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The Health Care Compact: A Historic Opportunity to Restore Self-Government and Affordable Health Care

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Introduction: Why the Health Care Compact?

As the U.S. Supreme Court recently reaffirmed,[1] our Constitution was structured on the principle of federalism in order to protect liberty. The diffusion of power among multiple levels of government was designed to protect individuals and their communities from the accumulation of central, arbitrary power. Under the Constitution as ratified, the federal government would be supreme as to matters of national concern, while the states would retain their portion of sovereignty as to matters of state and local concern.

Unfortunately, in the last 100 years the federal government has expanded relentlessly, eroding the constitutional limits on federal power, and diminishing both responsiveness to local preferences and the accountability of government at all levels. Many Americans sense intuitively that we are well along the road to the very accumulation of central power that Patrick Henry warned of in the Virginia ratification debates.

Nowhere is the erosion of constitutional constraints on federal government power more evident than in the health care arena. The Framers consistently assured their fellow Americans that health laws would always remain the prerogative of the states, outside federal control. Well into the 20th century, the Supreme Court retained this understanding. Yet in the last 70 years, the federal government has progressively usurped state authority to regulate health care, creating enormous problems at every step. The Patient Protection and Affordable Care Act ("PPACA") is just the latest attempt to solve the problems created by federal intervention in health care through still more federal intervention.

In health care policy, the federal government has all but eliminated local choice and imposed a health care model that is unsustainable and fated to bankrupt the nation if not radically reformed. Repealing PPACA will make things better, but will only delay the day of reckoning. Only returning health care regulation to the states, along with the tax revenues the federal government sucks away to fund its misguided programs, can ultimately lead the way to accessible and affordable health care in America.

One promising tool that has enormous potential to retrace the vanishing boundary between state and federal authority is the interstate compact. With the consent of Congress, interstate compacts can shield whole areas of regulation from federal intrusion, allowing states and local communities to reassert their proper role as the primary instruments of self-government.

Adopted in four states, with more on the way, the Health Care Compact (HCC) will give each state the opportunity to chart its own path in the health care arena, without having to worry about giving up "federal matching funds" that the states have already paid for. The HCC compact will give states a formal mechanism for working together to roll back federal overreach in health care, and reassert state and local control at the right time and in their own way.

The HCC attempts to protect states against both major kinds of federal intervention in health care. First, it allows states to suspend the operation of federal regulations that apply directly to individuals (such as the individual mandate in PPACA). Second, it allows states to defeat the coercive conditions that the federal government attaches to federal funds (such as Medicaid) in order to bludgeon states into compliance with federal preferences.

The Medicaid program is based on an idea of federal-state cooperation that seems appealing enough at first glance. But because the federal government first taxes revenue away from the states, and then returns it to them only on condition that they comply with federal preferences, conditional grant programs such as Medicaid pose a grave danger of turning the states into mere instrumentalities of federal policy. State legislators are held accountable to their constituents for policies they would not freely choose, simply because they cannot afford to lose the general revenue of federal matching funds. The HCC helps to defeat the coercion that is inherent in federal conditional grants such as Medicaid, by making sure that the state's Medicaid dollars stay within the state.

The HCC will be in effect as soon as Congressional consent is effective. A draft resolution of congressional consent is cur-

continued

rently being coordinated. The following discussion further discusses the history and legal aspects of interstate compacts; the provisions of the HCC; and addresses some of the concerns that have been expressed.

Interstate Compacts: History and Legal Operation

In their most basic form, interstate compacts are simply contractual agreements among state governments for the purpose of addressing issues of common interest. They were common in the Colonial period and led to the Articles of Confederation and to the Constitution itself.

In the last 200 years, hundreds of compacts have been entered into. Compacts currently in effect regulate criminal background checks, environmental standards, education benefits, regional transit systems and ports, and a wide variety of other subjects.

