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Industrial and Labor Adjustments by Interstate Compacts

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INDUSTRIAL AND LABOR AJUSTMENTS BY INTERSTATE COMPACTS

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THE educational value of local self-government to train citizens to assume the larger responsibilities of the administration of state and nation was fully comprehended by the statesmen of revolutionary times. The well-nigh universal participation of the people in county, township, city and village government was treasured as the badge of a free citizenry. Out of that schooling emerged an understanding widely diffused of the functions of representative government in broader fields. Thus, there was constant resistance to the conception of a central authority with powers so extensive and far-reaching as to constitute conceivably a threat to the full exercise of those primary political rights. The Articles of Confederation reflected that distrust.

When the Constitutional Convention convened the situation afforded opportunity to the advocates of an all powerful central government to press that view with particular force. Patriotism and statesmanship, however, triumphed over individual convictions, prejudices, and sectional differences. Opposing philosophies of government compromised upon the plan as finally adopted. But the purpose to preserve home rule in local and state affairs in so far as the principle could be retained compatible with a strong and efficient central government, was written into the Constitution in unmistakable language .

The conflict of opposing views has persisted from that day to this. But without embracing either side of the controversy, we may accept as established law that Congress cannot pass laws regulating the hours of labor, the minimum wage, child labor, conditions of production, employment and work, in industries and commerce wholly intrastate, which only indirectly affect interstate commerce. To that extent at least, the purpose of the constitution makers to preserve home rule over local affairs remains, argument is at rest, and the barrier beyond which federal authority cannot pass is established. The Constitution so provides.[1]

Yet we are not thereby rid of the division of opinion. Current agitation urges, by an amendment to the Constitution, the transfer of the police powers of the states over such subjects to the federal government. The public mind is confused by arguments obscured by violent partisanship. Surely at this juncture it is the part of statesmanship to examine our organic law with a view to determining whether the wis-

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[1] *A. L. A. Schechter Poultry Corporation, et al.* v. *United States,* 55 Sup. Ct. 837, 79 L.ed. 888 (1935).

dom of its framers provides a way for efficient action without destruction of state sovereignty, and home rule.

THE COMPACT CLAUSE

It is important, for a moment, to review, briefly, the situation of the states at the date of the Constitutional Convention. They had won their independence from the mother country. Each was a sovereign nation with all the powers inherent in the sovereignty of any nation. Individually lacking in material resources and in man power adequate for defense, they feared the aggressions of foreign nations and desired the strength which union would afford. Their initial attempt at such a union as expressed by the Articles of Confederation had not been a happy one.

The people were jealous of the freedom they had so hardly won for themselves, and the independence they had achieved for their respective states, yet they were willing to surrender much to attain relative security. So it came about that they abandoned their first effort and established a federal government with greatly increased powers, delegating to it control over international questions, war and peace, treaty-making, regulation of commerce between the states and with foreign nations, coinage and the establishment of monetary standards, and other matters, which in common affected all the states. To confirm those powers and to make them as effectual as possible, the people barred the states by express prohibitions from exercising any of the sovereign powers which they had delegated to the central government thus created, but by the compact clause: "No State shall, without the consent of Congress * * * enter into any agreement or compact with another state, or with a foreign nation * * *;"[2] the people declared that when Congress consented, the sovereign powers with respect to treaty-making which the states had enjoyed as independent nations should become theirs as in their former right with respect to matters within their reserved powers.[3] It follows that in the construction of a compact

[2] U. S. CONST. Art. I, § 10. "No state shall enter into any treaty, alliance or confederation * * * "

[3] *Poole et al.* v. *The Lessee of John Fleeger et al.*, 11 Pet. 185, 9 L.ed. 680 (1837) (boundary compact between Tennessee and Kentucky); *Green et al.* v. *Biddle*, 8 Wheat. 1, 5 L.ed. 547 (1823) (compact between Virginia and Kentucky); *The State of Rhode Island and Providence Plantations* v. *The Commonwealth of Massachusetts*, 12 Pet. 657, 9 L.ed. 1233 (1838) (involving agreements as to boundaries and subsequent possession by Massachusetts); see *The State of Rhode Island* v. *the State of Massachusetts*, 4 How. 591, 11 L.ed. 1116 (1846); *Lessee of Joseph Marlatt* v. *John Silk and John M'Donald*, 11 Pet. 1, 9 L.ed. 609 (1837).

For the purposes of this paper the word "Compact" will be used interchangeably with the word "Treaty." A famous writer defines a treaty as, "A compact made with a view to the public welfare, by the superior power, either for perpetuity, or for a considerable time." VATTEL, LAW OF NATIONS (new ed by Chitty, 1859) 287. But see STORY, COMMENTARIES ON THE CONSTITUTION,

between states made with the consent of Congress[4] international law will be applied and as in the case of treaties between sovereign nations,

§ 1402, 1403, 1404, where a distinction is made in the use of the word "treaty" in clause 1 and the word "compact" in clause 2, U. S. CONST. Art. 1, § 10.

