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THE NEW INTERSTATE COMPACT — A CONGRESSIONAL TOOL: SEATTLE MASTER BUILDERS ASS'N v. PACIFIC NORTHWEST ELECTRIC POWER

The compact clause of the United States Constitution provides a mechanism by which states may form cooperative agreements governing issues of regional concern. Originally used merely to settle boundary disputes, compacts have become an effective means for states to solve a wide variety of problems involving taxation, mass transit, air pollution, land use planning, water resources and education. The expansion of compacts into areas previously recognized as exclusively within the federal domain has been ac-

1 U.S. Const. art. I, § 10, cl. 3. The compact clause provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State. . . ." Id. Despite the broad language of the compact clause, not all agreements between states fall within the ambit of the clause. See Virginia v. Tennessee, 148 U.S. 503, 518 (1893). A compact only requires consent if it 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." Id. at 519; see also United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 471 (1978) (compact that promotes uniform state tax systems does not require consent); New Hampshire v. Maine, 426 U.S. 363, 369 (1976) (compact locating boundary not threat to federal supremacy). Compacts which pertain to particular subjects automatically require congressional consent. See, e.g., The Water Pollution Control Act Amendments of 1956, Pub. L. No. 92-500, 70 Stat. 498 (1956) (congressional consent required for compacts which involve water pollution). Subjects such as mental health, higher education, and juvenile compacts do not need congressional consent. See F. Zimmerman & M. Wendell, The Law and Use of Interstate Compacts 24 (1976).

2 See F. Zimmerman & M. Wendell, supra note 1, at ix; see also Frankfurter & Landis, The Compact Clause of the Constitution - A Study in Interstate Adjustments, 84 Yale L. J. 685 (1925) (advocating uses of compacts).


4 See F. Zimmerman & M. Wendell, supra note 1, at ix; Leach, supra note 3, at 422.

5 See Port of New York Authority Compact, Pub. Res. No. 67-17, 42 Stat. 174 (1921). The Port Authority affects interstate commerce and thus involves a federally preemptible area. See M. Ridgeway, Interstate Compacts - A Question of Federalism 27 (1971). While the regulation of commerce is expressly reserved to the federal government, see U.S. Const. art I, § 8, cl. 3, "Congress' authority under the Commerce Clause also extends to intrastate economic activities that affect interstate commerce." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537 (1985); see also United States v. Darby, 312 U.S. 100, 118 (1941) (same). As such, Congress may confer upon a state the power to regulate commerce by granting consent to an interstate compact. See Dixon, Constitutional Bases for Regional-
panied by increased federal participation in the formation and administration of compacts. Despite this increase in federal participation, compact agreements have traditionally been negotiated and drafted by the member states. Recently, however, in Seattle Master Builders Ass’n v. Pacific Northwest Electric Power, the United States Court of Appeals for the Ninth Circuit upheld the constitutionality of an interstate compact agreement that was completely devised by Congress.

See Leach, supra note 3, at 426. The federal government has participated in interstate compacts on the negotiation and administration levels, id., and recently, has taken part as a full member of an interstate compact. See Delaware River Basin Compact, Pub. L. No. 87-329, 75 Stat. 688 (1961). The Delaware River Basin Compact includes the federal government as a full voting member together with the states of Delaware, New Jersey, New York and Pennsylvania. Id. at 689.


At common law, early compacts were derived through negotiations between the contending colonies, and were often subject to the approval of the Crown. Id. The negotiations were traditionally undertaken by joint compact commissions composed of representatives of each state and appointed by the Governor. See F. Zimmerman & M. Wendell, supra note 1, at 16. In the interest of speed and simplicity, the modern trend favors a less formal negotiation process. Id. at 18. Often interested state officials will draft an agreement, which will be enacted by the state if acceptable. Id. The enactment constitutes an offer to the other states to join. Id.


