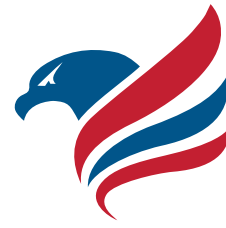


Policy Brief

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COMPACT FOR AMERICA



The Prosperity Zone Compact:

Leveraging the Power and Promise of Interstate Compacts to Bring Back the American Dream

By Nick Dranias

Introduction

This policy brief explains why an interstate compact is the most powerful launch vehicle for establishing Prosperity Zones. Future policy briefs in this series will discuss the specific features of the Prosperity Zone Compact that allow for replacement of sub-optimal regulatory and fiscal policies with state-of-the-art public policy reforms; as well as why the establishment of Prosperity Zones will result in explosive economic growth, flourishing communities, and dominant international competitiveness for the United States as a whole.

Prosperity Zones are optimally regulated and taxed greenfield areas, at least one square mile in size, that are designed to be easily formed and later expanded by consenting property owners and residents. An interstate compact enables the state-of-the-art public policy reforms within a Prosperity Zone to have immediate statutory effect at the state level. When at least two states join the compact, those reforms will become as durable as a state constitutional amendment. Equally important, congressional consent can “upgrade” the compact’s state level reforms to the status of federal reforms as well—indeed an existing federal statute may already

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serve to upgrade a future “Prosperity Zone Compact” to federal status to some extent.

In short, through the contemplated Prosperity Zone Compact, a partnership between two or more states and Congress could result in dramatic and lasting reforms. Although the concept is innovative, the legal framework upon which it relies is not. As discussed below, a wide body of longstanding case law supports the constitutionality of the Prosperity Zone Compact.

What is an Interstate Compact?

An interstate compact is both a law and a contract among two or more states.¹ A compact is often formed by the passage of a statute in one state creating an open offer to enter into or “adopt” the specified agreement and the subsequent passage of a counterpart statute in one or more other states that meet the requisites of accepting the open offer by likewise declaring an intention to enter into or “adopt” the specified agreement. In both the offering and accepting states, the statutes adopting the agreement are passed as ordinary legislation, with gubernatorial presentment.

The subject matter of compacts between the states may involve the invocation of any sovereign power, including the police power. There are over 200 existing interstate compacts. The average state is a party to at least 25 compacts.²

Although most compacts deal with subject matters that have immediate and direct interstate impacts, such as a shared boundary line or water resources, others simply coordinate and standardize intrastate policies for the sake of encouraging greater policy certainty and reliability among member states, their residents and businesses. The Interstate Insurance Product Regulation Compact, for example, requires all member states, even those that do not share boundaries, to adopt the same intra-state regulatory standards for approving insurance companies and insurance policies.³ Likewise, the Agreement on Qualifications of Educational Personnel coordinates the uniform recognition of public school teacher certification among member states.⁴ Similarly, the Interstate Medical Licensure Compact provides relatively streamlined and reciprocal licensure processes for various medical professionals.⁵

In our nation's interconnected economy, the use of interstate agreements to coordinate intrastate public policy is not surprising. Every state has a mutual interest in each other's intrastate public policy to maintain a familiar and predictable legal framework for their own businesses and residents as they travel and do commerce among the states. One of the earliest interstate compacts reciprocally guaranteed the continued protection of existing property and contract rights in the adopting states from "any law which rendered those rights less valid and secure."⁶ Although this early compact guaranteed continuity of internal policies among bordering states, given modern transportation and communication, such mutual interest is the same regardless of whether the states are located geographically next to each other or across the country.

For the same reason that nearly every state has adopted uniform laws on topics such as commercial transactions, adult guardianships, and trade secrets, virtually any intrastate public policy is reasonably embedded in a compact. That's why the subject matters of existing interstate compacts now span a huge public policy spectrum—from boundary line resolution, to regulatory policy, to economic development, to transportation policy, to tax law coordination, to

advancing constitutional amendments.

A Deeper Dive into the Prosperity Zone

The Prosperity Zone Compact borrows various aspects of many other existing interstate compacts to unite willing states and Congress behind a powerful framework for regulatory and fiscal reform in greenfield areas. Of greatest structural similarity to the Prosperity Zone Compact are compacts that establish joint or multi-state regulatory and economic development pacts for sub-state local or regional jurisdictions.

The Tahoe Regional Planning Compact adopted by the States of California and Nevada, for example, has established a detailed joint regulatory and governance framework for the use and development of designated waters and land around Lake Tahoe.⁷ This framework has created a governing body that is empowered to issue (and refuse) development and activity permits; and to enforce unusually strict codes limiting land and lake uses in its limited jurisdiction. Washington and Oregon have likewise joined the Columbia River Gorge Compact, which has the purpose of establishing a regional agency to disapprove county land use ordinances and to enact ordinances setting standards for using nonfederal land within a designated area.⁸

Kansas and Missouri have entered into a compact to create "a special district and commission to promote and coordinate the arts, cultural activities (including sports) for the public" known as the Kansas and Missouri Metropolitan Culture District Compact.⁹ Similarly, Congress has passed legislation to authorize the states of Mississippi and Tennessee to join in the Chickasaw Trail Economic Development Compact "to create a development authority which incorporates public and private partnerships to facilitate the economic growth of such areas by providing developed sites for the location and construction of manufacturing plants, distribution facilities, research facilities, regional and national offices with supportive services and facilities, and to establish a joint interstate authority to assist in these efforts."¹⁰ A similar

concept has been deployed by Missouri and Illinois in the Bi-State Development Agency Compact.¹¹

The common feature of the foregoing compacts is that they create one or more local or regional agencies or governing bodies that can implement desired public policies in a designated area even to the extent of overriding contrary state and local law. Of course, each of the foregoing compacts encourage a public policy of relatively activist government from a top-down perspective. But the power of the interstate compact is policy content neutral. It is not reserved exclusively for activist government. There is no principle of law that says expansions of government power through an interstate compact are lawful, but not limitations of government power.

Therefore, just as compacts can be used to create governing bodies to furnish a top-down layer of activist government for more intensive regulation, spending, taxation or central planning in a designated area, it is only logical that an interstate compact could also be used to create governing bodies to empower local communities to remove layers of government from the bottom-up for optimal regulation and free market economic development. That's precisely what the Prosperity Zone Compact does.

