



## A LOGICAL EXTENSION OF CONGRESSIONAL TRADITION

Using a Concurrent Resolution to Partner with the States on an Article V Compact

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### Introduction

Sustained and growing congressional interest in the Compact for a Balanced Budget has led to the repeated introduction of concurrent resolutions to partner with the states in setting the amendment process in motion, beginning with H. Con. Res. 26 in the 114<sup>th</sup> Congress and continuing with H. Con. Res. 73 in the 115<sup>th</sup> Congress.<sup>2</sup> The use of a concurrent resolution to effectuate the Balanced Budget Compact has a number of advantages over a vehicle that requires presentment, such as a bill or joint resolution, not the least of which is the ability to bypass filibuster in certain circumstances and an adverse occupant of the White House. Given these advantages, it is entirely legitimate to ask whether it is constitutional to use a concurrent resolution to fulfill Congress's call and ratification referral duties in connection with an Article V compact, instead of a presentable bill or joint resolution. We have analyzed this issue and have determined that the practice is indeed constitutional.

A presentable bill or joint resolution would be the incorrect legislative vehicle for Congress to partner with the states on an Article V compact because Congress's role in Article V does not involve exercising any lawmaking power whatsoever. The resolution needed to effectuate the Compact for a Balanced Budget simply states that Congress shall be deemed to have fulfilled its convention call and amendment proposal ratification referral duties under Article V of the U.S. Constitution when the requisite constitutional and legal thresholds are reached under the Balanced Budget Compact. These duties are ministerial obligations that fall within the category of parliamentary procedure, not lawmaking. It is standard custom and practice for Congress to use concurrent resolutions in precisely this way. Further, to require Congress to fulfill its call and ratification referral duties through a presentable bill or joint resolution, rather than concurrent resolution, would be contrary to the Supreme Court's ruling that the President has no role in the Article V amendment process. Furthermore, although presentable bills and joint resolutions have been the historical vehicle for Congress to give express consent to interstate compacts

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under Article I, section 10 of the U.S. Constitution, that tradition is neither required by legal precedent nor applicable to the Balanced Budget Compact. This is because the Balanced Budget Compact does not require “Article I” consent under established Supreme Court precedent; and even if the Balanced Budget Compact were wrongly held to require “Article I” consent, the passage of the contemplated concurrent resolution would fulfill that requirement as a type of implied consent under governing Supreme Court precedent.

### **Analysis of the Text, Congressional Practice and Analogous Legal Precedent**

No case has directly addressed the issue of the proper legislative vehicle for Congress to effectuate an Article V compact. But the text of the U.S. Constitution, congressional practice, and legal precedent provide clear answers. Starting with the text, it is significant to note that not every power exercised or duty fulfilled by Congress, even in Article I, requires presentment. For example, Congress is completely free to determine its own rules without a presentable bill or joint resolution.<sup>3</sup> Moreover, Congress’s call and ratification referral duties are not textually located among the lawmaking powers of Congress in Article I that expressly require presentment. They are located in Article V, which establishes the amendment authority of Congress and the states.

It is standard custom and practice for Congress to use concurrent resolutions to fulfill its duties under Article V. For example, during the first session of the 101st Congress, in 1989, Senator Orrin Hatch introduced S.204, which provided for procedures to be used in connection with the Article V state-initiated amendment process. S.204 expressly acknowledged the use of a concurrent resolution by Congress to fulfill its call duty under Article V at sections 5(a) and 6(a).<sup>4</sup> S.204 also contemplated the use of a concurrent resolution to fulfill Congress’s ratification referral duty at section 11(a). This contemplated use of a concurrent resolution was not unprecedented. Similar bills were introduced in the House during the 96<sup>th</sup> Congress in 1978<sup>5</sup> and 95<sup>th</sup> Congress in 1977.<sup>6</sup> Indeed, the contemplated use of a concurrent resolution to exercise Congress’s Article V call and ratification referral duties traces as far back as to 1973, when Senator Sam Ervin similarly proposed the use of a concurrent resolution by Congress to fulfill its call or ratification referral duties in sections 5(a), 6(a), 7(a), 8(a) and 11(a) of S.1272, during the first session of the 93rd Congress.<sup>7</sup>

