State-to-State Teamwork

Compacts as a tool of the game

As state governments increasingly face similar policy problems that rarely end at a state’s borders, the search for effective policy responses often does.

One weapon in the states’ arsenal is the interstate compact—an historic cooperative tool allowing states to work together to solve their mutual policy dilemmas while reinforcing the role of the states in tackling regional and national issues.

As states struggle with emerging policy issues such as prescription drug pricing, increased energy production and distribution, refined and updated tax systems and the refurbishment of an aging infrastructure, the interstate compact may well prove to be the answer to these and other policy questions.

The Nature of Interstate Compacts

Compacts are simply formal agreements between two or more states that bind the parties to the compacts’ provisions, just as a contract binds two or more parties in a business deal. As such, compacts are subject to the principles of contract law and are protected by the constitution’s prohibition against laws that impair the obligations of contracts.

That means that compacting states are bound to observe the terms of their agreements, even if those terms are inconsistent with other state laws. In short, compacts between states are somewhat like treaties between nations. Compacts have the force and effect of statutory law and take precedence over conflicting state laws, regardless of when those laws are enacted.

Unlike treaties, however, compacts are not dependent solely upon the good will of the parties. Once enacted, compacts may not be unilaterally renounced by a member state, except as provided by the compacts themselves. Moreover, Congress and the courts can compel compliance with the terms of interstate compacts. That’s why compacts are considered one of the most effective means of ensuring interstate cooperation.

History of Interstate Compacts

Compacts were seldom used until the 20th century. Between 1783 and 1920, states approved just 36 compacts, most of which were used to settle boundary disputes. But in the last 75 years, more than 150 compacts have been created, most since the end of World War II.

The purpose of compacts ranges from implementing common laws to exchanging information about similar problems. They apply to everything from conservation and
The resource management to civil defense, emergency management, law enforce-
ment, transportation, and taxes. Other compact subjects include education,
energy, mental health, workers compensation and low-level radioactive waste.

Some compacts authorize the establishment of multistate regulatory bodies.
The first and most famous of these is the New York-New Jersey Port
Authority, which arose from a 1921 compact between the two states. But
other agreements are simply intended to establish uniform regulations with-
out creating new agencies.

In recent years, compacts have grown in scope and number. Today, many are
designed for regional or national participation, whereas the compacts of
old were usually bi-state agreements.

Recent efforts include the Emergency Management Assistance Compact,
the Interstate Compact on Industrialized/Modular Buildings, Interstate
Insurance Receivership Compact, and several low-level radioactive waste
compacts, which were mandated by Congress.

Other examples of compact activity include the revision of existing interstate agree-
ments; updating agreements that maintain relevance, but which require a moderniza-
tion of their structures. Recent examples include the Interstate Compact for Adult
Offender Supervision, the interstate Compact for Juveniles, and the Interstate
Compact for the Placement of Children.

Creating Interstate Compacts

Compacts are essentially contracts between states. To be enforceable, they must sat-
sify the customary requirements for valid contracts, including the notions of offer
and acceptance.

An offer is made when one state, usually by statute, adopts the terms of a compact
requiring approval by one or more other states to become effective. Other states
accept the offer by adopting identical compact language. Once the required number
of states has adopted the pact, the “contract” among them is valid and becomes effect-
ive as provided. The only other potential requirement is congressional consent.

Congressional Consent

Article I, Section 10 of the U.S. Constitution provides in part that “no state shall,
without the consent of Congress, enter into any agreement or compact with an-
other state.” Historically, this clause generally meant all compacts must receive con-
gressional consent.

However, the purpose of this provision was not to inhibit the states’ ability to act in
concert with each other. In fact, by the time the Constitution was drafted, the states
were already accustomed to resolving disputes and addressing problems through
interstate compacts and agreements. The purpose of the compact clause was to pro-
tect the pre-eminence of the new national government by preventing the states from
infringing upon federal authority or altering the federal balance of power by compact.

Accordingly, the Supreme Court in 1893 in Virginia v. Tennessee, indicated that not all
compacts require Congressional approval. Today, it is well established that only those
compacts that affect a power delegated to the federal government or alter the polit-
ical balance within the federal system, require the consent of Congress.

