

A Call for an Interpretive Presumption Against Burdens on Interstate Commerce in the Context of Interstate Compacts

Claire Murray

Repository Citation

Claire Murray, *A Call for an Interpretive Presumption Against Burdens on Interstate Commerce in the Context of Interstate Compacts*, 3 LSU J. of Energy L. & Resources (2014)
Available at: <http://digitalcommons.law.lsu.edu/jelr/vol3/iss1/13>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in LSU Journal of Energy Law and Resources by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.

A Call for an Interpretive Presumption Against Burdens on Interstate Commerce in the Context of Interstate Compacts

INTRODUCTION

Everything's hotter in Texas. In fact, due to the intense Texas heat and the devastating lack of rain, 2006 marked one of Texas's worst droughts in 50 years.¹ Drought-related crop and livestock losses totaled \$4.1 billion and about one-third of Texas's 6.4 million planted acres were abandoned due to lack of rain.²

In 2007, faced with a drought and a dwindling water supply, Tarrant Regional Water District, a Texas agency responsible for providing water to over 1.6 million people in north-central Texas, felt the heat.³ The agency turned to its northern neighbor, Oklahoma, for some of its Red River water supply. In its application to the Oklahoma Water Resources Board, Tarrant requested 460,000 acre-feet of water per year, or about 411 million gallons a day.⁴ Of course, Texas planned to pay Oklahoma for its water; such an agreement would likely have carried a price tag of tens of millions of dollars.⁵

In contrast to thirsty Texas, Oklahoma's water supply satisfies the state's own needs more than adequately: in 2008, Oklahoma had 3.6 million residents, but enough water for 21 million people.⁶ Statistics show that Oklahoma could easily have stepped in to sate Texas's thirst: Oklahoma has eight times the amount of water that North Texans needed to make up annual shortages that are slated to occur in the next 50 years.⁷

Nevertheless, Oklahoma gave its neighbor-in-need the cold shoulder.⁸ Over a decade ago, the Oklahoma legislature considered proposals to pump billions of gallons of water out of the Red River

Copyright 2014, by CLAIRE MURRAY.

1. *Summer of Despair: Drought is especially tough on Texas farmers*, DALLAS MORNING NEWS, Aug. 23, 2006, at 16A.

2. *Id.*

3. Tony Thornton, *North Texas water district sues over state moratorium: Interstate commerce violation alleged in federal court action*, THE DAILY OKLAHOMAN, Jan. 12, 2007, at 13A.

4. *See id.*

5. Eric Aasen, *Parched Texas looks to Oklahoma for water: Despite pressure from N. Texas, Oklahoma's not ready to sell sources*, THE DALLAS MORNING NEWS, Aug. 5, 2007.

6. *Moving water from Oklahoma to Texas: Legal case could bring water in from Oklahoma*, THE DALLAS MORNING NEWS, Mar. 26, 2008.

7. *Id.*

8. *Id.*

Basin to sell to Texas to alleviate a drought devastating the Dallas-Fort Worth area.⁹ The idea was put to rest, however, in 2002 when Oklahoma instituted a moratorium on out-of-state water transfers.¹⁰ The moratorium persists today, after the Oklahoma legislature voted to renew the measure in 2009.¹¹ Oklahoma's resistance to sharing its water with Texas may stem from the longstanding Sooner-Longhorn football rivalry, but Oklahomans insist it is simply an exercise of state sovereignty.¹² While Texas officials have persuasively argued that the water deal would be as beneficial to Oklahoma as it is to Texas, Oklahomans have staunchly disapproved of the out-of-state water sharing.¹³ Although it is easy to criticize Oklahoma's choice to deny Texas's application on the premise that its refusal is impolite, as a legal matter, the question becomes whether Tarrant had any legally enforceable right to the water.

Texas, Oklahoma, Arkansas, and Louisiana are parties to the Red River Compact, an agreement allocating the Red River water supply among the member states.¹⁴ The compact, approved by Congress in 1980, grants the states "equal rights to the use and runoff" of undesignated water that flows in the particular sub-basin of Tarrant's request, but only if flows in Louisiana and Arkansas reach a certain threshold.¹⁵ The compact further dictates that no state is entitled to more than 25% of the water located within the sub-basin.¹⁶ Tarrant, believing this language to guarantee each state 25% of the water, sued Oklahoma for declining to share with them what Texas considers its equal share of the sub-basin water.¹⁷ The lawsuit, instituted in 2007, made its way through the federal courts, with Oklahoma defeating Tarrant each level.¹⁸

9. Jim Malewitz, *Red River showdown: Texas-Oklahoma water war could reverberate across U.S.*, STATELINE.ORG (Apr. 24, 2013), <http://www.pewstates.org/projects/stateline/headlines/red-river-showdown-texas-oklahoma-water-war-could-reverberate-across-us-85899470724>, archived at <http://perma.cc/AYW6-NUHL>.

10. *Id.*

11. *Id.*

12. *See* Aasen, *supra* note 5.

13. *Id.*

14. *See* Red River Compact, congressional consent., Pub. L. No. 96-564, 94 Stat. 3305 (1980).

15. Malewitz, *supra* note 9.

16. *Id.*

17. *Id.*

18. *See* Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2129 (2013).

The case, *Tarrant Regional Water District v. Herrmann*,¹⁹ raised several pressing issues. Namely, the dispute highlighted the difficulties the United States faces as a result of climate change and the depletion of natural resources.²⁰ Oklahoma, in exercising its state sovereignty, successfully staved off Texas's attempts to purchase Oklahoma's abundant supply of water.²¹ This raised the question: state sovereignty is a fundamental, defining characteristic of our governmental structure, but at what cost?