These contemplated uses of concurrent resolutions to fulfill

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Congress’s ministerial call and ratification referral duties in Article V are consistent with the longstanding custom and practice of using concurrent resolutions in connection with the amendment process. For instance, Congress used a concurrent resolution to acknowledge the ratification of the 14th Amendment on July 21, 1868.<sup>8</sup> Congress has also repeatedly used concurrent resolutions to express its sentiments in favor of proposing a balanced budget amendment in particular.<sup>9</sup> Moreover, the use of concurrent resolutions in regard to Article V is also consistent with the broader practice of using concurrent resolutions to effectuate Congress’s non-lawmaking obligations throughout the Constitution. For example, during the first session of the 115th Congress, Senator Mitch McConnell introduced S.Con.Res. 2 to effectuate Congress’s obligation to tally votes of delegates to the Electoral College under Article 2, Section 1 of the Constitution.<sup>10</sup> In view of the foregoing, it would be manifestly contrary to established congressional custom and practice to require the use of a presentable bill or joint resolution in order for Congress to fulfill its call and ratification referral duties.

Governing Supreme Court precedent stands against requiring congressional fulfillment of Article V call and ratification referral duties by presentable bill or joint resolution. The Supreme Court ruled nearly two hundred and twenty years ago in *Hollingsworth v. Virginia* that the amendment authority of Congress under Article V is not subject to the presentment requirement of Article I.<sup>11</sup> Although the *Hollingsworth* ruling was rendered in the specific case of congressionally-proposed amendments, the ruling is applicable with greater force to the fulfillment of Congress’s call and ratification referral duties under Article V. This is because calling for a meeting of a parliamentary body to propose legislation or to ratify legislation as contemplated in Article V of the U.S. Constitution is obviously an instance of parliamentary procedure. Thus, the fulfillment of an Article V call/ratification referral duty by Congress is far less



like lawmaking than directly proposing a constitutional amendment.<sup>12</sup> Therefore, it would actually violate longstanding governing Supreme Court and congressional precedent to require the use of a presentable bill or joint resolution instead of a concurrent resolution in connection with fulfilling Congress's call and ratification referral duties.

### **Effectuating an Article V Compact Does Not Require Article I Consent**

This analysis is not altered by the fact that the contemplated concurrent resolution would fulfill Congress's call and ratification referral duties in relation to an Article V convention organized by interstate compact. Of course, there is a congressional practice of furnishing express consent under Article I, section 10 of the U.S. Constitution for an interstate compact by presentable bill or joint resolution. But the contemplated concurrent resolu-

anced Budget Compact necessarily threatens or trenches on Congress's delegated powers or federal supremacy. Congress's delegated powers and federal supremacy cannot be regarded as threatened or violated by a constitutionally-authorized amendment process. After all, Congress's delegated powers and federal supremacy do not stand outside of the Constitution; their nature and extent is constituted and limited by the Constitution, including Article V.

Moreover, the Balanced Budget Compact does not accomplish anything more than what the states have the sovereign authority to do on their own in the absence of a compact,<sup>16</sup> with the sole exception of the Compact becoming binding when thirty-eight states join the Compact. But such entrenchment does not implicate federal supremacy any more than the underlying exercise of constitutional and sovereign state power does.<sup>17</sup> Nor is federal supremacy in any way infringed by the model

A compact that only coordinates the exercise of powers that states could exercise in the absence of a compact does not trench on federal supremacy and does not trigger the need to secure Article I consent.

tion is not intended to furnish express Article I consent for the Balanced Budget Compact. Principally, this is because Article I congressional consent is not required for the Balanced Budget Compact under governing Supreme Court precedent.

In recognition of the limited and enumerated powers of the federal government, the Supreme Court has long recognized that the requirement of Article I consent for interstate compacts sweeps no more broadly than is needed to defend federal supremacy in the exercise of its delegated powers.<sup>13</sup> A compact that only coordinates the exercise of powers that states could exercise in the absence of a compact does not trench on federal supremacy and does not trigger the need to secure Article I consent.<sup>14</sup> The Supreme Court has also ruled that a compact does not trigger the need for Article I consent by furnishing "strength in numbers" and unity to the States in an effort to lobby or persuade Congress to take legislative action.<sup>15</sup> Under this precedent, the Balanced Budget Compact does not trench on federal supremacy in any sense that triggers the need for Article I consent.