The passage of legislation to adopt the Prosperity Zone Compact in just one state immediately empowers property owners and residents of the adopting

state to "press" a regulatory and fiscal policy "reset button" for a green field area by petitioning for the formation of a streamlined special district known as a "Prosperity District" to govern them. The area lightly governed by the Prosperity District thereby becomes a "Prosperity Zone," the jurisdiction of which can be expanded to adjacent areas through a similar unanimous petition of affected property owners and residents.

Prosperity Zone Compact Key Features

Ease of Formation and Expansion. *Prosperity Zones and corresponding governing Prosperity Districts are formed and expanded through a simple petition process for greenfield areas that consist of a minimum of one square mile of unencumbered land located at least 6 miles outside of any existing municipality (unless the municipality invites formation of a Prosperity District within its jurisdiction by local law).*

Deep Regulatory Reform. *Statutory state and local regulatory policy in the Prosperity Zone are replaced by a default reliance on the common law of property, contract and torts and malum in se criminal law augmented by authority granted to the Prosperity District to adopt regulatory best practices only where relevant risks cannot be allocated by contract and which authorize only the least restrictive regulations after proof of their necessity and efficacy is advanced through a detailed regulatory impact study process, subject to repeal after five years.*

The petition process precludes cronyism and minimizes uncertainty by quickly establishing or expanding the Prosperity District based on objective and uniform criteria that can be met by anyone. In fact, the district can be established in as soon as 20 days after submission of minimal paperwork to the Governor and Presiding Officers of the Legislature of the State adopting the Prosperity Zone Compact, which consists of a petition evidencing (a) unanimous consent of all affected property owners and residents, (b) a legal description

of the encompassed land, which must consist of at least one square mile of unencumbered land located at least 6 miles outside of any existing municipality (unless the municipality opts into the Prosperity Zone Compact by local law), (c) the designation of the initial district governing board, (d) initial governing charter, and (e) revenue sharing covenant guaranteeing a neutral fiscal impact on the state.

Once the Prosperity District is formed, deep public

policy reforms targeted to the affected area immediately replace existing state laws, governing bodies and agencies, taxes and regulations. Specifically, state and local regulatory authority is limited to those regulations that are carefully reviewed to ensure they actually protect life, liberty and property where the common law of torts, contracts and property would otherwise fail to do so. Neither the Prosperity District nor any other state or local agency or governing body may exercise eminent domain authority in the zone. The municipal service authority of the Prosperity District is limited to only those services that are absolutely necessary or approved by a supermajority of property owners; and procured through competitive outsourcing and public-private partnerships. State and county-wide taxes arising from statutory authority are replaced in the area with a revenue sharing covenant to run with the land in the zone, which guarantees revenue neutrality to the surrounding state and county.

Once at least two states pass the same legislation to adopt the Prosperity Zone Compact, a sovereign contract is formed between them whereby the foregoing state-level reforms become entrenched in the Prosperity Zone from future repeal and reciprocally recognized. The Compact is also designed to “upgrade” the reforms already in effect within the Prosperity Zone to include the similar replacement of suboptimal federal laws, taxes and regulations with best practices as well. This upgrade would require congressional consent that approves the Prosperity Zone Compact.

The Prosperity Zone Compact would replace decades of special interest-driven counterproductive tax and regulatory policies with best practices in easily formed and expandable areas. But can the Prosperity Zone Compact withstand legal scrutiny? The short answer is yes. Interstate compacts can offer all of the power and authority of an ordinary state statute plus the durability of a sovereign contract and the capacity to replace federal law with congressional consent. Governing legal precedent is clearly supportive of the Prosperity Zone Compact, as discussed below.

The Prosperity Zone Promises Reform Now

A concern sometimes expressed about the Prosperity Zone Compact is that it cannot have any legal effect before it receives congressional consent in the form of a joint or concurrent resolution passed by the House and Senate. This concern is based on the text of article I, section 10, clause 3 of the United States Constitution, which provides: “No State shall, without the consent of Congress . . . enter into agreement or compact with another State.” The broadness of the language of the “Compact Clause,” when read literally in isolation, seems to indicate that all agreements between or among states would require the consent of Congress. This interpretation would be wrong because the Supreme Court has never interpreted the Compact Clause based on its literal meaning in isolation from the rest of the Constitution.

Prosperity Zone Compact Key Features

Deep Tax Reform. Statutory state and local tax policy in the Prosperity Zone is replaced with a revenue sharing covenant that runs with the land in the zone which must have a neutral or positive fiscal impact.

Powerful Debt Reform. The borrowing authority of the Prosperity District is limited to value of assets and revenues received by the district and without recourse to the surrounding state or the federal government.

Streamlined Governance. The Prosperity District is denied tax, civil forfeiture, and eminent domain authority and restricted to furnishing municipal services that are absolutely necessary subject to two-thirds override by the managing board of the district on a case-by-case basis and procured through competitive outsourcing and public-private partnerships.

In recognition of the limited and enumerated powers of the federal government, the Supreme Court has long recognized that the Compact Clause sweeps no more broadly than is needed to defend federal supremacy in the exercise of its delegated powers. For example, over one hundred twenty years ago, in *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893), the Supreme Court held that only those interstate agreements which affect the power of the national government or the “political balance” *vis-à-vis* the states and the federal government require the consent of Congress.¹²

Respect for the principle of state sovereignty drove the Court to rule that the Compact Clause is not a freestanding prohibition on any and all interstate compacts that lack Congressional consent. As held in *U.S. Steel v. Multistate Tax Commission*, 434 U.S. 452, 495 (1978), if an interstate compact merely contracts for the exercise and coordination of powers that states could exercise rightfully on their own, without enhancing their power relative to the federal government or invading any power of the federal government, that compact does not trigger the need for Congressional consent. It does not matter if the Compact might lend “strength in numbers” to a federal lobbying campaign by member states. *U.S. Steel*, 434 U.S. at 479 n.33.

Further, the Court has held very clearly that the Compact Clause is exclusively concerned about such “vertical” effects *vis-à-vis* the states and the federal government. It has expressly refused to apply the Compact Clause based on the “horizontal” effects of an interstate compact, such as concerns about the adverse effects of “collusion” among compacting states. *Id.* at 473, 478. Instead, the Court has ruled that horizontal effects that do not alter the balance of power between the states and the federal government do not implicate the Compact Clause. *Id.*

In view of these principles, there is no question that the Prosperity Zone Compact can have immediate effect upon state passage of legislation adopting it for three reasons.

