The Broader Implications of *Gillette*: Razor or Bludgeon

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Much has been written about the Michigan compact litigation and the ability of states to retroactively withdraw from the Multistate Tax Compact. Less attention has been paid to *Gillette* and the compact litigation in other states. In this article, the authors discuss one of the fundamental disagreements between the parties and the potentially far-reaching implications on interstate compacts in general.

Pluralitas non est ponenda sine necessitate.

— William of Ockham

Occam's razor is translated as "plurality should not be posited without necessity." It is often paraphrased as "simpler explanations are generally better than more complex ones." Occam's razor is not without detractors, however. Crabtree's bludgeon — "No set of mutually inconsistent observations can exist for which some human intellect cannot conceive a coherent explanation, however complicated" — operates as a foil to Occam's razor.

In some ways, these opposing philosophical principles symbolize one area of fundamental disagreement in the compact litigation pending in California, Minnesota, Oregon, and Texas. In those cases, the parties sharply disagree about whether an "established body of compact law" exists separate and apart from the restrictions imposed by the compact clause, the supremacy clause, and the contracts clause of the U.S. Constitution. Resolution of that question could have broad implications for all interstate compacts — not just those involving state taxation.

I. The Compact Clause

The compact clause of the U.S. Constitution states: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State."[1] Read literally, the clause appears to prohibit any compact among the states that lacks congressional consent. As early as 1893, however, Justice Stephen Johnson Field observed in *Virginia v. Tennessee* that "it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[2] Field's interpretation borrowed from Justice Joseph Story's observations 60 years earlier.[3]

The U.S. Supreme Court had occasion to revisit — and reaffirm — Field's view of the compact clause in *New Hampshire v. Maine* in 1976. There, the Court specifically held that the clause was limited to those agreements that increased the political power of the states to the detriment of federal supremacy.[4]

A mere two years later, the taxpayers in *U.S. Steel Corp. v. Multistate Tax Commission* urged the Court to abandon the test articulated in *Virginia v. Tennessee* and *New Hampshire v. Maine*.[5] The Court expressed reluctance to adopt a literal reading of the clause but nevertheless conducted an examination of its origin and development. It concluded that its earlier decisions confirmed the relevant inquiry was the impact on federal structure, and it held that the rule first articulated in *Virginia v. Tennessee* "states the proper balance between federal and state power with respect to compacts and agreements among the States."[6]

Because of these decisions, not all compacts require congressional consent. For example, the Multistate Tax Compact does not have congressional approval but is nevertheless valid because it does not threaten federal supremacy.[7]

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[1]U.S. Const., Art. I, section 10, cl. 3.
[2]*Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).
[3]J. Story, "Commentaries of the Constitution of the United States," section 1403, p. 264 (T. Cooley ed. 1873).
[4]*New Hampshire v. Maine*, 426 U.S. 363, 369 (1976).
[5]*United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 460 (1978).
[6]*Id.* at 471.
[7]*Id.* at 471-78.

II. Compacts as Federal Law

The Supreme Court revisited the law applicable to compacts in 1981.[8] In *Cuyler v. Adams*, the Court first reiterated that congressional consent is required only for interstate agreements that fall within the compact clause. The Court then held that in cases in which Congress has authorized an agreement among the states and in which the subject matter of the agreement is an appropriate subject for congressional legislation, that consent transforms the agreement into federal law under the compact clause.

Significantly, the test for whether a compact becomes federal law under *Cuyler* is different (and much more lenient) from the test for whether a compact requires congressional approval. The latter test, sometimes referred to as the political power test, asks whether the compact increases the political power of the states at the expense of the federal government. The test announced in *Cuyler* asks only whether there has been congressional consent and whether that consent was appropriate. If so, the compact is transformed into federal law.[9]

Further broadening the universe of compacts treated as federal law is the fact that congressional consent can be expressed or implied and prospective or retroactive.[10] The question is: "Has Congress, by some positive act, in relation to such agreement, signified the consent of that body to its validity?"[11]

The ramifications of transformation of an interstate compact into substantive federal law are substantial. Interpretation of such a compact presents a question of federal law and confers federal jurisdiction. Federal remedies are available, including injunctive relief.[12]

If a compact is federal law, the compact is subject to the supremacy clause of the U.S. Constitution.[13] As such, its terms prevail over any inconsistent existing or subsequent state laws rendering them void and unenforceable.[14] As the Supreme Court recently reiterated: "The Supremacy Clause . . . ensures that a congressionally approved compact, as a federal law, preempts any state law that conflicts with the Compact."[15]

Further, under the supremacy clause, no party to the compact may unilaterally alter any of its provisions.[16] Instead, the compact must be formally amended by all of the parties.[17] In addition, some have suggested that for compacts with congressional consent, Congress must also approve the amendment.[18] The MTC has advanced this position in the *Gillette* litigation.[19]

Importantly, the supremacy clause applies only to those compacts Congress has explicitly or implicitly approved.