By passing the contemplated resolution, Congress will indeed set the amendment process contemplated by the Balanced Budget Compact in motion. But that does not mean the Bal-

anced Budget Amendment contained within the Compact. The Amendment has no legal effect until a convention is called, the convention proposes the amendment, the amendment is referred out for ratification, and it is ratified. In other words, until Congress first fulfills its call and ratification referral duties under Article V, as provided in the contemplated resolution, all of the Compact's provisions serve as nothing more than a convenient unifying platform for the states to exercise their independent Article V and Tenth Amendment authorities and to engage in joint educational and lobbying efforts. Moreover, as discussed below, any wrongly demanded Article I consent would be instantly furnished the moment the contemplated resolution were passed, rendering the debate over the necessity of Article I consent entirely moot.

### **The Contemplated Resolution Furnishes Article I Consent in Any Event**

Even if the Balanced Budget Compact were regarded as somehow requiring Article I consent, the contemplated concurrent resolution would adequately furnish such consent. While it is true that presentable joint resolutions or bills have been utilized



to consent to compacts that affirmatively attempted to override federal law or federal jurisdiction, in that context, the purpose of Article I consent was to imbue the interstate compact with the literal status of federal law or to delegate federal lawmaking power to the compact agency. In contrast, the contemplated concurrent resolution is simply exercising a ministerial obligation of Congress that is parliamentary in nature. There is no custom, practice or precedent in Congress that requires a resolution that is parliamentary and ministerial in nature to be treated the same way as legislation that seeks affirmatively to create federal law or to delegate federal lawmaking power.

The act of giving Article I consent does not necessarily equate to federal lawmaking or the delegation of federal lawmaking power, which would trigger the need for a presentable bill or joint resolution. A compact's parity with a "law of the Nation" can be due to congressional consent restoring states to their "original inherent sovereignty."<sup>18</sup> As explained by Justice Baldwin in his concurrence to *Poole v. Fleeger's Lessee*, "The effect of such consent is, that thenceforth, the compact has the same force as if it had been made between states who are not confederated."<sup>19</sup> Thus, the parity with federal law that a compact achieves through congressional consent can be regarded as a consequence of compacting states becoming the sovereign equals of the federal government in regard to the compact's subject matter. Although arising from early Supreme Court precedent, this understanding of the effect of congressional consent as yielding to the sovereignty of the states in regard to the compact's subject matter, rather than literally bestowing federal legal status or delegating federal lawmaking power, is entirely consistent with the modern rule that compact agencies are not treated as federal agencies.<sup>20</sup> Because a grant of congressional consent is not necessarily an exercise or delegation of federal lawmaking power, it makes no sense to require the legislative vehicle that effectuates such consent to be a presentable bill or joint resolution—especially in regard to an Article V compact in which Congress's role is parliamentary and ministerial in nature.

Finally, no case has ever held that congressional consent requires express consent, much less a presentable joint resolution or bill.<sup>21</sup> To the contrary, the Supreme Court has long held congressional consent to interstate compacts can be implied both before and after the underlying agreement is reached.<sup>22</sup> For example, in *Virginia v. Tennessee*,<sup>23</sup> the Supreme Court held that Congress impliedly consented to a compact settling a boundary dispute by authorizing federal elections to be conducted consistently with the jurisdiction

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established by the compact. Likewise, in *Wharton v. Wise*, congressional approval of an arbitration award under the alternative dispute resolution provisions of an existing fisheries compact was deemed sufficient consent as well.<sup>24</sup>

This doctrine of implied consent regards any congressional action that legitimizes or recognizes the authority of a compact as Article I consent, even without an express legislative blessing of the compact itself. By exercising Congress's call and ratification referral duties "in accordance with" the Balanced Budget Compact, the contemplated concurrent resolution clearly legitimizes the Balanced Budget Compact in the precise sense required for implied consent. Nothing more is needed to secure Article I consent for the Balanced Budget Compact. Thus, any dispute over the necessity of Article I consent would be rendered moot the moment that the Compact's amendment process is set in motion by the contemplated resolution.

## Conclusion

Taken together, from any theoretical vantage point, it is clearly constitutional for the resolution to effectuate the Balanced Budget Compact to be advanced as a concurrent resolution, instead of a presentable bill or joint resolution. If Congress wishes to deliver on its promise of fiscal responsibility, the Compact for a Balanced Budget provides a vehicle for simple majorities of each House to do so; namely, the contemplated concurrent resolution previously introduced as H. Con. Res. 26 in the 114<sup>th</sup> Congress and H. Con. Res. 73 in the 115<sup>th</sup> Congress.

