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The Power and Promise of Interstate Compacts

States can organize collectively to resist the federal government through interstate compacts.¹ 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.² 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.³ 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.”⁴ 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.”⁵

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.”⁶ 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.⁷ 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,”⁸ 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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and education and child welfare compacts (13).⁹ The average state is a party to 25 interstate compacts.¹⁰ Perhaps the most aggressive effort to coordinate multistate regulatory power is the Regional Greenhouse Gas Initiative, in which 10 states have agreed to apply “cap and trade” carbon regulations to themselves.¹¹

Interstate Compacts Can Powerfully Coordinate Collective State Action

As their proliferation suggests, interstate compacts are a powerful tool for exerting state sovereignty. Each state to a compact has the power to enforce the compact through the remedy of specific performance because the enforceability of compacts is guaranteed under the Contracts Clause and an exception to the rule that one legislature cannot bind future legislatures.¹² Thus, the coordinated action that interstate compacts make possible a unified front among the states and help overcome collective action problems.

Compacts, for example, could require states to coordinate litigation efforts and to require state officials to refuse to cooperate with federal agents or agencies—rejecting “regulatory primacy” en masse to ensure that federal resources cannot be targeted to punish specific states. Compacts could be used for collectively resisting conditional federal grants—to minimize the fear of the unequal loss of federal funds, states could devise an interstate compact that would preclude all states from taking any conditional federal money only after a certain threshold number of states enter into the agreement. Under *U.S. Steel*, interstate compacts like these would be binding on the states with or without congressional consent because they would only exercise the state’s inherent sovereign powers without attempting to increase those powers relative to those of the federal government.

The Power of Congressionally-Approved Interstate Compacts to Trump Federal Law

Significantly, *U.S. Steel*’s requirement that congressional consent must be obtained for interstate compacts that increase the sovereign powers of the states relative to those of the federal government implies that *congressionally-approved* interstate compacts *can* increase the powers of the states relative to those of the federal government. Indeed, well over 100 years ago, Joseph Story’s *Commentaries on the Constitution of the United States* emphasized that “the consent of Congress may be properly required in order to check any infringement on the rights of the national government.”¹³ In fact, if congressional consent is secured, an interstate compact can be a vastly more powerful tool for protecting state sovereignty.

The power of congressionally-approved interstate compacts is best illustrated by a review of the fine print, authorizing statutes, and history of interstate compacts. An examination of a wide range of congressionally-approved compacts reveals a common feature: provisions that prevent the compact from altering the rights, obligations, or powers of the federal government. For example, the Colorado River Compact of 1922 provides, “Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.”¹⁴ Likewise, looking to federal laws that have given preapproval and subsequent approval to interstate compacts, one repeatedly discovers artful efforts to impose variants of the following caveat to congressional approval: “Nothing contained in this Act or in the compact consented to hereby shall be construed to affect the

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jurisdiction on, powers, or prerogatives of any department, agency, or officer of the United States Government.”¹⁵ Even the Weeks Act of 1911, which otherwise gives blanket consent to states entering into compacts for the purpose of forest protection, provided that the compact must not conflict with any law of the United States.¹⁶ Such caveats evidence an awareness of the risk that interstate compacts could expand the power of the compacting states in such a way that federal supremacy is challenged. Indeed, Congress has long been aware of the potential for compacts to expand the powers of the states relative to the federal government. Such awareness is evidenced, for example, by the act giving congressional consent to the Gulf States Marine Fisheries Compact of 1951, which states nothing contained in the agreement should be construed to limit “or add to” the powers of the states over fisheries.¹⁷

Digging deeper into our nation’s history, one discovers a series of clashes over interstate compacts during the 1930s and ’40s, triggered by state-based efforts to displace federal jurisdiction and regulatory authority. When the four states of the Connecticut and Merrimac valleys tried to enter into flood control agreements, for example, the Federal Power Commission saw the possibility of interference with its jurisdiction over hydroelectric power generation and objected to Congress in a memorandum, stating:

The signatory states will have a veto power over national policy with respect to the power so developed since the terms and conditions under which any such signatory state shall make available the rights of power development herein reserved shall be determined by separate agreement or arrangement between such State and the United States. Under this provision, for example, the Federal Government would not be free as it is now, to give the preference to municipalities and public power districts in the disposition of these water power resources which it has been the Congressional policy since 1920 (Federal Water Power Act) to provide.¹⁸

Based on this objection, President Roosevelt threatened to veto the compact, which prevented the compact from receiving approval.¹⁹ Later, Roosevelt found it necessary to act on his veto threats.

