

## Shield of Federalism: Interstate Compacts in Our Constitution

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### Introduction

The American republic is facing one of the greatest challenges of our history. In Washington, Republicans and Democrats alike have indulged the runaway spending and regulatory overreach of a federal government that continues to expand the scope of its powers. Americans are starting to realize that restoring and protecting self-government requires a return to our founding principles of limited government and local control.

As this nationwide movement of constitutional renaissance gathers momentum, Americans are searching for tools to restore the Constitution's founding principles. Among the most promising is the interstate compact. Its power as a constitutional device to regulate a multitude of regional issues has already been demonstrated: More than 200 interstate compacts are currently in force. And yet, as this paper shows, that power remains largely unexploited.

Under our Constitution, interstate compacts that regulate matters within the enumerated powers of the federal government require congressional consent. That consent can be express (an affirmative majority vote in Congress) or implied by congressional acquiescence. In the case of express congressional consent, a resolution has usually been presented to the President for his signature into law. But it is not clear that presentment is actually required, and there are strong grounds for arguing that the President's signature is

not necessary. When Congress consents to an interstate compact, the compact carries the force of federal law, trumping all prior federal law, state law, and even state constitutions.

In the decades ahead, interstate compacts could gain increasing use as a shield against federal overreach. With congressional consent, federalized interstate compacts could shield whole areas of state regulation from the power of the federal government. This Policy Perspective explores the history and law of interstate compacts, with particular focus on federalized interstate compacts.

### Interstate Compacts in Constitutional History

The interstate compact has a long history in America. During the colonial period, interstate compacts were used to regulate inter-colonial affairs. Two centuries later, more than 200 interstate compacts are in force, woven into the fabric of our society. The Port Authority of New York and New Jersey is an interstate compact; so is the Washington Metropolitan Area Transportation Authority that runs the subways and buses in our nation's capital; so are a myriad of agreements that regulate criminal background checks, environmental standards, and education benefits, across state lines.

Interstate compacts were born of the uniquely Anglo-American tradition of common law and respect for the solemn obligation of

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contract—that tradition which has proved such a bountiful source of strength for the American republic. Indeed, they are at one level just ordinary contracts, governed by the same common law of contracts that applied to private transactions. But because they were agreements among governments, which could bind future governments, they had a quasi-constitutional force. In this sense, both the Articles of Confederation and the Constitution of the United States can be seen as interstate compacts.

Both the contractual and quasi-constitutional dimensions of the interstate compact survive to this day. The Constitution specifically provides for them, in Article I, Sec. 10: “No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State.” This provision has been very narrowly construed. The Supreme Court has been loath to strike down interstate compacts generally, and has not in fact required congressional consent in many cases. Congressional consent has generally been required only when necessary “in order to check any infringement of the rights of the national government.”<sup>1</sup>

Interstate compacts have tended to fall into one of three categories.<sup>2</sup> First and most traditional is the compact dealing with border questions among states. Second is the advisory compact, which is usually set up to study a question and make recommendations. Third is the regulatory compact, which has come into increasing prominence in the last century. The most important for our purposes, regulatory compacts run the gamut of policy areas, from regional transportation to crime, radioactive waste, and environmental regulation.

Regulatory compacts usually (but not always) establish a regional agency of some kind. These vary as much in size and function as the compacts themselves, from three-person commissions to the Washington Metropolitan Area Tran-

sit Authority, which employs 10,000 people. The key thing to note about these agencies is that they (like the compacts which create them) “are neither federal in nature nor state in scope. Administrative compacts have created powerful governing commissions appropriately described as a “third tier” of government, a tier that occupies that space between the sphere of federal authority and the sphere of individual state authority.”<sup>3</sup>

### Legal Effect of Interstate Compacts

#### *Impact of interstate compacts on state law.*

In keeping with their general purpose, the most basic effect of an interstate compact is to bind the member states. As one court put it, “The law of interstate compacts as interpreted by the U.S. Supreme Court is clear that interstate compacts are the highest form of state statutory law, having precedence over conflicting state statutes.”<sup>4</sup> In fact critics of interstate compacts often argue their case from a states’ rights point of view: An interstate compact necessarily involves a giving up of some state sovereignty by entering into a restraining arrangement with other states. For this reason, courts have imposed limits on what the states can do with compacts: The “reserved powers” doctrine holds that certain attributes of sovereignty cannot be contracted away.<sup>5</sup> Courts have also held that the surrender of a state’s power in a compact must be “in terms too plain to be mistaken.”<sup>6</sup> These limitations, however, are mere caveats to bear in mind when considering the fact that interstate compacts not only trump existing state law, they bind all future state governments. (In fact, as discussed in the next paragraph, when a compact enjoys congressional approval, it becomes federal law; hence, when the Compact Clause and Supremacy Clause operate in tandem, an interstate compact will trump even the *constitutions* of members states). Most compacts provide for withdrawal and dissolution; but they are otherwise permanent, as some worried commentators have noted.<sup>7</sup>