## Professional Biographies

**Nick Dranias** has published numerous articles in the Article V field for the National Constitution Center, Goldwater Institute, and Engage. He has served as President and Executive Director of Compact for America Educational Foundation, policy advisor with the Heartland Institute and an expert with the Federalist Society. As the Goldwater Institute's constitutional policy director, Dranias led its successful challenge to Arizona's "clean elections" system to the U.S. Supreme Court. Prior to that, he was an attorney with the Institute for Justice. At Loyola University Chicago School of Law, where he earned his J.D., Dranias served on the law review, was a member of the national labor law moot court team, and received various academic awards. He graduated cum laude from Boston University with a B.A. in economics and philosophy.

**Judge Harold R. DeMoss, Jr.** is a recently retired senior federal appellate judge and sat on the U.S. Court of Appeals for the Fifth Circuit. He was appointed to the court in 1991 by President George H. W. Bush, took senior status in 2007, and retired in 2015. Judge DeMoss graduated from Rice University in 1952 and the University of Texas Law School in 1955. After serving in the United States Army from 1955 to 1957, Judge DeMoss joined the Houston law firm of Bracewell Reynolds & Patterson (now known as Bracewell), where he became a partner and remained until his appointment to the federal bench.

**John C. Eastman** is the Henry Salvatori Professor of Law & Community Service at Chapman University Fowler School of Law, and also served as the School's dean from June 2007 to January 2010. He is the founding director of the Center for Constitutional Jurisprudence, a public interest law firm affiliated with the Claremont Institute. Prior to joining the Fowler School of Law faculty, he served as a law clerk with Justice Clarence Thomas at the Supreme Court of the United States and with Judge J. Michael Luttig at the U.S. Court of Appeals for the Fourth Circuit. He earned his J.D. from the University of Chicago Law School, where he graduated with high honors. Dr. Eastman also has a Ph.D. and M.A. in Government from the Claremont Graduate School and a B.A. in Politics and Economics from the University of Dallas.

**Kevin R. C. Gutzman** is the New York Times best-selling author of five books, including *Thomas Jefferson—Revolutionary: A Radical's Struggle to Remake America*. Gutzman is professor and former chairman in the department of history at Western Connecticut State University and he holds a B.A., M.P.A., and J.D. from the University of Texas at Austin, as well as an M.A. and a Ph.D. in American history from the University of Virginia.

**Rick Masters** is general counsel to the Interstate Commission for Adult Offender Supervision providing legal guidance concerning the compact and its administrative rules, including application and enforcement, to the member state commissioners of ICAOS and other state officials. Masters is also a recognized subject matter expert in the field of interstate compacts and provides legal advice to several other compact governing boards and agencies. He is the co-author of the most comprehensive compilation of legal authorities and commentary on the subject published by the American Bar Association in 2006 entitled *The Evolving Use and Changing Role of Interstate Compacts: A Practitioner's Guide*. Masters received his J.D. from the Brandeis School of Law of the University of Louisville and his B.A. from Asbury University. He is a former assistant attorney general for the Commonwealth of Kentucky, previously served as general counsel to the Council of State Governments and just completed a four-year term as a Commissioner of the Kentucky Executive Branch Ethics Commission.

**Ilya Shapiro** is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the *Cato Supreme Court Review*. Before joining Cato, he was a special assistant/adviser to the Multi-National Force in Iraq on rule-of-law issues and practiced at Patton Boggs and Cleary Gottlieb. Shapiro has testified before Congress and state legislatures and, as coordinator of Cato's amicus brief program, filed more than 200 "friend of the court" briefs in the Supreme Court. Before entering private practice, Shapiro clerked for Judge E. Grady Jolly of the U.S. Court of Appeals for the Fifth Circuit. He holds an A.B. from Princeton University, an M.Sc. from the London School of Economics, and a J.D. from the University of Chicago Law School.

**Greg Snowden** is Speaker Pro Tempore of the Mississippi House of Representatives. He also serves on the Executive committees of both the National Conference of State Legislatures (NCSL) and the Southern Legislative Conference (SLC). Snowden graduated from The University of Alabama with a B.A., magna cum laude. He went to Vanderbilt Law School, where he earned a J.D., and served on the editorial staff of *The Vanderbilt Law Review*.