This is where two important areas of constitutional law—and the troubled relationship between them—come into play. Authorized under Article I, Section 10 of the United States Constitution, states may enter into agreements with each other with the approval of Congress.²² The slim text of the provision has left much to be determined by the courts, but it is clear that states may not burden interstate commerce pursuant to an interstate compact unless Congress has given the compact its blessing.²³ Tarrant unsuccessfully argued that Oklahoma's moratorium on exporting its water beyond state lines was tantamount to an unconstitutional burden on interstate commerce.²⁴

This Comment proposes a solution to the issues surrounding the scope of congressional consent to interstate compacts affecting interstate commerce. Part I presents the relevant legal background necessary to understand the issues implicated where the Compact Clause and the dormant Commerce Clause intersect. Part II examines case law dealing with congressional consent granted pursuant to both the Compact Clause and Commerce Clause, including a discussion of the *Tarrant* case. Part III provides a solution to the issues raised in *Tarrant*: an interpretive presumption against burdens on interstate commerce. Finally, Part IV demonstrates the usefulness of the proposed solution by applying the presumption to the *Tarrant* case and explaining how the interpretive presumption would produce a more desirable result.

I. LEGAL BACKGROUND

Interstate compacts created under the United States Constitution provide a mechanism for formal interstate cooperation

19. 133 S. Ct. 2120 (2013).

20. *See id.* at 2128.

21. *See id.* at 2137.

22. U.S. CONST. art. I, § 10, cl. 3.

23. *Id.*

24. *See Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2128–29 (2013).

upon approval from Congress.²⁵ These compacts are negotiated and implemented by states and serve as a valuable means for the resolution of regional issues.²⁶ But just as the Compact Clause has been an efficient vehicle for states to resolve regional issues, some regulations are not properly made by states. Under the dormant Commerce Clause of the Constitution, states are not permitted to burden interstate commerce without the consent of Congress.²⁷ Thus, when states enter into compacts that may ultimately create barriers to interstate commerce, the question arises as to whether Congress contemplated and approved such consequences, or whether Congress simply agreed to allow the states to enter the compact without considering its ramifications relative to the dormant Commerce Clause.

A. The Compact Clause

The compact is the oldest known mechanism used to achieve formal interstate collaboration.²⁸ The origins of the modern Compact Clause are rooted in colonial history.²⁹ Prior to the establishment of the United States, boundary disputes demanded significant attention of colonial officials and the Crown, requiring significant intercolonial cooperation.³⁰ These early methods of resolution are likely the basis of the interstate dispute resolution written into the Articles of Confederation: “No 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, specifying accurately the purpose for which the same is to be entered into, and how long it shall continue.”³¹ The success of these early interstate agreements and the prevalence of boundary disputes in 1787 prompted the drafters of the Constitution to include a similar provision for interstate cooperation.³²

Article I, Section 10 of the Constitution, the Compact Clause, provides, “No State shall, without the Consent of Congress, . . .

25. See U.S. CONST. art. I, § 10, cl. 3.

26. Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent?*, 42 COLUM. J.L. & SOC. PROBS. 511, 519 (2009).

27. See *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970).

28. CAROLINE N. BROUN ET AL., *THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS* 3 (2006).

29. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 692 (1925).

30. BROUN, *supra* note 28, at 4–5.

31. ARTICLES OF CONFEDERATION of 1781, art. VI, para. 2.

32. JOSEPH F. ZIMMERMAN, *INTERSTATE COOPERATION* 41 (2d ed. 2012).

enter into any Agreement or Compact with another State”³³ Today, Congress has approved about 200 interstate compacts.³⁴ Compacts cover a broad range of issues, including water allocation and conservation, low-level radioactive waste disposal, crime control, education, and child welfare.³⁵ As of 2009, 37 compacts³⁶ attempt to resolve water allocation issues between states.³⁷ According to the Supreme Court in *New York v. New Jersey*,³⁸ interstate water conflicts, in particular, are disputes “more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of the representatives of the States so vitally interested in it than by proceedings in any court however constituted.”³⁹

Although the Compact Clause prohibits states from entering into agreements with each other without the consent of Congress, the Supreme Court has held that not all interstate agreements require congressional consent.⁴⁰ In *Virginia v. Tennessee*, the Court interpreted the Compact Clause as applying to those agreements facilitating 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.”⁴¹ In its analysis, the Court recognized “there are many matters upon which different states may agree that can in no respect concern the United States.”⁴² In dicta, Justice Field provided several examples of state agreements that would not encroach upon the supremacy of the federal government.⁴³

The Supreme Court affirmed and expounded upon the *Virginia v. Tennessee* holding in its 1978 decision *United States Steel Corporation v. Multistate Tax Commission*,⁴⁴ deciding that the

33. U.S. CONST. art. I, § 10, cl. 3.

34. See ZIMMERMAN, *supra* note 32, at 237–49.

35. Pincus, *supra* note 26, at 519.

36. *Id.*

37. GEORGE WILLIAM SHERK, DIVIDING THE WATERS: THE RESOLUTION OF INTERSTATE WATER CONFLICTS IN THE UNITED STATES 29 (2000).

38. *New York v. New Jersey*, 256 U.S. 296, 313 (1921).

39. *Id.*

40. See, e.g., *Virginia v. Tennessee*, 148 U.S. 503, 518–19 (1893); *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976).

41. *Virginia*, 148 U.S. at 519.

42. *Id.* at 518.

43. One example is as follows: “If Massachusetts, in forwarding its exhibits to the World’s Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that State in that way.” *Id.*

44. 434 U.S. 452 (1978).

Virginia v. Tennessee rule “states the proper balance between federal and state power with respect to compacts and agreements among States.”⁴⁵ In *United States Steel*, the Court sought to determine whether the Multistate Tax Compact (MTC) was unconstitutional as an unapproved interstate compact.⁴⁶ In determining whether the compact “enhance[d] state power quoad⁴⁷ the national government,”⁴⁸ the Court described the proper analysis as one focused upon the “potential, rather than actual, impact upon federal supremacy.”⁴⁹

Although some interstate agreements require congressional consent, the Constitution does not state when Congress must give its consent, whether the consent should follow or precede the compact, or whether the consent should be express or implied.⁵⁰ With respect to the proper timing of consent, traditional practice indicates that consent is granted in one of three ways.