#### *Federalism and interstate compacts with congressional consent.*

From the point of view of federalism the more important effect of interstate compacts is on federal law—and on the balance of federal-state powers. Here a crucial distinction must be drawn between those interstate compacts which require congressional consent and those which do not. Courts are generally hesitant to put an interstate agreement within the

Compact Clause (i.e., requires congressional consent) at all. Courts have required congressional consent for two kinds of compacts: first, when the compact would change the balance of power between states and the federal government or diminish the power of the federal government; and second, where the compact intrudes on an area of specific federal authority. If the area of regulation is federally preempted, congressional consent is generally required. Presentment not required for congressional consent.

Before proceeding with that discussion, however, it is vital to highlight that because the power to consent or withhold consent is granted to Congress directly under Article I, Sec. 10, it is well established that the “consent” in question is not legislation of the ordinary and does not need to be presented to the President for his signature. That is a crucial consideration if the President is unwilling to sign pro-federalism legislation. In such situations, congressional resistance to federal overreach is restricted to blocking further legislation, defunding current programs, and holding hearings (assuming, as seems likely, a majority in the House). Beyond these essentially negative blocking functions, consenting to an interstate compact is virtually the only proactive tool available to a Congress that is committed to rolling back the federal overreach and reestablishing a constitutional balance.

### *Congressional consent transforms interstate compacts into federal law.*

In *Cuyler v. Adams* (1981) the Supreme Court said: “[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States’ agreement into federal law under the Compact Clause.”<sup>8</sup> A moment’s reflection suffices to see the enormous power that this gives interstate compacts within our Constitutional system. Note that in *Cuyler* the issue was the effect of congressional consent given in advance to interstate compacts “for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal law and policies ....”<sup>9</sup> Some commentators have expressed concern that interstate compacts that go further than implementing the precise terms of a *prior* congressional approval stand on shaky ground—but it seems abundantly clear that congressional approval given to an already existing interstate compact “transforms the States’ agreement into federal law under the Compact Clause.”

## **Just how deeply a compact can intrude on federal law has not been precisely established, chiefly because compacts generally try to have as little impact as possible on federal law, in order to eliminate potential political hurdles in Congress.**

An interstate compact cannot impact federal law beyond the borders of the member states. But just how deeply a compact can intrude on federal law has not been precisely established, chiefly because compacts generally try to have as little impact as possible on federal law, in order to eliminate potential political hurdles in Congress. The outer boundary has not been explored. But we can assume, and proponents should argue, that interstate compacts can cut quite a swathe into federal law—assuming of course the congressional consent that would then be required. This is because, “When it approves a compact, Congress arguably exercises the legislative power that the compact threatens to encroach upon and declares that the compact is consistent with Congress’s power in that area. [...] Congress, in effect, consents to the state’s intruding on its traditional domain.”<sup>10</sup>

Congressional consent transforms a compact into a “law of the Union,” as Justice McLean put it in the seminal *Pennsylvania vs. Wheeling* (1852).<sup>11</sup> Most of the federal cases involving interstate compacts turned on fairly minor questions of federal law; but if a congressionally approved interstate compact can trump pre-existing federal law on a minor issue there is no legal bar to its doing so on a major issue. Hence the importance of the “law of the Union” doctrine as applied in cases such as *McKenna vs. Washington Metropolitan Area Transit Authority* (D.C. Cir. 1987).<sup>12</sup>

In *McKenna*, the plaintiff sued for wrongful death on the basis of the Federal Employers’ Liability Act (FELA) after her husband (an employee of WMATA) was killed in an accident while on the job. The Court of Appeals for the D.C. Circuit ruled that FELA was unavailable to her, because the WMATA Compact has its own liability scheme and specifically provides

(in sec. 77 of the Compact) that its transit services “shall [...] be exempt from all rules, regulation and orders of [...] the United States otherwise applicable to such transit[....]” The court also pointed to sec. 5 of the Compact, which provides that “the applicability of the laws of the United States, and the rules, regulations, and order promulgated thereunder, relating to or affecting transportation under the Compact ... is suspended, except as otherwise specified in the Compact, to the extent that such laws, rules regulations and orders are inconsistent with or in duplication of the provisions of the Compact.”