Fearing displacement of federal jurisdiction and regulatory authority, President Roosevelt vetoed a statute giving open congressional consent in advance to fishing compacts for states bordering on the Atlantic Ocean.²⁰ Likewise, in 1943, Roosevelt vetoed the Republican River Compact, which explicitly precluded the United States from exercising “such power or right ... that would interfere with the full beneficial and consumptive use” of waters from the Republican River Basin,²¹ stating:

It is unfortunate that the compact also seeks to withdraw the jurisdiction of the United States over the waters of the Republican Basin for purposes of navigation and that it appears to restrict the authority of the United States to construct irrigation works and to appropriate water for irrigation purposes in the basin. The provisions having that effect, if approved without qualification, would ... unduly limit the exercise of the established national interest....²²

All of these seemingly disparate facts evidence that “during periods of national government activism, interstate compacts have been seen as ways to safeguard state authority in the face of potential federal preemption.”²³ Among federal officials, in particular, there is a profound awareness

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that interstate compacts can increase the power of the states relative to the federal government. And there is also the concomitant recognition that interstate compacts could impact, alter, or even displace federal law and the power of federal agencies. Indeed, as President Roosevelt anticipated (and those who drafted the boilerplate caveats found in most interstate compacts and their authorizing statutes), congressionally approved interstate compacts are now clearly recognized as equivalent to federal law under the Supremacy Clause and as a potential source of vested rights that are protected against federal regulatory action.²⁴ This is despite the longstanding competing theory that an interstate compact is not equivalent to a federal statute, but merely an agreement between states that becomes an enforceable contract with congressional consent.²⁵

The road to the current state of the law has been circuitous. In 1851, for example, the Supreme Court held that a “compact, by the sanction of Congress, has become a law of the Union.”²⁶ Nearly a century later, however, the Court in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*²⁷ ruled that a compact was *not* the equivalent of a federal statute. But only two years later, the Court in *Delaware River Joint Toll Bridge Commission v. Colburn*²⁸ held that an interstate compact created a federal right and privilege. This led one commentator to declare in 1965 that “it seems abundantly clear that the doctrinal basis chosen by the Court for the *Coburn* rule was that a compact, by sanction of Congress, has become a law of the Union.”²⁹

As predicted, modern precedent now holds that a congressionally approved interstate compact is indeed a “law of the United States.”³⁰ In 1981, *Cuyler v. Adams* explained how the Supreme Court arrived at this conclusion:

Although the law-of-the-Union doctrine was questioned ... any doubts as to its continued vitality were put to rest in *Delaware River Joint Toll Bridge Comm’n v. Colburn* ... where the Court stated: “... [W]e now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal ‘title, right, privilege or immunity’”.... This holding reaffirmed the law-of-the-Union doctrine and the underlying principle that congressional consent can transform interstate compacts into federal law. The requirement of congressional consent is at the heart of the Compact Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the States’ compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority.³¹

It is now so well established that congressionally approved interstate compacts constitute federal law that the regulatory bodies some interstate compacts create have even sought certification as federal agencies.³² Lawsuits brought against agencies created by interstate compacts under state 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.”³³ 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 Employee Liability Act were displaced by the contrary provisions of the Washington Metropolitan Area Transit Authority (WMATA) interstate compact.³⁴ Additionally, it is

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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.³⁵ 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.³⁶ 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."³⁷ 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.³⁸ 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,³⁹ then each house would need only to approve an interstate compact by passing a concurrent joint resolution, which does not require presidential presentment.⁴⁰

No case holds that congressional consent to an interstate compact requires presidential approval.⁴¹ 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.⁴² 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.⁴³ 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,⁴⁴ the substantive power of an interstate compact could be alternatively sustained under

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the doctrine of estoppel by acquiescence, or “quasi estoppel,” which would bar the federal government from changing its position on an interstate compact.⁴⁵ Moreover, the structure and purpose of the Constitution does not require the President to have the power to veto congressional consent for interstate compacts. This is because the President’s role in presentment is to defend the executive branch from incursions by the *federal* legislative branch and to act as the representative of *all* of the people of the nation.⁴⁶ Fulfilling this role does not require the President to have the power to veto interstate compacts, which directly affect only the compacting states—especially in view of the Founders’ robust conception of state sovereignty and strong preference for decentralized government.