Seattle Master Builders, 786 F.2d at 1383. The Pacific Northwest Electric Power Planning and Conversation Council's ("Council") member states include Washington, Oregon, Montana, and Idaho. Id. at 1382. The parties and various amici disagreed about whether the Council constituted a federal agency or an interstate compact organization. Id. at 1363. The Pacific Northwest Act expressly states that the Council is not a federal agency. See 16 U.S.C. § 839 b(a)(2)(A)(iv) (1982). The Council is similar to a federal agency because...
In *Seattle Master Builders*, a group of homebuilders and other industry representatives brought suit against the Pacific Northwest Electric Power Planning and Conservation Council ("Council"). The task of the Council was to prepare and adopt a conservation and electric power plan to be implemented by the Bonneville Power Administration (BPA), a federal agency. Each state agreed to participate in the Council by enacting legislation that authorized the governor to appoint two members. The petitioners claimed that the Council was "unusual," thus invalid, because it was congressionally created and its activities directly affected a federal agency. The plaintiffs further asserted that the creation of the Council violated the appointments clause of the Constitution because the Council members exercise significant authority in law to make decisions," Washington Research Project, Inc. v. Department of HBW, 504 F.2d 238, 248 (D.C. Cir. 1974), and can "act with the sanction of the Government behind it." Ellsworth Bottling Co. v. United States, 408 F. Supp. 280, 282 (W.D. Okla. 1975). The Pacific Northwest Act expressly states that the Council must follow federal law in particular situations.

For the purpose of providing a uniform system of laws, in addition to this chapter, applicable to the Council relating to the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Council, advisory committees, disclosure of information, judicial review of Council functions and actions under this chapter, and related matters, the Federal laws applicable to such matters in the case of the Bonneville Power Administration shall apply to the Council to the extent appropriate, except that with respect to open meetings, the Federal laws applicable to open meetings in the case of the Federal Energy Regulatory Commission shall apply to the Council to the extent appropriate.


The Council reports its activities in the Federal Register and adheres to the requirements of the "Government in the Sunshine Act" with regard to open meetings. See 49 Fed. Reg. 29,342 (July 1, 1984); Administrative Procedure Act, 5 U.S.C. § 552(b) (1982). Furthermore, the Council is federally funded. See Pacific Northwest Act, 16 U.S.C. § 839b(b) (1982). The Council's activities are suitable for a federal agency. See 16 U.S.C. § 839b(b) (alternative establishment of Council as federal agency). Despite the logomachy concerning the Council's classification, it is submitted that the Council acts pursuant to federal law.

10 *Seattle Master Builders*, 786 F.2d at 1362.


13 See *Seattle Master Builders*, 786 F.2d at 1364.

14 U.S. CONST. art. II, § 2, cl. 2. The appointments clause states: [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads
authority over the federal government, yet have not been appointed by the President.\textsuperscript{15} As a third cause of action, the claimants challenged the Council’s regional energy plan as an arbitrary and capricious exercise of authority.\textsuperscript{16}

\textit{Id.} (emphasis added).

The term “Officers of the United States,” as used in article II, has been defined to include “all persons who can be said to hold an office under the government.” See United States v. Germaine, 99 U.S. 508, 510 (1879) (civil surgeons appointed by Commissioner of Pensions held not to be “Officers of the United States”). The Supreme Court firmly stated that there can be no doubt that all officers of the United States were intended to be included within one of the two modes of appointment provided by art. II, § 2, cl. 2. \textit{Id.} The Court further elucidated the meaning of officers of the United States in \textit{Buckley v. Valeo}, 424 U.S. 1 (1975). The Court in \textit{Buckley} asserted that the term officers of the United States, as defined by United States v. Germaine, was intended to have “substantive meaning.” \textit{Id.} at 126. The Court stated that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States’ and must, therefore, be appointed in the manner prescribed by section 2, cl. 2 of that Article.” \textit{Id.} Officers of the United States do not include all employees of the United States. \textit{Id.} at n.162. Commissioners may be distinguished from employees because they are appointed for a statutory term and “are not subject to the control or direction of any other executive, judicial or legislative authority.” \textit{Id.; see Pacific Northwest Act}, 16 U.S.C. § 839b(3) (1982) (statutory term for Council members).

\textsuperscript{15} See \textit{Seattle Master Builders}, 786 F.2d at 1365. The Ninth Circuit did not dispute that the Council exercises significant authority over the BPA. \textit{Id.} at 1365. See, e.g., 16 U.S.C. § 839b(i) (1982) (Council may review BPA’s action); \textit{id.} at § 839(j) (Council can request Administrator to act); \textit{id.} at § 839(j)(2) (Administrator must respond to Council’s request within 90 days); \textit{id.} at § 839(j)(3) (Council may request informal hearing and final reviewable decision). Nonetheless, the court held this authority to be immaterial. \textit{Seattle Master Builders}, 786 F.2d at 1365. See also Hemmingway, \textit{The Northwest Power Planning Council: Its Origins and Future Role}, 13 Envlt. L. 673, 684 (1983) (asserting that Council does not exercise significant authority).