Usurpation by the states of the treaty-making power delegated to the United States is guarded against by the censorship over their agreements with other states or with foreign nations vested in Congress. But there are recognized limits to the treaty-making power delegated to the United States arising of necessity from the nature of our institutions as established by the Constitution. Thus, "A treaty which undertook to take away what the Constitution secured, or to enlarge the federal jurisdiction would be void." *Downes* v. *Bidwell,* 182 U.S. 244, 312, 21 Sup. Ct. 770, 45 L.ed. 1088 (1900).[a] Any contention to the effect that the delegation of the treaty making power included the right by treaty to destroy the reserved powers of the states, amounts to a conclusion that the tenth amendment is a nullity when in conflict with the delegated power of treaty making, that the people in establishing the Union had created a Frankenstein with power to destroy the sovereignty of the states which they had decreed should be preserved. There is a lack of harmony in that contention with expressions of the Supreme Court upon the subject, and with the logic of accepted rules of construction,[b] which admits of the conclusion that the treaty making power delegated to the United States is limited at least to the extent that it cannot be exercised to annul the police powers of the states.[c]

As regards negotiations with foreign nations for uniform international commercial and labor legislation, limitations on the federal power have long been recognized. (See Report of the Committee on Interstate Compacts to the National Conference of Commissioners on Uniform State Laws, August 1921, pp. 26 to 33, commonly known as "Wigmore's Report.") Since the reserved powers of the states comprehend such subjects it is a field upon which the United States has been disinclined to trespass. VATTEL, *op. cit. supra,* § 206 says, "The public compacts called conventions, articles of agreement, etc., when they are made between sovereigns, differ from treaties only in their object." What then is the distinction in clause 1 and clause 2, (U. S. CONST. Art. I, § 10) in the use of the words "treaty" and "compacts"? The first refers to the treaty powers of the United States of America, the second defines the treaty powers of the states. Both words describe the same attribute of sovereignty, but each has limitations expressed in, or implied from the nature of, the instrument in which they are used.

[a] See TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER (1915) chapter X and cases therein cited; *contra,* Corwin, *The Treaty-Making Power,* THE NORTH AMERICAN REVIEW, June, 1914; I WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES (2nd ed. 1929) 561; address by Senator Elihu Root before the American Society of International Law, April 19, 1907.

[b] In *Downes* v. *Bidwell,* 182 U.S. 244, 312, 21 Sup. Ct. 770, 45 L.ed. 1088 (1900), Justice White said, "It is conceded at once that the true rule of construction is not to accept one provision of the Constitution alone but to contemplate all and therefore to limit one conceded attribute by those qualifications which naturally result from the other powers granted by that instrument, so that the whole may be interpreted by the spirit which vivifies and not by the letter which killeth."

[c] In *State of Missouri* v. *Holland,* 252 U.S. 416, 40 Sup. Ct. 382, 64 L.ed. 641 (1920), The Migratory Bird Treaty with Great Britain was held to be supreme and paramount to state laws on the subject which admittedly the states were not competent to act upon because of the nature of the problem, but the Court said, "We do not mean to imply that there are no qualifications to the treaty-making power."

[4] Such consent may be given before or after the compact has been agreed upon, or may be implied. *Virginia* v. *Tennessee,* 148 U.S. 503, 13 Sup. Ct. 728, 37 L.ed. 537 (1893) (compact of 1803); *Virginia* v. *West Virginia,* 11 Wall. 39, 20 L.ed. 67 (1871); *Wharton* v. *Wise,* 153 U.S. 155, 14 Sup. Ct. 783, 38 L.ed. 669 (1894). Under certain conditions the consent of Congress is not required. See *Virginia* v. *Tennessee, supra; The State of Florida* v. *The State of*

they are obligatory upon the citizens thereof and bind their rights.[5] We may conclude that upon any subject involving mutual concern for the welfare of their people calling for the exercise of their police powers, the states may agree, with the consent of Congress, and in some instances, perhaps, without it,[6] with the same force and effect as any nation in dealing with other nations could in the enjoyment of complete sovereignty.[7]

Before the Constitution and since its adoption, the treaty power of the states has been frequently invoked for the adjustment of a variety of controversies between them and for the prosecution of joint ventures.[8] Disputed boundaries have been settled, the water supply of interstate rivers has been apportioned, jurisdiction over boundary waters agreed upon, rights of fishery adjusted and protected, comprehensive development of interstate harbors and rivers undertaken, cession of territory by one state to another accomplished, construction of improvements involving the use of territory within two or more states has been authorized and completed, and within the year, an oil and gas conservation agreement has been reached, consented to by Congress and accepted by seven of the largest producing states, all by means of agreements between the states. What one state can do singly, it can do jointly with another by the adoption of appropriate measures sanctioned by Congress.

Georgia, 17 How. 478, 494, 15 L.ed. 181, 190 (1854); *Dover* v. *Portsmouth Bridge,* 17 N.H. 200 (1845); *Fischer* v. *Steele,* 39 La. Ann. 447, 1 So. 882 (1887); *Union Branch R. Co.* v. *East Tenn. & Ga. R. Co.,* 14 Ga. 327 (1853); *cf. Holmes* v. *Jennison,* 14 Pet. 540, 10 L.ed. 579 (1840).

