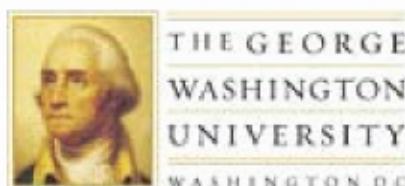


# The Burger Court Opinion Writing Database

*United States Steel Corp. v. Multistate Tax Commission*

434 U.S. 452 (1978)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

✓

December 27, 1977

Dear Lewis:

Re: 76-635 U.S. Steel v. Multistate Tax Comm.

On the basis of your December 16 memorandum  
I can join your opinion revised along the lines Bill  
suggested.

Regards,

WAB

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM.J. BRENNAN, JR.

December 6, 1977

RE: No. 76-635 United States Steel Corporation v.  
Multistate Tax Commission, et al.

Dear Lewis:

I agree.

Sincerely,

*Brennan*

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

December 7, 1977

Re: No. 76-635, United States Steel Corp.  
v. Multistate Tax Comm'n

Dear Lewis,

I am glad to join your opinion for the  
Court in this case.

Sincerely yours,

C. S.  
P. J.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 8, 1977

Re: No. 76-635 - United States Steel Corp. v.  
Multistate Tax Commn.

Dear Lewis:

I am contemplating filing a dissent in  
this case and will hope to get it down over the  
Christmas recess.

Sincerely,



Mr. Justice Powell

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 12, 1978

Re: 76-635 United States Steel  
v. Multistate Tax Commission

Dear Lewis:

I am sorry to have held you up, and I have finally sent to the printer a draft of a dissent which I hope will be around next week.

Sincerely,



Mr. Justice Powell

Copies to the Conference

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice White

Circulated: 1/18/78

1st DRAFT

Recirculated: \_\_\_\_\_

**SUPREME COURT OF THE UNITED STATES**

No. 76-635

United States Steel Corporation et al., Appellants, v. Multistate Tax Commission et al. On Appeal from the United States District Court for the Southern District of New York.

[January —, 1978]

MR. JUSTICE WHITE, dissenting.

The majority opinion appears to concede, as I think it should, that the Compact Clause reaches interstate agreements presenting even *potential* encroachments on federal supremacy. In applying its Compact Clause theory to the circumstances of the Multistate Tax Compact, however, the majority is not true to this view. For if the Compact Clause has any independent protective force at all, it must require the consent of Congress to an interstate scheme of such complexity and detail as this. The majority states it will watch for the mere *potential* of harm to federal interests, but then approves the Compact here for lack of *actual* proved harm.

I

The Constitution incorporates many restrictions on the powers of individual States. Some of these are explicit, some are inferred from positive delegations of power to the Federal Government. In the latter category falls the federal authority over interstate commerce.<sup>1</sup> The individual States have long been permitted to legislate, in a nondiscriminatory manner, over matters affecting interstate commerce, where Congress has not exerted its authority, and where the federal

<sup>1</sup> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . ." U. S. Constitution, Art. I, §8.

—  
STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 7, 8, 10, 11, 13, 14

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated: \_\_\_\_\_

Recirculated: 1/23

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-635

United States Steel Corporation et al., Appellants,  
v.  
Multistate Tax Commission et al. } On Appeal from the United States District Court for the Southern District of New York.

[January —, 1978]

MR. JUSTICE WHITE, dissenting.

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<sup>1</sup> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . ." U. S. Constitution, Art. I, § 8.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 8, 1978

Re: 76-635 - United States Steel  
Corp v. Multistate  
Tax Commission

Dear Harry,

Sorry. I shall make sure to  
indicate that you joined the dissent.

Sincerely,



Mr. Justice Blackmun

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 10 / 13

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

3rd DRAFT

Circulated: \_\_\_\_\_

## SUPREME COURT OF THE UNITED STATES

No. 76-635

United States Steel Corporation } On Appeal from the United  
et al., Appellants, } States District Court for  
v. } the Southern District of  
Multistate Tax Commission et al. } New York.

[February —, 1978]

MR. JUSTICE WHITE, dissenting.