The Constitution specifically provides for interstate compacts. Article I, sec. 10 provides, "No State shall, without the Consent of Congress … enter into any Agreement or Compact with another State." This provision has been very narrowly construed by the Supreme Court, which has required Congressional consent only when necessary "in order to check any infringement of the rights of the national government."[2]

Generally where the contact touches on an area of federal authority, congressional consent is required. Congressional consent elevates the substance of the compact to the status of federal law, even to the extent of superseding any pre-existing federal law that might be in conflict with the compact. Of the 200 currently in force, about half have been "federalized" with congressional consent. Because the Constitution's Presentment Clause requires that any resolution or act of Congress must be presented to the President for his signature "before it shall become a law," resolutions of congressional consent have virtually always been presented to the president for his signature.

Impact on state law. 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."[3] Interstate compacts have been held to bind all future state governments, and under the Supremacy Clause, can even trump state constitutions. However, compacts typically provide for withdrawal and dissolution.

Federalism and interstate compacts with congressional consent. From the point of view of federalism the more 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 which require congressional consent and those which do not. Courts are generally hesitant to put an interstate agreement within the Compact Clause (i.e., requires congressional consent) at all. Courts have 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.

Congressional consent transforms interstate compacts into federal law. In *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."[4] This is what makes interstate compacts so potentially powerful as a tool for protecting local self-government and the Constitution's limits on federal power. "When 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 state' intruding on its traditional domain*."[5]

Congressional consent transforms a compact into a "law of the Union," as Justice McLean put it in the seminal *Pennsylvania vs. Wheeling* (1852).[6] 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. Hence the importance of the "law of the Union" doctrine as applied in cases such as *McKenna vs. Washington Metropolitan Area Transit Authority (WMATA)* (D.C. Cir. 1987).[7]

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 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 have not drawn a great deal of attention, but they suggest the enormous potential that interstate compacts to return the scope of federal power back to a model that is compatible with the dual sovereignty of the states. As one liberal environmentalist put it (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."[8]

Summary of the Health Care Compact

The HCC includes several important provisions. Some operate simply as mutual obligations among the Member States, while others require the additional consent of Congress to be fully effective. Unlike most compacts, the HCC is not effective in any respect until Congress consents. The main provisions are the following:

- **Pledge:** Member States mutually agree to work together to pass the Compact, and to improve the health care in their respective states.

- **Legislative Power:** Declares that Member states have primary responsibility for regulating health care.

- **Suspension Clause:** Provides that in Member states, an act of the legislature can suspend such federal health care regulations as may conflict with local preferences. Federal and state health care laws remain in force until Member states enact regulations and trigger the suspension clause.

- **Funding:** Establishes that Member states will be substantially recompensed for federal health care program their residents pay into, when they opt out of the program. The yearly amount each Member state is entitled to is based on the amount the federal government spent on health care in that state in 2010, adjusted yearly for population and inflation, pro rata depending on what programs the state opts out of.

- **Interstate Health Care Advisory Commission:** Creates a purely advisory commission (no regulatory powers of its own) charged with researching and reporting on health care issues, and studying possible optimal solutions to problems facing the Member states.

Addressing Concerns with the HCC

Given the public's understandable lack of familiarity with interstate compacts, particularly as a tool of federalism, some have raised questions and concerns about the HCC.

- *The funding stream is pegged to population and inflation but not to health care inflation, so the funding stream will not keep pace with state needs.* As it is, many states received less than a dollar back for every dollar they pay in to health care. Furthermore fulfilling the conditions attached to federally-funded programs already faces states with an increasingly difficult fiscal situation. Even if the HCC's funding stream does not fully recompense states for what their citizens pay into federal programs they don't want, simply returning most of that money back to the states, and letting them chart their own way on health care, will leave them in an immeasurably better fiscal situation. Moreover, under the HCC, the federal government will face an increasing disincentive to continue taxing state residents for programs they don't want and would prefer to opt out of.

- *The HCC won't do anything about PPACA*. The HCC will allow states to pursue their own path on health care. Those who want to suspend the effect of PPACA will have a way to do so; those who want to unwind the whole federal intrusion into health care going back 70 years will be able to do so; those who want to try other more state-centered ideas will be able to.