[5] For cases so holding in effect see Note 4, *supra.*

[6] See note 4, *supra.*

[7] In *Poole et al.* v. *The Lessee of John Fleeger et al.,* 11 Pet. 185, 209, 9 L.ed. 680 (1837), Mr. Justice Story, for the Court, said, "We are of the opinion that the instruction given by the court below is entirely correct. It cannot be doubted that it is a part of the general right of sovereignty belonging to independent nations to establish and fix the disputed boundaries between their respective territories, and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be so treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the states of this Union, unless it has been surrendered under the Constitution of the United States. So far from there being any pretense of such a general surrender of the right, it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress. The Constitution declares that, 'No state shall, without the consent of Congress, enter into any agreement or compact with another state;' thus plainly admitting that, with such consent, it might be done; and in the present instance, that consent has been expressly given. The compact, then, has full validity, and all the 'terms and conditions of it must be equally obligatory upon the citizens of both states'." See *The State of Rhode Island and the Providence Plantations* v. *The Commonwealth of Massachusetts,* 12 Pet. 657, 9 L.ed. 1233 (1838).

[8] Ely, *Oil Conservation through Interstate Agreement* (1933), Federal Oil Conservation Board.

TREATY MAKING BY THE UNITED STATES OF AMERICA AND BY THE STATES COMPARED

As we have already observed, if the consent of Congress is given, the treaty-making power of the states is reinvested with respect to their reserved powers as fully as it existed when independence was achieved.[9] As an expression of their treaty powers prior to the Constitution, the Articles of Confederation represent the major exemplification. By that instrument they surrendered to the Congress of the United States a considerable measure of their sovereignty. Ratification (March 1781) was by the state legislatures acting by agents empowered for that purpose. The compact was in fact, therefore, a treaty of alliance between thirteen independent states authorized by their respective legislatures acting in that regard for each state as the treaty making sovereign of that state.[10] Elected by the people, they acted for the people in lieu of king, emperor, or czar. Such authority, although unusual, was the natural outcome of the distrust the people of the colonies felt for rulers and "governors."

An act of the legislature of a state ratifying a compact is a law with the force and effect of any law, but above and beyond that aspect it is an exercise of the sovereign power of the state to enter into a contract with another state for the common purposes defined in the treaty.[11] The legislature, then, functions in a dual capacity, i.e., first, it is the sovereign contracting in the name of and binding the state and the citizens thereof by its approval of a treaty—that is not a legislative act;[12] and second, legislatively speaking, it has passed a law which gives notice to the citizens of the state of their rights thereunder and the obligations and duties imposed upon them and assumed thereby. In the latter capacity, the legislature performs according to its delegated

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[9] See footnotes 4 and 8.

[10] WHEATON, INTERNATIONAL LAW (5th Eng. ed.) 73, 74.

[11] Thus, after ratification, the compact becomes a contract between the states so that none can thereafter pass laws impairing the obligations thereof, or making less valid and secure the rights secured thereunder. For cases construing compacts between states under the Articles of Confederation see *Marlatt* v. *Silk and M'Donald,* 11 Pet. 1, 9 L.ed. 609 (1837); *Wharton* v. *Wise,* 153 U.S. 155, 14 Sup. Ct. 783, 38 L.ed. 669 (1894); *Sim's Lessee* v. *Irvine,* 3 Dall. 425, 1 L.ed. 665 (1799). For cases considering compacts entered into subsequent to 1789, see *Poole et al.* v. *Lessee of John Fleeger et al.,* 11 Pet. 185, 9 L.ed. 680 (1837); *Green et al.* v. *Biddle,* 8 Wheat. 1, 5 L.ed. 547 (1823); *Virginia* v. *West Virginia,* 11 Wall. 39, 20 L.ed. 67 (1871); Report of Committee on Interstate Compacts to National Conference of Commissioners on Uniform State Laws, August, 1921, p. 39.

[12] *Foster* v. *Neilson,* 2 Pet. 253, 314, 7 L.ed. 415, 435 (1829), in which Justice Marshall stated, "A treaty is in its nature a contract between two nations, not a legislative ace * * *." See *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 8 L.ed. 25 (1831) in which Thompson, J., dissenting, said, at page 60, "What is a treaty as understood in the law of nations? It is an agreement or contract between two or more nations or sovereigns, entered into by agents appointed for that purpose, and duly sanctioned by the supreme power of the respective parties."

powers as found in the constitution of the state, but one will search in vain for a delegation of power in any state constitution granting to a legislature authority to make treaties in the name of the state.

The Constitution of Wisconsin is silent upon the subject, but in the past twenty-five years the legislature has bound the state and its citizens by at least two treaties with neighboring states.[13] In none of the six ratifying states signatory to the Colorado River Compact is constitutional authority to be found vesting in their respective legislatures power to enter into so far-reaching an agreement binding for all time upon the states and their citizens.