First, consent may be given explicitly, upon submission of the compact by member states for Congress’s approval.⁵¹ For instance, in 2008, Congress passed an act granting its approval of the Great Lakes-St. Lawrence River Basin Water Resources Compact between Illinois, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin.⁵² The preamble of the Act characterizes Congress’s enactment as a “Joint Resolution Expressing the consent and approval of Congress to an interstate compact regarding water resources in the Great Lakes-St. Lawrence River Basin. . . . [w]hereas the interstate compact regarding water resources in the Great Lakes-St. Lawrence River Basin reads as follows: . . . ” The language of the Compact is imported into the Act, clearly delineated by quotation marks. Following the language of the Compact itself, the Act provides as follows: “Congress consents to and approves the interstate compact regarding water resources in the Great Lakes-St. Lawrence River

45. *Id.* at 471.

46. *Id.* at 454.

47. As regards; with regard to. BLACK’S LAW DICTIONARY (9th ed. 2009).

48. 434 U.S. at 494.

49. *Id.* at 472. In finding that the MTC did not require congressional consent, somewhat contradictorily, the Court looked only to the actual impacts upon federal supremacy. Because the MTC did not authorize the states to exercise any powers it could not exercise in the absence of the Compact, congressional consent was not required.

50. *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893).

51. BROUN, *supra* note 28, at 36.

52. See Great Lakes—St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110-342, 122 Stat. 3739 (2008).

Basin described in the preamble”⁵³ This language is typical of back-end congressional approval.⁵⁴

Second, Congress may grant its consent broadly in advance by adopting legislation encouraging states to enter into interstate compacts.⁵⁵ For example, in 1980, Congress granted its consent in advance for regional waste compacts.⁵⁶ In part, the Low-Level Radioactive Waste Policy Act⁵⁷ provides:

It is the policy of the Federal Government that the responsibilities of the States . . . for the disposal of low-level radioactive waste can be most safely and effectively managed on a regional basis. To carry out [this] policy . . . the States may enter into such compacts as may be necessary to provide for the establishment and operation of the regional disposal facilities for low-level radioactive waste⁵⁸

The Act further conditions its advanced consent, explaining that the Act neither diminishes the applicability of any federal laws nor affects any state laws.⁵⁹

Although there are inherent drawbacks to the advanced consent method, it is an entirely appropriate way for Congress to approve an interstate compact. It is certainly a suitable exercise of federal structure for Congress to participate in the advanced consent practice by calling for states to enter into interstate compacts to resolve an issue deemed by Congress as fit for state regulation. One scholar characterized the realm of interstate compact regulation as “supra-state, sub-federal,”⁶⁰ meaning that the matters covered by interstate compacts are clearly beyond the realm of individual state authority but may not be within the purview of the federal government due to regional content. Accordingly, Congress’s willingness to invite and encourage state negotiation and resolution in areas of regional concern is a useful and appropriate exercise of Congress’s power to approve interstate compacts. However, issues arise when advanced consent is broad and uncertain. When that is the case, it is sometimes difficult to ascertain the scope of consent that Congress has given.

53. *Id.*

54. BROWN, *supra* note 28, at 37.

55. *Id.* at 37.

56. ZIMMERMAN, *supra* note 32, at 243.

57. 42 U.S.C. §2021d (1980).

58. *Id.* at §2021d(a)(1–2).

59. *Id.* at §2021d(b)(3, 5).

60. *See* BROWN, *supra* note 28, at 1.

The advanced consent method has various advantages. For instance, without the advanced go-ahead from Congress, states may be unwilling to enter into negotiations, due to the risk that Congress will withhold its consent. Congressional consent to compacts is a gratuity on the part of Congress, not a right that the states possess⁶¹ and states may rationally decline to invest large upfront negotiating costs if there is no guarantee that Congress will sign off on the fruits of their efforts. Moreover, because the compacting process can take years—even decades in some cases—states may be more willing to enter into these drawn-out compacting negotiations if Congress has provided guideposts that can lead them to form an agreement to which Congress will grant its consent.⁶²

Last, consent may be implied through congressional acquiescence to an interstate compact.⁶³ In *Virginia v. Tennessee*, the Supreme Court decided that Congress impliedly consented to the boundary compact between the two states.⁶⁴ *Virginia v. Tennessee*'s most significant takeaway, perhaps, is the Court's holding that congressional acquiescence can be implied from "subsequent legislation and proceedings."⁶⁵ The Court held that Congress had implicitly approved the boundary line due to its use of the boundary in resolving "judicial and revenue" issues in the two states.⁶⁶

Congress may also impose conditions to its consent.⁶⁷ Chief Justice Charles Evans Hughes noted in 1937, "It can hardly be doubted that in giving consent Congress may impose conditions."⁶⁸ Such conditions are often tacked on to the end of a piece of congressional legislation approving an interstate compact; Congress often reserves its right to "alter, amend, or repeal" consent.⁶⁹ Although conditional language is often attached in this boilerplate form, Congress has attached specific conditions to some compacts.⁷⁰

61. *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

62. For instance, negotiations between Arkansas, Louisiana, Oklahoma, and Texas persisted for over twenty years before the Red River Compact was completed. Malewitz, *supra* note 9.

63. BROWN, *supra* note 28, at 38.

64. 148 U.S. 503, 522 (1893).

65. *Id.*

66. *Id.*

67. ZIMMERMAN, *supra* note 32, at 55.

68. *James v. Dravo Contracting Co.*, 302 U.S. 134, 148 (1937).

69. ZIMMERMAN, *supra* note 32, at 50.

70. For instance, Congress conditioned its consent to the 1959 Wabash Valley Compact and the 1960 Washington Metropolitan Area Transit

Once Congress consents to an interstate compact, it becomes federal law.⁷¹ Compacts are typically enacted into state law using the precise language of the compact.⁷² Although some states enact this enabling legislation to execute interstate compacts, one authority suggests such legislation is not required.⁷³

B. The Dormant Commerce Clause

Article I, section 8 of the Constitution provides that Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”⁷⁴ Under the Commerce Clause power, Congress is empowered to regulate the following: the use of channels of interstate commerce; the instrumentalities of interstate commerce, or persons or things in interstate commerce; and those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.⁷⁵ Thus, the scope of Congress’s power under the Commerce Clause is quite broad.