- *The HCC could allow states to use federal funds to provide for taxpayer-funded abortions and health care for illegal aliens.* This is precisely the race-to-the-bottom argument that is used to justify stifling federal uniformity. Those who think local self-government should be curtailed because in some areas people will adopt policies that they would not agree with need to take a step back and ask themselves a more basic question: Do they agree with the principles of freedom and local self-government, or do they prefer to use the machinery of national government to impose their preferences on everyone, regardless what the Constitution says? The latter is the philosophy of liberal nationalists from the New Deal to Obama.

- *Because the HCC is a "governance reform," not a "health care reform," once the states have a right to the return of their federal health care dollars, they will have to design health care programs that meet the needs of senior and the poor who are currently served by Medicare and Medicaid.* It's the other way around. Once states use their rights under the HCC to come up with more effective alternatives to unsustainable federal programs, they will be able to use their share of federal funds to pay for those programs.

- *The HCC will allow states to impose a socialist health care model.* The HCC will allow states to respond to local preferences—that is the idea of liberty and local self-government that the Constitution was meant to enshrine. The 50 "laboratories of democracy" can then compete to see which solutions are best. Any socialist models will quickly show their catastrophic unsustainable results; while market-based, consumer driven programs will show their success, much as California has pursued ruinous policies while Texas has pursued favorable ones, for all the country to see. Those who believe in regulatory competition need to accept that some states will make the wrong choices; otherwise, they are taking up the liberal argument for national uniformity.

- *Because Congressional consent is required, the HCC still leaves the federal government in charge of health care decisions.* The idea of the HCC is to seek a consensual restoration of the limits on federal power. We expect Congress to recognize sooner or later that it cannot effectively govern every aspect of our lives. Federal health care programs are projected to bankrupt the federal government by the middle of this century. They are unsustainable. PPACA is unsustainable. It is only a matter of time before Congress recognizes that only states can fulfill the responsibility for effective self-government in the area of health care, and that only market principles can chart the way to affordable and accessible health care.

- *The HCC does not allow states to alter the federal tax bias in favor of employer-provided health insurance and against individual purchasers, because it only allows states to suspend "health care" laws.* The HCC's Suspension Clause allows states to suspend all federal laws "regarding Health Care;" this would include tax rules that explicitly affect the purchase of health insurance.

- *Congress would never consent to such a sweeping and undefined grant of opt-out authority to the states.* Congress's consent can be limited to assuage any concerns about the HCC's provisions that exceed what Congress is willing to consent to. Many resolutions of congressional consent to interstate compacts are similarly limited, allowing Congress to consent to a more strictly defined "portion" of the compact.

Conclusion

Across the country, our fellow citizens are increasingly united in demanding that we return to the founding principles of our Constitution. They can sense that the relentless expansion of the federal government into every area of our lives is incompatible with a Constitution based on local self-government, economic freedom, and shared sovereignty among state, federal, and local authorities.

They are right. The historical record—the proceedings of the Constitutional Convention in Philadelphia, the state ratification conventions, the Federalist Papers, the early cases of the Supreme Court, the letters and diaries of the Framers—these sources leave absolutely no doubt that health care was never meant to be regulated by the Federal government. Over and over again the Framers cited the regulation of health care as an example of an area of regulatory authority that would be reserved to the so-called "police power" of the states. In the case of *Gibbons vs. Ogden* (1824) the Supreme Court held that "inspection laws, quarantine laws, health laws of every description, as well as law for regulating the internal commerce of a State" were but a few examples "of that immense mass of legislation" not surrendered to the federal government. "No direct power over these objects is granted to Congress," the Court observed, "and, consequently; they remain subject to State legislation." ✯

[1] *Bond v. United States*, 548 U.S. __ (2011).

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

[3] Caroline Broun, et al, *The Evolving Use and Changing Role of Interstate Compacts: A Practitioner's Guide*, (American Bar Association, 2006) p. 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).

[4] 449 U.S. 433, 440 (1981).

[5] Broun, at 41.

[6] 54 U.S. 518, 566.

[7] 829 F.2d 186.

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

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