Notwithstanding lack of constitutional authority in the state legislatures, no compact between the states has ever been successfully questioned upon that ground. In fact there has been universal acceptance by the courts of their authority as the recognized and appropriate source of power.[14] Custom has established, and acquiescence for one hundred and fifty years has confirmed the right.[15] To deny it would be to reject an unchartered power as thoroughly established in the political departments of our state governments as the common law is in our jurisprudence.

The treaty-making power of the United States of America is vested by the Constitution in the President of the United States acting "by and with the advice and consent of the Senate, * * *, provided two thirds of the Senators present concur"[16] and "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitutions or laws of any state to the contrary notwithstanding."[17] No such provisions appear in the state constitutions. The legislatures ordinarily initiate and always ratify compacts. Under the Federal Constitution the House of Representatives has no part in treaty making unless by the terms of a treaty legislative action by Congress is required to make it effective or to fulfill its provisions.

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[13] Wis. Laws (1917) c. 64, p. 171; WIS. STAT. (1927) c. 87.

[14] See notes 4, 5, 8, *supra.*

[15] VATTEL, *op. cit. supra* § 154, "Notwithstanding our assertion above, that public treaties are made only by the superior powers, treaties of that nature may nevertheless be entered into by princes or communities, who have a right to contract them, either by the concession of the sovereign, or by the fundamental laws of the state, by particular reservations, *or by custom.* Thus, the princes and free cities of Germany, though dependant on the emperor and the empire, have the right of forming alliances with foreign powers. The constitutions of the empire give them, in this as in many other respects, the rights of sovereignty. Some cities of Switzerland, though subject to a prince, have made alliances with the cantons; the permission or toleration of the sovereign has given birth to such treaties, *and long custom has established the right to contract them.*" (Present writer's italics.)

[16] U. S. CONST. Art. II, § 2.

[17] U. S. CONST. Art. VI, clause 2.

Since the power to make treaties or compacts is not by the constitutions of the states reposed in the governor, and by common consent and ancient custom has been conceded to be in the legislature, an interesting question arises as to whether the veto power lodged in the governor could be exercised to defeat the treaty by a veto of the ratifying act. The limits of this paper do not permit of discussion of the point, and we will assume for our purposes that there is agreement between the chief executive and the legislature of the ratifying state upon the compact.

A treaty of the United States is made a legislative act and becomes the law of the land by force of the Constitution.[17a] A treaty ratified by state legislatures becomes a contract between states and the law of the states by force of the acts of ratification.

Responsibility In Terms of the Constitution

Under our system of government, there can be no action by Congress constitutionally beyond the delegated and implied powers of that body, and conversely there can be no exercise of their police powers by the states which usurps federal authority in any field constitutionally occupied by that authority. It is obvious, then, than nation-wide and regional commercial, industrial and social reforms cannot be completely effected without a juncture of power and a combination of all agencies, federal and state, devoted to the common purpose. A fusion of all power and means to the end becomes, therefore, not only desirable but imperative. The responsibility is more that of the states than of the federal government. Through the compact clause, the power to initiate lies with the former, the duty to cooperate with the latter. Full recognition and a complete understanding of these basic obligations must be widespread and consciously present in every effort.

The National Industrial Recovery Act was foredoomed to failure not only because of the apparent conflict with the Constitution, but because the authors of it conceived their plan in disregard of the position which the states must occupy in labor and industrial reforms. The legislation which the state legislatures in many instances enacted to supplement the N. I. R. A. was fundamentally dishonest, because it amounted to a surrender to the United States of that measure of home rule which the people had declared in the Constitution should remain in the states.

Hours of labor, the minimum wage, conditions surrounding employment, and what constitutes unfair practices in competitive business, are frequently regional problems; quite often one may be of major importance in an industry limited to a comparatively few states, and in

[17a] U. S. Const. Art. VI, clause 2.

no instance is it likely that blanket restrictions covering the entire country would be just to every section. Lack of familiarity with or disregard of actual facts has caused theory to supplant common sense; fanaticism over-rides considerations of justice. The minimum wage which one industry might support will ruin another, and throw thousands of willing workers out of employment. Child labor on the farm is quite a different thing from child labor in the factory and underground. Intensive labor of an exacting character requires limitation on number of hours in one industry, whereas, in another the same limitation would be unfair to employer and employee. And finally, considerations of sex and of age present definite problems in labor legislation.

The states have passed a bewildering variety of laws on the subjects mentioned.[18] The study of them discloses a conflict of motives which combine economic orthodoxy with humanitarian idealism without much direction. It is plain that the state legislator cannot think in terms of reforms in labor conditions which are translatable directly into increased costs and reduced production as compared with costs and production in a competitive state, and at the same time reach very lofty heights in legislation for the relief of the oppressed in industry. Reform at the cost of economic ruin for his state is a weighty responsibility for him to assume. Nevertheless, there has been steady progress and public opinion has been recorded upon the statute books of many of the states in the form of enlightened legislation. But the point is that there is a lack of uniformity which results in unmerited disadvantage to one state and an unfair advantage to another. If progress is to proceed in an orderly fashion, resort must be had to interstate agreements in which uniformity can be measurably attained in regions where like conditions prevail, or in industries where competitive conditions can be brought into substantial accord with justice to all. Assuming that the desirability of that approach will be conceded, the question of the most effective mode of making the compact useful becomes of next importance.