Although on its face the Commerce Clause seems to provide Congress with only an affirmative power to regulate commerce, the Commerce Clause has been interpreted to carry with it an implicit restriction on state interference with interstate commerce.⁷⁶ To determine whether a state regulation violates this “dormant,” or “negative,” aspect of the Commerce Clause, a court must first ask whether the regulation discriminates, on its face, against interstate commerce.⁷⁷ A law discriminates against interstate commerce if the regulation favors in-state economic interests and burdens out-of-state interests.⁷⁸ The Supreme Court has set out a two-tiered approach to determine whether a state regulation violates the dormant Commerce Clause.⁷⁹ A reviewing court must first ascertain whether the regulation discriminates

Regulation Compact with the requirement each compact commission must publish specified data and information. ZIMMERMAN, *supra* note 32, at 55.

71. See *Texas v. New Mexico*, 462 U.S. 554, 564–65 (1983).

72. ZIMMERMAN, *supra* note 32, at 50.

73. See *General Expressways, Inc. v. Iowa Reciprocity Bd.*, 163 N.W.2d 413, 419 (1968).

74. U.S. CONST. art. I, § 8, cl. 3.

75. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

76. See *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

77. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 954 (1982).

78. *Id.*

79. Amy M. Petragani, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215, 1217 (1994).

against interstate commerce on its face.⁸⁰ If it does, the regulation is *per se* invalid, unless the state can demonstrate a compelling state interest to justify the differential treatment.⁸¹ The second tier, derived from the 1970 seminal case *Pike v. Bruce Church, Inc.*,⁸² provides that in the case of a facially neutral regulation, the court must examine potential discriminatory effects and weigh the incidental burdens on interstate commerce against the benefits to local interests under the regulation.⁸³ According to *Pike*, a facially neutral regulation will be struck down when its discriminatory effects exceed any local benefits.⁸⁴

However, states are not entirely prohibited from regulating aspects of interstate commerce. Because Congress's power to regulate commerce is plenary, it can authorize states to pass laws that interfere with interstate commerce.⁸⁵ When Congress so chooses, approved state actions are invulnerable to constitutional attack under the Commerce Clause.⁸⁶ Take, for instance, the McCarran-Ferguson Act as a clear example of congressional acquiescence to state regulation in an area of interstate commerce.⁸⁷ The 1945 congressional Act provides: "Congress hereby declares the continued regulation . . . by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation . . . of such business by the several States."⁸⁸ The Supreme Court has interpreted the Act to unambiguously insulate a state's regulation of insurance from Commerce Clause challenge.⁸⁹

The congressional acquiescence doctrine has come into play in the context of interstate agreements created under the Compact Clause. It does not take much imagination to conceive of an

80. *Id.*

81. *Id.* See also *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

82. 397 U.S. 137 (1970).

83. Petragani, *supra* note 79, at 1217.

84. 397 U.S. at 142.

85. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87-88 (1984).

86. *Northwest Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985).

87. See McCarran-Ferguson Act, 15 U.S.C. § 1011 (1945).

88. *Id.*

89. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946) ("Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised . . .").

interstate agreement that may affect or burden interstate commerce. In the past, when the two issues have been raised together, courts have employed ambiguous standards to determine whether Congress's consent of the states entering into the compacts impliedly demonstrates its consent to any possible dormant Commerce Clause violations that execution of the compact would entail.

Courts have taken uncertain approaches in determining whether Congress has in fact granted its consent for a state to regulate in a way that would normally violate the dormant Commerce Clause. In *Sporhase v. Nebraska ex rel. Douglas*,⁹⁰ the Supreme Court held that, in order to demonstrate Congress's intent to allow states to burden interstate commerce, Congress's "intent and policy"⁹¹ to protect the state legislation from attack under the Commerce Clause must be "expressly stated."⁹² In *South-Central Timber Development, Inc. v. Wunnicke*, the Supreme Court held that an express statement is just one way Congress can manifest its intent to allow a state to burden interstate commerce.⁹³ According to the Court, what matters is that Congress "affirmatively contemplate" that it is consenting to protectionism and that its intent is "unmistakably clear."⁹⁴ Moreover, in *Wunnicke*, the Court cautioned that state consistency with parallel federal policy is not enough to evince congressional acquiescence of such regulation.⁹⁵ In other words, a state cannot sustain a congressional acquiescence claim by demonstrating the policies underlying the state regulation are similar to those underlying parallel federal statutes.

In *Wunnicke*, the Alaska regulation at hand involved restrictions on timber exportation.⁹⁶ In striking down the regulation as a violation of the dormant Commerce Clause, the Court rejected Alaska's claim of congressional acquiescence based on the Alaska statute's consistency with federal timber exportation policy.⁹⁷ The Court explained, "Congress acted only with respect to federal lands; we cannot infer from that fact that it intended to authorize a similar policy with respect to state lands."⁹⁸ Thus, case law merely provides a mish-mash of meaningless phrases all tending to indicate that a state bringing the acquiescence claim must bring to

90. 458 U.S. 941 (1982).

91. *Id.* at 960.

92. *Id.*

93. *South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).

94. *Id.* at 91–92.

95. *Id.* at 92.

96. *Id.* at 84.

97. *See id.* at 91–92.

98. *Id.* at 92–93.

the court's attention some concrete statement of Congress approving the regulation.

As federal law, interstate compacts themselves are invulnerable to challenges under the dormant Commerce Clause.⁹⁹ This principle is based on the idea that, because Congress has affirmatively approved the state regulation, Congress's power over interstate commerce has been exercised, and thus does not lie dormant.¹⁰⁰ However, as explained in the following section, this does not mean interstate compacts can never give rise to dormant Commerce Clause issues; on the contrary, the interaction of interstate compacts and state laws can implicate the dormant Commerce Clause, as it did in the *Tarrant* case.

When an interstate compact seeks to regulate interstate commerce, the issue may arise as to whether Congress meant simply to allow the member states to enter into the compact, or whether Congress's consent to the compact also implies Congress's understanding that the compacting states could and would discriminate against interstate commerce in implementing the compact itself. This "double-consent" issue was raised in the recent Supreme Court case, *Tarrant Regional Water District v. Herrmann*.¹⁰¹

II. TARRANT REGIONAL WATER DISTRICT V. HERRMANN

The Red River Compact is a congressionally approved¹⁰² interstate compact that allocates water rights within the Red River Basin among Arkansas, Louisiana, Oklahoma, and Texas. Under the Compact's own terms, its purposes include "governing the use, control, and distribution of the interstate water" and "to provide an equitable apportionment" of that water.¹⁰³ Further, the Compact provides that nothing in the compact "shall be deemed to interfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water or

99. *Intake Water Co. v. Yellowstone River Compact Comm'n*, 769 F.2d 568, 569–70 (9th Cir. 1985).

