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Ernest C. Carman

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SHOULD THE STATES BE PERMITTED TO MAKE COMPACTS WITHOUT THE CONSENT OF CONGRESS?

ERNEST C. CARMAN

There has come into being since the Constitution of the United States was adopted a decided enlargement of the twilight zone between affairs of national interest and those entirely the concern of individual States; and this zone may now be governed most efficiently by cooperative action of the States directly interested. But the constitution provides that no State shall, without the consent of Congress, enter into any agreement or compact with another State. This provision had its genesis in the suspicion and distrust of each other inherent among the thirteen States when the Constitution was formulated; and particularly, in the fear of alliance between the larger states to obtain control of the new Federal Government or otherwise to destroy the equality which the smaller States sought to make secure. That these reasons for requiring the consent of Congress—including the Senate where each State has the same voting power—to the making of compacts between the States have now disappeared will be denied by none.

And so it follows that the power of the States to enter into agreements or compacts relating to matters of less than national concern, without the consent of Congress, should now be restored. The word “restored” is advisedly used because when the States achieved their independence, they acquired the sum total of all sovereign power to make treaties, compacts or agreements among themselves or with other nations; and they used that sovereign power freely during the few intervening years before the Constitution was adopted, and the power became subject to the consent of Congress. To be sure, the restoration of such treaty making power among the States at this time should be made subject to the supremacy of the Federal Constitution and valid laws enacted by Congress. But this would still leave such compacts or agreements clothed with as much continuity as inheres in treaties made between the United States and foreign powers; for an Act of Congress inconsistent with any prior treaty is a denunciation thereof and supersedes the

\(^1\)U. S. Const., Art. 1, § 9.
\(^2\)Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657 at page 720 et seq. (1838).
\(^3\)Delaware River treaty of 1783 between Pennsylvania and New Jersey, discussed in Rundle v. Delaware & Raritan Canal Co., 14 Howard (U. S.) 80 (1852); Chesapeake Bay treaty of 1785 between Maryland and Virginia discussed in Middletauk v. Le Compte, 140 Md. 621 (1926); treaty of Hartford (1786) between Massachusetts and New York discussed in Massachusetts v. New York, 271 U. S. 65 (1925); treaty of Beaufort between South Carolina and Georgia discussed in South Carolina v. Georgia, 93 U. S. 4 (1876). These treaties are still in force except as modified by the Federal Constitution. Wharton v. Wise, 153 U. S. 155 (1894).
treaty. The same power in Congress to enact laws overriding all conflicting provisions of interstate compacts is ample to protect national interests against any detrimental compacts that might be made between the States; and surely no greater safeguard is needed. The Constitution and laws of the United States "made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States" would still be "the supreme law of the land"—anything in such compacts between the States to the contrary notwithstanding.

Under the Constitution as now written, the cart is placed before the horse so far as compacts between the States are involved. The consent of Congress must be had before any such compact can become valid, no matter how localized its operation or effect may be. California cannot make an enforceable agreement with Arizona for cooperative action at joint expense to eradicate a citrus fruit pest without asking the consent of the Congressmen and Senators from Maine in Congress assembled, although obviously they have not the slightest interest in such matter; and the procurement of their consent, and of like consent of the Congressmen and Senators from many other States, entails delay that may be fatal to the accomplishment of the object sought and, in any event, imposes upon Congress a needless legislative burden. The same observation applies with equal force to the making of a compact between Louisiana and Arkansas to drain a mosquito-breeding swamp that extends across their common boundary line and substitute in its place a healthful farm area; to a compact between Minnesota and Wisconsin to prevent disastrous forest fires, or for uniformity in the inspection and sanitation laws of the two States affecting dairy products marketed alike from both States in the Twin Cities; to a compact between Connecticut and Massachusetts for equitable diversion of the waters of the Connecticut River for domestic use or for the joint construction and maintenance of public works for the same purpose; to a compact between Montana, Wyoming, and Idaho for conservation of their migratory bird and wild game life; to a compact between New York and New Jersey for continuity of public highway construction and maintenance at a cost apportioned between them on the basis of beneficial use and enjoyment instead of geographical location of their common boundary line; to a compact between Iowa and Missouri for uniform regulation of motor vehicle traffic in adjacent areas of the two States; and to other compacts for a variety of purposes appropriate to the better government of vast numbers of people living along the two sides of artificial State lines but with no natural or logical division of their community life and interests.

Again, if there now be removed the outmoded constitutional obstruction to all interstate agreements, it is not difficult to envision the making of many beneficial compacts which might be aptly described as regional in an industrial or economic sense, even when not so geographically. Of such nature would be compacts for conservation of natural resources common to more than one but not all of the States; and particularly resources of a fugitive nature such as oil and gas. And similarly as to uniformity in manufacturing production localized in a few States, such as the textile industries of New England and the old South. Or a planned economy in agricultural production of the cotton-growing or wheat-producing States. And so on.

Nor would any lack of protection of the general public throughout the United States result from such interstate compacts. Congress or the Supreme Court would promptly lay a restraining hand upon any compacts or agreements between States unduly tending to foster monopoly or increase costs to the consuming public of the United States as a whole, or retard the general flow of interstate commerce, or otherwise operate to the public detriment.

The desirability of freedom among the States to make compacts in respect to matters of local concern has been recognized by the Supreme Court, and the doubtful doctrine of implied consent by Congress has been judicially invoked to give them validity. Similarly, the States themselves, without the consent of Congress, have endeavored in some cases to get the same result by reciprocal legislation which, however, the Supreme Court apparently construes as mere legislative declarations—not compacts of binding force.