Although the Council does not have the final word over the BPA’s actions, see 16 U.S.C. § 839(d)(c)(3)(B) (1982) (if inconsistent with Plan, Administrator may petition Congress for permission to acquire that resource), it is submitted that the Council indeed exercises significant authority over the BPA. The Plan uses language which requires the Administrator to act at the behest of the Council. Chapter 10 of the Plan provides in pertinent part:

The Council has used the word “shall” in this two year action plan, when referring to actions to be carried out by Bonneville, to express the Council’s expectations that these actions can and should be implemented...to ensure proper coordination in the implementation of these actions, the Council intends that all Bonneville actions in the two-year plan shall be taken in consultation with the Council.


\textsuperscript{16} \textit{Seattle Master Builders}, 786 F.2d at 1362. The Administrative Procedure Act provides that an agency’s factual finding may be set aside if arbitrary and capricious. See 5 U.S.C. § 706(2)(A) (1982). The Council is directed to adopt model conservation standards...
Writing for the majority, Judge Goodwin refused to categorize the Council’s attributes as “unusual,” and thus held it in accordance with constitutional requirements.\(^{17}\) Reasoning that congressional creation of the Council through a federal act merely constituted conditional consent in advance,\(^ {18}\) the Ninth Circuit did not address the fact that Congress had drafted the entire agreement.\(^ {19}\) The court recognized that “[t]here is no bar against federal agencies following policies set by non-federal agencies,” and held that the impact on the federal government did not affect the Council’s validity pursuant to the compact clause.\(^ {20}\) In determining whether the Council violated the appointments clause, the court employed the three part test enunciated by the Supreme Court in Buckley v. \[\]
The Ninth Circuit concluded that the Council survived Buckley analysis and thus did not violate the appointments clause because the Council's members did not solely serve pursuant to federal law. In dissent, Judge Beezer asserted that the majority had elevated form over substance when it concluded that the Council was a lawfully formed compact agency. The dissent contended that "the Council lacks several of the classic indicia of an interstate compact." Judge Beezer concluded that the Council constituted a federal agency because power to constrain actions of a federal agency is not a legitimate function of an interstate compact agency. Even if the Council was a legitimate interstate compact agency, the dissent argued that it still violated the appointments clause because the Council exercises significant control over a federal agency and acts pursuant to federal law.

The Ninth Circuit has construed the consent requirement of the compact clause broadly to allow Congress wide discretion to create a state-appointed body which may have significant effects on a federal agency. It is submitted that the Council violates basic contract principles governing compact agreements and thus is not

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21 424 U.S. 1, 123-27 (1975). The Buckley test provides that the appointments clause applies to: 1) all executive or administrative officers; 2) who serve pursuant to federal law; and 3) who exercise significant authority over federal governmental actions. Id. at 126. Buckley involved the provision in the Federal Election Campaign Act creating an eight member commission to administer that Act. Id. at 109. The commission's functions involved record keeping, disclosure, investigative functions, rulemaking and adjudicative powers. Id. at 109-10. The Court recognized that Congress may appoint its own officers to perform "appropriate legislative functions." Id. at 119. Such functions are limited to those of an "investigative and informative nature." Id. at 137. The Buckley Court held that the commission was not exercising "appropriate legislative functions," and thus was subject to the provisions of the appointments clause. Id. at 143.

In Seattle Master Builders, the Council is not limited to "investigative and informative functions." See, e.g., Pacific Northwest Act 16 U.S.C. § 839b(f)(1) (1982) (Council may review actions of BPA); id. at § 839d(c)(2)(A) (Council determines if BPA Administrator's actions are consistent with plan); id. at § 839b(j) (Council may request Administrator to undertake action pursuant to plan).

Past Supreme Court decisions are consistent with the holding in Buckley. See Humphrey's Ex'r v. United States, 295 U.S. 602, 625-26 (1935) (Congress cannot usurp President's power to appoint even if agency is quasi-judicial or quasi-legislative); Springer v. Phillipine Islands, 227 U.S. 189, 201-02 (1928) (legislative branch may not exercise executive authority by retaining power to appoint those who will execute its laws).

