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Federalism Do-It-Yourself: 10 Ways for States to Check and Balance Washington

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law have been dismissed based on the determination that any state law that conflicts with the authority conferred by an interstate compact “is preempted under the Supremacy Clause of the United States Constitution.” In fact, congressionally approved interstate compacts not only displace state law under the Supremacy Clause but have been held to supersede prior federal law as well. For example, the Circuit Court of Appeals for the District of Columbia held that the liability provisions of the previously enacted Federal Employer Liability Act were displaced by the contrary provisions of the Washington Metropolitan Area Transit Authority (WMATA) interstate compact. Additionally, it is 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. 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. 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. Moreover, by incorporating state laws that might otherwise conflict with the Supremacy Clause into a congressionally-approved interstate compact before they are struck down in court, Congress can effectively waive any such conflict.

**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.” 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. 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, then each house would need only to approve an interstate compact by passing a concurrent joint resolution, which does not require presidential presentment.

No case holds that congressional consent to an interstate compact requires presidential approval. 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. 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. This rule of law
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”).

Zimmerman & Wendell, supra note 415, 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”).

Author’s research on www.lexis.com.

Compare Zimmerman & Wendell, supra note 415, 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 Schaeffer, 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 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 essentially 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 disability 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”)

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. Story says that the consent may be [an] implied act of Congress, admitting such State into the Union, is an implied consent to the terms of the compact”); see also Cuyler, 449 U.S. at 441; Wharton v. Wise, 133 U.S. 155 (1894), Green, 21 U.S. at 39-40.

See, e.g., Engdahl, supra note 438, at 1024.

Simmons v. Burlington, Cedar Rapids & Northern Ry. Co., 159 U.S. 278, 290 (1895); Ritter v. Ulman, 78 F. 222, 224 (4th Cir. 1897) (holding that “[i]n order to constitute estoppel, or quasi estoppel, by acquiescence, the party, with full knowledge or notice of his rights, must freely do what amounts to a recognition of the transaction, or must act in a manner inconsistent with its repudiation, or must lie by for a considerable time, and knowingly permit the other party to deal with the subject matter under the belief that the transaction has been recognized, or must abstain for a considerable time from impeaching it, so that the other party may reasonably suppose that it is recognized”).