100. *See Gibbons v. Ogden*, 22 U.S. 1, 210 (1824).

101. 133 S. Ct. 2120 (2013).

102. *See Red River Compact*, Pub. L. No. 96-564, § 1, 94 Stat. 3305, 3305 (1980) ("Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled The consent of Congress is hereby given to the Red River Compact among the States of Arkansas, Louisiana, Oklahoma, and Texas, of May 12, 1978, as ratified by the States . . .").

103. *Id.* at § 1.01(a), (b).

quality of water, not inconsistent with its obligations under this Compact.”¹⁰⁴

The Compact divides the Red River Basin into five “reaches,” and subsequently divides those reaches into subbasins.¹⁰⁵ Tarrant, a Texas state agency, sought a water resource permit from the Oklahoma Water Resources Board (OWRB) in an attempt to appropriate water located in reach II, subbasin 5 in southern Oklahoma.¹⁰⁶

Presumably, Tarrant knew Oklahoma would deny its request because Oklahoma’s water statutes effectively prevent any out-of-state applicants from taking or diverting water from within Oklahoma’s borders.¹⁰⁷ Once denied the permit, Tarrant filed suit to enjoin the enforcement of the Oklahoma water statutes, arguing that Oklahoma’s water allocation scheme was preempted by federal law and violated the Commerce Clause by discriminating against interstate commerce in water.¹⁰⁸ Tarrant filed its suit within 30 minutes of Oklahoma’s denial.¹⁰⁹

Oklahoma observes a strict moratorium on out-of-state water exportation.¹¹⁰ Additionally, the state has passed legislation demonstrating an explicit preference for in-state water users: “Water use within Oklahoma should be developed to the maximum extent feasible for the benefit of Oklahoma so that downstream out-of-state users will not acquire vested rights therein to the detriment of the citizens of this state.”¹¹¹

At the district court level, Tarrant argued that Oklahoma’s water statutes violated the dormant Commerce Clause because the

104. *Id.* at § 2.10(a).

105. *Id.* at § 2.12, §§ 5–8.

106. *Tarrant*, 133 S. Ct. at 2126.

107. *Id.* at 2128. *See also* OKLA. STAT. ANN. tit. 82, § 1086.1(A)(3) (West 2008) (“Water use within Oklahoma should be developed to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of citizens of this state.”).

108. 133 S. Ct. at 2129.

109. Thornton, *supra* note 3.

110. *See* OKLA. STAT. tit. 82, § 1B(A) (2004) (“In order to provide for the conservation, preservation, protection and optimum development and utilization of surface water and groundwater within Oklahoma, the Legislature hereby establishes a moratorium on the sale or exportation of surface water and/or groundwater outside this state pursuant to the provisions of this section.”). *See also* OKLA. STAT. tit. 82, § 1B (1992) (“In order to provide for the conservation, preservation, protection and optimum development and utilization of surface water and groundwater within Oklahoma, the Legislature hereby establishes a moratorium on the sale or exportation of surface water and/or groundwater outside this state pursuant to the provisions of this section.”).

111. OKLA. STAT. ANN. tit. 82, § 1086.1(A)(3) (West 2008).

statutes grant Oklahoma residents a “preferred right of access, over out-of-state consumers, to natural resources located within its borders . . .” in violation of the dormant Commerce Clause.¹¹² Oklahoma argued that Congress’s ratification of the Red River Compact acted to authorize Oklahoma’s state limitations on its state water subject to the compact.¹¹³ The district court defined the relevant inquiry as a question of whether the Red River Compact is a “sufficiently clear” expression of Congressional intent to grant Oklahoma the ability to burden interstate commerce in a manner which would otherwise be impermissible under the dormant Commerce Clause.¹¹⁴

In order to resolve the issue of whether Congress’s consent was “sufficiently clear” to demonstrate dormant Commerce Clause acquiescence, the court determined the question was one of “congressional intent.”¹¹⁵ Because the main purpose of the Red River Compact was to allocate resources, the district court found that the compact “necessarily”¹¹⁶ constituted Congress’s consent to a “legal scheme different from that which would otherwise survive Commerce Clause scrutiny.”¹¹⁷ As a result, the district court granted summary judgment in favor of Oklahoma.¹¹⁸

The Tenth Circuit Court of Appeals focused its analysis on the relationship between the Red River Compact and the Oklahoma water statutes in order to determine whether Congress intended to displace the limitations of the dormant Commerce Clause when approving the Red River Compact.¹¹⁹ The Tenth Circuit examined the language of the compact and found that because the compact’s terms recognized plenary state power to regulate water, Congress “conferred broad regulatory authority on the state using unqualified terms.”¹²⁰ In particular, the court focused on section 2.01 of the Red River Compact, which provides, in part: “Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state. Each state may freely administer water rights and uses in accordance with the laws

112. *Tarrant Reg’l Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2009 WL 3922803, at *3 (W.D. Okla. Nov. 18, 2009).

113. *Id.* at *4.

114. *Id.*

115. *Id.*

116. *Id.* at *6.

117. *Id.* at *6.

118. *Tarrant Reg’l Water Dist.*, 2009 WL 3922803, at *8.

119. *Tarrant Reg’l Water Dist. v. Herrmann*, 656 F.3d 1222, 1236 (10th Cir. 2011).