22 See Seattle Master Builders, 786 F.2d at 1365.
23 See id. at 1372.
24 Id.
25 Id. at 1373.
26 Id. at 1376.
a compact at all. The creation of the Council has resulted in an unconstitutional redistribution of power which restricts the power of both the states and the executive. This Comment will assert that congressional creation of the Council has effectively robbed the states of their traditional role in the negotiation and drafting of compact agreements, and usurped the executive's power of appointment.

**Indicia of a Compact**

In *Northeast Bancorp, Inc. v. Board of Governors*,27 the Supreme Court enunciated four factors that support the existence of a compact agreement. Although not a comprehensive list, the *Northeast Bancorp* Court declared the following to be "classic indicia" of a compact agreement: (1) a joint agreement; (2) statutes conditioned on action by the other state[s]; (3) the absence of an ability to unilaterally modify or repeal the agreement; and (4) a reciprocal regional limitation.28 The majority in *Seattle Master Builders* concluded with a cursory analysis that the Council satisfied these indicia.29 However, a more thorough analysis demonstrates that the Council does not satisfy the last three of the *Northeast Bancorp* indicia.30

An interstate compact is manifestly a contract between states.31 Thus, the second of the *Northeast Bancorp* indicia, mutuality of obligation, is paramount.32 This concept was integral to the Supreme Court's decision in *United States Steel Corp. v. Multistate Tax Commission*.33 The *United States Steel* Court expressly rejected the contention that a compact clause agreement was

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28 Id.
29 See *Seattle Master Builders*, 786 F.2d at 1363. "The Council is an operational body established by reciprocal legislation whose *effectiveness* is conditioned upon binding legislative commitments by the states." *Id.* (emphasis added). It is submitted that reciprocal legislation whose effectiveness is conditioned upon binding legislative commitment by the states is distinguishable from binding reciprocal legislation within the meaning of *Northeast Bancorp*.
30 See *infra* notes 36-44 and accompanying text.
31 See F. ZIMMERMAN & M. WENDELL, supra note 1, at 7. The concept of offer, acceptance, and consideration are all applicable to the formation of a compact agreement. *Id.* at 8-9.
32 See *id.* at 9-10.
formed when each member state had the freedom to adopt or reject the Multistate Tax Commission's rules. The Court dismissed such an agreement as "nothing more than reciprocal legislation . . . ." Rather than making binding commitments to a compact agreement, the member states in Seattle Master Builders merely passed reciprocal legislation that agreed to promulgate a plan for a federal agency. The Council fails to conform with the third Northeast Bancorp indicia because none of the state statutes preclude the state from unilaterally modifying or repealing the agreement.

Additionally, the contractual principles require that member states may not be contractually bound without their consent. Yet, Congress provided for the creation of the Council upon consent of only three of the four states to be affected by the Council's decisions. The absence of a valid regional limitation, the fourth Northeast Bancorp indicia, further militates against the conclusion that the Council is a compact. Therefore, because it failed to meet three of the four requirements set out in Northeast Bancorp, the Council in Seattle Master Builders cannot reasonably be considered an interstate compact.

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34 Id. at 475-76.
35 Id.
36 See Idaho Code § 16-1201 (1985); Mont. Code Ann. § 90-4-401 (1985); Or. Rev. Stat. § 469.800 (1986); Wash. Rev. Code Ann. § 43-52A.010 (1986). This state legislation merely gives consent to participate in the Council; there is no obligatory language. Significantly, none of the statutes refer to the agreement as a "compact".
37 See F. Zimmerman & M. Wendell, supra note 1, at 7-8. The substantive law of compacts is contract law and thus a state which has not accepted the offer to join the agreement cannot thereafter be bound by that agreement. The acceptance of the agreement constitutes the consideration. Id. at 9.
39 See id. at §§ 839a(14)(A), 839 a(14)(B) (Pacific Northwest region extends beyond the states of Idaho, Montana, Oregon, and Washington).
40 Commentators' traditional notions of what constitutes a compact seem to indicate that the Seattle Master Builders Council is not a compact. See F. Zimmerman & M. Wendell, The Interstate Compact Since 1925 42 (1951). Compacts are 1) formal and contractual agreements; 2) between the states themselves; 3) enacted in substantially identical words by the legislature of each compacting state; 4) requiring consent of Congress in certain cases; 5) enforceable by suit in the Supreme Court of the United States; 6) that take precedence over ordinary state statutes. Id. The Council in Seattle Master Builders meets only one of these six criteria. The Council is not a contractual agreement, and no agreement exists between the member states. See supra note 15 (states have agreed to "constrain" the BPA, but not themselves). Further, the state enactments substantially differ. Compare Wash. Rev. Code Ann. § 43-52A.040 (1986) (Council members removable at Governor's will) with Or. Rev. Stat. § 469.830 (1985) (Council members not removable at Governor's will); see also People v. City of South Lake Tahoe, 466 F. Supp 527, 541-42 n.29 (E.D. Cal. 1978)
INTERSTATE COMPACT

