



# PolicyPerspective

## Shield of Federalism: Interstate Compacts in Our Constitution

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### Key Points

- As shields, interstate compacts can protect areas of State regulation from federal power.
- Interstate compacts allow States to initiate changes in federal law.
- Interstate compacts are one way that States, working together, can reassert their proper role within the Constitution's balance of federalism.

### Introduction

The American Republic is facing one of the greatest challenges of our history. In Washington, Republicans and Democrats alike have indulged the runaway spending and regulatory overreach of a federal government that continues to expand the scope of its powers unabated. The Patient Protection and Affordable Care Act (“ObamaCare”) marks a dramatic new milestone in that expansion. Americans are starting to realize that restoring and protecting self-government requires a return to our founding principles of limited government and local control.

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

Under our Constitution, interstate compacts that regulate matters within the enumerated powers of the federal government require congressional consent. That consent can be express (an affirmative majority vote in Congress) or even implied by congressional acquiescence. In the case of express congressional consent, historically that has been accomplished through either a bill or a resolution that typically has been presented to the President for his signature into law.

Critically, once Congress consents to an interstate compact, the compact carries the force of federal law, trumping all prior federal and state law.

Few issues have energized citizens nationally more than the recent federal health care legislation—seen by many as a federal power-grab at the expense of state authority and individual liberty. An interstate health care compact would present a powerful vehicle for the States to confront ObamaCare directly.

Two insights give force to this Policy Perspective, a legal insight and a political insight. First, legally, the problem confronted by most state efforts against federal health care legislation is that, under the Supremacy Clause, federal law preempts state law. However, with congressional consent, an interstate compact *is federal law*. Hence, it can supersede all prior federal law—including ObamaCare. Second, politically, if States enter into an interstate compact, it becomes very difficult for their elected congressional representatives to deny them consent. It is one thing to vote in the abstract for federal legislation; it is quite another to tell your home-state constituents that you will not respect their views and expressed desire not to be bound by ObamaCare.

More broadly, in the decades ahead, interstate compacts could gain increasing use as a shield against federal overreach. With congressional consent, federalized interstate compacts could shield entire areas of state regulation from the power of the federal government. This paper

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explores the history and law of interstate compacts, with particular focus on federalized interstate compacts.

### Interstate Compacts in Constitutional History

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

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

Both the contractual and quasi-constitutional dimensions of the interstate compact survive to this day. The Constitution expressly provides for them, in Article I, Sec. 10: “No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State.” This provision has been very narrowly construed. The Supreme Court has been loath to strike down interstate compacts generally,

and has not in fact required congressional consent in many cases. Congressional consent has generally been required only when necessary “in order to check any infringement of the rights of the national government.”<sup>1</sup>

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

Regulatory compacts usually (but not always) establish a regional agency of some kind. These vary as much in size and function as the compacts themselves, from three-person commissions to the Washington Metropolitan Area Transit Authority, which employs 10,000 people. The key thing to note about these agencies is that they (like the compacts which create them) “are neither federal in nature nor state in scope. Administrative compacts have created powerful governing commissions appropriately described as a “third tier” of government, a tier that occupies that space between the sphere of federal authority and the sphere of individual state authority.”<sup>3</sup>

### Legal Effect of Interstate Compacts

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

In keeping with their general purpose, the most basic effect of an interstate compact is to bind the member States. As one court put it, “The law of interstate compacts as interpreted by the U.S. Supreme Court is clear that interstate compacts are the highest form of state statutory law, having precedence over conflicting state statutes.”<sup>4</sup> Indeed, an interstate compact necessarily involves a giving up of some state sovereignty by entering into a restraining arrangement with other States. For this reason, courts have imposed limits on what the States can do with compacts: The “reserved powers” doctrine holds that certain attributes of sovereignty cannot be contracted away.<sup>5</sup> Courts have also held that the surrender of a State's power in a compact must be “in terms too plain to be mistaken.”<sup>6</sup> These limitations, however, are mere caveats to bear in mind when considering the fact

that interstate compacts not only trump existing state law, they bind all future state governments. Most compacts provide for withdrawal and dissolution; but they are otherwise deemed permanent.<sup>7</sup>

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

From the point of view of federalism the most important effect of interstate compacts is on federal law—and on the balance of federal-state powers. Here a crucial distinction must be drawn between those interstate compacts that require congressional consent and those that do not. Courts have typically required congressional consent for two kinds of compacts: first, when the compact would change the balance of power between States and the federal government or diminish the power of the federal government; and second, where the compact intrudes on an area of specific federal authority. If the area of regulation is federally preempted, congressional consent is generally required.