III. The Contracts Clause

The contracts clause of the U.S. Constitution states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[20] Unlike the supremacy clause, the contracts clause applies to all interstate compacts, regardless of congressional approval.[21]

In 1823 the Supreme Court held that a compact between Virginia and Kentucky was a contract within the meaning of the contracts clause and that "a state has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals."[22] The Court further held that "any deviation from its terms . . . however minute, or apparently immaterial, in their effect" constitutes an impairment under the contracts clause.[23]

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[8] *Cuyler v. Adams*, 449 U.S. 433 (1981).

[9] At least one court has stated, subsequent to *Cuyler*, that a compact will not become federal law simply because Congress, in an abundance of caution, enacts consent legislation. *Washington Metropolitan Area Transit Authority v. One Parcel of Land*, 706 F.2d 1312, 1317 (4th Cir. 1983). A commentator has suggested that the second prong of the test is essentially meaningless. L. Mark Eichorn, "*Cuyler v. Adams* and the Characterization of Compact Law," 77 *Va. L. Rev.* 1387, 1393 (1991). Later decisions from the Supreme Court tend to support the latter view: "[C]ongressional consent 'transforms an interstate compact . . . into a law of the United States.'" *Virginia v. Maryland*, 540 U.S. 56, 66 (2003) (citation omitted).

[10] *Cuyler*, 449 U.S. at 441; *Green v. Biddle*, 21 U.S. 1, 85-86 (1823) ("the constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified").

[11] *Green*, 21 U.S. at 86; *see also Virginia v. Tennessee*, 148 U.S. at 521 ("Story says that the consent may be implied, and is always to be implied when congress adopts the particular act by sanctioning its objects and aiding in enforcing them") (finding implicit congressional consent).

[12] *One Parcel of Land*, 706 F.2d at 1318.

[13] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the

(Footnote continued in next column.)

Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2.

[14] *Bush v. Muncy*, 659 F.2d 402, 410 (4th Cir. 1981).

[15] *Tarrant Regional Water Distribution v. Herrmann*, 133 S. Ct. 2120, 2130 n.8 (2013) (citation omitted).

[16] *Bush*, 659 F.2d at 411.

[17] *C.T. Hellmuth & Associates Inc. v. Washington Metropolitan Area Transit Authority*, 414 F. Supp. 408, 409 (D. Md. 1976) (compact with congressional approval "may not be amended, modified, or otherwise altered without the consent of all parties").

[18] *See Nebraska ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Comm'n*, 902 F. Supp. 1046, 1047 n.1 (D. Neb. 1995) ("While I tend to agree with the Commission that any amendment of the Compact . . . would require Congressional approval before the amendment could become effective, it is unnecessary to resolve that issue in this case"); Norman J. Singer and J.D. Shambie Singer, "Sutherland Statutes and Statutory Construction," section 32.3 (2014) ("action by Congress is essential to either amend or repeal a compact" that has congressional approval).

[19] Brief Amicus Curiae of the Multistate Tax Commission in Support of Defendant-Respondent California Franchise Tax Board, at 15.

[20] U.S. Const., Art. I, section 10, cl. 1.

[21] *See Green*, 21 U.S. at 91-92; Singer and Singer, *supra* note 18, section 32.8 (explaining that the contracts clause limits states' authority to abrogate non-congressionally approved compacts).

[22] *Green*, 21 U.S. at 92.

[23] *Id.* at 84.

In 1987 the Court reiterated that a "Compact is, after all, a contract."[24] By this time, the Court's view of the contracts clause had considerably evolved.

Much like the language of the compact clause, the language of the contracts clause is facially absolute.[25] Ushering in the modern era of contracts clause jurisprudence, the Supreme Court held in 1934 that "the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."[26] Instead, a state must retain "authority to safeguard the vital interests of its people."[27]

Since 1983, the Court has applied a three-pronged approach in determining whether a state has violated the contracts clause.[28] The threshold inquiry is whether the state law has substantially impaired a contractual relationship.[29] If so, the state must have a significant and legitimate public purpose for the law. If the state can identify such a purpose, the final inquiry is whether the legislation reasonably and appropriately furthers that purpose.

IV. A Fundamental Dispute: The Existence of Established Compact Law

One of the most fundamental disputes in *Gillette* is whether a body of established compact law exists separate and apart from the strictures imposed by the compact clause, the supremacy clause, and the contracts clause that prevents one party from unilaterally altering or nullifying a compact without congressional approval. Gillette says yes; the Franchise Tax Board says no.

To be fair, arguments exist on both sides. At least some of the opacity results from courts not always having been precise in their language or rationale.

Gillette takes an Occam's razor approach, arguing that because compacts are treated as both contracts and statutes, a state cannot unilaterally alter any term of any compact.[30] The California Court of Appeal agreed, holding that "under established compact law, the Compact superseded subsequent conflicting state law."[31] It further held that the contracts clause provided a second and independent basis for its decision.[32]

As explained, the compact does not have congressional approval. It is therefore a state law, not a federal law, and the supremacy clause analysis is not applicable. Most of the cases relied on by Gillette involved compacts with congressional approval, a point emphasized by the FTB and its amici.