Significantly, those who claim that presidential presentment is necessary have never made the case that the original meaning of the phrase “Consent of Congress” entails the requirement of presidential presentment. Instead, they have declared, “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.”⁴⁷ But the claim that presidential presentment is “settled usage” disregards the longstanding court-sanctioned phenomenon of “implied consent” to interstate compacts. This phenomenon alone disproves the assertion that “settled usage” requires presidential presentment for effective congressional consent to interstate compacts.

It is not unusual and perhaps even “settled usage” for the exercise of conferred powers under the Constitution to have the effect of law *without* following the ordinary lawmaking process. Treaties, for example, create federal law under the Supremacy Clause despite conferring treaty powers only upon the Senate and the President.⁴⁸ It is natural to similarly regard congressional consent to an interstate compact as excepted from the normal lawmaking process, given that the Compact Clause mirrors the treaties clause of the Articles of Confederation,⁴⁹ and may be regarded as aimed at a similar purpose.⁵⁰ Moreover, where the Constitution specifically confers a power upon a named legislative assembly, as it does in the Compacts Clause, action by that assembly, without presentment to the executive branch, has been repeatedly sustained.⁵¹ The theory underpinning this rule is that the exercise of a specifically conferred power, such as the power to consent to an interstate compact, is not an exercise of the lawmaking apparatus; instead, the exercise of a conferred power is the exercise of a power that was meant to be exercised exclusively by the designated body.

Binding precedent, original meaning, and “settled usage” thus justify the conclusion that presidential presentment is unnecessary to securing effective congressional consent to an interstate compact. Without a presentment requirement, states would be able to form viable interstate compacts that displace federal power within their jurisdiction without having to grapple with an antagonist in the executive branch. For example, an agreement between two or more states to allow insurance companies reciprocal access to intrastate markets, to allow for the portability of existing medical insurance coverage, or to protect the right to pay directly for health care services in either state could serve as a vehicle for superseding conflicting federal laws regulating insurance companies or precluding free choice among medical providers and insurance issuers—such as the Obama Health Care Program. A compact among the states to protect, recognize, and mutually enforce the rights created by the Firearms Freedom Acts or the Health Care Freedom Acts could

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establish vested rights protected against prior or subsequent federal law. To test the boundaries of the extent to which congressionally approved interstate compacts supersede contrary federal law, states could devise interstate compacts that (1) directly displace contrary federal laws that affect the reserved powers of the states, (2) redefine compliance with the terms of conditional federal grants to prevent recapture of federal funds that are appropriated to serve state and local priorities, and (3) redirect federal tax revenues to custodial accounts and shield taxpayers from federal tax liability.

Interstate Compacts Advance Consent Statute

Even if presidential presentment were required for effective congressional approval of an interstate compact, at least one blanket “consent-in-advance” statute has been on the books for decades.⁵² This statute gives blanket consent “to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.”⁵³ The foregoing statute contains no caveat and no stipulation that the consent it offers is conditional on the interstate compact being consistent with federal law. Such blanket congressional consent contrasts with numerous prior, contemporaneous, and subsequent consent-in-advance laws that only give consent to interstate compacts that do not conflict with federal law.⁵⁴ The only reasonable way to construe the omission of such language is to infer that blanket consent was given to future conforming interstate compacts. States should be able to rely on the effectiveness of this consent-in-advance statute because such statutes have been enforced from the earliest days of the Republic.⁵⁵

The foregoing “consent-in-advance” statute provides the legal basis for states to attempt to resist nearly any federal regulatory law by criminalizing related enforcement efforts, reaching agreement with other states on enforcing such criminal laws and establishing “such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.” The Health Care Freedom Act, for example, guarantees the right to free choice among medical providers and insurance issuers. The Firearms Freedom Act establishes a less restrictive regulatory regime for in-state manufacturing and sales of firearms. States enacting these laws are free to criminalize the violation of the rights they protect. In fact, Wyoming has criminalized the violation of its version of Firearms Freedom Act.⁵⁶ States could then enter into an interstate compact mutually guaranteeing to protect the enjoyment of the rights guaranteed by the Health Care Freedom Act or the Firearms Freedom Act under the protections of their respective criminal laws. Such a compact could then be lodged with Congress under the authority of the foregoing consent-in-advance statute, whereupon the provisions of the compact would arguably become federal law, superseding prior inconsistent federal law.⁵⁷

In principle, states would be able to exert their police powers to define and protect many other types of individual rights from federal encroachment using the foregoing “consent-in-advance” statute to criminal law enforcement statutes. The possible ways in which interstate compacts can be used to resist federal power under the foregoing consent-in-advance statute are nearly limitless. It is up to the states to push the boundaries to determine what is possible. There is no time to lose.