First, when it is passed by only one state, the Compact expressly only has the status of state legislation and an offer to compact with other states. No sovereign contract is formed at that time, no interstate commission is formed, and the state remains fully free to repeal the legislation or amend it. In other words, the Compact is purely statutory upon its first enactment. Hence, the Compact Clause is not implicated at all.¹³

Second, it should be observed that the Prosperity Zone Compact actually already enjoys a measure of congressional consent. The Compact expressly invokes 4 U.S.C. § 112, which gives congressional 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.” Federal courts have already held that 4 U.S.C. § 112 provides congressional consent, in advance, to a wide range of interstate agreements related to criminal justice, such as compacts on extradition and on providing special correctional services, as well as the interstate transfer and supervision of offenders on probation or parole supervision.¹⁴ 4 U.S.C. § 112 itself was specifically upheld by the Supreme Court as effectively giving advance consent to an interstate compact formed decades after the statute’s original enactment. *Cuyler*, 449 U.S. at 440-41.

There is nothing in the text of the 4 U.S.C. § 112 that suggests it cannot be applied to give congressional consent to the Prosperity Zone Compact. So long as the compact in question enables “cooperative effort and mutual assistance” in preventing crime and in criminal law enforcement through “desirable” agencies, the compact falls within the scope of the plain language of 4 U.S.C. § 112. The Prosperity Zone Compact literally falls into this category by (a) authorizing the formation of Prosperity Districts which are vested with exclusive governing authority in their jurisdictions, including the power to promulgate and enforce criminal law, and requiring reciprocal rec-

ognition of such authority among all member states and (b) requiring disputes over related jurisdictional and interpretative disputes between and among federal and state agencies to be settled by alternative dispute resolution overseen by its interstate commission. To some extent, therefore, congressional consent already exists for the Prosperity Zone Compact, allowing it to be immediately effective upon formation to the extent that it encroaches on federal criminal law and policy. But even if other features require further congressional consent to be effective, the Prosperity Zone Compact is still perfectly viable.

The third reason why the Compact Clause is no bar to the effectiveness of the Prosperity Zone Compact is because the Compact uses conditional enactments to ensure the Compact Clause is fully observed.

Specifically, it uses conditional enactments to segregate the effectiveness of those contractual provisions that merely exercise and coordinate powers that states could exercise rightfully on their own, such as reciprocally recognizing and committing to maintain the compact's state law reforms, from those provisions that may be construed as overriding contrary federal law and policy beyond that which is already authorized by 4 U.S.C. § 112. The former are deemed immediately effective upon a second state adopting the Compact. The latter are expressly deemed effective only if the requisite additional congressional consent is secured.

The use of conditional enactments in this way precludes any claim that the Prosperity Zone Compact threatens or displaces federal supremacy. This is because the compact has neither the intention nor the effect of altering federal-state relations until the requisite congressional consent is received. The Compact's severance clause further underscores this intent by authorizing a court to sever any provision of the Compact that might violate the Compact Clause.

The Prosperity Zone Compact properly uses conditional enactments to preclude provisions that require further congressional consent from having legal effect until such consent is secured. Condition-

ing the effectiveness of provisions of the Prosperity Zone Compact that require congressional consent on securing such consent is directly analogous to conditioning the effectiveness of a state law on the passage of a federal law, which has been repeatedly sustained.¹⁵ As explained by one typical court decision, "[l]egislation, the effectiveness of which is conditioned upon the happening of a contingency, has generally been upheld." *Helmsley v. Borough of Ft. Lee*, 394 A.2d 65, 82 (N.J. 1978). Courts defer to "broad legislative discretion" when conditional enactments are used. *Id.* at 83. The U.S. Supreme Court and courts in 45 states and territories have recognized the viability of conditional enactments for a wide range of both state and federal legislation.¹⁶

Although the use of conditional enactments has been struck down to prevent evasion of single subject rule requirements in a few states (see, e.g., *Missouri Roundtable for Life, Inc. v. State*, 396 S.W.3d 348 (Mo. 2013)), the Compact's conditional enactments do not pose a single subject rule violation. Preventing provisions of the Compact that require congressional consent from having effect before congressional consent is secured obviously relates to the same purpose as the overall Compact. They do nothing more than enforce what the Compact Clause requires. States have the power to ensure that their compacts do not unconstitutionally trench on federal power in violation of the Compact Clause, just as they have the power to ensure they follow any other provision of the Constitution. See generally *Pennsylvania v. Porter*, 659 F.2d 306, 317 (3rd Cir. 1981) ("[T]he Commonwealth has the same interest in compliance with the standard of conduct laid down in the Fourteenth Amendment as it has in compliance with standards of conduct enacted by the Pennsylvania legislature.").

Furthermore, the Prosperity Zone Compact's use of conditional enactments to maintain the dormancy of Compact Clause-triggering provisions before congressional consent is obtained is entirely consistent with the general rule of law that congressional consent can be furnished for a compact after

it is formed. As explained in *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893), a compact's near term effect on federal-state relations may be immaterial or inherently unknowable at the time it is formed. A compact agreeing to set a boundary line between two states, for example, cannot threaten federal supremacy until the line is actually established. *Id.* Accordingly, the Compact Clause is not offended if such a compact receives congressional consent once measurements of the boundary line have been settled, even decades after the compact was formed. *Id.*

Likewise, the mere formation of the Prosperity Zone Compact cannot possibly threaten federal power because it does not achieve any alteration in

substantive policy on the ground until a Prosperity District is actually formed. Further, the scope of the congressional consent the Compact already enjoys under 4 U.S.C. § 112 is very broad under its plain terms. As discussed below, it is possible that it furnishes some or all of the consent needed for the Prosperity Zone Compact to achieve the status of federal law. Thus, whether and to the extent that additional consent is needed for

the Compact's terms to achieve the status of federal law cannot be known with certainty until after the issue ripens through interactions between federal agencies and a future Prosperity District. Therefore, following the Supreme Court's lead in *Virginia*, the near term immateriality of the Prosperity Zone Compact's impact on federal-state relations combined with the uncertainty over the extent to which it needs additional congressional consent justifies the conclu-

sion that the Compact can be formed.

Taken together, the non-contractual terms of the Prosperity Zone Compact are immediately effective as ordinary legislation in the first state that passes it. This enables Prosperity Districts to be formed as soon as 20 days after the first state adopts the Compact. Additionally, the Compact's contractual terms enabling the formation of cross-border districts, requiring reciprocal recognition of the reform policies existing in Prosperity Zones, and guaranteeing that such reform policies will be maintained are immediately effective when two states adopt the Compact. This is because those terms merely coordinate and commit the exercise of sovereign powers that could be exercised without a compact.

