to time without the prior consent or approval of the Congress of the United States and any amendment shall be effective unless, within one year, the Congress disapproves that amendment." If Congress had consented to that provision of the compact, the compact would have allowed subsequent state legislative action to change federal law *without further congressional action.*[20] Critics will charge an impermissible delegation of legislative authority—but interstate compacts have at least as much latitude in this respect as federal regulatory agencies, which routinely set rules without violating the doctrine of non-delegation.

- Interstate compacts have been launched and adopted in a variety of ways. Here are some examples:

  - *Port Authority of NY/NJ*: The governor of each state appointed three commissioners each to a commission to study the question of regional mobility and commerce. The commissioners reported back several years later with a draft compact. The compact was quickly ratified by the States and approved by Congress.

  - *Interstate Compact on the Placement of Children*: New York's Joint Legislative Committee on Interstate Cooperation studied the question at length. Eventually it proposed a draft, and the draft was quickly passed by 12 legislatures.

  - *Emergency Management Assistance Compact*: The Southern Governors' Association endorsed the need for a compact to facilitate mutual disaster assistance among states facing hurricanes and other natural disasters. The SGA established a working group which took about a year to propose a draft compact. The plan was signed by SGA members, who began presenting it to their legislatures.

  - *National Crime Prevention and Privacy Compact*: The NCPPC was formed to facilitate criminal backgrounds checks across borders. The proposal took shape over 15 years under the auspices of a national umbrella organization, and it was finally formalized in coordination with the FBI. Congress endorsed it, and it then passed in the States.

Conclusion: Interstate Compacts as "Shields" for the States

One of the founding pillars of our Constitution is the idea of dual sovereignty—the supremacy of the federal government as to issues of national concern, and the primacy of the States as to matters of state and local concern. But as the national economy has developed and become more integrated, and as communities have grown into thriving metropolitan areas

that spill across state lines, the federal government has steadily expanded in scope and power, to a point that today calls into question the very idea of federalism. With the loss of many of the meaningful constraints on the power of the federal government, the original distinction between a federal government whose powers are "few and definite" and state governments whose powers are "numerous and indefinite" (as James Madison put the matter in Federalist No. 45) has been substantially diminshed. Hence, one result of the expansion of the federal government has been to blur the distinction between national issues and local ones, which in has in turn facilitated the further expansion of federal power.

Interstate compacts have great potential to help reestablish the crucial boundary of dual sovereignty—if not just where the Framers intended, then at least enough to restore a meaningful separation between national matters and local ones, and meaningful limits on federal power. The fact that congressional consent gives the interstate compact the status of federal law means that, in effect, the federal government would be consenting to carve out—from the scope of its own ever-expanding powers—an area within which the States can retain substantial authority. In this way, "compacts can effectively preempt federal interference into matters that are traditionally within the purview of states but that have regional or national implications."[21]

One promising avenue may be to conceive of a compact for a particular area of legislation—say health care—and provide for a "thin" set of reciprocal legislative provisions (the compact) which would include a clause to the effect that "the operation of federal laws not consistent with state laws and regulations adopted pursuant to this compact will be suspended." The compact would provide that within certain parameters the States would be free to legislate as they chose. Such a compact would function as a "thin shield compact" to carve out an area of regulation from the power of the federal government, and leave States free to regulate according to their preferences under the umbrella. Such a compact would require congressional consent, which would then give it the status of federal law.

Used in this way, interstate compacts can help clarify and strengthen the limitations on the federal government's enumerated powers. They can thereby restore a meaningful distinction between matters of national concern and matters of local concern—the essence of federalism in our Constitution. ★

Endnotes

[1] J. Story, Commentaries on the Constitution of the United States § 1403, p. 264 (T. Cooley ed. 1873).

[2] Caroline Broun, et al., The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide., pp. 12 and passim \merican Bar Association 2007).

Broun, at 15.

[4] Broun, at 20, citing Doe v. Ward, 124 F.Supp.2d 900, 914. (W.D. Pa. 2000), citing McComb v. Wambauch, 934 F.2d 474, 479 (3d Cir. 1991).