Some Suggestions

I.

An Interstate Labor Relations Compact

The National Industrial Recovery Act is no more, but the Congress has passed the "National Labor Relations Act"[19] which if sustained as constitutional will result in the regulation of intrastate industries by the "National Labor Relations Board" created by it. However, constitu-

[18] See tabulations in first (January 1934) and third (January 1935) Reports to the General Court of Massachusetts of the Commission on Interstate Compacts Affecting Labor and Industries.

[19] P. L. No. 198, 74th Cong., 1st Sess. (1935).

tional objections to it could be urged upon the same grounds which caused the Supreme Court to unanimously declare the N. I. R. A. offensive to American institutions as established by the Constitution. It is not the purpose of this paper to attack the Act on that score, but instead to demonstrate that these repeated efforts by Congress to encroach upon the reserved powers of the state should be met by an assertion of state sovereignty through the medium of interstate compacts.

Experience has taught us during the past three years that the representatives of the states in Congress will not, when subject to powerful executive pressure, protect the states from such attacks. The states, then, must assume the burden of their own defense.

By means of an interstate compact with the consent of Congress, the sixteen leading industrial states which produce 82.5 per cent in value of all of our manufactured products and employ about 80 per cent of all persons gainfully occupied in manufactures,[20] could unite to establish an industrial labor relations board with all the powers necessary to make its authority effective within those states and such other states as might subsequently ratify.

Such a compact could be drawn to include every desirable provision found in the National Labor Relations Act. As an interstate compact it would be confined in its application to intrastate industry and commerce, but by the Act of Congress consenting, the compact could be extended to interstate commerce. This would not be a surrender by Congress of its power to regulate commerce between the states; it would be an exercise of that power in that it would constitute a choice of means which is a necessary incident to the power to regulate.[21] The compact, should, of course, provide for federal representation and should be left open for ratification by other states desiring to take advantage of its provisions.

Under the National Labor Relations Act, enforcement of the orders and judgments of the Board is provided for by recourse to the Federal District Courts or to the United States Circuit Courts of Appeal and their jurisdiction is enlarged for that purpose.[22] The states could agree upon the same procedure, assuming, of course, that the Congress in the

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[20] New York, Pennsylvania, Illinois, Ohio (these four states produce 42.3 per cent in value of the nations manufactures), Michigan, New Jersey, Massachusetts, California, Indiana, Wisconsin, Missouri, Connecticut, Texas, North Carolina, Minnesota and Maryland.

[21] *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L.ed. 597 (1819) in which Chief Justice Marshall said, "The government which has a right to do an act and has imposed on it the duty of performing that act, must according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception * * * ."

[22] P. L. No. 198, 7th Cong., 1st. Sess. (1935) § 9 (e), 9(f), 9(g), 9(h), 9(i).

consenting act affirmatively conferred the necessary jurisdiction upon those courts. Or the states could provide in their compact that the courts of the state in which the person (including corporations) found delinquent resides, or is doing business, or in which the unfair labor practice in violation of the compact occurred, should have jurisdiction of enforcement proceedings.

The membership of the Labor Board created by the Compact should be limited to five and the Board should be given all the powers necessary to an efficient administration of the duties imposed upon it. The commissioners should be named initially in the Compact for terms of two, four, six, eight and ten years, respectively, and thereafter should be appointed by the governors of the ratifying states acting jointly, either to fill vacancies for an unexpired term, or for ten years where the incumbent has served his term. In case the governors could not agree, then the selection should be decided by their vote, the majority controlling.

The Board should be paid adequate salaries and provided with ample funds with power to use state agencies whenever available. The costs of administration should not be fixed in the compact, and after the first year should depend upon a budget furnished by the Board by January first of each calendar year and pro rated amongst the ratifying states according to the number of cases heard by the Board originating in each state during the preceding year. For the first year the amount would have to be arbitrarily fixed and proration settled by agreement. The ratifying states would pledge themselves in the Compact to pay their share just as any nation would do in the case of an arbitration treaty or a claims convention. If extended by Congress to interstate commerce, the United States would contribute on the same basis as the states.

The concentration of employment in wholesale establishments, in the production of minerals in the mineral producing states, in transportation intrastate, and in intrastate commerce generally for the sixteen leading industrial states corresponds roughly with the percentage given for them in manufactures. If four leading mineral producing states not included are added, the percentage of the persons employed in industry, commerce and the production of minerals in the United States included within the twenty states would exceed eighty-five per cent. Thus, an agreement between twenty states establishing an interstate labor relations board could afford substantially the same measure of relief to labor and employer proposed to be given by the National Labor Relations Act.