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

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

An interstate compact cannot impact federal law beyond the borders of the member States. But just how deeply a compact can intrude on federal law has not been precisely established, chiefly because compacts generally have tried to have as little impact as possible on federal law, in order to eliminate po-

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tential political hurdles in Congress. The outer boundaries have not been explored. But we can assume, and proponents should argue, that interstate compacts can cut a considerable swathe into federal law—assuming that congressional consent is given to do so. This is because, “[w]hen it approves a compact, Congress arguably exercises the legislative power that the compact threatens to encroach upon and declares that the compact is consistent with Congress’s power in that area. [...] *Congress, in effect, consents to the states’ intruding on its traditional domain.*”<sup>10</sup>

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

In *McKenna*, the plaintiff sued for wrongful death on the basis of the Federal Employers’ Liability Act (FELA) after her husband (an employee of WMATA) was killed in an accident while on the job. The Court of Appeals for the D.C. Circuit ruled that FELA was unavailable to her because the WMATA Compact has its own liability scheme and specifically provides (in sec. 77 of the Compact) that its transit services “shall [...] be exempt from all rules, regulation and orders of [...] the United States otherwise applicable to such transit[....]” The court also pointed to sec. 5 of the Compact, which provides that “the applicability of the laws of the United States,

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and the rules, regulations, and order promulgated thereunder, relating to or affecting transportation under the Compact ... is suspended, except as otherwise specified in the Compact, to the extent that such laws, rules regulations and orders are inconsistent with or in duplication of the provisions of the Compact.”

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

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

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

One interesting possibility is that, because Congress may consent in advance to a compact, it may perhaps delegate the equivalent of administrative rulemaking authority to any regulatory body established by the compact. Thus, in the abstract, the interstate compact

has as much potential as a “policymaking” device as the regulatory agencies of the federal government.

### *Congressional consent and presentment.*

Although no court has so held, a strong argument can be made that presentment is required for congressional consent. As an initial matter, the text of the Compact Clause (Art. I, Section 10) requires only the “consent” of Congress, and makes no reference to the President. Moreover, as noted in *Cuyler*, the Supreme Court’s cases establish that “Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined.” And if Congress can consent implicitly, through mere acquiescence, then a credible argument could be made that Congress may also consent by means of a form intermediate between express legislation and implied acquiescence, such as a concurrent resolution expressing consent, without the need for presentment to the President.

However, as a matter of historical practice, in virtually every case, express congressional consent has taken the form of an act of Congress, signed by the President. Both the second and third clauses of Art. I, Section 7 (Presentment) of the Constitution provide a strong basis for arguing that the President’s signature is required for congressional consent.<sup>16</sup> Indeed, President Franklin Roosevelt vetoed at least two resolutions of congressional consent presented to him for signature: one, related to fisheries, in 1939, and another, the Republican River Compact (later adopted in modified form) in 1942. On the basis of these two examples, one commentator writes, “[w]hen congress gives its consent to a compact by an act or joint resolution, it is subject to Presidential veto.”<sup>17</sup> No Court has ever so held, and the Compact Clause is silent on the issue, but as one commentator urges, “[u]sage has brought the President into the compact process.”<sup>18</sup>

If it were litigated, the matter would be largely one of first impression for the federal courts, because no interstate compact has ever been challenged for insufficient congressional consent on the grounds that the claimed consent lacked the signature of the President.

Even assuming that presentment to the President is in fact required, however, the interstate compact is a powerful device for shaping the balance of state and federal power. If it were adopted by a number of States and consented to by Congress, a President would face perilous challenges refusing to allow an

interstate compact to go into effect. And a federalized compact (whatever the form of consent) has full force of federal law. It is the one tool through which the States as States can directly initiate changes to federal law.

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

Subsequent legislation can modify or withdraw congressional consent. In cases where the compact impinges on preempted federal regulatory area, and therefore required congressional consent to start with, the operative federal law can subsequently be modified by Congress.

## Technical and Tactical Considerations

Several observations bear keeping in mind.