[5] Just as, for individuals, certain constitutional rights—e.g., freedom from slavery—cannot be waived.

[6] Jefferson Branch Bank v. Skelly, 66 U.S. 436 (1862).

[7] Jill Elaine Hasday, "Interstate Compacts in a Democratic Society: The Problem of Permanency," 49 F.a. L. Rev. 1 (January 1997). The author notes:

> Even if compacts are the product of deliberative, collective self-determination [...] they severely hamper the people's ability to continue to guide their own fate by strictly limiting a party state's power to respond to changing preferences and circumstances. At the heart of the meaning of compacts, this tension has gone essentially unexplored by compact writers, who instead expound on the advantages of finality and hail compacts as augmenting the voice of the citizenry as they empower the states.

Id. at 3.

[8] 449 U.S. 433, 440 (1981).

[9] 4 U.S.C. § 112(a).

[10] Broun, at 41.

[11] 54 U.S. 518, 566.

[12] 829 F.2d 186.

[13] Marlissa S. Briggett, "State Supremacy in the Federal Realm: The Interstate Compact", 18 B.C. Envtl. Aff. L. Rev. 751, 765 (1991).

[14] Broun, at 180.

[15] 449 U.S. at 441, citing Virginia v. Tennessee, 148 U.S. 503 (1893) (where Congress, for judicial administration and taxing purposes, demarcated the border of districts adjacent to the boundary agreed in the compact as if that was the official boundary for all purposes, it effectively consents to the compact for purposes of the Compact Clause).

[16] The full text of Art. I, Section 7 is:

> All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.
>
> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.
>
> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

[17] Joseph F. Zimmermann, Interstate Relations: The Neglected Dimension of Federalism 39 (1996).

[18] Frederick L. Zimmerman, The Law and Use of Interstate Compacts 24 (1961). See also, Frederick L. Zimmermann & Mitchell Wendell, The Law and Use of Interstate Compacts 16-17 (1976) ("Congressional consent to interstate compacts may be granted by an act of Congress or a joint resolution setting out the compact's terms.") (cited in Note, "Charting No Man's Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts", 111 Harv. L. Rev. 1991, 1993-94 (1998) and Kevin J. Heron, "The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements", 60 St. John's L. Rev. 1, 16 (1985)); and Frederick L. Zimmermann & Mitchell Wendell, The Interstate Compact Since 1925, at 94 (1951). ("The Compact Clause itself requires only the consent of Congress, but 'settled usage' has granted the President veto power over consent").

[19] 148 U.S. 503

[20] Broun, at 56.

[21] Broun, at 27.

About the Authors

Ted Cruz served as Solicitor General for the State of Texas—the chief appellate lawyer for the State—from 2003 to2008. He was the first Hispanic Solicitor General in Texas, and when appointed, was the youngest Solicitor General in the United States. Ted has authored more than 80 U. S. Supreme Court briefs and presented 38 oral arguments, including eight before the U.S. Supreme Court. He has been named by Texas Lawyer magazine as one of the "25 Greatest Texas Lawyers of the Past Quarter Century," by American Lawyer magazine as one of the "50 Best Litigators under 45 in America," and by National Law Journal as one of the "50 Most Influential Minority Lawyers in America." A graduate of Princeton University and Harvard Law School, Ted previously served as a law clerk to Chief Justice William H. Rehnquist on the U.S. Supreme Court; as Domestic Policy Advisor to President George W. Bush on the 2000 Bush-Cheney Campaign; and as Associate Deputy Attorney General at the U.S. Department of Justice.

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Mario began his career in corporate finance law. Since 2003, he has focused on public policy, dividing his time between government service and research and writing at prominent policy institutes. He served in the Pentagon as a special assistant to the Under Secretary of Defense for Policy, and on Capitol Hill as counsel for foreign and defense affairs to the U.S. Senate Republican Policy Committee. Mario has also worked as a state policy advisor for Senator Kay Bailey Hutchison.

Mario has written extensively for national and international publications, including features for National Review and The Weekly Standard, and op-eds in The Wall Street Journal. He has appeared on The Glenn Beck Show, CNN International, BBC Television, Radio America, and more.