The majority opinion appears to concede, as I think it should, that the Compact Clause reaches interstate agreements presenting even *potential* encroachments on federal supremacy. In applying its Compact Clause theory to the circumstances of the Multistate Tax Compact, however, the majority is not true to this view. For if the Compact Clause has any independent protective force at all, it must require the consent of Congress to an interstate scheme of such complexity and detail as this. The majority states it will watch for the mere *potential* of harm to federal interests, but then approves the Compact here for lack of *actual* proved harm.

### I

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 7, 1977

Re: No. 76-635, United States Steel Corporation et al. v.  
Multistate Tax Commission et al.

Dear Lewis:

Please join me.

Sincerely,

*T. M.*  
T. M.

Mr. Justice Powell

cc: The Conference

✓  
Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

Rochester, Minnesota

December 12, 1977

Re: No. 76-635 - U. S. Steel Corp. v. Multistate  
Tax Commission

Dear Lewis:

I shall await the dissent in this case.

Sincerely,

H. A. B.

Mr. Justice Powell

cc: The Conference

✓✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 24, 1978

Re: No. 76-635 - United States Steel Corporation  
v. Multistate Tax Commission

Dear Byron:

Please join me in your dissent as circulated January 23.

Sincerely,

*Harry*  
/

Mr. Justice White

cc: The Conference

February 8, 1978

Re: No. 76-635 - United States Steel Corp. v.  
Multistate Tax Commission

Dear Byron:

I thought I joined your dissent on January 24, but your  
recirculation of today does not so indicate.

Sincerely,

HAB

Mr. Justice White

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: DEC 2 1977

**1st DRAFT**

Recirculated: \_\_\_\_\_

## SUPREME COURT OF THE UNITED STATES

No. 76-635

United States Steel Corporation et al., Appellants,  
 v.  
 Multistate Tax Commission et al. On Appeal from the United States District Court for the Southern District of New York.

[November —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court. The Compact Clause of Art. I, § 10, cl. 3, of the Constitution provides that "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ." The Multistate Tax Compact, which established the Multistate Tax Commission, has not received congressional approval. This appeal requires us to decide whether the Compact is invalid for that reason. We also are required to decide whether it impermissibly encroaches on congressional power under the Commerce Clause and whether it operates in violation of the Fourteenth Amendment.

### I

The Multistate Tax Compact was drafted in 1966 and purportedly became effective on August 4, 1967, after seven States had adopted it. By the inception of this litigation in 1972, 21 States had become members.<sup>1</sup> Its formation was a

<sup>1</sup> Those States were: Alaska, Alaska Stat. Ann. § 43.19.010 (1971); Arkansas, Ark. Stat. Ann. § 84-4101 (Supp. 1975); Colorado, Colo. Rev. Stat. § 24-60-1301 (1963); Florida, Fla. Stat. § 213.15 (1971); Haw. Rev. Stat. § 255-1 (Supp. 1975); Idaho, Idaho Code § 63-3701 (1976); Illinois, Ill. Rev. Stat., Ch. 120, § 871 (1973); Indiana, Ind. Code § 6-8-9-101 (1972); Kansas, Kan. Stat. Ann. § 79-4301 (1969); Michigan, Mich. Comp. Laws Ann. § 205.581 (1970); Missouri, Mo. Rev. Stat. § 32.200 (1969);

79/161  
20/22

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

2nd DRAFT

Recirculated: DEC 19 1977

## SUPREME COURT OF THE UNITED STATES

No. 76-635

United States Steel Corporation et al., Appellants,  
 v.  
 Multistate Tax Commission et al. } On Appeal from the United States District Court for the Southern District of New York.

[November —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

The Compact Clause of Art. I, § 10, cl. 3, of the Constitution provides that "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . ." The Multistate Tax Compact, which established the Multistate Tax Commission, has not received congressional approval. This appeal requires us to decide whether the Compact is invalid for that reason. We also are required to decide whether it impermissibly encroaches on congressional power under the Commerce Clause and whether it operates in violation of the Fourteenth Amendment.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

December 16, 1977

No. 76-635 U.S. Steel v. Multistate Tax Comm.

Dear Bill:

Unless some of our Brothers who have joined my opinion object, I am happy to make the language changes you suggest in your letter of December 15.

They do not change the analysis upon which the opinion is structured. They do clarify the language in question.