CREATION VS. CONSENT: THE LIMITS OF CONGRESSIONAL POWER

The compact clause is a constitutional vehicle which enables states to negotiate agreements addressing regional problems “wholly unsuited to federal action . . . .” Only if a compact infringes upon federal power is congressional consent necessary. However, the Seattle Master Builders court has held that the power to consent also gives Congress the power to create. It is asserted that a crucial distinction exists between the authority to consent to an agreement and the authority to create one.

Consent has been extended to include a “supervisory role,” but the extent of this concept has yet to be defined by the Supreme Court of the United States. The Senate has the power to consent to an agreement, but the extent of this concept has yet to be defined by the Supreme Court of the United States.

If the Council is a compact, Zimmerman & Wendell's fifth requirement for a compact agreement indicates that its judicial review provisions violate the Constitution. See Pacific Northwest Act, 16 U.S.C. § 839f(e)(5) (1982). This provision states: “Suits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by the Administrator or the Council, or the implementation of such final actions . . . shall be filed in the United States court of appeals for the region.” Id. (emphasis added). The Constitution provides that in all cases in which a state is a party, the Supreme Court shall have original and exclusive jurisdiction. See U.S. CONST. art. III, § 2 cl. 2; F. ZIMMERMAN & M. WENDELL, supra note 1, at 46-47; Ladd, Federal and Interstate Conflicts in Montana Water Law: Support For a State Water Plan, 42 MONT. L. REV. 267, 278 (1981). Section 839f(e)(f) mandates that all actions be brought in the U.S. court of appeals regardless of whether it concerns a dispute between two states. Finally, the Council's plan does not take precedence over state statutes as dictated by Zimmerman & Wendell's criterion six. See, e.g., Idaho Code § 61-1201 (West Supp. 1985) (providing that “[n]othing in this agreement shall be construed to alter, diminish or abridge the rights of the state”).

41 See Frankfurter & Landis, supra note 2, at 708.

42 See Virginia v. Tennessee, 148 U.S. 503, 519-20 (1893); Heron, supra note 6, at 12; Leach, supra note 3, at 439. (“If the ruling in Virginia v. Tennessee still has meaning, Congress’ consent merely attest[s] to its conviction that the compact does not infringe on federal powers and jurisdiction. Nothing More.”) (emphasis added). In order to preserve the national interest, Congress may condition this consent. See Cuyler v. Adams, 449 U.S. 433, 440 (1981); Petty v. Tennessee Mo. Bridge Comm’n, 359 U.S. 275, 277-78 (1959).

43 Seattle Master Builders, 786 F.2d at 1364.

44 See Heron, supra note 6, at 22 n.116 (power to consent to treaty does not extend to power to create treaty). Analogously, congressional power to consent to Presidential appointments does not further empower Congress to make those appointments. See Buckley v. Valeo, 424 U.S. 1, 129 (1976). The consent requirement should not be used to abrogate the state’s power to negotiate and draft compact agreements. See City of El Paso v. Simmons, 379 U.S. 497, 509 (1965). “[W]hatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects.” Id. (quoting Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 439 (1934)) (emphasis added). Granting Congress the power to create compact agreements for the states would destroy this reserved power in its essential aspects.
A noted district court case involving the Port Authority of New York and New Jersey intentionally left this issue unresolved in order to avoid constitutional confrontation. Neither the majority nor the dissenting opinion adequately addressed the distinction between congressional consent and congressional creation of a comprehensive compact agreement. Although the Council's regulation of electricity involves the national interest, granting the federal government the power to draft interstate compact agreements is not necessary to protect this interest. Our system of checks and balances is threatened when Congress receives free reign to regulate itself. State consent to usurpation does not grant Congress the authority to exceed its constitutional limitations. Although congressional drafting may result in a more expe-

45 Ambiguity concerning the scope of this role has led to disagreement between commentators. Compare Cellar, supra note 6, at 699-702 (arguing that Congress has right to alter or amend compact agreement and therefore has right to investigate) with Leach, supra note 3, at 428 (asserts that Congress' supervisory role does not extend to investigative authority); see also Note, Constitutional Law — Power of Congressional Committee To Investigate an Interstate Compact Denied Due to Lack of Grant of Specific Authority, 31 Fordham L. Rev. 581, 586 (1963) (Constitution specifically restricts congressional compact activity to granting or withholding consent).