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HEALTH POLICY prescriptions

Blue-Sky Thinking on Health Reform: An Interstate Compact for Health Insurance

By John R. Graham

Medicare cuts, federal control of medical practice, reduced incentives to invest in medical innovation, and general economic sluggishness; such are the wages of Obamacare, which also conscripts the states to do much of its dirty work. It dramatically expands Medicaid, such that 16 million to 18 million Americans will become dependent on this welfare program. State Medicaid programs sentence low-income Americans to worse access to medical care than if they had private health insurance.[1] Obamacare further encourages states to institute so-called "exchanges" that will limit residents' choice of health insurance to policies determined by politicians and bureaucrats. These exchanges will be significantly more expensive than advertised by the Administration.[2]

Last November's elections provided clear evidence that the majority of people reject Obamacare.[3] Many state offices were won by candidates who oppose the federal takeover of access to medical care. As described in a previous publication, the states, if they haven't done so already, can launch a number of initiatives to help deconstruct Obamacare.[4] Further, a number of important reforms that lie unequivocally within states' sovereignty have little or nothing to do with Obamacare.

Medical-malpractice reform, product-liability reform, increasing the scope of practice of allied health professionals, and improving choice and competition amongst hospitals by relieving or repealing Certificate-of-Need (CON) laws, are some of the changes that states should advance notwithstanding the death throes of Obamacare over the next two years. Indeed, November's electoral wave might

Key Points:

- Health insurance is the only line of insurance regulated by the federal government, but federal control has created and deepened the health crisis.
- Obamacare attempts to conscript states to do the dirty work of limiting people's choice of health benefits.
- States have ensured portability and competition in other lines of insurance through an "interstate compact," a treaty of sorts between the states defined by the U.S. Constitution.
- Including health insurance in an interstate compact would effectively demonstrate that states are ready, willing, and able to regulate portable, individually owned, health insurance.

provide unprecedented opportunities to satisfy pent-up demand for such reforms in many states. For governors and legislators seeking to prioritize their efforts, the *U.S. Index of Health Ownership* indicates which reforms are most critical in each state.[5]

But wait: There's more! States can also explore ways of demonstrating that *there is no need for the federal government to be in the business of health insurance at all.* One tool is the "interstate compact." A compact is treaty of sorts between two or more states, by which each state voluntarily gives up sovereignty to the compact. The U.S. Constitution (Article 1, section 10) addresses states' power to enter compacts: "No State shall, without the consent of Congress. . . enter into any Agreement or Compact with another State. . . "

Ted Cruz and Mario Loyola, lawyers at the Texas Public Policy Foundation, have recently breathed new life into the idea that states can use compacts to roll back federal overreach. When Congress consents to them, interstate compacts actually become federal law, according to Cruz and Loyola. However, courts have also held that consent can be inferred from Congress' acquiescence to a compact. Because they bind the states, courts have found that interstate compacts trump conflicting statutes passed by the member states, as long as the states belong to the compact in question.[6]

One of the goals of effective health reform is health insurance that is owned by the individual and portable from job to job and state to state. For more than half a century, Congress has failed to correct the flaw in the Internal Revenue Code that discriminates against such health insurance, and given employers monopoly control of our health dollars. Although unified in opposition to Obamacare, Congressional Republicans have never exerted a significant effort to fix this deeper problem. Indeed, they *reinforced* the status quo in 1996 when they collaborated with President Clinton and Democrats in Congress to pass the Health Insurance Portability and Accountability Act (HIPAA), the federal government's first intrusion into the regulation of private health insurance.[7]

Facing decades of congressional failure, it is high time for states to seize the initiative, and begin discussing an interstate compact for health insurance. Although the Supreme Court decided (in 1944) that insurance is subject to congressional authority under the Constitution's interstate commerce clause, Congress responded by declining to exercise this authority and leaving insurance regulation to the states. Over the decades, states have managed successfully to deal with crises in all lines of insurance.[8] The federal government's abandonment of the field has been successful: A presidential candidate campaigning on solving a national "crisis" in auto insurance would be unimaginable, even ridiculous. Unfortunately, Congressional control of health insurance has only deepened the health crisis.