Such compact provisions, and court decisions confirming them, have not drawn a great deal of attention, but they suggest that interstate compacts have enormous unexplored potential to shape the contours of federal power and of federalism. As one commentator noted (proposing a Pacific States environmental regulatory compact after the Exxon Valdez spill in 1989), “the states have never used an interstate compact explicitly to circumvent existing federal regulations. There does not seem to be any obstacle, however to using the interstate compact in this manner.”<sup>13</sup>

One treatise notes the evolving uses of interstate compacts and the potential for further expansion:

Today, interstate compacts govern a wide variety of issue areas, ranging from health, education, taxation and transportation to corrections, child welfare, energy, and the environment to name just a few[....] The substantive breadth of these initiatives clearly demonstrates that the interstate compact mechanism may be readily adapted for use in almost any field. The possibilities are truly limitless, and as recent developments suggest, the range of subjects covered by such agreements is likely to continue growing in the years to come.<sup>14</sup>

One interesting possibility is that, because Congress may consent in advance to a compact, it may delegate the equivalent of administrative rulemaking authority to any regulatory body established by the compact. Thus, in the abstract, the interstate compact has as much potential as a “policymaking” device as the regulatory agencies of the federal government.

### *Presentment not definitively required for congressional consent.*

The Compact Clause (Art. I, Section 10) requires congressional consent for interstate compacts within its scope, but is silent on the form of consent. However, as noted in *Cuyler*, the seminal interstate compact cases of the Supreme Court establish that “Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined.”<sup>15</sup> It would seem to follow inescapably that Congress may consent by means of a form intermediate between express legislation and implied acquiescence, such as a concurrent resolution expressing consent, without the need for presentment to the President.

The constitutional law of interstate compacts is not settled, and the precedents show some tension and instability, especially in respect of the requirement for, and effect of, congressional consent. In virtually all cases, express congressional consent has taken the form of an act of Congress, signed by the President. The Compact Clause requires only the “consent” of Congress, and makes no reference to the President. But *both* the second and third clauses of Art. I, Section 7 (Presentment) provide a basis for arguing that the President’s signature is required for congressional consent.<sup>16</sup> President Franklin Roosevelt vetoed at least two resolutions of congressional consent presented to him for signature: one, related to fisheries, in 1939, and another, the Republican River Compact (later adopted in modified form) in 1942. On the basis of these two examples, one commentator writes, “When congress gives its consent to a compact by an act or joint resolution, it is subject to Presidential veto.”<sup>17</sup> No Court has ever so held, and the Compact Clause is silent on the issue, but as Frederick L. Zimmerman explains, “Usage has brought the President into the compact process.”<sup>18</sup>

It seems clear, however, that congressional consent to a compact is not legislation of the ordinary sort. The legal effect of a compact is not contained within the congressional consent—which is often a simple statement of consent referring to a specific compact, which may or may not be set forth fully within the consent. Compacts that require congressional consent are ineffective without it, but the law of the compact arises from within the compact itself. The power to consent or withhold consent is granted to Congress directly, and because Congress may exercise it by mere implication, it seems clear that a simple statement of consent (without presentment) would also suffice. In this way, the consent power granted in the Compact Clause

is akin to the power to propose constitutional amendments for ratification, and congressional administration of territories.

The matter would be largely one of first impression for the federal courts, because no interstate compact has ever been challenged for insufficient congressional consent on the grounds that the claimed consent was a simple concurrent resolution of Congress rather than an act signed by the President. A court faced with the question could rule, consistent with Supreme Court precedents, that presentment is not required for express congressional consent to an interstate compact.

Even assuming that presentment to the President is required, however, the interstate compact is a powerful device for shaping the balance of state and federal power. A federalized compact (whatever the form of consent) can change and shape federal law. It is the one tool through which the states as states can initiate changes to federal law.

### *Withdrawal of congressional consent; legislative modification.*

Subsequent legislation can modify or withdraw congressional consent. In cases where the compact impinges on preempted federal regulatory area, and therefore required congressional consent to start with, the compact would become inoperative.