120. *Id.* at 1237.

of that state.”¹²¹ Considering this language, and Congress’s comprehensive approval of the compact, the Tenth Circuit concluded that Congress intended to allow the states to freely administer the water in any way each state deemed beneficial, and thus satisfied the *Sporhase* and *Wunnicke* standards.¹²² Moreover, the court cited section 2.10 as an express acknowledgement of state discretion over water allocation, focusing in particular on the following language: “Nothing in this Compact shall be deemed . . . to interfere within its boundaries the appropriation, use, and control of water.”¹²³ The court considered section 2.10 to represent a reaffirmation of state control of water.¹²⁴ The court ultimately concluded that Congress’s ratification of the Red River Compact represented its approval of Oklahoma’s moratorium.¹²⁵

The United States Supreme Court rejected Tarrant’s dormant Commerce Clause claim on different grounds.¹²⁶ Instead of closely analyzing the expressions of purpose set out in the Red River Compact as the lower courts did, the Court focused on Tarrant’s characterization of the water to which Tarrant argued Texas had rights under the Compact.¹²⁷ Tarrant argued that the Oklahoma statutes discriminated against interstate commerce by erecting barriers to the distribution of water “unallocated” under the compact.¹²⁸ Because the Court held that, under the provisions of the Compact,¹²⁹ no water was left “unallocated,” Tarrant’s claim could not prevail.¹³⁰ The Court sidestepped the “double-consent” issue altogether.

121. Red River Compact, *supra* note 102, at § 2.01.

122. *Tarrant*, 656 F.3d at 1237.

123. *Id.* at 1237–38 (quoting Red River Compact § 2.01).

124. *Id.* at 1238.

125. *Id.*

126. *Tarrant Reg’l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2136–37 (2013).

127. *Id.*

128. *Id.* at 2137.

129. “Tarrant’s assumption that that [sic] the Compact leaves some water ‘unallocated’ is incorrect . . . [W]hen the River’s flow is above 3,000 CFS, ‘all states are free to use whatever amount of water they can put to beneficial use,’ subject to the requirement that ‘[i]f the states have competing uses and the amount of water available in excess of 3000 CFS cannot satisfy all such uses, each state will honor the other’s right to 25% of the excess flow.’ . . . If more than 25 percent of subbasin 5’s water is located in Oklahoma, that water is not ‘unallocated’; rather, it is allocated to Oklahoma unless and until another State calls for an accounting and Oklahoma is asked to refrain from utilizing more than its entitled share. The Oklahoma water statutes cannot discriminate against interstate commerce with respect to unallocated waters because the Compact leaves no waters unallocated.” *Id.*

130. *Id.*

Tarrant brings to light the “double-consent” issue. Both the district court and Tenth Circuit Court of Appeals opinions assumed that because Congress approved the interstate compact, it inherently approved of the compact’s terms, and thus knowingly consented to potential dormant Commerce Clause violations. Similarly, in *Intake Water Company v. Yellowstone River Compact Commission*,¹³¹ the Ninth Circuit found that when Congress approved the Yellowstone River Compact, Congress was “acting within its authority to immunize state law from some constitutional objections by converting it into federal law.”¹³² The Yellowstone River Compact fixes the water usage of all waters of the Yellowstone River Basin.¹³³ Intake Water sought to divert water from the Yellowstone River Basin, which was outside the jurisdiction of the compact; Intake Water Company was unable to do so because, under the compact, “No water shall be diverted from the Yellowstone River Basin without unanimous consent of all the signatory states.”¹³⁴ Intake Water Company argued that the restriction of the diversion of the water was a constitutionally impermissible burden on interstate commerce.¹³⁵ The Ninth Circuit found that there could be no question of whether Congress in fact approved the state laws at issue because “[t]he Compact was before Congress and Congress expressly approved it.”¹³⁶ Although it may certainly be true that Congress did intend to allow the compacting states to exclusively control the water in the Yellowstone River Basin, it is improper to heedlessly infer such congressional consent by simply noting the fact that Congress approved the compact itself.

III. SOLUTION: REVIEWING COURTS SHOULD ADOPT AN INTERPRETIVE PRESUMPTION AGAINST AN INTERSTATE COMPACT’S INTERFERENCE WITH INTERSTATE COMMERCE

Double-dipping is problematic, and courts must employ a doctrinal rule to better separate and deal with the two issues. Courts must take a more reasoned approach to determining the scope of congressional consent. The following interpretive presumption proposal would force courts to analyze congressional consent more closely in order to ascertain the intended scope.

131. 769 F.2d 568 (9th Cir. 1985).

132. *Id.* at 570.

133. *Id.* at 569.

134. Yellowstone River Compact, Pub. L. No. 81-83, Art. X, 65 Stat. 663, (1951)

135. *Intake*, 769 F.2d at 569.

136. *Id.* at 570.

As *Tarrant* and other cases involving the Compact Clause and dormant Commerce Clause indicate, it is difficult to determine the scope of Congress's consent to interstate compacts. By their nature, interstate compacts tend to have regional focus; member states negotiate terms for years and undertake significant research efforts to resolve the regional issues at hand. Thus, the question becomes whether it is proper to impute an awareness of possible dormant Commerce Clause implications to Congress.

In order to resolve disputes regarding the scope of Congress's consent to interstate compacts, courts should adopt an interpretive presumption *against* interstate commerce discrimination. This doctrinal rule would hold that interstate compacts must be interpreted narrowly insofar as they relate to activities potentially burdensome upon interstate commerce.

The presumption against interstate commerce discrimination will apply whenever an interstate compact is challenged under the dormant Commerce Clause. The state claiming congressional acquiescence to the regulation must first provide the compact language and the proof of congressional consent.

The reviewing court must, of course, first examine the plain language of the compact in order to determine whether Congress expressly contemplated the compact to escape dormant Commerce Clause scrutiny. In the event an interstate compact approved by Congress contains language directly addressing the dormant Commerce Clause, one can hardly take issue with assuming Congress contemplated the possible implications. In the absence of express language expressing intent to seek congressional acquiescence from Congress, the state claiming the exception must prove that Congress has, by statute or other means, unambiguously ceded to the states its authority over the particular field.

A. Threshold Matters—Identifying Interstate Compacts and Dormant Commerce Clause Violations

As a preliminary matter, a reviewing court must conclude that the agreement at issue is a valid interstate compact under Article I, Section 10. The principal inquiry is whether the agreement is between two or more states and whether Congress has approved the agreement.

