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April 25, 2010

Extract from Nick Dranias, Goldwater Institute Policy Report, The Power and Promise of Interstate Compacts (2010), submitted as an exhibit to Montana House Bill 448, citing Tillman's "A Textualist Defense"

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HB 4448 3/17/11  
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### *The Power and Promise of Interstate Compacts*

States can organize collectively to resist the federal government through interstate compacts.<sup>1</sup> But this effort would be more than a protest movement; it offers a cornucopia of resistance tactics limited by little more than the imagination. Existing legal authority could support state efforts to define and secure individual rights against federal legislation by criminalizing encroachment of those rights by federal authorities. An aggressive interpretation of the law could support carving out entire regions from the reach of federal regulations that invade state sovereignty. If pushed to their limits, interstate compacts could even empower states to completely redesign federal programs that intrude upon their reserved powers.

#### **The Essence of Interstate Compacts**

An interstate compact is a contractual agreement among states, typically evidenced by an enabling act authorizing state officials to reach the agreement, a statute that memorializes the agreement and its terms, and a confirmatory writing manifesting the consent of signatory states to the agreement.<sup>2</sup> Like a contract, a compact must involve an offer, acceptance, and consideration in the form of mutual obligations or a bargained-for exchange. Additionally, the subject matter of a compact must also be one over which states have the capacity to contract.<sup>3</sup> The subject matter of compacts between the states may involve the invocation of any sovereign power, including the police power. Compacts thus far have been “classified as follows: boundary-jurisdictional, boundary-administrative, regional-administrative, administrative-exploratory-recommendatory, and administrative-regulatory.”<sup>4</sup> One of the earliest interstate compacts, for example, reciprocally guaranteed the continued protection of existing property and contract rights from “any law which rendered those rights less valid and secure.”<sup>5</sup>

#### **Congressional Consent Is Not Mandatory**

Although the Constitution provides that states may not enter into compacts without the “consent” of Congress, the Supreme Court ruled in *U.S. Steel v. Multistate Tax Commission* that congressional consent is only required for an interstate compact that attempts to enhance “states power quoad [relative to] the federal government.”<sup>6</sup> This means that congressional consent is not required for compacts that merely exercise the sovereign powers of the states without purporting to augment those powers relative to those of the federal government.<sup>7</sup> This relaxed rule has opened the door to the formation of numerous interstate compacts, with or without congressional consent. Although “states approved only thirty-six compacts between 1783 and 1920,”<sup>8</sup> today there are approximately 200 interstate compacts in effect, including water allocation and conservation compacts (37), energy and low-level radioactive waste disposal (15), criminal law enforcement (18),

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reasonable to expect that the rights, guarantees, and obligations congressionally approved interstate compacts create are likely protected from deprivation by the federal government as vested rights under the Fifth Amendment's Due Process Clause.<sup>35</sup> For example, water rights protected by the Colorado River Compact have been protected against a federal agency's efforts to undermine those rights by enforcing an inconsistent federal law.<sup>36</sup> In short, states can leverage congressionally approved interstate compacts to supersede prior federal laws and to protect themselves and their residents against the reach of future federal laws through the creation of vested rights protected by interstate compact.

### **Congressional Consent Does Not Require Presidential Approval**

Given that congressionally approved interstate compacts have the force of federal law, the next question is: How should states secure the requisite approval? The Constitution speaks only of securing the "Consent of Congress."<sup>37</sup> If granting the consent 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.<sup>38</sup> 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,<sup>39</sup> then each house would need only to approve an interstate compact by passing a concurrent joint resolution, which does not require presidential presentment.<sup>40</sup>

No case holds that congressional consent to an interstate compact requires presidential approval.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> 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 that can be exercised without presidential presentment. This conclusion is also consistent with the original meaning of the Constitution.

From an originalist perspective, the text of the Compact Clause is the starting point for analysis. The fact that Congress has long had a means of manifesting its consent without presidential presentment—the concurrent joint resolution—precludes the claim that the meaning of the phrase "Consent of Congress" *necessarily* implies the requirement of presidential presentment. And while it has been argued that the Compact Clause was not meant to provide an alternative means of legislation,<sup>44</sup> the substantive power of an interstate compact could be alternatively sustained under

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<sup>32</sup> McGuinn, *supra* note 8, at 14 (referencing “the Interstate Insurance Receivership Compact, Northeast Interstate Dairy Compact, and the Interstate Compact for Adult Offender Supervision”); see, e.g., *Elcon Enterprises, Inc. v. Washington Metro Area Transit Authority*, 977 F.2d 1472 (D.C. Cir. 1992) (noting intra-circuit split and assuming without deciding that WMATA is a quasi-federal agency); *Coalition for Safe Transit, Inc. v. Bi-State Development Agency*, 778 F. Supp. 464 (E.D. Mo. 1991) (Bi-State quasi-federal agency subject to section 702 of federal APA).

<sup>33</sup> *Parkridge 6 LLC v. U.S. Department of Transportation*, 2010 U.S. Dist. LEXIS 34182 \* 17-18 (E.D. Va. 2010).

<sup>34</sup> *McKenna v. Washington Metropolitan Area Transit Authority*, 829 F.2d 186 (D.C. Cir. 1987).

<sup>35</sup> Joseph Zimmerman, *Accounting Today: Regulation of Professions by Interstate Compact*, *The CPA Journal* (March 15-April 4, 2004) (observing, “What 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.

<sup>36</sup> *Bryant v. Yellen*, 447 U.S. 352, 369 (1980) (holding that “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”).

<sup>37</sup> U.S. Const. art. I, § 10.

<sup>38</sup> U.S. Const. art. I, § 7, para. 2.

<sup>39</sup> *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”).

<sup>40</sup> Zimmerman & Wendell, *supra* note 2, 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”).

<sup>41</sup> Author’s research on [www.lexis.com](http://www.lexis.com).

<sup>42</sup> Compare Zimmerman & Wendell, *supra* note 2, at 93 & n. 334, 94 (“Virtually 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”).

<sup>43</sup> *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893) (“The 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.

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