For example, a river basin agreement between two or more states that might affect
the water rights of non-party states would surely require congressional approval.
Determining whether a compact affects federal powers is more difficult. Generally,
any compact that touches on an area of mutual state-federal concern, or threatens to
interfere with the doctrine of federal preemption, may be said to require congressional consent, such as the Driver License Compact.

By example, it is almost easier to identify agreements that do not require congressional consent. Included among these are compacts concerning matters in which state authority is clearly pre-eminent. Education is one such area.

Compacts designed to facilitate interstate communication or promote cooperative studies do not usually require congressional consent, but those that impose more substantive obligations often do.

Fortunately, the consent requirement is not particularly burdensome. Though usually satisfied by means of a congressional resolution granting the states the authority to create a compact, the Constitution specifies neither the means nor the timing of the required consent. Over the years, the Supreme Court has held that congressional consent may be expressed or implied and may be obtained either before or after a compact is enacted.

Congressional consent may also be conditional, limited, or temporary, and is always subject to modification or repeal, even if this right is not expressly reserved when the consent is initially given. Thus, whether a compact requires consent or not, and regardless of the form that consent may take, no compact is immune from future invalidation by an Act of Congress. Therefore, express congressional consent is sometimes considered desirable, even if it isn’t strictly required at the time the compact is created.

**Delegation of State Authority to a Joint Administrative Agency**

One of the axioms of modern government is the ability of a state legislature to delegate to an administrative body the power to make rules and decide particular cases. Upheld in 1951 by the U.S. Supreme Court in West Virginia v. Dyer, this delegation of authority extends to the creation of interstate commissions through the vehicle of an interstate compact.

Examples include the Interstate Compact for Adult Offender Supervision, the New York-New Jersey Port Authority and the Interstate Pest Control Compact—each creates and maintains an interstate commission capable of providing administrative oversight to its member states on compact related issues.

Modern compacts are a reinvigoration of our federalist system in which states may only be able to preserve their sovereign authority over interstate problems to the extent that they share their sovereignty and work together cooperatively through interstate compacts.

**Amending and Enforcing Compacts**

Once established, compacts can only be amended or terminated in accordance with the instruments themselves or by mutual consent of the members by adopting identical substantive language. In other words, amending compacts requires the same process that is used to create them unless the compacts themselves specify other mechanisms.

A violation of compact terms, i.e., a breach of contract, is subject to judicial remedy. Since compacts are agreements between states, the U.S. Supreme Court is the usual forum for the resolution of disputes between member states. However, compacts can, and frequently do, include provisions to resolve disputes through arbitration or other means.
Other Compact Components

Typical compact language might include any or all of the following: a statement of purpose; a list of goals and objectives; a description of functions, powers and duties; substantive regulations; provisions for an administrative structure or an independent agency; financial participation requirements, such as dues; enforcement and construction guidelines; and other provisions governing entry into force, amendments, severability, withdrawal and termination.

Timeframe Enacting Compacts

Compacts are not always complicated, but they may take time, especially if their subject matter is controversial. A study of 65 interstate compacts, conducted in the early 1960s, indicated that the average amount of time required to launch a new compact was almost 5 years. But that study was admittedly skewed by the unusually long time required for the approval of several compacts that dealt with controversial natural resource issues. In fact, the average time required to enact 19 compacts covering river management and water rights was almost 9 years.

More recently, however, interstate compacts have enjoyed great rapidity in their adoption. The Interstate Compact for Adult Offender Supervision was adopted by 35 states in just 30 months. Other recent compacts, including the new Interstate Insurance Product Regulation Compact are enjoying fast success, gaining quick adoptions over a period of 2–3 years.

In recent years, there have been some remarkable success stories. For example, in December 1989, a committee of the Midwestern Legislative Conference approved draft language for the Midwestern Higher Education Compact and began circulating it to lawmakers in the 12 Midwestern states that were eligible to participate. Just 13 months later, the compact became effective.

Avoiding Federal Interface

Finally, interstate compacts provide states the opportunity to cooperatively address policy issues in the face of an increasingly active federal government. With the federal dynamic constantly shifting between all levels of government, interstate compacts are an attractive alternative to ensure state agreement on complex policy issues, establish state authority over areas reserved for states and allow states to speak strongly with one unified voice. Without the compact, federal activism in traditional state policy areas is an increasing possibility.