Prosperity Zone Compact Key Features

Durability, Reciprocity and Dispute Resolution.

The Prosperity Zone Compact forms an interstate compact upon receipt of notification of passage of statute adopting the Prosperity Zone Compact by second state; resulting in (a) contractual entrenchment of the foregoing policy reforms, (b) the ability to form cross-border Prosperity Districts, (c) reciprocal recognition of freedoms existing in each district in each member state, (d) formation of an interstate commission to advocate further expansion of the membership, and (e) the establishment of an alternative dispute resolution process overseen by the commission to resolve interpretive and jurisdictional disputes between and among districts, third party beneficiaries and member states.

Further, the terms of the Prosperity Zone Compact that can be construed as "enabling 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" are immediately effective on the basis of advance con-

gressional consent under 4 U.S.C. § 112. Only the portion of the Prosperity Zone Compact that seeks to "upgrade" its fiscal and regulatory policies to the status of federal law beyond the consent furnished by 4 U.S.C. § 112 is not immediately effective. By express provision, this upgrade will have to wait until congressional consent is secured—precisely as the Constitution commands. In the meantime, as discussed below, the state level reforms of the Prosper-

ity Zone Compact will achieve essentially the same level of policy durability as a state constitutional amendment once two states join the compact.

The Prosperity Zone Compact Guarantees Durable State Level Reform

Once the Prosperity Zone Compact is joined by two states and transitions from ordinary legislation to a genuine interstate compact, its state level reform policies become an exceptionally reliable framework for lasting reform and investment in Prosperity Districts. This is because member states may subsequently amend its state level policy reforms or withdraw from the compact only by following certain procedures that require either supermajority approval of all member states or the payment of reasonable compensation to third party beneficiaries who relied upon such reforms in making investment decisions. At the same time, suboptimal policy compromises made in the course of passing the Compact can be corrected relatively easily—undesirable exemptions from the Compact’s tax and regulatory reform policies, which are embedded in the “local tailoring” section of the Compact, can be freely repealed by the affected member state through ordinary legislation during any session.

Some contend that this constrained amendment and withdrawal process violates the rule against entrenchment, which is the general rule that one legislative body cannot enact ordinary legislation binding future legislative bodies. They point to the fact that the Compact is adopted by ordinary legislation and, therefore, they claim the Compact cannot constrain future legislation from amending or repealing that legislation. But the truth of the matter is that the rule against entrenchment does not apply to sovereign contracts. This is why, when legislation authorizes the establishment of public pension systems or the issuance of municipal bonds under conditions requiring the implementation of various fiscal policies (such as building stadiums or transportation lines), future legislatures are contractually bound to those decisions and limited in their legislative power to adjust them—even when such acts embed public policy choices

they would never have made. Interstate compacts have been treated similarly for decades, if not hundreds of years.¹⁷

Perhaps most famously, the Colorado River Compact may only be terminated upon unanimous agreement of all members (Article X) and it even entrenches the rights established by it after termination.¹⁸ This is a very robust form of entrenchment—even if all member states unanimously terminate the Compact, the rights it created and vested will remain enforceable. It basically means that the previously established terms of the Colorado River Compact cannot, in substance, be freely terminated ever.

Similarly, an existing compact dealing with radioactive waste (Midwest Interstate Low-Level Radioactive Waste Compact) provides at Article VIII(e): “no withdrawal may take effect until five years after the governor of the withdrawing state gives notice in writing of the withdrawal to the Commission and to the governor of each party state.”¹⁹ Likewise, a crime prevention compact (National Crime Prevention and Privacy Compact) allows renunciation but only under specific terms and after the expiration of a period of time of 180 days (Article IX (a) and (c)).²⁰ These two Compacts alone essentially bar unilateral withdrawal for a period of 180 days to 5 years without any flexibility to exit more quickly.

Against this backdrop, the various amendment and withdrawal options of the Prosperity Zone Compact actually allow a greater degree of freedom of amendment and withdrawal for future legislatures than would otherwise be the case in their absence. After all, the requirement of unanimous consent of all member states for withdrawal from or amendment to an interstate compact is the normal default rule for Compacts.²¹ No state or state official can lawfully act in conflict with the terms of a compact.²² Although subsequent parallel legislation in the same field of law can complement an interstate compact, such law cannot impair the obligation of interstate compact.²³ This is because Compacts are binding sovereign contracts under Article I, Section 10 of the U.S. Constitution (the Contracts Clause), which

prohibits states from impairing the obligation of contract.²⁴ Only if a state expressly reserves the right to amend or withdraw unilaterally from a Compact it has joined, as contemplated by the Prosperity Zone Compact with certain reasonable limitations, can the state do so without violating the U.S. Constitution's Contracts Clause.²⁵

Viewed in light of such precedent, by allowing various options for amendment or withdrawal, the Compact actually reduces the extent to which it would otherwise be entrenched from subsequent legislative action under the U.S. Constitution's Contracts Clause. For this reason, unlike most compacts joined by most states, the Prosperity Zone Compact does not contract away the sovereignty of a member state. Instead, it reasonably balances the Compact's goal of creating a predictable and reliable legal framework to encourage improvement of the Prosperity Zone with a significant degree of policy flexibility. Like all sovereign contracts, the Prosperity Zone properly maintains its state level reforms in member states with a degree of entrenchment and durability only otherwise found in state constitutional amendments.

The Prosperity Zone Compact is Upgradeable to Furnish Federal Reform

Interstate compacts receiving congressional consent 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.²⁶ This is despite the historical 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.²⁷

In 1981, the Supreme Court explained in *Cuyler v. Adams* how it 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.²⁸

It is now so well-established that interstate compacts receiving congressional consent have the status of federal law that such compacts not only displace state law under the Supremacy Clause, but have been held to supersede prior federal law and even to delegate federal power to compact-created agencies as well.²⁹ For example, the Circuit Court of Appeals for the District of Columbia held that the liability provisions of the previously enacted Federal Employer's Liability Act were displaced by the contrary provisions of the Washington Metropolitan Area Transit Authority interstate compact.³⁰

Additionally, the rights, guarantees, and obligations such interstate compacts create are protected from deprivation by the federal government as vested rights under the Fifth Amendment's Due Process Clause.³¹ 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.³²