## Technical and Tactical Considerations

Several observations bear keeping in mind.

- Congressional consent can take a variety of forms. Congress can consent to an existing compact (after-the-fact) either through resolution or legislation. It can consent to a compact in advance, also either through resolution or legislation, but almost always through legislation. And its consent can be inferred from its acquiescence to a compact, as occurred in the classic case of *Virginia v. Tennessee* (1893).<sup>19</sup> The deference courts have shown to clear statements of congressional consent suggests a formal flexibility that may have significant unexploited potential.
- Congressional consent can be conditional and limited in any way Congress sees fit. In cases where this is a concern, the compact can expressly provide that it will go into effect only when congress consents unconditionally.
- Congressional consent can also delegate wide powers to the compact, including the power to change the terms of

the compact subsequently. The Washington Metropolitan Area Transit Regulation Compact provides: “This Compact may be amended from time to time without the prior consent or approval of the Congress of the United States and any amendment shall be effective unless, within one year, the Congress disproves that amendment.” In other words, compacts allows both state legislation to be elevated to the height of federal law and subsequent state legislative action to change federal law<sup>20</sup> *without further congressional action*. Critics will charge an impermissible delegation of legislative authority—but interstate compacts have at least as much latitude in this respect as federal regulatory agencies, which routinely set rules without violating the doctrine of non-delegation.

- Interstate compacts have been launched and adopted in a variety of ways. Here are some examples:
  - **Port Authority of NY/NJ:** The governor of each state appointed three commissioners each to a commission to study the question of regional mobility/commerce. The commissioners reported back several years later with a draft compact. The compact was quickly ratified by the states and approved by Congress.
  - **Interstate Compact on the Placement of Children:** New York’s Joint Legislative Committee on Interstate Cooperation studied the question at length. Eventually it proposed a draft, and the draft was quickly passed by 12 legislatures.
  - **Emergency Management Assistance Compact:** The Southern Governors’ Association endorsed the need for a compact to facilitate mutual disaster assistance among states facing hurricanes, etc. The SGA established a working group which about a year to propose a draft compact. The plan was signed by SGA members, who began presenting it to their legislatures.
  - **National Crime Prevention and Privacy Compact:** The NCPPC was formed to facilitate criminal backgrounds checks across borders. The proposal took shape over 15 years under the auspices of a national umbrella organization, and finally formalized in coordination with the FBI. Congress endorsed it, and it then passed in the states.

## Conclusion: Interstate Compacts as “Shields” for the States

One of the founding pillars of our Constitution is the idea of dual sovereignty—the supremacy of the federal government as to issues of national concern, and the primacy of the states as to matters of state and local concern. But as the national economy has developed and become more integrated, and as communities have grown into thriving metropolitan areas that spill across state lines, the federal government has steadily expanded in scope and power, to a point that today calls into question the very idea of federalism. With the loss of meaningful constraints on the power of the federal government *viz-a-viz* the states since the 1930s, the original distinction between a federal government whose powers are “few and definite” and state governments whose powers are “numerous and indefinite” (as James Madison put the matter in Federalist No. 45) has been quite lost. Hence, one result of the expansion of the federal government has been to blur the distinction between national issues and local ones, which in turn facilitated the further expansion of federal power.

Interstate compacts have great potential to reestablish the crucial boundary of dual sovereignty—if not just where the Framers intended, then at least enough to restore a meaningful separation between national matters and local ones, and meaningful limits on federal power. The fact that congressional consent gives the interstate compact the status of federal law means that, in effect, the federal government is consenting to carve out—from the scope of its own ever-expanding powers—an area within which the states can remain preeminent. In this way, “compacts can effectively preempt federal interference into matters that are traditionally within the purview of states but that have regional or national implications.”<sup>21</sup>

One promising avenue may be to conceive of a compact for a particular area of legislation—say health care—and provide for a “thin” set of reciprocal legislative provisions (the compact) which would include a clause to the effect that “the operation of federal laws not consistent with state laws and regulations adopted pursuant to this compact will be suspended.” The compact would provide that within certain parameters the states would be free to legislate as they chose. Such a compact would function as a “thin shield compact” to carve out an area of regulation from the power of the federal government, and leave states free to regulate according to their preferences under the umbrella. Such a compact would require congressional consent in the form of a resolution (not needing presentment to the President). Congressional consent would then give it the status of federal law, including changes to pre-existing federal law.