Nevertheless, an effective interstate compact for health insurance faces a couple of obstacles. First, while there are examples of compacts passed without explicit Congressional approval, none is established deliberately to provoke a hostile response from the federal government. Such would be the outcome of an interstate compact attempted while Obamacare is still the law of the land. Therefore, nobody should be supremely confident that federal courts would let such a compact survive a challenge by the Administration.[9]

A second obstacle could arise from the complexity of building a new compact for a single line of insurance from scratch. Indeed, doing so reinforces the flawed notion that health insurance should be governed differently than other lines of insurance. Health insurance is already treated so differently than other lines of insurance that it is not really "insurance" at all. True insurance is designed to indemnify the insured financially for rare, unpredictable, catastrophically expensive events. Instead, federal laws motivate us to buy pre-paid health plans that launder almost all our health dollars through insurers' claims-processing bureaucracies, increasing administrative costs but adding no value.

This second obstacle might be overcome by adding health insurance to the interstate compact that *already exists* for other lines of insurance: The Interstate Insurance Product Regulation Commission (IIPRC). According to the IIPRC:

> The Compact enhances the efficiency and effectiveness of the way insurance products are filed, reviewed and approved allowing consumers to have faster access to competitive insurance products in an ever-changing global marketplace. The Compact promotes uniformity through application of national product standards embedded with strong consumer protections.
>
> The Compact established a multi-state public entity, the Interstate Insurance Product Regulation Commission (IIPRC) which serves as an instrumentality of the Member States. The IIPRC serves as a central point of electronic filing for certain insurance products, including life insurance, annuities, disability income and long-term care insurance to develop uniform product standards, affording a high level of protection to purchasers of asset protection insurance products.[10]

The advantages of enlarging this compact to include health insurance are easily enumerated. First, it exists. The IIPRC enjoys solidly written legislative language; and committees for audit, finance, product standards, rulemaking, and other critical responsibilities for a successful compact. Insurers file their forms and reports with the compact, after which they can conduct business in all the compacting states without further fuss or bother. Second, all of this information is freely available at its website, which bears the convenient URL of www.insurancecompact.org.

Second, state legislators and other interested parties can quickly educate themselves by contacting officials employed by the compact who can assist and advise. Third, to the degree that the IIPRC would be *unable* to enlarge itself to accommodate health insurance, this would serve further to expose the absurdity of federal laws governing health insurance. Such exposure would increase popular demand for health reform that reduces, rather than increases, federal power.

Benign forces conspired to drive states to enter into an interstate insurance compact for a simple reason: Most insurance is the property of individuals, not our employers. People need policies they can keep when they move from state to state. Nobody who buys life insurance in Florida, and then moves to California a few years later, worries for one minute that he will lose his coverage because he has left the state in which he bought the policy. Life insurers would not sell many policies if that were to happen. The IIPRC facilitates interstate portability.

Enlarging the compact would demonstrate that states are ready, willing, and able to regulate individually owned and portable health insurance. Rather than wasting scarce legislative time trying to find the least harmful way of "implementing" Obamacare, state politicians should invest in reforms that will survive long after Obamacare is relegated to history's dustbin. Including health insurance in an interstate compact would be such a reform.

ENDNOTES

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6 Ted Cruz and Mario Loyola, *Shield of Federalism: Interstate Compacts in Our Constitution* (Austin, TX: Texas Public Policy Foundation, December 2010).

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8 John R. Graham, "Popular But Pointless: Subjecting Health Insurers to Federal Antitrust Laws Would Avoid, Not Achieve, Reform," *Health Policy Prescriptions*, vol. 8, no. 2 (February 2010).

9 Robert Moffit (Heritage Foundation), presentation to the American Legislative Exchange Council's States and Nations Policy Summit (Washington, DC, December 3, 2010).

10 IIPRC, *About the IIPRC* (Washington, DC: Interstate Insurance Product Regulation Commission, 2010). Available at http://www.insurancecompact.org/about.htm as of December 9.