The History of Federal Upgradeability

The clear rule of law establishing the "upgradeability" of an interstate compact to the status of federal law for the foregoing purposes did not emerge suddenly. It is something with which courts and policy makers have grappled for centuries. Most of the time, federal upgradeability has been regarded as a bug and not a feature. For example, 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."³³ 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 jurisdiction on, powers, or prerogatives of any department, agency, or officer of the United States Government."³⁴ Even the Weeks Act of 1911, which otherwise gives blanket consent to states entering into compacts for the purpose of forest protection, provides that the compact must not conflict with any law of the United States.³⁵

Such caveats evidence an awareness of the risk that interstate compacts could overrule federal law and policy. Indeed, Congress has long been aware of the potential for congressionally-approved 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.³⁶

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 use compacts to displace federal jurisdiction and regulatory authority

with congressional consent. 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.³⁷

Based on this objection, President Roosevelt threatened to veto the compact, which prevented the

compact from receiving the votes needed for approval.³⁸ 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.³⁹ Likewise, in 1943, Roosevelt vetoed the Republican River Compact, which explicitly precluded the United

Prosperity Zone Compact Key Features

Federal Upgradeability. When and to the extent the Prosperity Zone Compact receives congressional consent, such consent will expand eligible lands for the formation or expansion of Prosperity Zones to federal lands and the replacement of federal regulatory and tax policy with the foregoing regulatory and tax policies, and submission of all interpretative and jurisdictional disputes with the federal government to the foregoing alternative dispute resolution process.

States from exercising “such power or right ... that would interfere with the full beneficial and consumptive use” of waters from the Republican River Basin, 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.⁴⁰

All of these seemingly disparate facts evidence that political players have long recognized that congressional consent enables compacts to powerfully impact, alter, displace, and supersede federal law and the power of federal agencies. Upgradeability, in other words, has been a basic premise (and obvious concern) of nearly every significant political tussle in the field of interstate compacts since the beginning.

A Closer Constitutional Analysis Confirms Federal Upgradeability

The only known possible limitation on the federal law “upgrade” of an interstate compact that receives congressional consent is whether the compact is an appropriate area for congressional legislation. *Cuyler*, 449 U.S. at 440. But early Supreme Court precedent, which was not addressed in *Cuyler*, indicates that there is another theoretical basis of recognizing the Prosperity Zone Compact’s equivalency in status to federal law upon congressional consent. Specifically, such status can also stem from construing such consent as yielding to the independent sovereignty of the states over the subject matter of the compact.

As explained in Justice Baldwin in his concurrence to *Poole v. Fleeger’s Lessee*, 36 U.S. 185, 212 (1837): “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.” In other words, congressional consent does not transform a compact into federal legislation *per se*, it simply yields the compact’s subject matter to the states as if the Constitution did not bind them. A compact thus attains equivalency in status to a “law of the United States” not because it literally becomes a federal law, but rather because federal laws cannot override the compact under the Supremacy Clause if the Constitution does not apply to the subject matter of the compact. This understanding of congressional consent would allow for the formation of compacts that might otherwise not be permissible as a matter of federal law, and yet still have the functional status of a “law of the United States” in the sense of being the predominate law in regard to its subject matter. This theory is perfectly compatible with the Prosperity Zone Compact replacing contrary federal laws and policies upon receipt of congressional consent.

But even if the sole test for receiving federal law status upon congressional consent were an assessment of whether a compact’s subject matter was appropriate for federal legislation, it is not difficult at all to justify such status for the Prosperity Zone Compact. After all, the Compact expressly seeks to replace existing federal laws and policies with its regulatory and fiscal reforms. Even though the reform of federal law and policy is localized to Prosperity Districts, the authority for such localized reform is precisely the same as that which authorized the federal law and policy that it would replace. Perhaps ironically, the Supreme Court’s broad reading of the Commerce Clause and most other federal powers would provide strong support for federal upgradeability of not just the Prosperity Zone Compact, but also almost any interstate compact no matter how locally-focused or non-federal it may seem.

Furthermore, there are no independent constitutional impediments to the treatment of the Prosperity Zone Compact as the equivalent of federal law when it receives congressional consent. The targeted nature of its tax reforms to areas governed by a Prosperity District should not pose any problem under the Uni-

formity Clause of Article I, section 8, of the United States Constitution, which states, “all Duties, Imposts and Excises shall be uniform.” The issue under the Uniformity Clause is “whether the Uniformity Clause prohibits Congress from defining the class of objects to be taxed in geographic terms.” *United States v. Ptasynski*, 462 U.S. 74 (1983). The Compact does not define the class of objects to be taxed in geographic terms. It does not impose any tax at all, it merely replaces existing statutory taxes with a revenue sharing covenant that is voluntarily adopted in the process of voluntarily forming a Prosperity District. The Prosperity Zone Compact is open to entry by all states. The formation of a Prosperity District is based on uniform criteria. There is simply no way the Uniformity Clause would preclude the Prosperity Zone Compact from attaining the status of federal law upon receiving congressional consent.

Likewise, treating the Prosperity Zone Compact as the equivalent of federal law when it receives congressional consent is not precluded by non-delegation doctrine under the Constitution’s separation of powers guarantee. Although the replacement of inconsistent federal laws and policies is triggered by the formation of a Prosperity District on the petition of all affected property owners and residents of the area, all criteria for granting the petition are specified in the Compact and no substantive federal policy matter is otherwise left to the discretion of any private party. The process is not materially different than the petition process used by private parties to establish special districts throughout the states, all of which thereby gain access to analogous federal tax exemptions for municipal borrowing (which no one challenges as involving an improper delegation of federal tax-

ing authority). See, e.g., A.R.S. § 48-905(C) (giving county board of supervisors power to “summarily order the formation of the district” on petition of affected residents without a public hearing). Moreover, the Supreme Court has repeatedly sustained legislative acts entailing direct private party approval, proposal or rejection of new comprehensive regulatory schemes or regulatory jurisdictions—even where a substantial degree of policy discretion was vested in those private parties. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398-99 (1940); *Currin v. Wallace*, 306 U.S. 1, 14-15 (1939). In contrast to the “unfair competition” regulations sustained in *Sunshine Anthracite Coal Co.* or the price control regulations sustained in *Currin*, no coercive

governing power and far less legislative power is delegated to those private parties who are petitioning for the formation of a Prosperity Zone. For this reason, current case law should easily sustain the Prosperity Zone Compact as the equivalent of federal law upon receiving congressional consent without raising concerns about impermissible legislative delegation.