If that is not considered to be of sufficient weight to turn the scales in favor of an interstate compact, then there can be added on the side

of state action as opposed to legislation by Congress, the ponderable fact that the former accords with the plan of the Constitution as regards division of powers, whereas, the latter is not only antagonistic to that plan but proposes to do by indirection that which is prohibited to Congress by inescapable implications, if not expressly.[23]

II.

Uniform Standards of Labor

In dealing with the minimum wage and maximum hours by interstate compacts the states have constitutional limitations, both state and federal, to consider.[24] However, if the purpose of the compact, actual, as well as expressed, should be to banish conditions oppressive to labor such as hours of work so long as to promote inefficiency and stifle intelligence, or a wage so low as to induce standards of living noxious to morals and bodily vigor, it would probably be sustained as not in conflict with constitutional guarantees of "liberty of person and freedom of contract."[25] The police powers of the states exercised jointly to effect a joint purpose for the public good would not be set aside by the courts unless it was apparent from the compact that the primary purpose was to restrict freedom of contract rather than to promote the public welfare.[26]

III.

Child Labor Compact

The proposed child labor amendment to the Federal Constitution delegates to the Congress unlimited power over the labor of persons under eighteen years of age. It is not a question of whether so vast a power over child, home, and possibly school, would be wisely used by the Congress, but rather whether jurisdiction and control over our youth should be transferred from the states and homes wherein they live to a great bureau in Washington. It is a choice between remote control by an agency which will seek to regiment childhood, just as

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[23] U. S. Const. Amend. X.

[24] U. S. Const. Amend. XIV. *Adair* v. *United States*, 208 U.S. 161, 28 Sup. Ct. 277, 52 L.ed. 436 (1908); *Coppage* v. *The State of Kansas*, 236 U.S. 1, 35 Sup. Ct. 240, 59 L.ed. 441 (1914); *Lockner* v. *New York*, 198 U.S. 45, 25 Sup. Ct. 539, 49 L.ed. 537 (1905); *Donham* v. *West Nelson Mfg. Co.*, 273 U.S. 657, 47 Sup. Ct. 343, 71 L.ed. 825 (1927); see *Adkins et al.* v. *Children's Hospital*, 261 U.S. 525, 43 Sup. Ct. 394, 67 L.ed. 785 (1923). For a state limitation see N. M. Const. art. II § 18, construed in *State* v. *Henry*, 37 N.M. 536, 25 P. (2d) 204 (1933).

[25] *Bunting* v. *Oregon*, 243 U.S. 426, 37 Sup. Ct. 435, 61 L.ed. 830 (1917); see *Muller* v. *Oregon*, 208 U.S. 412, 28 Sup. Ct. 324, 52 L.ed. 551 (1908).

[26] A conclusion drawn from *Bunting* v. *Oregon*, 243 U.S. 426, 37 Sup. Ct. 435, 61 L.ed. 830 (1917).

similar agencies have sought to regiment adult activities, and home control by parents and the legislatures of the states.

Since 1910 state laws have eliminated child labor as a material factor in competitive industries. In 1930 the number employed in factories under sixteen years was negligible. In view of the progress made it is fair to assume that the Census of 1940 will show that there is no problem of child labor in industry.

An interstate compact, however, would furnish greater uniformity. An agreement upon a basic *sine qua non,* say sixteen years, as an age under which no child shall be allowed to work in factories of any sort, in mines or mining operations of any character, in building trades, or in wholesale or retail establishments, leaving the state legislatures power to regulate employment of minors of and above that age or those engaged in other occupations, would meet essential requirements. The adoption of the compact would give the desired uniformity since the ratifying act in each state would repeal all acts in conflict therewith. Enforcement could safely be left to the states, all of which have the machinery already established for such enforcement. Every state in the Union today has a child labor law. If such a compact as that suggested were ratified by the ten leading industrial states, public opinion in all the states would lead to a speedy ratification by all. Agitation for a child labor amendment to the Constitution would cease for lack of an appealing argument.

Consideration of Objections

The suggestions as to the uses of interstate compacts made above will not be popular with the evangelists preaching the gospel of centralization of all authority over industry and labor in the federal government. It can be expected that anyone advocating the extension of state sovereignty by interstate compacts over matters affecting industry and labor will be attacked with much fervor.[27]

The first assault will be upon the capacity of the states to agree. It will be urged that there will not be vision reaching beyond the limits of a state sufficient to overcome purely material and economic rivalries and selfishness and bring about interstate agreements upon such questions as child labor, the minimum wage and maximum hours, labor relations with industry, establishing code authorities, and social reforms regional in character.

[27] George Soule, *Back to States' Rights,* Harpers Magazine, September 1935. The author omits to present the fact that since 1789 there have been not less than fifty-eight interstate compacts ratified by state legislatures and consented to by Congress, and thirteen so ratified without that consent. He fails to mention the outstanding examples of the Colorado River Compact, the New York-New Jersey Compact creating the "Port of New York Authority," and others.

