The Nostalgia of Eternity: Interstate Compacts, Time, and Mortality

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I. Introduction

> "Although the idea of permanence appears to be traditionally associated with legislation, law is inevitably constrained by time. Laws are doomed to face a destiny like the mythological character Kronos: they overthrow existing laws, have a period to reign, but are destined to be overthrown again by the next generation. Like Kronos, legislators often experience the 'nostalgia of eternity,' refusing their mortality as well as that of their rules."[2]

An interstate compact designed to promote uniformity in state taxation would appear to have little in common with an interstate compact designed to fight corruption in the Port of New York.[3] Yet recent cases concerning these two very different subjects illustrate that interstate compacts can experience similar aging issues that can create an existential crisis decades after their formation. Who could have anticipated when the New York Waterfront Commission Compact was adopted in 1953 that the proliferation of containerized shipping would cause New Jersey, one of the Compact's two parties, to attempt to withdraw from the Compact in 2018,

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[2] Antonios Kouroutakis & Sofia Ranchordás, *Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies*, 25 MINN. J. INT'L L. 29, 49–50 (2016) (footnotes omitted).

[3] U.S. CONST. art. I, § 10, cl. 3. (providing "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State."). Justice Story defined an "agreement" or "compact" to refer to "private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of states bordering on each other." 2 Story, *Commentaries on the Constitution of the United States* (5th ed. 1891), sec. 1403, as cited in Comment, *The Power of the States to Make Compacts*, 31 YALE L.J. 635, 636 (1922). Notwithstanding the seemingly mandatory requirement of congressional consent, the Supreme Court has made clear that many such agreements or compacts among states do not require congressional approval. *See, e.g.*, Virginia v. Tennessee, 148 U.S. 503 (1893); New Hampshire v. Maine, 426 U.S. 363 (1976); United States Steel Corporation v. Multistate Tax Commission, 434 U.S. 452 (1978). Interstate compacts do not require congressional consent if they do not "enhance the political power of the member States in a way that encroaches upon the supremacy of the United States." *United States Steel Corp.*, 434 U.S. at 472.

leading to litigation over its right to do so?[4] And who would have predicted when the Multistate Tax Compact was formed in 1967 that the adoption of an income tax apportionment formula by a non-party state would, three decades later, cause the Compact states to abandon a different apportionment formula that had been integral to the Compact from its inception, leading to multiple lawsuits challenging their authority to do so?[5]

It should not be surprising that the passage of time can cause even the most well-reasoned and carefully written compact to become destabilized in a much different economic or legal environment than existed when it was written. When that occurs, it isn't easy to "fix" the compact to address the problem. Interstate compacts are often considered contracts.[6] If they were private contracts, the parties to the contract would always be free to modify it. But because interstate compacts are also statutes, modifying the compact is no easy task. First, the compact must provide a method to modify it. And then the legislature in each state would need to enact a statute that makes the change. The situation is even more complicated if the compact is a congressionally approved compact like the Waterfront Compact. Such compacts constitute federal law.[7] Congress would usually need to approve any change to such a compact.[8] If the compact provides no mechanism to resolve the problem, the compact may face an existential crisis – states may determine the only solution is to withdraw. This is precisely what happened with the Waterfront Compact and the Multistate Tax Compact. This Article explores the derivation, causes and – at least in the case of the Multistate Tax Compact – the resolution of such a crisis.

While it is not possible to anticipate all the circumstances that could adversely affect a compact's continuing viability, it is possible to include certain tools in the compact that can help the states more nimbly adapt to those changed circumstances than through the vagaries of litigation. The Article will explore some of those tools.

Part II of the Article will recount a brief history of the New York Waterfront Commission Compact and the Multistate Tax Compact. Part III will describe the developments that led to the litigation that threatened each Compact's continuing viability. Part IV will discuss the recent litigation that threatened both compacts and the deficiencies in each compact that made litigation likely. Part V will suggest some legal tools that future compact drafters might consider to reduce the likelihood of such destabilizing litigation occurring. Part VI will offer a brief conclusion.

II.

[4] Waterfront Commission of N.Y. Harbor v. Murphy, 429 F. Supp. 3d 1 (D.N.J. 2019), *rev'd and remanded for dismissal*, 961 F. 3d 234 (3d Cir. 2020), *cert. denied* No. 20 – 772, -- S. Ct. --, 2021 WL 5434352(2021).
[5] Moorman Manufacturing Company v. Bair, 437 U.S. 267 (1978); Gillette Commercial Operations v. Dep't. of Treasury, 878 N.W. 2d 891 (Mich. App. 2015), *appeal denied* 880 N.W. 2d 230 (MI 2016), *cert. denied* 137 S. Ct. 2157 (2017); Gillette Company v. Franchise Tax Board, 363 P. 3d 94 (CA 2015), *cert. denied* 137 S. Ct. 294 (2016); Kimberly-Clark Corporation v. Commissioner of Revenue, 880 N.W. 2d 844 (Minn. 2016), *cert. denied* 137 S. Ct. 598 (2016); Graphic Packaging Corp. v. Hegar, 538 S.W. 3d 89 (Texas 2017); Health Net. Inc. v. Dep't. of Revenue, 415 P.3d 1034 (OR 2018).
[6] *See, e.g.*, Green v. Biddle. 21 U.S. (8 Wheat.) 1, 92-93 (1823).
[7] Cuyler v. Adams, 449 U.S. 433 (1981).
[8] Congress has in effect preauthorized New York and New Jersey to amend the Waterfront Compact by both states enacting mutual legislation. Waterfront Commission Compact, N. Y.-N. J., Pub. L. No. 83-252, 67 Stat. 541 (1953).