Prosperity Zone Compact Key Features

Local and Federal Tailoring. *The Prosperity Zone Compact anticipates flexibility to modify all of the foregoing features to allow for local and federal tailoring through the preservation of otherwise repealed state and federal laws and agency jurisdictions, all such exemptions at the state level being subject to future repeal but not future augmentation once the compact is formed.*

Dissolution. *The Prosperity Zone Compact guarantees the right to dissolve the Prosperity District and return the area to the legal status quo ante.*

Finally, it is exceedingly unlikely that the Prosperity Zone Compact’s alternative dispute resolution process would be regarded as improperly delegating the Supreme Court’s Article III judicial power. In *Texas v. New Mexico*, 462 U.S. 554 (1983), the Supreme Court emphasized that it would be happy to defer to the informal dispute resolution decisions of the Pecos River Commission, a compact agency created by the Pecos River Compact as a “completely adequate means” of resolving disputes among the member states. *Id.* at 571 n.18. In view of this observation, it is safe to predict that the Court would defer

to the Prosperity Zone Compact's dispute resolution process overseen by its interstate commission.

In sum, a robust legal analysis confirms that the state level reforms enabled by the Prosperity Zone Compact would be ripe for a federal upgrade should Congress consent to it. Indeed, such analysis supports a strong argument that the consent furnished by 4 U.S.C. § 112 for the Prosperity Zone Compact has already done just that, at least to some extent.

The Prosperity Zone Compact Might Already Qualify for a Federal Upgrade

Again, 4 U.S.C. § 112 gives broad advance consent to any compact "enabling 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." Significantly, 4 U.S.C. § 112 was passed by Congress and signed by President Roosevelt in the midst of the previously mentioned pitched political battles during the 1930s and '40s over efforts to secure congressional consent for hydroelectric and fisheries compacts.⁴¹

As discussed above, the stakes involved in furnishing advance congressional consent to interstate compacts were known to all at the time 4 U.S.C. § 112 became law. President Roosevelt and Congress battled over seemingly innocuous compacts because both sides understood that a congressionally-approved compact would displace federal law and jurisdiction over the same subject matter. Despite such contemporaneous knowledge, and unlike every interstate compact approved up to its passage and thereafter, Congress passed and President Roosevelt signed 4 U.S.C. § 112 into law without any savings clause to prevent compacts within its scope from displacing or overriding federal law or power. Instead, echoing Justice Baldwin's early theory of the Compact Clause in *Poole*, 36 U.S. at 212, the legislative history suggests 4 U.S.C. § 112 was passed in order to yield the compact's subject matter to the states as if the Constitution did not bind them. See S. Rep. No.

1007, 73d Cong., 2d Sess., 1 (1934); H. R. Rep. No. 1137, 73d Cong., 2d Sess., 1-2 (1934) ("This bill seeks to remove the obstruction imposed by the Federal Constitution and allow the States cooperatively and by mutual agreement to work out their problems of law enforcement").

Against this backdrop, it would be ahistorical to declare that 4 U.S.C. § 112 was not meant to give compacts within its scope the status of federal law at least to some extent. Even if 4 U.S.C. § 112's consent were meant only to encompass compacts creating desirable agencies for cooperative criminal law enforcement, that's all the consent needed to upgrade the criminal law and regulatory reforms advanced through Prosperity Districts by the Prosperity Zone Compact to the status of federal law. In view of the over-criminalization of public policy at all levels of government, whereby even the most minor civil regulations are enforced by criminal sanctions and law enforcement, it is entirely possible that a court could rule that 4 U.S.C. § 112 confers the status of federal law on most, if not all, of the powers and authorities of Prosperity Districts.

Suffice it to say that statutory text, legal precedent and history are entirely consistent with construing 4 U.S.C. § 112 as capable of upgrading the Prosperity Zone Compact to the status of federal law to some extent. But for genuine clarity on this point, as indicated previously, we may have to wait for a specific dispute to ripen through actual interactions between future Prosperity Districts and federal agencies. For this reason, the best path to federal upgradeability for the Prosperity Zone Compact would still be to secure congressional consent that unambiguously defers to or embraces all of its terms and public policy goals. The question thus becomes: How should states secure the requisite consent?

Upgrading without Presidential Presentment

Not much guidance can be found in the actual words of the Compact Clause. The Constitution speaks only of securing the "Consent of Congress." U.S. Const. art. I, § 10. 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. U.S. Const. art. I, § 7, para. 2. Indeed, seeking presentment for congressional consent would be the most prudent path given the usual formulation of the nature of federal upgradeability being a function of the compact literally becoming federal law upon congressional consent.

But if granting the consent of Congress were regarded as the exercise of a power conferred exclusively upon Congress, such as Congress' power to propose constitutional amendments, then each house would need only to approve an interstate compact by passing a concurrent resolution, which does not require presidential presentment.⁴² Likewise, the case for requiring presidential presentment would also become much weaker if Justice Baldwin's early interpretation of the Compact Clause in *Poole*, 36 U.S. at 212, were to prevail. If congressional consent yields the subject matter of the compact to the states as if the Constitution did not govern them, then such consent would have none of the indicia of a federal law necessitating presidential presentment. This is because the compact would itself be the "law" in regard to its subject matter based on the inherent sovereign power of the states.

It is therefore very important to underscore that no case actually holds that congressional consent to an interstate compact requires presidential approval. Scholars are divided on whether the requisite congressional consent requires presidential presentment, even though there is a history of vetoes and threatened vetoes of interstate compacts during President Roosevelt's term in office, as well as a custom of presenting interstate compacts to the President for approval.⁴³ Equally significant is the fact that 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."⁴⁴

But the claim that presidential presentment is "settled usage" disregards the longstanding court-sanctioned phenomenon of "implied consent" to interstate compacts. The Supreme Court has long held congressional consent to interstate compacts can be implied both before and after the underlying agreement is reached.⁴⁵ 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. 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.

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. Prevailing precedent thus justifies concluding that the Compact Clause might confer an exclusive power upon Congress to approve interstate compacts that can be exercised without presidential presentment. This would not be as strange as it seems.

It is not unusual 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.⁴⁷ 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, and may be regarded as aimed at a similar purpose.⁴⁸ Moreover, where the Constitution specifically confers a power upon a named legislative assembly for rulemaking, as it does in the Compacts Clause, action by that assembly, without presentment to the executive branch, has been sustained. There is nothing in the text of Compact Clause that plainly indicates the congressional consent requirement cannot be analogized to these conferred powers.