History does not support the objection. As early as 1789, Virginia and Kentucky settled by compact, rights and interests in lands severed from Virginia and jurisdiction over the Ohio River.[28] In 1834 New York and New Jersey entered into a treaty determining their boundary line in New York harbor and agreeing upon jurisdiction.[29] For over one hundred years they have lived in peace and harmony, under that agreement. More recently (1921-1922) they have agreed upon joint development of New York Harbor by a joint commission given broad powers.[30] Concurrent jurisdiction over the Columbia River has been assented to by Oregon and Washington and the protection of fish provided for by interstate compact.[31] Wisconsin and Minnesota have made mutual cessions of territory and adjusted their boundary line accordingly.[32]

By the Colorado River Compact apportionment of the waters in perpetuity of the "Nile of the Southwest" was agreed upon by six out of the seven states of the river basin.[33] This compact made possible the construction of the greatest dam and impounding project in the world. There could be no more controversial question, nor one more vital to the present and future development of the arid and semi-arid states of the west, than the division of the waters of their rivers and streams. And yet since 1922 five such compacts have been ratified by state legislatures.

In all, sice 1789, there have been not less than fifty eight interstate compacts ratified by state legislatures and consented to by Congress and thirteen so ratified without that consent.

In the light of that factual presentation of statesmanship and leadership, doubts concerning the present reality of those qualities in state administration are apparitions and not substantial in truth. They may obscure the light of history, but they cannot extinguish it.

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[28] 13 Hening, VA. STAT. at L. 17, 19; KY. CONST. art. VIII, § 7; 1 LITT. KY. LAWS 32; 1 STAT. 189 (1791); *Green et al.* v. *Biddle,* 8 Wheat. 1, 5 L.ed. 547 (1823); *Hawkins et al.* v. *Barney's Lessee,* 5 Pet. 457, 8 L.ed. 190 (1831).

[29] N. Y. Laws 1834, c. 8, p. 8; N. J. Laws 1834-35, 118; 4 STAT. 708-11, c. 105 (1834).

[30] Treaty between New York and New Jersey creating "Port of New York Authority." N. Y. Laws 1922, c. 43, p. 61; N. J. Laws 1921, c. 151, p. 412; N. J. Laws 1922, c. 9, p. 25; 42 STAT. 174, 180, c. 77 (1921); 42 STAT. 822, 826, c. 277 (1922); see *City of New York* v. *Willcox et al.,* 115 Misc. Rep. 351, 189 N.Y. Supp. 724 (1921).

[31] Or. Gen. Laws 1915, c. 188, § 29; Wash. Laws 1915, c. 31, § 116; 40 STAT. 515, c. 47 (1918).

[32] Wis. Laws 1917, c. 64, p. 171; Minn. Laws 1917, c. 116, p. 142; 40 STAT. 959, c. 172 (1918).

[33] Cal. Laws c. 1 1929; Colo. Laws (1925), c. 177; Nev. Laws 1925, c. 96; N. M. Laws 1925, c. 78; Utah Laws 1929, c. 31; Wyo. Laws 1925, c. 92; 45 STAT. 1057-1066, c. 42 (1928); see *Arizona* v. *California,* 283 U.S. 423, 51 Sup. Ct. 522, 75 L.ed. 1154 (1931).

And then we encounter those who say that a state should not surrender its sovereignty and in fact cannot do so by an interstate compact. Cession of territory is a complete relinquishment of sovereignty and yet it has been repeatedly done by interstate compact, and the power to do so has never been successfully questioned. Joint control over the development of resources in more than one state has been vested in a joint commission established by interstate agreement for that purpose as in the case of "Port of New York Authority." California has agreed with the United States to a limitation of the use by the state of the water of the Colorado River, such limitation to accrue for the benefit of the six other basin states.[34] The historic case of surrender of sovereignty by the state is, of course, the Articles of Confederation.

We have already observed that compacts between the states are to be construed in the light of public law, the law of nations. There is no question but that sovereign nations may divest themselves of sovereignty provided the intention is plainly expressed in their treaties.[35]

The sovereignty bugaboo is an excuse for evasion of a plain responsibility resting upon the states; it is not a valid reason for denial of the right of the states to assume and efficiently discharge their responsibilities through the medium of interstate compacts.

Again it will be said that what a state legislature has enacted a succeeding one may repeal.[36] This objection overlooks two considerations attaching to interstate compacts, first, the ratification of a treaty between the staes is not a legislative act, but an act by the sovereign of the state with power to bind the state and its citizens by a contract with another state, or more than one state; and, second, that such a contract, if it involved property rights in general, would fall within the protection of the Federal Constitution prohibiting the impairment of the obligation of contracts.[37] But we may assume apart from purely technical reasons, that no state, once good faith is pledged, would lightly treat so weighty a promise as a solemn agreement to be bound by the stipulated provisions of an interstate agreement. Moreover, recourse to history shows but one such instance in one hundred and fifty years.[38]

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[34] Cal. Laws 1929, c. 16, p. 38; 45 STAT. 1057, c. 42 (1928).

[35] TAYLOR, INTERNATIONAL PUBLIC LAW (1901) § 385, in which the author says, "As it will not be presumed that any state desires to divest itself of its sovereignty, its property, or its right of self-preservation, no such result can be established by implication. It must be clearly expressed."