Next, the court should determine whether the regulation at issue in the compact constitutes a burden on interstate commerce. Recall that the initial question is whether a state law discriminates against out-of-staters or treats all alike.¹³⁷ A regulation may

137. See *supra* Part I.B.

unconstitutionally burden interstate commerce when it discriminates against out-of-state individuals on the face of the regulation or, in the case of a facially neutral regulation, if the discriminatory effects outweigh any in-state advantages. If the court identifies a would-be violation of the dormant Commerce Clause, then the court must determine whether Congress sought to permit such regulation, thus insulating the regulation from attack.

Not all interstate agreements require congressional consent. However, in order for a state to claim that the agreement at issue is shielded from dormant Commerce Clause violations by virtue of congressional approval of the agreement itself, the state must demonstrate the agreement is a valid interstate compact under Article I, Section 10. Thus, those informal interstate agreements, which were not created under the Compact Clause and unconstitutionally burden interstate commerce, cannot be shielded from a dormant Commerce Clause attack because there is no congressional involvement from which a reviewing court may infer congressional acquiescence to the burdensome condition.

B. The Interpretive Presumption

As demonstrated by the district and circuit court opinions in *Tarrant*, courts have yet to develop a consistent standard for determining whether incidences of discrimination against interstate commerce executed pursuant to a congressionally-approved interstate compact are insulated from dormant Commerce Clause attack.¹³⁸ The proper solution to this issue is to clearly separate the analyses. Congressional consent to the compact and congressional acquiescence to possible dormant Commerce Clause issues are two *distinct* inquiries. A court cannot simply infer the latter from the former. This is based on the premise that Congress should not cede its power to regulate interstate commerce casually. Thus, courts should employ an interpretive presumption against congressional acquiescence to dormant Commerce Clause violations contained within valid interstate compacts under Article I, Section 10. The presumption would be rebuttable; if the party claiming congressional acquiescence can provide a concrete, articulated expression of Congress's intent to allow regulation of the particular article of commerce in the manner provided by the compact, the presumption is rebutted.

138. See *Tarrant Reg'l Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2009 WL 3922803, at *3 (W.D. Okla. Nov. 18, 2009); *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1236 (10th Cir. 2011).

As a practical matter, when consent to an interstate compact has been granted in advance of the compact's creation, or when the consent to the compact is merely implied by subsequent congressional activity, the state asserting congressional acquiescence will likely face more difficulty in meeting the burden of proof. An advanced call for negotiation and compacting should not be treated as a true and knowing approval of the content of the resulting compacts; Congress cannot consent to an agreement that does not yet exist. In *Cuyler v. Adams*,¹³⁹ the Supreme Court held that a 1934 act of Congress constituted the consent required to validate a purported interstate compact. The 1934 act, in part, provides: "The consent of Congress is hereby given 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"¹⁴⁰ In order to resolve the substantive issues involved in *Cuyler*, the Court was required to determine whether the 1934 congressional act constituted the required consent under the Compact Clause necessary to validate the Interstate Agreement on Detainers and the Uniform Criminal Extradition Act.¹⁴¹ Relevant to the discussion here, Justice Rehnquist concluded in his dissent that the legislation at issue was a state law "for which the consent of Congress was not required under the Constitution, and to which Congress never consented at all save in the vaguest terms some 25 years prior to its passage"¹⁴² Justice Rehnquist's reference to "the vaguest terms some 25 years prior to its passage" highlights, albeit dismissively, a problem inherent in the advanced consent method: when the consent is broad, dated, and nonspecific, it becomes less clear that Congress intended to consent to the resulting compact. The *Cuyler* case demonstrates the inherent ambiguity surrounding many advanced consent compacts, and that they are properly mistrusted as demonstrating nothing more than an approval of the agreement between states as laid out by the plain text within the four corners of the agreement.

States defending dormant Commerce Clause challenges, in the context of an interstate compact impliedly approved by Congress, will also have a difficult hurdle to overcome in order to demonstrate congressional acquiescence, as it will be difficult to point to an expression of congressional intent. States seeking to demonstrate implied congressional approval of interstate compacts

139. 449 U.S. 433 (1981).

140. 4 U.S.C. § 112(a) (2012).

141. *Cuyler*, 449 U.S. at 435.

142. *Id.* at 450 (Rehnquist, J., dissenting).

often cite congressional acts demonstrating acceptance of the compact's terms, such as the adoption of legislation consistent with the terms of the compact or ratification of actions by state authorities and Congress that are consistent with the purposes of the compact.¹⁴³ A state would not be able to overcome the interpretive presumption merely by showing that Congress only impliedly consented to the interstate compact at hand, as this implicit consent could not sufficiently indicate Congress's acquiescence to any possible dormant Commerce Clause violations. The interpretive presumption would prevent such far-removed inferences from demonstrating congressional acquiescence.

Once the reviewing court verifies that the agreement at hand is a valid interstate compact under the Constitution, its next task will consist of an examination of the language of both the interstate compact and Congress's consent language, if any such language exists. Of course, if Congress expressly permits would-be dormant Commerce Clause violations, this language would control and would extinguish any claims of dormant Commerce Clause violations. In order to evince its consent to would-be dormant Commerce Clause violations, Congress may use language similar to that espoused in the McCarran-Ferguson Act. In other words Congress, in order to insulate an interstate compact from dormant Commerce Clause attack, could include the following expression: "Congress hereby permits the member states to this compact to regulate the interstate commerce item of, pursuant to these congressionally-approved provisions." Clear language to this effect would unambiguously insulate states from dormant Commerce Clause attack, while also notifying the states that they must act in accord with the provisions of the compact in order for the protection to apply. If the state cannot demonstrate such a congressional expression, its acquiescence claim will fail, and the state will be prohibited from sustaining a regulation in violation of the dormant Commerce Clause. However, a state alleging congressional acquiescence to a would-be dormant Commerce Clause violation raised by an interstate compact does not need to provide an express congressional statement. Because the interpretive presumption is rebuttable, a state could conceivably overcome the presumption by demonstrating that the compact's terms were so clear and obvious that Congress, pursuant to a reasonable examination, must have known of the dormant Commerce Clause implications and, through consent of the interstate compact, sought to allow the regulation. Consider, for instance, an interstate compact whose unambiguous purpose was to implement a scheme which would, on its face,

143. BROWN, *supra* note 28, at 38.

discriminate against interstate commerce. Congressional approval of an interstate compact to this effect would necessarily represent Congress's acquiescence to the would-be dormant Commerce Clause violation. In other words, if the interstate commerce burden is so clear that any simple reading of the text of the interstate compact would put Congress on notice of a possible dormant Commerce Clause violation, the state would likely be able to overcome the presumption.