A strong legal argument can thus justify advancing the theory that presidential presentment is unnecessary to securing effective congressional consent to an interstate compact, including the Prosperity Zone Compact. Although bypassing presidential presentment should not be the first resort, policy makers and advocates should keep the foregoing analysis in mind if the President becomes an obstacle to achieving congressional consent for the Prosperity Zone Compact.

Conclusion

The vehicle of an interstate compact holds unique power and promise for the Prosperity Zone movement. With passage in just one state, the Prosperity Zone Compact can immediately deliver deep state level reform aimed at protecting liberty and catalyzing economic growth. With two states adopting it, the Compact can make such state level reform as durable as a state constitutional amendment for the price of statutes in each state. The existence of congressional consent for all compacts coordinating criminal law policies, also allows the Prosperity Zone Compact to override any federal criminal law and policy that might interfere with its reforms. And with the passage of a resolution granting further congressional consent, the Compact can upgrade all of its state level reforms into equivalently robust federal level reforms.

In short, the Prosperity Zone Compact empowers the entrepreneurial community and ordinary Americans to press the reset button on terrible public policy that has recklessly destroyed wealth, opportunity and countless jobs through excessive regulation and inequitable taxation. It is fully constitutional and, as forthcoming policy briefs in this series will demonstrate, it can bring the American dream back.

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Endnotes

1. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987).
2. 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).
3. 36 Okl.St. Ann. Sec. 7004 (2006) (available at <http://apps.csg.org/ncic/Compact.aspx?id=86>).
4. RSA 200-E:1 et seq. (1969) available at <http://apps.csg.org/ncic/Compact.aspx?id=2>
5. Arizona Legislature, HB2502 (Fifty-second Legislature 2nd Regular Session 2016) (available at <http://apps.csg.org/ncic/Compact.aspx?id=217>).
6. *Green v. Biddle*, 21 U.S. 1, 16-17 (1823).
7. NRS 277.190-277.220 (1968) (available at <http://apps.csg.org/ncic/Compact.aspx?id=185>).
8. RCW 43.97.015 (1987) (available at <http://apps.csg.org/ncic/Compact.aspx?id=38>).
9. Sec. 70.500, RSMo (1996) (available at <http://apps.csg.org/ncic/Compact.aspx?id=96>).
10. Public Law 105–145 (Dec. 15, 1997), 111 Stat. 2669 (available at <https://www.gpo.gov/fdsys/pkg/PLAW-105publ145/pdf/PLAW-105publ145.pdf>)
11. 45 ILCS 100/0.01 et seq. (1949) available at <http://apps.csg.org/ncic/Compact.aspx?id=21>)
12. See also Broun, Buenger, McCabe & Masters, *The Evolving Use and Changing Role of Interstate Compacts: A Practitioner’s Guide*. (A.B.A. 2006) at pp. 47-53; *New Hampshire v. Maine*, 426 U.S. 363 (1976).
13. *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*, 472 U.S. 159 (1985).
14. See, e.g., *Cuyler v. Adams*, 449 U.S. 433, 440-41 (1981) (detainer agreement); *M.F. v. State of New York Executive Dept. Div. of Parole*, 640 F.3d 491, 75 A.L.R.6th 691 (2d Cir. 2011); *Doe v. Pennsylvania Bd. of Probation and Parole*, 513 F.3d 95, 103 (3d Cir. 2008) (Interstate Compact for Adult Offender Supervision); *Cameron v. Mills*, 645 F. Supp. 1119, 1127-28 (S.D. Iowa 1986) (interstate corrections compact); see Michael L. Buenger and Richard L. Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 Roger Williams University Law Review, (No. 1), pp. 107-08 (2003);
15. See, e.g., *State v. Dumler*, 559 P.2d 798 (Kan. 1977); *Bracey Advertising Co. v. North Carolina Dept. of Transportation*, 241 S.E.2d 146 (N.C. Ct. App. 1978).
16. See, e.g., *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892); *Opinion of the Justices*, 287 Ala. 326 (1971); *Thalheimer v. Board of Supervisors of Maricopa County*, 11 Ariz. 430, 94 P. 1129 (Ariz. Terr. 1908); *Thomas v. Trice*, 145 Ark. 143 (1920); *Busch v. Turner*, 26 Cal. 2d 817 (1945); *People ex rel. Moore v. Perkins*, 56 Colo. 17 (1913); *Pratt v. Allen*, 13 Conn. 119 (1839); *Rice v. Foster*, 4 Harr. 479 (De. 1847); *Opinion to the Governor*, 239 So. 2d 1 (Fla. 1970); *Henson v. Georgia Industrial Realty Co.*, 220 Ga. 857 (1965); *Gillesby v. Board of Commissioners of Canyon County*, 17 Idaho 586 (1910); *Wirtz v. Quinn*, 953 N.E.2d 899 (Ill. 2011); *Lafayette, M&BR Co. v. Geiger*, 34 Ind. 185 (1870); *Colton v. Branstad*, 372 N.W. 2d 184 (Iowa 1985); *Phoenix Ins. Co. of N.Y. v. Welch*, 29 Kan. 672 (1883); *Walton v. Carter*, 337 S.W. 2d 674 (Ky. 1960); *City of Alexandria v. Alexandria Fire Fighters Ass’n, Local No. 540*, 220 La. 754 (1954); *Smigiel v. Franchot*, 410 Md. 302 (2009); *Howes Bros. Co. v. Mass. Unemployment Compensation Commission*, 296 Mass. 275 (1936); *Council of Orgs. & Ors. For Educ. About Parochiaid, Inc. v. Governor*, 455 Mich. 557 (1997); *State v. Cooley*, 65 Minn. 406 (1896); *Schuller v. Bordeaux*, 64 Miss. 59 (1886); *In re O’Brien*, 29 Mont. 530 (1904); *Akin v. Director of Revenue*, 934 S.W.2d 295 (Mo. 1996); *State v. Second Judicial Dist. Ct. in & for Churchill County*, 30 Nev. 225 (1908); *State v. Liedtke*, 9 Neb. 490 (1880); *State ex rel. Pearson*, 61 N.H. 264 (1881); *In re Thaxton*, 78 N.M. 668 (1968); *People v. Fire Ass’n of Philadelphia*, 92 N.Y. 311 (1883); *Fullam v. Brock*, 271 N.C. 145 (1967); *Enderson v. Hildenbrand*, 52 N.D. 533 (1925); *Gordon v. State*, 23 N.E. 63 (Ohio 1889); *State ex rel. Murray v. Carter*, 167 Okla. 473 (1934); *Hazell v. Brown*, 242 P.3d 743 (Or. App. 2010); *Appeal of Locke*, 72 Pa. 491 (1873); *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634 (1999); *Clark v. State ex rel. Bobo*, 113 S.W.2d