[36] See such cases as *Newton* v. *Commissioner,* 100 U.S. 548, 25 L.ed. 710 (1880); and *Illinois Central R. Co.* v. *Illinois,* 146 U.S. 387, 13 Sup. Ct. 110, 36 L.ed. 1018 (1892).

[37] See *Green* v. *Biddle,* 8 Wheat. 1, 5 L.ed. 547 (1823).

[38] See *Commonwealth of Virginia* v. *State of West irginia et al.,* 246 U.S. 565, 38 Sup. Ct. 400, 62 L.ed. 883 (1918); *Virginia* v. *West Virginia,* 11 Wall. 39, 20 L.ed. 67 (1871).

But as an answer to all objections, no better reply can be given than the words written in connection with this subject of a beloved preceptor of the law and the author of a monumental work on evidence: "Common sense and world experience teach us to proceed in practical matters to do the obviously wise thing, and not to let ourselves be paralyzed by theoretical doubts."[39]

CONCLUSION

Advocates of a constitutional amendment transferring from the states to the federal government power to regulate all intrastate industry and commerce, the relations of employer and employees engaged therein, including the right to limit hours of labor, to establish maximum hours of work and generally to place in effect social reforms, and those who oppose such a radical shift in our present form of government, represent the north and south poles of philosophies of government. Broadly speaking the change would spell government by federal bureaucrats in place of our present system of local self-government as exhibited by our states. In short the state governments would administer affairs not as direct representatives, but as the agents of remote officials not accountable for blunders or errors, whom the people of the states would seldom know by name and probably never see in person. Home rule by and for the home people would take its place with the horse and buggy age, quite fittingly since it was during that period that our ancestors fought for and embedded the principle in our institutions.

But, say the advocates of change, you forget that the people elect the Congress of the United States and that the Congress represents all the people. Such, indeed, is the theory of the Constitution, and such, certainly, was the intention of the authors of that great instrument and of the people when they adopted it, but practice during the past three years has fallen woefully short of theory and intention. Surrender of its powers delegated to the Congress by the people to bureaus or commissions and the attempted delegation by Congress to bureaus and commissions of powers which the people had reserved to the states, furnish proof of the futility of the argument that the Congress is a dependable representative of the people; it is so elected, but it has not so functioned. The appalling growth of bureaucracy in our federal government reveals the impotency of Congress and the comparative ease with which it can be manipulated to augment that growth.

The great obstacle to further expansion of bureaucracy is the reserved powers of the states and the forty-eight state govern-

[39] Dean Wigmore in "Report of the Committee on Interstate Compacts" to the National Conference of Commissioners on Uniform State Laws, August, 1921, p. 40.

ments. Transfer those powers to the federal government and the stage is set for the last appearance of representative government. The question of "Why States?" will be answered, but too late to save the American people from an autocracy of bureaucrats and an army of retainers maintained by the people's money furnished by a complacent Congress whose most valued functions will then be to pass appropriation bills and to invent ingenious way of separating the taxpayers from their earnings and savings to supply the wherewithal until there are no more earnings or savings.

Centralization of government of the character proposed is not government with the consent of the governed, nor yet government by and for the people; it is government by a governing class for that class. The conception is not remotely American in thought or execution; instead it is distinctly European and Oriental in philosophy and origin. The genesis of the reasoning is rooted in distrust of the capacity of the governed to govern themselves; the belief that a gifted few know better what is best for their lowly fellow citizens than do that numerous category. Weighed by present European standards they are liberals, but when placed in the scales of the bill of rights and the Declaration of Independence, they are reactionaries.

By energetic action and by education of the people as to the ultimate result of present trends, the states may recover the ground which has been lost during the past few years. The assertion of their sovereignty by interstate compacts will be a most effective means to that end. Federal bureaucracy will be checked and there will be a return to the sanity of balanced powers and of direct responsibility to the people, the source of all authority under our system of government.

Usurpation of powers reserved in the states and in the people attempted by bold frontal attacks and by the far more dangerous method of undermining by subtle indirection, will terminate when every senator and representative in the Congress knows that when he votes for measures intended to strike down the sovereignty of the states, he will be held to strict accountability by an indignant constituency. Public opinion is still the force which governs America.[40]

[40] For general reading on the subject see Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments* (1925) 34 YALE L. J. 685; Bruce, *Compacts and Agreements Between States* (1919) 2 MINN. L. REV. 500; Wilson, *Interstate Compacts under the Constitution. Past Uses and Future Possibilities* (1932) 57 A. B. A. REP. 734; Cohen, *The New York Harbor Problem and Its Legal Aspects* (1920) 5 CORN. L. Q. 973; Williams, *Interstate Compacts as a Means of Settling Disputes between States* (1922) 35 HARV. L. REV. 322; Williams, *The Power of the State to Make Compacts* (1922) 31 YALE L. J. 635; Wigmore, *Uniformity of Law-Compacts between States* (1925) 19 ILL. L. REV. 479.