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- ¹ U.S. Const. art. I, § 19 cl. 3.
- ² Frederick L. Zimmerman & Mitchell Wendell, *The Interstate Compact Since 1925*, 88-89 (1951).
- ³ Caroline N. Broun, Michael L. Buenger, Michael H. McCabe, & Richard L. Masters, *The Evolving Use and the Changing Role of Interstate Compacts, A Practitioner's Guide* 18 (American Bar Association 2006).
- ⁴ Zimmerman & Wendell, *supra* note 411, at 8.
- ⁵ *Green v. Biddle*, 21 U.S. 1, 39-40 (1823)
- ⁶ *U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452, 459 (1978) (holding that only those interstate agreements that “enhance state power quoad the national government” are ineffective without the approval of Congress).
- ⁷ *Id.* at 472.
- ⁸ Patrick McGuinn, *E Pluribus Unum in Education? Governance Models for National Standards and Assessments: Looking Beyond the World of K-12 Schooling* 10 (Thomas B. Fordham Institute June 2010).
- ⁹ Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent*, 42 Col. J. Law & Social Prob. 511, 519 (2009) (citing William Kevin Voit, Nancy J. Vickers, and Thomas L. Gavenonis, *Council of State Governments, Interstate Compacts and Agencies 2003* (2003), available at http://www.csg.org/pubs/documents/2003_compacts_directory.pdf (last visited Dec. 12, 2010)).
- ¹⁰ McGuinn, *supra* note 8, at 10.
- ¹¹ *Id.* at 13-20; see also Regional Greenhouse Gas Initiative, “Key Documents,” <http://www.rggi.org/states> (last visited Dec. 12, 2010).
- ¹² *Dyer v. Sims*, 341 U.S. 22, 28 (1951) (“It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States”); *Kentucky v. Indiana*, 281 U.S. 163, 178 (1930); *Green*, 21 U.S. at 92.
- ¹³ *Virginia v. Tennessee*, 148 U.S. 503, 519-20 (1893) (citing Joseph Story, *Commentaries on the Constitution of the United States* (1st ed. 1833))
- ¹⁴ *Colorado River Compact of 1922* (Aug. 18, 1921).
- ¹⁵ An Act Granting the Consent of Congress to a Great Lakes Basin Compact, S. 660 (PL 90-419) (1968); see, e.g., An Act to grant the consent of the Congress to the Tahoe Regional Planning Compact, 94 Stat. 3233, § 5 (1980) (“Nothing contained in this Act or in the compact consented to shall in any way affect the powers, rights, or obligations of the United States, or the applicability of any law or regulation of the United States in, over or to the region or waters which are the subject of the compact, or in any way affect rights owned or held by or for Indians or Indian tribes subject to the jurisdiction of the United States”).
- ¹⁶ 36 Stat. 961, 16 U.S.C. § 552 (1911).
- ¹⁷ Zimmerman & Wendell, *supra* note 2, at 41 n. 174 (citing P.L. 721, 81st Cong, 2nd Sess.).
- ¹⁸ *Id.* at 16 & n. 78, 38 & n.162 (quoting Federal Power Commission, Memorandum to the Commerce Committee of the U.S. Senate on S.J. Res. 177, H.J. 430, H.J. 435, and H.J. 436).
- ¹⁹ *Id.* (citing Franklin D. Roosevelt letter to Governor Cross, in *Connecticut Annual Report Connecticut Society of Civil Engineers* 61 (1938)).
- ²⁰ Zimmerman & Wendell, *supra* note 2, at 38 & n.162 (citing August 11, 1939 memorandum of disapproval).
- ²¹ *Id.* (citing Art. XI, Republican River Compact; Republican River Compact, 86 Stat. 86 (1943)).
- ²² *Id.* (citing Document No. 690, H.R. 77th Congress 2nd Session (Apr. 2, 1942)).
- ²³ McGuinn, *supra* note 8, at 10.
- ²⁴ *New Jersey v. New York*, 523 U.S. 767, 811 (1988) (holding that congressional approval “transforms an interstate compact within [the Compact Clause] into a law of the United States”).
- ²⁵ David E. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 Va. L. Rev. 987, 999-1002 (1965).
- ²⁶ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 565-66 (1851).
- ²⁷ 304 U.S. 92, 109-10 (1938).
- ²⁸ *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U.S. 419 (1940).
- ²⁹ Engdahl, *supra* note 434, at 1004-12.
- ³⁰ *New York*, 523 U.S. at 811 (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)).
- ³¹ *Cuyler*, 449 U.S. at 439-40 (citing *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S., at 278; *United States ex rel. Esola v. Groomes*, 520 F.2d 830, 841 (3rd Cir. 1975) (Garth, J., concurring); *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517 (9th Cir. 1974), cert. denied, 420 U.S. 974 (1975); Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 694-95, 735-48 (1925)).

