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Extract from Nick Dranias' The Federalist Toolkit (2010) citing Tillman's A Textualist Defense

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The Federalism Toolkit: Ten Tactics for Citizens and States to Protect Individual Liberty by Restoring State Sovereignty

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EXECUTIVE SUMMARY

Once upon a time, the federal government defended the states from foreign invasion and helped maintain interstate harmony; the states were responsible for day-to-day internal governance. Today, that vision is more like a dimly recalled bedtime story. The reality is that the federal government routinely usurps the role of the states; and the resulting concentration of power threatens individual liberty.

To secure liberty, this policy report proposes that citizens and states adopt a comprehensive strategy to restore state sovereignty in our compound republic. The report identifies the proper structural role of states and then analyzes key court decisions to determine how best to position states to resist federal overreach. From this analysis we can formulate a comprehensive strategy of 10 tactical tools to revive the American system of dual sovereignty:

1. Enacting state sovereignty legislation backed by strategic litigation;
2. Establishing taxpayer courts to enforce dual sovereignty based on taxpayer standing;
3. Enacting state sovereignty civil rights laws;
4. Establishing constitutional defense councils;
5. Enforcing coordination rights enjoyed by state and local governments in existing federal statutes;
6. Enacting laws that force the federal government to commandeer the states in order to deploy or enforce federal laws;
7. Enacting laws devolving power back to the people by depriving state and local officials of the power to implement federal policies;
8. Engaging in strategic litigation and enacting laws to limit or eliminate the power of state officials to accept conditional federal grants;
9. Restoring the Constitution through initiating the state-based amendments convention process; and
10. Resisting federal overreach through interstate compacts that coordinate the adoption of the foregoing tactics, define and secure individual rights, carve-out entire regions from the reach of federal regulations, and redesign federal programs.

**This is a DRAFT version; the final version of this policy report will be available late December 2010 at www.goldwaterinstitute.org or by calling Misty Wickizer-Jernigan at (602) 462-5000 x 233.*

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of Congress were regarded as an exercise of Congress' normal lawmaking process, then each house would be required to pass a resolution consenting to the compact, whereupon the joint resolution would be sent to the President for his approval or veto.[447] But if granting the consent of Congress were regarded as the exercise of a power conferred exclusively upon Congress, such as Congress' power to propose constitutional amendments,[448] then each house would need only to approve an interstate compact by passing a concurrent joint resolution, which does not require presidential presentment.[449]

No case holds congressional consent to an interstate compact requires presidential approval.[450] Scholars are divided on whether the requisite congressional consent requires presidential presentment, even though there is a history of vetoes and threatened vetoes of interstate compacts during President Roosevelt's term in office, as well as a custom of presenting interstate compacts to the President for approval.[451] But it is clear that granting consent of Congress to an interstate compact is *not* an exercise of Congress' normal lawmaking process. This is because the Supreme Court has long held congressional consent to interstate compacts can be *implied* both before and after the underlying agreement is reached.[452] This rule of law treats the consent of Congress very differently from the normal lawmaking process insofar as laws obviously cannot be enacted by mere implication. It also compels the conclusion that presidential presentment is unnecessary to garner the requisite consent of Congress for an interstate compact. After all, if an actual vote on specific legislation approving a specific interstate compact is not necessary to secure the requisite consent of Congress, it follows that presidential presentment is not necessary. Prevailing precedent thus justifies concluding that the Compact Clause confers an exclusive power upon Congress to approve interstate compacts,

[444] Joseph Zimmerman, *Accounting Today: Regulation of Professions by Interstate Compact*, The CPA Journal (March 15-April 4, 2004) (observing "[w]hat effect would a new congressional statute with conflicting provisions have on an interstate compact previously granted consent by Congress? The conflicting provisions in the consent would be repealed, with the exception of any vested rights protected by the Fifth Amendment to the U.S. Constitution"); *see generally Delaware River Joint Toll Bridge Com.*, 310 U.S. at 427.

[445] *Bryant v. Yellen*, 447 U.S. 352, 369 (1980) (holding "nothing . . . excuses the Secretary from recognizing his obligation to satisfy present perfected rights in Imperial Valley that were provided for by Art. VIII of the Compact").

[446] U.S. Const., art. I, sec. 10.

[447] U.S. Const., art. I, § 7, para. 2.

[448] *Hollingsworth v. Virginia*, 3 U.S. 378 (1798); *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 460 (D.C. Cir. 1982) ("By not mentioning presidential participation, Article V, which sets forth the procedure for amending the Constitution, makes clear that proposals for constitutional amendments are congressional actions to which the presentation requirement does not apply."); Special Constitutional Convention Study Committee, American Bar Association, Amendment of the Constitution by the Convention Method under Article V 25 (1974) ("There is no indication from the text of Article V that the President is assigned a role in the amending process.").

[449] ZIMMERMAN & WENDELL, *supra* note 411, at 94 (1951) ("On the face of the Constitution, it would seem that the concurrent resolution, over which the President has no control, also should be available as a means of giving consent to compacts ").

[450] Author's research on www.lexis.com.

[451] *Compare* ZIMMERMAN & WENDELL, *supra* note 411, at 93 & n. 334, 94 ("[v]irtually without exception, consent to compacts has been given by act of Congress or by joint resolution. It follows that presidential signature or the overriding of a veto has been a necessary part of the consent process . . . . whatever the original meaning of the consent requirement may have been with regard to compacts, settled usage now has definitely established the President's power to participate in the consent process"); *with* Michael Greve, *Compacts Cartels and Congressional Consent*, 68 MO. L. REV. 285, 319 n. 138 (Spring 2003) ("Whereas affirmative federal legislation is of course subject to presentment and presidential veto, the state activities listed in Article I, Section 10 are subject only to the consent of the Congress, thus rendering approval of compacts somewhat easier to obtain than ordinary legislation"); Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1349 n.183 (2005) ("A Congress that acts pursuant to a provision demanding 'consent' of both houses may very well have met the minimum requirement of the clause. However, by bypassing the President, the Congress might thereby have excluded the federal courts from enforcing its edict."); Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 742 (2007) ("The new rule would then be that every time Congress consents to an interstate agreement, the agreement becomes federal law. This seems an eminently reasonable and possible holding. As discussed previously, it is unclear what this concept adds to the regime anyway. The subject matter of the compact itself only seems relevant under a theory of delegation whereby Congress is simply delegating its lawmaking authority to the states. But such a theory would seemingly violate the Presentment Clause in that the President is excluded from the process"); David Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496, 499 n. 19 (2007) ("Among the powers constitutionally vested in Congress that seem non-legislative in character (even if performed in conventional parliamentary form - i.e., by bill or resolution, and even if with presentment) are those conferred by, e.g., U.S. Const. art. I, § 10, cl. 3 (consent to state 'Agreements or Compacts,' tonnage duties, or state troops or ships, or state engagement in war); U.S. Const. art. IV, § 3, cl. 2 (admission of new states and management and disposal of United States property); U.S. Const. art. V (proposing, or calling conventions for proposing, constitutional amendments); U.S. Const. amend. XXV (determining presidential inability or ability to discharge duties of office). From time to time, some of these have been mistakenly regarded by courts (even by the Supreme Court, and even within the past few decades) as legislative powers; but the historical mainline of the case law, and the principled common sense of the provisions in context, is to the contrary")).

[452] *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893) ("[t]he Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement, as where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given. Story says that the consent may be implied act of Congress, admitting such State into the