Perhaps the most notable example of reciprocal legislation between the States is to be found in the various Inheritance Tax Acts exempting intangible personal property of non-residents if a like provision is made in the State where such non-residents reside for the benefit, among others, of residents of the taxing State. California is typical. Chapter 358 Statutes and Amendments to the Codes of California, 1935, Section 6, paragraph 7, at page 1275.

But for an entirely different type of reciprocal legislation, see Chapter 94, Session Laws of Minnesota, 1927, page 148 (drafted by the writer of this article, but of doubtful constitutionality) entitled:

"An act reciprocally permitting citizens of adjoining States and of adjoining Canadian provinces to operate their motor vehicles tax free upon the streets and highways of this State under certain conditions prescribed by this act, if and when like privileges in such adjoining states and provinces are extended to Minnesota motor vehicle owners similarly situated; also creating offenses, fixing penalties and civil remedies and prescribing rules of evidence."

If constitutional, this reciprocal legislation is now wholly or partly effective under responsive legislation by all neighboring States except Manitoba. Chapter 444, Laws of Wisconsin, 1931; Sections 4865 and 4866, Code of Iowa, 1931; Chapter 183 (Section 7) Session Laws of South Dakota, 1931; Chapters 193 and 194, Laws of North Dakota, 1935 (reciprocity not mentioned); Chapter 54 (Section 19) Statutes of Ontario, Canada, 1931 and Chapter 20, ibid., 1933; and in principle, but not extended across the international border, in Chapter 19 (Section 7, paragraph 5) Laws of Manitoba, 1930.

or effect. Hence reciprocal tax laws, reciprocal criminal laws, and their enforcement, and even matters of local government adaptable to joint or concurrent action between neighboring counties on opposite sides of State lines could be made more practical by interstate compacts without the consent of Congress.

Here, as elsewhere in the Constitution, restrictions upon State power and limitations in national power the reasons for which have ceased to exist, should be abolished and revised restrictions or grants substituted in their place.

The last paragraph of Section 10 in Article I of the Constitution should now be amended to read as follows:

"No state shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with a foreign power, or engage in war unless actually invaded or in such imminent danger as will not admit of delay. All compacts and agreements between the States shall be subordinate to this Constitution and to all conflicting or inconsistent laws of Congress at any time enacted pursuant thereto; and no such compact shall cover any subject of national concern."

But when the power of the States to make such compacts without the consent of Congress is thus restored then, as a logical corollary thereto, the original jurisdiction of the Supreme Court of the United States should be extended to include, not merely the decision of legal cases or controversies between the States arising from such compacts, but to declaratory and arbitral and advisory relief as well as the strictly judicial relief now to be had; all of these should be available not only to the signatories to such compacts but also to the United States, at any time, and to any State claiming to have an interest sufficient to warrant the Supreme Court in permitting intervention by such State.

This would afford a fitting substitute for the loss by the States under the Constitution of the original sovereign power, in case of disagreement, to arbitrate, or to exert economic pressure, or to fight. It would relieve States, unable to agree upon their respective rights under any compact from the predicament of also being unable to do anything about it until a wrong is committed or immediately threatened by one of them. A declaration of rights before injury is done, and as a guide for doing the proper thing, is

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9Very recent reciprocal legislation which might be either superseded or supplemented by interstate compacts, if the same could be made without the consent of Congress, is to be found in the New York Insurance Law (Sections 406a-406h) relating to liquidation of interstate insurers which is discussed in (1937) 37 Col. L. Rev. 1031.

preferable in sovereign relations to a leap in the dark followed by a judgment setting forth that it was either all right or all wrong. This is particularly so when projects are to be undertaken involving large expenditures of public money.

The complete disposal of a controversy arising from any such compact through one submission to the Supreme Court would be less burdensome and much less dilatory than a long series of cases through the years to get the same results, piecemeal and at random. It would also be more businesslike, and less inclined to keep alive the rancor and ill-will that thrives in an endless controversy among sovereigns the same as among individuals.

Accordingly, Section 2 of Article III of the Constitution should be amended by adding at the end thereof this further provision:

"The supreme court shall have original and exclusive jurisdiction in all matters or controversies arising from compacts or agreements between the States; including arbitral and declaratory relief and relief by advisory interpretation, which it shall be the duty of the court always to grant upon the petition of any interested State or of the United States."

By such amendments the balance between State and Federal power may be revised and set most definitely upon the principles of locality and generality which Abraham Lincoln conceived to be the guiding star for proper distribution of sovereignty between the States and the United States.

And in this way the widely separated States of the far flung American Union will be permitted to adapt themselves to regional arrangements with their neighboring States, or to coordination of industrial or agricultural or other pursuits with more distant States having a common interest therein, but of such a nature that neither the remaining States nor the United States need have any concern therewith.

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See Lincoln's message to a special session of Congress on July 4, 1861. Messages and Papers of the Presidents, Volume VII, page 3229, published by Bureau of National Literature, Inc., New York. In that message President Lincoln said:

"This relative matter of national power and State rights, as a principle, is no other than the principle of generality and locality. Whatever concerns the whole should be confided to the whole—to the General Government—while whatever concerns only the State should be left exclusively to the State. This is all there is of original principle about it."

The late Chief Justice William Howard Taft is reported to have said that no man ever lived who would have made an abler Chief Justice of the United States Supreme Court than Abraham Lincoln. See Journal of American Bar Association, March, 1937, at page 171.