³² 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).

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

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

³⁵ 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.

³⁶ *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”).

³⁷ U.S. Const. art. I, § 10.

³⁸ U.S. Const. art. I, § 7, para. 2.

³⁹ *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”).

⁴⁰ 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”).

⁴¹ Author’s research on www.lexis.com.

⁴² 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”).

⁴³ *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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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*, 153 U.S. 155 (1894); *Green*, 21 U.S. at 39-40.

⁴⁴ See, e.g., Engdahl, *supra* note 25, at 1024.

⁴⁵ *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").

⁴⁶ *Ins v. Chadha*, 462 U.S. 919, 951 (1983) ("President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws"); *Myers v. United States*, 272 U.S. 52, 123 (1926) ("The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide..."); *The Federalist* No. 73 (Alexander Hamilton) (Gideon ed., 1818), available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=788&Itemid=27 (last visited Dec. 12, 2010).

⁴⁷ Zimmerman & Wendell, *supra* note 2, at 94.

⁴⁸ Cf. *The Head Money Cases*, 112 U.S. 580, 599 (1884).

⁴⁹ Art. Conf. art. VI. (stating that "[n]o two or more states shall enter into any treaty, confederation or alliance whatever between them without the consent of the United States in Congress assembled").

⁵⁰ Zimmerman & Wendell, *supra* note 2, at 31 ("It is sometimes said that an interstate compact is a treaty between states. In a number of respects this categorization is apt"); cf. *Hinderlider*, 304 U.S. at 104 (discussing how compact clause "adopts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations").

⁵¹ *Hollingsworth*, 3 U.S. 378; *United States v. Sprague*, 282 U.S. 716 (1931) (bestowal of power on Congress); *Hawke v. Smith*, 253 U.S. 221 (1920) (bestowal of power on state legislature); see also *Hawke v. Smith*, 253 U.S. 231 (1920).

⁵² Zimmerman & Wendell, *supra* note 2, at 6 n. 25 (citing the Flood Control Act of 1936, 49 Stat. 1591, 33 U.S.C.A. Sec. 701; Tobacco Control Act of 1936, 49 Stat. 1240, 7 U.S.C.A. Sec. 515, Crime Compact Act of 1934, 48 Stat. 909; Weeks Forest Act of 1911, 36 Stat. 961)).

⁵³ 4 U.S.C. § 112.

⁵⁴ See 15 U.S.C. § 1358; 15 U.S.C. § 8201; 16 U.S.C. § 824p; 23 U.S.C. § 129; 23 U.S.C. § 401; 23 U.S.C. § 601; 29 U.S.C. § 2941; 33 U.S.C. § 1253; 42 U.S.C. § 2021d; 42 U.S.C. § 4727; 42 U.S.C. § 7402; 49 U.S.C. § 5303; 49 U.S.C. § 5304.

⁵⁵ *Green*, 21 U.S. at 39-40 (congressional consent given in 1791 to support compact entered into in 1797).

⁵⁶ *Firearms Freedom Act*, Wyoming House Bill no. HB0095 (signed Mar. 3, 2010), available at <http://legisweb.state.wy.us/2010/Engross/HB0095.pdf> (last visited Dec. 12, 2010).

⁵⁷ Even if the Health Care Freedom Acts or Firearms Freedom Acts are ultimately held unconstitutional, their enactment should be regarded as voidable, not *void ab initio*, because states have the inherent reserved power to enact such laws, subject to invalidation by a court of law. Cf. *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989) ("An overbroad statute is not void ab initio, but rather voidable, subject to invalidation"). Accordingly, congressional consent to an interstate compact enforcing the Health Care Freedom Act or Firearms Freedom Act should be regarded as a ratification of an otherwise voidable state law that waives any voidness objection under the Supremacy Clause.