## (Endnotes)

1. Gratitude is expressed to Compact for America Educational Foundation CEO and Chairman Harold R. “Chip” DeMoss III and Council of Scholars Member Baker Spring for their invaluable research into congressional custom and practice.
2. H.Con.Res.26, Effectuating the Compact for a Balanced Budget, 114th Congress (2015-2016) <https://www.congress.gov/bill/114th-congress/house-concurrent-resolution/26>; H. Con. Res. 73, Effectuating the Compact for a Balanced Budget, 115<sup>th</sup> Congress (2017-2018), <https://www.congress.gov/bill/115th-congress/house-concurrent-resolution/73>.
3. See, e.g., U.S. Const., art. I, sec. 5 (cl. 2).
4. S.204, Constitutional Convention Implementation Act of 1989, 101st Congress (1989-1990), <https://www.congress.gov/bill/101st-congress/senate-bill/204?q=%7B%22search%22%3A%5B%22S.204%22%5D%7D&r=1>.
5. See, e.g., H.R.2587, Federal Constitutional Convention Procedures Act, 96th Congress (1979-1980), <https://www.congress.gov/bill/96th-congress/house-bill/2587?q=%7B%22search%22%3A%5B%22constitutional+convention%22%5D%7D&r=5>
6. See, e.g., H.R.10134, A bill to provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to article V of the Constitution, 95th Congress (1977-1978), <https://www.congress.gov/bill/95th-congress/house-bill/10134?q=%7B%22search%22%3A%5B%22constitutional+convention%22%5D%7D&r=1>.
7. S.1272, Federal Constitutional Convention Procedures Act, 93rd Congress (1973-1974), <https://www.congress.gov/bill/93rd-congress/senate-bill/1272?q=%7B%22search%22%3A%5B%22S.1272%22%5D%7D&r=1>.
8. Certification of Secretary of State, 15 Stat. Lg. 708 (July 28, 1868) (referencing concurrent resolution of July 21, 1868).
9. See, e.g., H.Con.Res. 287, Setting forth the congressional budget for the United States Government for the fiscal years 1993, 1994, 1995, 1996, and 1997, 102nd Congress (1991-1992), <https://www.congress.gov/bill/102nd-congress/house-concurrent-resolution/287?q=%7B%22search%22%3A%5B%22H.Con.Res.+287%22%5D%7D&r=9>; S.Con. Res. 11, An original concurrent resolution setting forth the congressional budget for the United States Government for fiscal year 2016 and setting forth the appropriate budgetary levels for fiscal years 2017 through 2025, 114th Congress (2015-2016), <https://www.congress.gov/bill/114th-congress/senate-concurrent-resolution/11?q=%7B%22search%22%3A%5B%22S.Con.Res.+11%22%5D%7D&r=2>.
10. S.Con.Res.2, A concurrent resolution to provide for the counting on January 6, 2017, of the electoral votes for President and Vice President of the United States, 115th Congress (2017-2018), <https://www.congress.gov/bill/115th-congress/senate-concurrent-resolution/2?q=%7B%22search%22%3A%5B%22S.+CON.+RES.+2%22%5D%7D&r=1>.
11. *Hollingsworth v. Virginia*, 3 U.S. 378 (1798); see also *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”).
12. See generally *INS v. Chadha*, 462 U.S. 919, 951 (1983).
13. *U.S. Steel v. Multistate Tax Commission*, 434 U.S. 452, 459-60, 467-70 (1978) (citing *New Hampshire v. Maine*, 426 U.S. 363 (1976); *North Carolina v. Tennessee*, 235 U.S. 1, 16 (1914); *Wharton v. Wise*, 153 U.S. 155, 168-170 (1894); *Virginia v. Tennessee*, 148 U.S. 503 (1893); *Union Branch R. Co. v. East Tennessee G. R. Co.*, 14 Ga. 327, 339 (1853)).
14. *U.S. Steel*, 434 U.S. at 473-74 (“Since appellants do not contest the right of each State to adopt these procedures if it conducted the audits separately, they cannot be heard to complain that a threat to federal supremacy arises”).
15. *U.S. Steel*, 434 U.S. at 479 n.33.