- Congressional consent can take a variety of forms. Congress can consent to an existing compact (after-the-fact) either through resolution or legislation. Courts have held that it can consent to a compact in advance, and its consent can be inferred from its acquiescence to a compact, as occurred in the classic case of *Virginia v. Tennessee* (1893).<sup>19</sup> The deference courts have shown to clear statements of congressional consent suggests a flexibility that may have significant unexploited potential.
- Congressional consent can be conditional and limited in any way Congress sees fit. In cases where this is a concern, the compact can expressly provide that it will go into effect only when Congress consents unconditionally.
- Congressional consent can also delegate wide powers to the compact, including the power to change the terms of the compact subsequently. The Washington Metropolitan Area Transit Regulation Compact provides: “This Compact may be amended from time to time without the prior consent or approval of the Congress of the United States and any amendment shall be effective unless, within one year, the Congress disapproves that amendment.” If Congress had consented to that provision of the compact, the compact would have allowed subsequent state legislative action to change federal law *without further congressional action*.<sup>20</sup> Critics will charge an impermissible delegation of legislative authority—but interstate compacts have at least as much latitude in this respect as federal regulatory agencies, which routinely set rules without violating the doctrine of non-delegation.
- Interstate compacts have been launched and adopted in a variety of ways. Here are some examples:
  - ***Port Authority of NY/NJ:*** The governor of each state appointed three commissioners each to a commission to study the question of regional mobility and commerce. The commissioners reported back several years later with a draft compact. The compact was quickly ratified by the States and approved by Congress.
  - ***Interstate Compact on the Placement of Children:*** New York’s Joint Legislative Committee on Interstate Cooperation studied the question at length. Eventually it proposed a draft, and the draft was quickly passed by 12 legislatures.
  - ***Emergency Management Assistance Compact:*** The Southern Governors’ Association (SGA) endorsed the need for a compact to facilitate mutual disaster assistance among states facing hurricanes and other natural disasters. The SGA established a working group which took about a year to propose a draft compact. The plan was signed by SGA members, who began presenting it to their legislatures.
  - ***National Crime Prevention and Privacy Compact:*** The NCPPC was formed to facilitate criminal backgrounds checks across borders. The proposal took shape over 15 years under the auspices of a national umbrella organization, and it was finally formalized in coordination with the FBI. Congress endorsed it, and it then passed in the States.

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

One of the founding pillars of our Constitution is the idea of dual sovereignty—the supremacy of the federal government as to issues of national concern, and the primacy of the States as to matters of state and local concern. But as the national economy has developed and become more integrated, and as communities have grown into thriving metropolitan areas that spill across state lines, the federal government has steadily expanded in scope and power, to a point that today calls into question the very idea of federalism. With the loss of many of the meaningful constraints on the power of the federal government, the original distinction between a federal government whose powers are “few and definite” and state governments

whose powers are “numerous and indefinite” (as James Madison put the matter in Federalist No. 45) has been substantially diminished. Hence, one result of the expansion of the federal government has been to blur the distinction between national issues and local ones, which in turn facilitated the further expansion of federal power.

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

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

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

## Endnotes

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

<sup>2</sup> Caroline Broun, et al., *The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide*, pp. 12 and passim (American Bar Association 2007).

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

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

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

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

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

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

Id. at 3.

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

<sup>9</sup> 4 U.S.C. § 112(a).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## About the Authors

**Ted Cruz** served as Solicitor General for the State of Texas—the chief appellate lawyer for the State— from 2003 to 2008. He was the first Hispanic Solicitor General in Texas, and when appointed, was the youngest Solicitor General in the United States. Ted has authored more than 80 U. S. Supreme Court briefs and presented 38 oral arguments, including eight before the U.S. Supreme Court. He has been named by *Texas Lawyer* magazine as one of the “25 Greatest Texas Lawyers of the Past Quarter Century,” by *American Lawyer* magazine as one of the “50 Best Litigators under 45 in America,” and by *National Law Journal* as one of the “50 Most Influential Minority Lawyers in America.” A graduate of Princeton University and Harvard Law School, Ted previously served as a law clerk to Chief Justice William H. Rehnquist on the U.S. Supreme Court; as Domestic Policy Advisor to President George W. Bush on the 2000 Bush-Cheney Campaign; and as Associate Deputy Attorney General at the U.S. Department of Justice.

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

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