Used in this way, interstate compacts can help clarify and strengthen the limitations on the federal government’s enumerated powers. They can thereby restore a meaningful distinction between matters of national concern and matters of local concern—the essence of federalism in our Constitution. ☆

## Endnotes

<sup>1</sup> J. Story, Commentaries on the Constitution of the United States § 1403, p. 264 (T. Cooley ed. 1873).

<sup>2</sup> Caroline Broun, et al., *The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide*, pp. 12 and passim. Hereinafter, "the ABA Practitioner's Guide."

<sup>3</sup> Broun, at 15.

<sup>4</sup> Broun, at 20, citing *Doe v. Ward*, 124 F.Supp.2d 900, 914. (W.D. Pa. 2000), citing *McComb v. Wambauch*, 934 F.2d 474, 479 (3d Cir. 1991).

<sup>5</sup> Just as, for individuals, certain constitutional rights—e.g., freedom from slavery—cannot be waived.

<sup>6</sup> *Jefferson Branch Bank v. Skelly*, 66 U.S. 436 (1862).

<sup>7</sup> Jill Elaine Hasday, "Interstate Compacts in a Democratic Society: The Problem of Permanency," 49 *Fa. L. Rev.* 1 (January 1997). The author notes:

Even if compacts are the product of deliberative, collective self-determination [...] they severely hamper the people's ability to continue to guide their own fate by strictly limiting a party state's power to respond to changing preferences and circumstances. At the heart of the meaning of compacts, this tension has gone essentially unexplored by compact writers, who instead expound on the advantages of finality and hail compacts as augmenting the voice of the citizenry as they empower the states.

Id. at 3.

<sup>8</sup> 449 U.S. 433, 440 (1981).

<sup>9</sup> 4 U.S.C. § 112(a).

<sup>10</sup> Broun, at 41.

<sup>11</sup> 54 U.S. 518, 566.

<sup>12</sup> 829 F.2d 186.

<sup>13</sup> Marlissa S. Brigggett, "State Supremacy in the Federal Realm: The Interstate Compact," 18 *B.C. Envtl. Aff. L. Rev.* 751, 765 (1991).

<sup>14</sup> Broun, at 180.

<sup>15</sup> 449 U.S. at 441, citing *Virginia v. Tennessee*, 148 U.S. 503 (1893) (where Congress, for judicial administration and taxing purposes, demarcated the border of districts adjacent to the boundary agreed in the compact as if that was the official boundary for all purposes, it effectively consents to the compact for purposes of the Compact Clause).

<sup>16</sup> The full text of Art. I, Section 7 is:

All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

<sup>17</sup> Joseph F. Zimmermann, *Interstate Relations: The Neglected Dimension of Federalism* 39 (1996).

<sup>18</sup> Frederick L. Zimmerman, *The Law and Use of Interstate Compacts* 24 (1961). See also, Frederick L. Zimmermann & Mitchell Wendell, *The Law and Use of Interstate Compacts* 16-17 (1976) ("Congressional consent to interstate compacts may be granted by an act of Congress or a joint resolution setting out the compact's terms.") (cited in Note, "Charting No Man's Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts", 111 *Harv. L. Rev.* 1991, 1993-94 (1998) and Kevin J. Heron, "The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements", 60 *St. John's L. Rev.* 1, 16 (1985)); and Frederick L. Zimmermann & Mitchell Wendell, *The Interstate Compact Since 1925*, at 94 (1951). ("The Compact Clause itself requires only the consent of Congress, but 'settled usage' has granted the President veto power over consent").

<sup>19</sup> 148 U.S. 503

<sup>20</sup> Broun, at 56.

<sup>21</sup> Broun, at 27.

## About the Author

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Mario began his career in corporate finance law. Since 2003, he has focused on public policy, dividing his time between government service and research and writing at prominent policy institutes. He served in the Pentagon as a special assistant to the Under Secretary of Defense for Policy, and on Capitol Hill as counsel for foreign and defense affairs to the U.S. Senate Republican Policy Committee. Mario has also worked as a state policy advisor for Senator Kay Bailey Hutchison.

Mario has written extensively for national and international publications, including features for *National Review* and *The Weekly Standard*, and op-eds in *The Wall Street Journal*. He has appeared on The Glenn Beck Show, CNN International, BBC Television, Radio America, and more.

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