16. Judge Harold R. DeMoss, Jr. (ret.), Nick Dranias, JD, Dr. John Eastman, JD, PhD, Dr. Kevin Gutzman, JD, PhD, Ilya Shapiro, JD, A Guidebook for Deploying Article V as the Founders Actually Intended: The Application & Convention Mode of Proposing Amendments, Compact for America Educ. Found. Policy Brief No. 7 (February 8, 2016), available at [http://docs.wixstatic.com/ugd/e48202\\_8ccea8ece20741ca82c0e2640b2aa2cd.pdf](http://docs.wixstatic.com/ugd/e48202_8ccea8ece20741ca82c0e2640b2aa2cd.pdf); Judge Harold R. DeMoss, Jr. (ret.), Nick Dranias, JD, Dr. John Eastman, JD, PhD, Dr. Kevin Gutzman, JD, PhD, Ilya Shapiro, JD, and Hon. Gregory Snowden, JD, Clearly Constitutional: The Article V Compact: A Vindication of the Principle of State Sovereignty Against Natelson's Attack, Compact for America Educ. Found. Policy Brief No. 11 (August 22, 2016), available at [http://docs.wixstatic.com/ugd/e48202\\_9b52a7f8ade7414fb04a6bde9449e2c5.pdf](http://docs.wixstatic.com/ugd/e48202_9b52a7f8ade7414fb04a6bde9449e2c5.pdf)

17. Moreover, it is immaterial because it cannot extend beyond the compact's contemplated sunset date of seven years after its formation (April 12, 2021).

18. *Rhode Island v. Massachusetts*, 37 U.S. 657, 725 (1838).

19. 36 U.S. 185, 212 (1837).

20. See, e.g., *Old Town Trolley Tours v. Wash. Metro. Area Transit Comm'n*, 129 F.3d 201, 204 (D.C. Cir. 1997) (APA inapplicable to compact agency); *Cal. Dep't of Transp v. City of South Lake Tahoe*, 466 F.Supp.527, 535-36 (E.D. Cal. 1978) (NEPA inapplicable to compact agency).

21. See, e.g., 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"). It has been claimed that the Supreme Court overruled the holdings of *U.S. Steel*, 434 U.S. at 459-60, 467-70, which is that not all compacts require congressional consent, and *Virginia*, 148 U.S. at 521-22, which is that implied consent before or after a compact is formed suffices under Article I, Section 10. The claim is based on an isolated assertion in *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 686 (1999), in which the majority states, "Under the Compact Clause, U. S. Const., Art. I, § 10, cl. 3, States cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." But this quote has been taken out of context. The dispute in *College Savings Bank* did not involve an interstate compact at all. It was a dispute over whether the Trademark Remedy Clarification Act worked a constructive waiver of sovereign immunity. The distinction between compacts that require congressional consent, and those that do not, and the method of giving such consent, simply was not at issue in *College Savings Bank*. The only reason the topic of interstate compacts arose was because, in the course of analyzing the doctrine of constructive waiver of sovereign immunity, the majority considered a variety of other cases in which the doctrine had been applied, one of which was a case in which express congressional consent to a compact was conditioned on member states consenting to suit; namely *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959). The foregoing quote was not a ruling on interstate compact law, it was meant only to describe and explain the irrelevance of the *Petty* case, and to distinguish the *Petty* case from the matter that was under consideration. It is dicta in the purest sense because the foregoing quote was not relevant to the facts or necessary to the holding or the outcome in *College Savings Bank*. Indeed, the assertion was made in order to underscore the irrelevance of interstate compact law to the matter at issue. Moreover, nothing in this dicta mentions or hints at overruling *U.S. Steel* or *Virginia*, much less actually does so. Not surprisingly, no court has subsequently adopted the foregoing dicta as a valid statement of interstate compact law in any case in which a challenge was brought under the Compact Clause; and the holdings of *U.S. Steel* and *Virginia* continue to be applied to this day. See, e.g., *SM Brands v. Caldwell*, 614 F.3d 172, 175 (5th Cir. 2010); *Star Scientific Inc. v. Beales*, 278 F.3d 339, 357 (4th Cir. 2002); *Detroit Int'l Bridge Co. v. Gov't of Canada*, 192 F.Supp.3d 54, 73 (D.D.C. 2016).

22. *Virginia*, 148 U.S. at 521.

23. 148 U.S. at 522.

24. 153 U.S. at 172-73.



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