However, Gillette also relies on a decision by the U.S. Court of Appeals for the Third Circuit that involved a compact without congressional consent. There, the court stated: "Having entered into a contract, the participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states."[33] The FTB and its amici contend that reliance on this case is misplaced.

The sharpest critique of Gillette's position on this point appears in the amici brief filed by Texas, on behalf of itself, 17 other states, and the District of Columbia. Texas is embroiled in its own compact litigation in *Graphic Packaging v. Combs*.[34] The amici brief takes a Crabtree's bludgeon approach and attempts to reconcile and explain the seemingly inconsistent authority regarding when a state may modify a compact that lacks congressional approval.

The opinions have not always been meticulous in their analysis. Some reiterate that states may not unilaterally modify the terms of a compact, but they provide no justification for the statement, which is often dicta.[35] Others state that the contracts clause prohibits unilateral alteration but perform no analysis of whether there has been an impairment, again often because such an analysis is irrelevant.[36] Other cases, however, are clear that congressional approval is the key to a state's inability to modify the terms of a compact under the supremacy clause.[37]

The FTB and its amici argue that no independent body of "established compact law" exists outside the constitutional framework. Instead, compacts with congressional approval are analyzed under the supremacy clause, and compacts without congressional approval are analyzed under the contracts clause.

Another point of disagreement between the two sides is whether modern contracts clause jurisprudence applies to compacts. Gillette and its amici argue that the literal approach of *Green v. Biddle* still applies when analyzing a compact. Unsurprisingly, the FTB and its amici disagree.

V. Potential Ramifications

According to the National Center for Interstate Compacts, there are over 200 compacts in existence. The decision

[24] *Texas v. New Mexico*, 482 U.S. 124, 128 (1987).

[25] *Energy Reserves Group Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 410 (1983).

[26] *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934).

[27] *Id.* at 434.

[28] *Energy Reserves*, 459 U.S. at 411-12.

[29] This inquiry consists of three components: whether there is a contractual relationship, whether a change in law impairs that relationship, and whether the impairment is substantial. *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992).

[30] *See* Answer Brief on the Merits, at 18 ("The primary basis for this precedence is the essential nature of compacts as both statutes and binding agreements among the sovereign states").

[31] *Gillette Co. v. Franchise Tax Board*, 147 Cal. Rptr. 3d 603, 615 (2012).

[32] *Id.* at 615-16.

[33] *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991).

[34] No. 03-14-00197-CV (Travis Cnty. Dist. Ct. 2014). Texas has also filed an amici brief in Oregon's compact litigation in *Health Net Inc. v. Dep't of Rev.*, joined by 11 other states.

[35] *See, e.g., McComb*, 934 F.2d at 479.

[36] *See, e.g., Aveline v. Pa. Bd. of Probation and Parole*, 729 A.2d 1254, 1257 n.10 (Pa. Commw. Ct. 1999).

[37] *See, e.g., Tarrant*, 133 S. Ct. at 2130 n.8.

in *Gillette* and the other pending compact cases could have broad implications for all interstate compacts.

As explained, one of the fundamental points of disagreement is the ability of a state to enact a law that alters or conflicts with the terms of a compact. Under the FTB's view, the analysis of whether a subsequent state law is invalid in light of an existing compact depends in large part on whether the compact is congressionally approved.

Under *Cuyler*, congressional approval transforms the compact into federal law. As federal law, the terms of a compact are supreme to any conflicting state enactment. Because congressional approval may be implied and after-the-fact, many compacts not specifically authorized by Congress will nevertheless be treated as federal law.

For those compacts without congressional consent — express or implied — the analysis, according to the FTB, depends on whether the subsequent state enactment constitutes an impairment of contract under modern contracts clause jurisprudence. This standard is considerably more lenient than the standard under the supremacy clause (and the earlier more literal formulation of the test).

Gillette, on the other hand, argues that any subsequent state enactment that alters or conflicts with a compact — congressionally approved or not — is invalid. No analysis under either the supremacy clause (for congressionally approved compacts) or the contracts clause is required. Under Gillette's view, determining whether a subsequent state law is invalid in light of an existing compact is not dependent on whether the compact is congressionally approved.

To the extent a contract clause analysis is required, Gillette argues, the rule announced in *Green* remains applicable to compacts. Under that rule, any impairment, no matter how trivial, is forbidden.

VI. Conclusion

Decisions in these cases could materially expand or restrict a state's ability to alter or nullify a compact that lacks congressional approval. Perhaps most troubling is the possibility that courts in different states could reach conflicting results. If so, some member states may be permitted to unilaterally alter a non-congressionally approved interstate compact (as long as it did not violate the contracts clause), while other member states would not. This would be a most unfortunate result that ultimately may require resolution by the U.S. Supreme Court.

In closing, one might evoke the principle of Newton's flaming laser sword: "What cannot be settled by experiment is not worth debating." Ultimately, fundamental questions about the nature of a compact will be settled by the courts — hopefully in a clear and consistent manner — but, until then, these issues will make for interesting debate. ☆