46 Tobin v. United States, 306 F.2d 270 (D.C. Cir.), cert. denied, 371 U.S. 902 (1962). Tobin raised the issue of whether the Constitution allows Congress to retain a reviewing role over an interstate compact to which it had already given consent. The controversy arose in response to Representative Emanuel Cellar's initiation of an investigation into the activities of the Port Authority. See M. Ridgeway, supra note 5, at 24. Cellar demanded general records of the Authority be made available for congressional scrutiny. Id. Austin Tobin, executive director of the Port Authority, was prosecuted for contempt of Congress for his refusal to furnish subpoenaed documents. Id. The Court of Appeals for the District of Columbia Circuit reversed Tobin's conviction, but based its decision on nonconstitutional grounds. See Tobin, 306 F.2d at 274-75. The court held that the congressional committee could not investigate the Port Authority's internal affairs absent a clear intention to retain such a power in the compact. Id. at 275-76. Congressional reservation of "the right to alter, amend, or repeal" consent was not sufficient to confer authority to supervise internal affairs. Id. at 274. The court refused to address the constitutional issue: "We have no way of knowing what ramifications would result from a holding that Congress has the implied constitutional power to 'alter, amend, or repeal' its consent to an interstate compact." Id. at 273.

47 See Frankfurter & Landis, supra note 2, at 714. "To be sure, the transmission of electricity across State borders is interstate commerce and as such subject to the Federal power evolved for the control of such commerce." . . . Id.

48 See Heron, supra note 6, at 23. "Any suggestion that Congress might use its plenary power under the Commerce Clause, rather than its limited power under the Compact Clause to establish arrangements such as the Northwest Power Council is also without merit." Id.


50 See Buckley v. Valeo, 424 U.S. 1, 132 (1976) (Presidential consent did not negate usurpation of executive power); Myers v. United States, 272 U.S. 52, 164 (1926) (same).
ditously created agreement than if the states negotiated their own compact, granting Congress such a power would impermissibly impede state initiative to formulate their own agreements, and thus impair the states' integrity as states.51 Ironically, the Council has

None of the member states objected to the congressional creation of the Council by joining the Seattle Master Builders litigation, see Seattle Master Builders, 786 F.2d at 1361, although Montana, Idaho and Washington did file amicus briefs. Id.

51 For almost a decade, the Supreme Court has wrestled with the issue of how far Congress' power pursuant to the commerce clause may intrude upon the states' domain. See Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528, 530 (1985). Garcia overruled the doctrine of sovereign immunity developed in National League of Cities v. Usery, 426 U.S. 533 (1976), which held that state governments were immune from the 1974 Fair Labor Standards Act. See Garcia, 469 U.S. at 557. In National League of Cities, the Court distinguished between federal regulation "of private sector and . . .businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside," and federal regulation "directed, not to private citizens, but to the States as States." National League of Cities, 426 U.S. at 845. National League of Cities emphasized that "traditional governmental functions" must be free from federal regulation. Id. at 852. Garcia rejected the concept of "traditional governmental functions" as unworkable, but did not expressly disavow the concept of "States as States." See Garcia, 469 U.S. at 531-57. This concept is applicable to the usurpation of the states' role in the compact process in Seattle Master Builders. In Garcia, the Court held the basic structure of the federal system provides adequate protection to the states, and therefore refused to circumscribe the limits of congressional power. Garcia, 469 U.S. at 550-51. However, it must be noted that in Garcia, the preservation of state sovereignty necessitated the deprivation of the individual rights protection afforded by the Fair Labor Standards Act. Id. at 533. It is suggested that preservation of state sovereignty with respect to the compact clause requires no such sacrifice; on the contrary, it may serve to enhance individual rights. See Tribe, Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services, 90 Harv. L. Rev. 1065, 1103 (1977) (arguing National League of Cities actually preserved personal rights by upholding state sovereignty).