IV. APPLICATION—TARRANT REGIONAL WATER DISTRICT V. HERRMANN

To demonstrate the efficacy of the proposed interpretive presumption, consider the facts of *Tarrant Regional Water District v. Herrmann*. A reviewing court can easily address and dispose of the threshold matters in *Tarrant*. The Supreme Court has held that water is an article of commerce,¹⁴⁴ so it is clear that Oklahoma's moratorium on out-of-state water exportation involves a regulation of an article of commerce. Next, it is clear that the Red River Compact is a congressionally approved compact between two or more states.

A court must then perform the dormant Commerce Clause violation analysis. In this case, Oklahoma's restrictive water scheme discriminates against interstate commerce on its face. A facially discriminatory regulation is *per se* invalid, unless the state can demonstrate a compelling state interest to justify the differential treatment.¹⁴⁵ Oklahoma would have to prove that its moratorium policy is supported by a compelling state interest. *Tarrant*, in its briefs, persuasively refuted Oklahoma's claims that its moratorium exists to preserve water in case of a future shortage.¹⁴⁶ As a result, a court could likely have found that Oklahoma's water moratorium created an unconstitutional burden on interstate water commerce. If a reviewing court came to such a conclusion, the next inquiry would necessarily entail an examination of the congressional consent language to determine whether Congress intended to permit the regulation.

In order for the court to determine whether the Red River Compact demonstrates Congress's intent to acquiesce to this violation of the dormant Commerce Clause, it must ascertain which type of consent Congress used. In the case of the Red River Compact, Congress first

144. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 954 (1982).

145. *Petragnani*, *supra* note 79, at 1217; see also *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

146. See Brief for Petitioner at 4, *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120 (2013) (No. 11-889), 2012 WL 167019, at *4 (suggesting Oklahoma has three times the water it needs to support itself).

invited the four states to enter into negotiations in 1955,¹⁴⁷ and then, Congress consented to the completed Red River Compact's content in 1980.¹⁴⁸ The interpretive presumption requires that a court assume that Congress did *not* intend to acquiesce to a dormant Commerce Clause violation. In order to rebut the presumption, Oklahoma would have to show that Congress's intent was "expressly stated" or "unmistakably clear."

In regard to existing state policy, the Red River Compact's most instructive provision is section 2.10, which states: "Nothing in this Compact shall be deemed to: (a) Interfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact."¹⁴⁹ This provision seems to suggest that the enactment of the Red River Compact did not serve to displace any existing state laws regarding water usage within state borders. Employing the proposed interpretive presumption, a reviewing court would be required to determine whether Congress's consent to the Red River Compact itself served also as congressional acquiescence to the dormant Commerce Clause violation raised by the Oklahoma water moratorium statutes, insofar as they regulate the usage of water subject to the Red River Compact. The proposed interpretive presumption calls for a reasoned and fair assessment of Congress's understanding of the text presented. It would be the task of the reviewing court to assess whether Congress truly contemplated the dormant Commerce Clause implications implicit within section 2.10 and whether Congress intended to allow the signatory states to regulate water usage in a way that would otherwise violate the dormant Commerce Clause. Weighing most heavily against a finding of congressional acquiescence to the dormant Commerce Clause violation is the fact that any language preserving existing or future signatory state regulation is sparse and general. In addition,

147. See Act of Aug. 11, 1955, Pub. L. No. 84-346, 69 Stat. 654 ("Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the states of Arkansas, Louisiana, Oklahoma, and Texas to negotiate and enter into a compact providing for an equitable apportionment among them of the waters of the Red River and its tributaries, upon the condition that one qualified person appointed by the President of the United States shall participate in such negotiations as chairman, without vote, representing the United States, and shall make a report to the President of the United States and the Congress of the proceedings and of any compact entered into. Such compact shall not be binding or obligatory upon any of the parties thereto until it shall have been ratified by the legislatures of each of the respective states, and approved by the Congress of the United States.").

148. See Red River Compact, *supra* note 102.

149. See *id.* at 2.10(a).

Oklahoma codified its water moratorium in 1992, 12 years after ratification of the Red River Compact. A reviewing court may have held that, although it is clear that Congress did not intend to significantly alter state regulation of Red River water within state boundaries, Congress likely did not intend to preserve state water moratoriums that unconstitutionally burden interstate commerce.

The interpretive presumption's most important function would be to eliminate double-consent rubber stamping—in other words, by employing the interpretive presumption, courts would be unable to infer congressional acquiescence to dormant Commerce Clause violations by simply noting that Congress approved of the compact itself. In *Tarrant*, Oklahoma would not have been able to simply rely on Congress's approval of the Red River Compact as evidence that Congress intended for Oklahoma to impose a burden on interstate commerce by way of its corresponding water statutes. Instead, Oklahoma would have had to provide more evidence of Congress's intent to allow states to hoard excess water supplies to the detriment of states in dire need of the resource. Oklahoma would likely have been unable to provide such proof, and Texas would have had an opportunity to purchase from Oklahoma the water it desperately needed for the rapidly growing Dallas-Fort Worth area.

V. CONCLUSION

In order to better preserve our natural resources and ensure even-handed economic practices between states, while maintaining the legitimacy of interstate compacts created pursuant to the Compact Clause of the Constitution, courts need to adopt an interpretive presumption against burdens on interstate commerce. This presumption requires that courts presume that Congress would not intend to agree to an interstate compact imposing a burden on interstate commerce without expressly conveying such intent. This would help eliminate state protectionism from creating unfair burdens on sister states, while also preserving states' rights to enter into contracts subject to the approval of Congress and the laws of the United States.

*Claire Murray**

* J.D./D.C.L., 2014, Paul M. Hebert Law Center, Louisiana State University. For helpful ideas, comments, and discussions, the author is grateful to Professor Michael Coenen and to the editors of the *Journal of Energy Law and Resources*.