- 374 (Tenn. 1938); *State Highway Dept. v. Gorham*, 139 Tex. 361 (1942); *Bull v. Reed*, 54 Va. 78 (1855); *State v. Baldwin*, 140 Vt. 501 (1981); *State ex rel. Zilisch v. Auer*, 197 Wis. 284 (1928); *Brower v. State*, 137 Wash. 2d 44 (1998); *Le Page v. Bailey*, 114 W. Va. 25 (1933).
17. Compacts stand as a clear exception to the general rule that a sitting state legislature cannot bind future state legislatures. See generally Broun, Buenger, McCabe & Masters, *The Evolving Use and the Changing Role of Interstate Compacts, A Practitioner's Guide*, 2007 ABA Sec Admin Law & Regulatory Practice, § 1.2.2.
18. Colorado River Compact of 1922 (Aug. 18, 1921) (available at <http://apps.csg.org/ncic/PDF/Colorado%20River%20Compact.pdf>)
19. W.S.A. 14.81 (1984), available at <http://apps.csg.org/ncic/PDF/Midwest%20Interstate%20Low-Level%20Radioactive%20Waste%20Compact.pdf>
20. W.V.C. § 15-2-24a (2006), available at <http://apps.csg.org/ncic/PDF/National%20Crime%20Prevention%20and%20Privacy%20Compact.pdf>
21. *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”); *State of Neb. ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Com’n*, 902 F.Supp. 1046 (D. Neb. 1995) (rejecting effort by one member state to unilaterally alter the voting membership of the Central Interstate Low-Level Radioactive Waste Commission without unanimous concurrence of all member states).
22. See *U.S. Trust Co v. New Jersey*, 431 U.S. 1 (1977) (Contract Clause applied to state’s obligation to bondholders in connection with interstate compact); *Wroblewski v. Commonwealth*, 570 Pa. 249, 809 A2d 247 (2002) (terms of an interstate compact contain the substantive obligations of the parties as is the case with all contracts; Contract Clause of the Federal Constitution protects compacts from impairment by the states; although a state cannot be bound by a compact to which it has not consented, an interstate compact supersedes prior statutes of signatory states and takes precedence over subsequent statutes of signatory states).
23. See, e.g., *Henderson v. Delaware River Joint Toll Bridge Comm’n*, 66 A.2d 843 (1949) (“[i]t is within the competency of a State, which is a party to a compact with another State, to legislate in respect of matters covered by the compact so long as such legislative action is in approbation and not in reprobation of the compact”).
24. *Green*, 21 U.S. at 92-93 (“a state has no more power to impair an obligation into which she herself has entered than she can the contracts of individuals”); *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991) (“[h]aving entered into a contract, a participant state may not unilaterally change its terms”).
25. See, e.g., *Seattle Master Builders v. Pacific Northwest Electric*, 786 F.2d 1359, 1371 (9th Cir. 1986) (“state can impose state law on a compact organization only if the compact specifically reserves the right to do so”); *C.T. Hellmuth & Assoc. v. Washington Metro. Area Transit Auth.*, 414 F. Supp. 408 (D. Md 1976) (“[A] compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of the parties”); *Aveline v. Penn. Bd. of Probation & Parole*, 729 A.2d 1254, 1257 n10 (Pa. Commw. Ct. 1999) (“[a compact] takes precedence over the subsequent statutes of signatory states and, as such, a state may not unilaterally nullify, revoke or amend one of its compacts if the compact does not so provide”).
26. *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”).
27. David E. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 Va. L. Rev. 987, 999- 1002 (1965).
28. *Cuyler*, 449 U.S. at 439-40 (citing *Petty v. Tennessee-Missouri Bridge Comm’n*, 359 U.S. 275, 278 (1959); *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); *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U.S. 419 (1940)); 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)).
29. *Compare McKenna v. Washington Metropolitan Area Transit Authority*, 829 F.2d 186, 188 (D.C. Cir. 1987) and *Washington Metropolitan Area Transit Authority v. One Parcel of Land in Montgomery County, Md.*, 706 F.2d 1312 (4th Cir. 1983) (authorizing use of federal “quick-take” condemnation statute by Washington Metropolitan Area Transit Authority, which was created by the Washington Metropolitan Area Transit Authority Compact) with *Parkridge 6 LLC v. U.S. Department of Transportation*, 2010 U.S. Dist. LEXIS 34182 * 17-18 (E.D. Va. 2010) (holding state law in conflict with compact receiving congressional consent “is preempted under the Supremacy Clause of the United States Constitution”).
 30. *McKenna*, 829 F.2d at 188.
 31. 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.
 32. *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”).
 33. Colorado River Compact of 1922 (Aug. 18, 1921).
 34. 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”).
 35. 36 Stat. 961, 16 U.S.C. § 552 (1911).
 36. Frederick L. Zimmerman & Mitchell Wendell, *The Interstate Compact Since 1925*, 41 n. 174 (1951) (citing P.L. 721, 81st Cong, 2nd Sess.).
 37. *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).
 38. *Id.* (citing Franklin D. Roosevelt letter to Governor Cross, in Connecticut Annual Report Connecticut Society of Civil Engineers 61 (1938)).
 39. *Id.* at 38 & n.162 (citing August 11, 1939 memorandum of disapproval).
 40. *Id.* (citing Document No. 690, H.R. 77th Congress 2nd Session (Apr. 2, 1942)); Art. XI, Republican River Compact; Republican River Compact, 86 Stat. 86 (1943)).
 41. *Id.* at 16 & n. 78, 38 & n.162.
 42. *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”); see generally 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 (determin-

ing 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. Compare *Zimmerman & Wendell*, *supra*, 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, *supra*, at 499 n.19.
44. *Zimmerman & Wendell*, *supra*, at 94.
45. *Virginia*, 148 U.S. at 521 (“The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement, as where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given. Story says that the consent may be [an] implied act of Congress, admitting such State into the Union, is an implied consent to the terms of the compact”); see also *Cuyler*, 449 U.S. at 441; *Wharton v. Wise*, 153 U.S.155 (1894).
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).
47. *Cf. The Head Money Cases*, 112 U.S. 580, 599 (1884).
48. 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”); *Zimmerman & Wendell*, *supra*, 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 v. La Plata Co.*, 304 U.S. 92, 104 (1938) (discussing how compact clause “adopts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations”).



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