The Garcia Court's five to four decision, with three rigorous dissenting opinions, suggests that the issue of state sovereignty has not been laid to rest. Justice Rehnquist and Justice O'Connor expressed confidence that the principle of National League of Cities will in time again command the majority of the Court. Garcia, 469 U.S. at 589 (O'Connor, J., dissenting). "The central issue of federalism, . . . is whether any realm is left open to the states by the Constitution. . . ." Id. at 580-81 (O'Connor, J., dissenting) (emphasis added). It is submitted that drafting a compact agreement is a realm intended by the Constitution to be left open to the states. Cf. Coyle v. Oklahoma, 221 U.S. 559, 565 (1911) (regulation of state capital is peculiarly a state function and must be free from federal regulation). A legitimate interstate compact agency is legally a state agency. See R. Leach & R. Sugg, The Administration of Interstate Compacts 22 (1959). It is suggested that because a compact agency is a state entity, the regulation and drafting phases of the compact process peculiarly belong to the states. The Supreme Court has recognized that Congress cannot supersede the states in the control of their state agencies. See, e.g., Ashton v. Cameron County Water Improvement Dist. No. One, 298 U.S. 513, 528 (1936) (taxing power of Congress does not extend to political subdivisions of states); Hopkins Fed. Sav. & Loan Ass'n. v. Cleary, 396 U.S. 315, 337 (1935) (conversion of state associations into federal ones beyond congressional authority).
been proclaimed as a new form of cooperative federalism, despite the congressional usurpation of a traditional state role. Curtailment of state involvement in interstate compacts is violative of the spirit of interstate compacts and basic precepts of state sovereignty.

THE COMPACT CLAUSE: AN EXCEPTION TO THE APPOINTMENTS CLAUSE?

The Seattle Master Builders court dismissed the petitioner's claim that the Council violated the appointments clause because the Council was acting under the aegis of an interstate compact. However, "[t]he relevant inquiry must be one of impact on [the] federal structure," not on the name affixed to that structure. The Council acts pursuant to federal law because it was created by Congress, rather than by the states. The guise of an interstate compact cannot controvert the fact that if the three prongs of Buckley are satisfied, the appointments clause must be complied with.

Contrary to the opinion of the majority, a separation of powers problem does exist in Seattle Master Builders. Historical analysis reveals that the compact clause was not intended to be an exception to the appointments clause. A proposed amendment that

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82 See Seattle Master Builders, 786 F.2d at 1366 (Council represents innovative cooperative federalism); Hemmingway, supra note 15, at 673 (Council constitutes example of trend reversing pendulum of federal authority in direction of states).
83 See M. RIDGEWAY, supra note 5, at 1 (spirit of interstate compacts is regional cooperation); Leach, supra note 3, at 446 (overriding objective of compacts is to avoid federal interference in regional planning).
84 See Seattle Master Builders, 786 F.2d at 1365. The majority contended that the Council acts pursuant to state law because the member states enacted consent legislation. Id. It is submitted that the state consent legislation cannot insulate the Council from the appointments clause because the Council acts pursuant to federal law. See supra note 9.
86 See supra note 9.
88 See Seattle Master Builders, 786 F.2d at 1365. The court denied that a separation of powers problem exists. Id. Federalism may not insulate the Council from separation of powers scrutiny; the two concepts are not mutually exclusive. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 18 (1978) (it is not possible to clearly separate federalism issues from separation of powers issues).
89 See 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 405 (1911). When the Constitutional Convention debated the executive's appointment power, Edmund Randolph suggested that the legislature be permitted "to refer appointments in some cases, to some State Authority." Id. John Dickinson of Delaware proposed an amendment which would have allowed Congress to delegate the power of appointment to "the Legislatures or Execu-
would have permitted Congress to delegate the power of appointment was expressly rejected at the Constitutional Convention. Thus, the fact that Congress expropriates the power of appointment and grants it to a state governor, rather than to itself, is irrelevant. Despite the fact that state-appointed commissioners might be more effective, the compact clause should not be utilized as a legal convenience to circumvent constitutional requirements.

CONCLUSION

The Seattle Master Builders decision has given the green light to Congress to create a “regional council,” label it an interstate compact, and dodge the appointments clause. In its eagerness to spur a new form of “cooperative federalism,” the Ninth Circuit has created a new governmental species which runs afoul of both the compacts clause and the appointments clause. Such a precedent is offensive to the axiomatic precepts of federalism and separation of powers.

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