Unless I hear objection to the contrary, I will circulate another draft early next week incorporating your suggested changes.

Sincerely,



Mr. Justice Rehnquist

lfp/ss

cc: The Conference

1  
— 17,26

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

3rd DRAFT

Recirculated: 19 JAN 1978

## SUPREME COURT OF THE UNITED STATES

No. 76-635

United States Steel Corporation | On Appeal from the United  
et al., Appellants, | States District Court for  
v. | the Southern District of  
Multistate Tax Commission et al. | New York.

[November —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

The Compact Clause of Art. I, § 10, cl. 3, of the Constitution provides that "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ." The Multistate Tax Compact, which established the Multistate Tax Commission, has not received congressional approval. This appeal requires us to decide whether the Compact is invalid for that reason. We also are required to decide whether it impermissibly encroaches on congressional power under the Commerce Clause and whether it operates in violation of the Fourteenth Amendment.

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26-27

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

4th DRAFT

Recirculated 3 FEB 1978

## SUPREME COURT OF THE UNITED STATES

No. 76-635

United States Steel Corporation  
 et al., Appellants,  
 v.  
 Multistate Tax Commission et al.

On Appeal from the United  
 States District Court for  
 the Southern District of  
 New York.

[November —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

The Compact Clause of Art. I, § 10, cl. 3, of the Constitution provides that "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ." The Multistate Tax Compact, which established the Multistate Tax Commission, has not received congressional approval. This appeal requires us to decide whether the Compact is invalid for that reason. We also are required to decide whether it impermissibly encroaches on congressional power under the Commerce Clause and whether it operates in violation of the Fourteenth Amendment.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 15, 1977

Re: No. 76-635 - United States Steel Corp.  
v. Multistate Tax Commission

Dear Lewis:

I mentioned to you sometime ago that I intended to join your opinion in this case if you could see your way fit to make what seem to me a couple of minor language changes. I am sorry to have taken so long to present my suggestions to you.

The first suggestion pertains to the sentence on page 17 of the second draft which now reads, "Agreements effected through reciprocal legislation or conscious parallel action may present opportunities for enhancement of state power at the expense of the Federal Government similar to the threats inherent in a more formalized 'compact.'" I think

this sentence takes something of a leap when it suggests that reciprocal legislation is subject to compact clause analysis, in view of the fact that the previous quotation on page 17 is from New York v. O'Neill, 359 U.S. 1 (1959), a case in which you say no compact clause question "was directly presented". Page 16. But I think it is another and further leap to add to interstate agreements the concept of "conscious parallel action" (a concept which I had previously thought was limited to the anti-trust field) and suggest that this sort of action, too, on the part of states is subject to compact clause analysis. Would you be willing at a minimum to remove the phrase "conscious parallel action" from that sentence?

My second suggestion is addressed to the language of footnote 23 on page 17 of the second draft. The first sentence of that footnote now reads:

"Although there is language in West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 27 (1951), that could be read to suggest that the formal nature of a 'compact' distinguishes it from reciprocal legislation, that language, properly understood, does not undercut our conclusion."

If I read the text preceding the footnote aright, you have not "concluded" that a "compact" is indistinguishable from reciprocal legislation; you have simply suggested that reciprocal legislation "may present" opportunities for enhancement of state power at the expense of the Federal Government similar to the threats inherent in a more formalized 'compact.'" I do not read this language as going further and saying that therefore all reciprocal legislation is subject to the same sort of limitations as would be an interstate "compact"; I read it as saying that it might be. If I am correct in this reading, I do not think the first sentence of the footnote quoted above should refer to "our conclusion", but instead to "our reasoning" or "our analysis". It is certainly not necessary to decide in this case, which does involve a "compact", that reciprocal legislation which does not involve a compact is to be treated as if it did under the compact clause.

Sincerely,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 19, 1977

Re: No. 76-635 - U. S. Steel v. Multistate Tax Commission

Dear Lewis:

Please join me in your opinion for the Court.

Sincerely,

*WVR*

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

December 5, 1977

Re: 76-635 - United States Steel Corp. v.  
Multistate Tax Commission

Dear Lewis:

Please join me.

Respectfully,



Mr. Justice Powell

Copies to the Conference