A. History of NY Waterfront Commission Compact

"I coulda' had class. I coulda' been a contender. I could've been somebody."[9]

The New York Waterfront Commission Compact is unique among the more than 200 interstate compacts that currently exist.[10] It is the only one whose purpose – combating corruption on the New York Waterfront – was the subject of an Academy Award-winning motion picture.[11]

The Compact was formed in 1953 by the states of New York and New Jersey by the enactment of mutually authorizing statutes in each state.[12] Congress gave its consent to the Compact on August 12, 1953.[13]

Prior to the formation of the Compact, both the states of New York and New Jersey and the federal government conducted major investigations into the influence of organized crime in the Port of New York.[14] The reports documented pervasive criminal control by the International Longshoremen's Association locals over labor management relations in the port.[15] As noted by the New Jersey Supreme Court, this criminal control extended to all aspects of operations – hiring, training, firing, loading, and unloading.

> "[C]riminals, racketeers and hoodlums had acquired a stranglehold upon port activities through their control of 64 positions in a large number of the 64 locals of the International Longshoremen's Association (eleven of the locals were New Jersey locals), which numbered in its membership not alone the longshoremen but as well the pier superintendents and hiring agents who employed and supervised their work; and the membership also included the so-called "public loaders" who intruded an apparently unnecessary

[9] ON THE WATERFRONT (Columbia Pictures Corporation 1954) (quoting Marlon Brando as Terry Malloy).
[10] "[T]here are more than 200 current compacts that address subjects as varied as social services delivery; child placement; education policy; emergency and disaster assistance; corrections, law enforcement, and supervision; professional licensing; water allocation; land use planning; environmental protection and natural resources management; and transportation and urban infrastructure management."
Jeffrey B. Litwak & John Mayer, *Developments in Interstate Compact Law and Practice 2020,* 51 URBAN LAWYER 99, 100 (July 2021),
https://www.americanbar.org/groups/state_local_government/publications/urban_lawyer/2021/51-1/ (last visited Sept. 2, 2021).
[11] ON THE WATERFRONT (Columbia Pictures Corporation 1954). History and awards available at *On the Waterfront*, WIKIPEDIA, https://en.wikipedia.org/wiki/On_the_Waterfront (last visited August 23, 2021).
[12] N.J. STAT. ANN. 32:23-1, *repealed by* 2017 N.J. Sess. Law Serv. Ch. 324; N.J. STAT. ANN. §§32:23 – 229, N.Y. C.P.L.R. § 9801 (CONSOL. 2012).
[13] Waterfront Commission Compact Act, Pub. L. 252, 67 Stat. 541 (1953). The Compact, as approved by Congress is available at https://www.wcnyh.gov/docs/wcnyh_act.pdf (hereinafter "Waterfront Compact").
[14] Hazelton v. Murray, 121 A.2d 1, 4 (N.J. 1956).
[15] *Id.*

> and uneconomic activity into the work of transferring cargo between pier and truck."[16]

Article I of the Compact details the findings in support of the formation of the Compact:

> "1. The States of New Jersey and New York hereby find and declare that the conditions under which waterfront labor is employed within the Port of New York district are depressing and degrading to such labor, resulting from the lack of any systematic method of hiring, the lack of adequate information as to the availability of employment, corrupt hiring practices and the fact that persons conducting such hiring are frequently criminals and persons notoriously lacking in moral character and integrity and neither responsive or responsible to the employers nor to the uncoerced will of the majority of the members of the labor organizations of the employees; that as a result waterfront laborers suffer from irregularity of employment, fear and insecurity, inadequate earnings, an unduly high accident rate, subjection to borrowing at usurious rates of interest, exploitation and extortion as the price of securing employment and a loss of respect for the law; that not only does there result a destruction of the dignity of an important segment of American labor, but a direct encouragement of crime which imposes a levy of greatly increased costs on food, fuel and other necessaries handled in and through the Port of New York district."[17]

Article II of the Compact sets forth relevant definitions of terms used elsewhere in the Compact. Article III of the Compact establishes the Waterfront Commission of New York Harbor, consisting of two members, one of whom is to be appointed by the governor of each member state. Article III provides further that "the commission shall act only by unanimous vote of both members." As will be discussed *infra,* the Commission's structure as required by Article III inevitably led to paralysis and stalemates in governing the Commission. Ultimately, it led to New Jersey's unilateral attempt to withdraw from the Compact and the litigation that followed.[18]

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[16] *Id. Hazelton* contains a thorough discussion of the history of corruption in the Port that gave rise to the Compact.

[17] Waterfront Compact, *supra* note 13, Article I, Findings and Declarations. Waterfront Compact, Article I, Paragraph 2 found the practice of so called "public loaders" at piers and other waterfront terminals added unnecessary costs and served no valid economic purpose. Additionally, Article VII of the Compact prohibited the continued use of public loaders within the Port.

[18] This is not to say that compacts between two states inevitably lead to paralysis. Ballotpedia lists approximately 100 bistate compacts formed between 1785 and 2014. *Chart of Interstate Compacts*, BALLOTPEDIA, https://ballotpedia.org/Chart_of_interstate_compacts (last visited Aug. 25, 2021). Many of these govern boundaries between the two states, bridges over waters between the two or the use of water between upstream and downstream states. It is in the mutual interest of states in such bistate agreements to reach a compromise on disputed issues. Indeed, the model for the Waterfront Compact is a two-state compact consisting of identical member states and governing transportation between the two over, under, and through the Port of New York. New York – New Jersey Port Authority Compact of 1921. N.J. STAT. ANN.§ 32:1-1 et seq., 32:2-1 et seq. (2021). Statute is available at https://apps.csg.org/ncic/Compact.aspx?id=141 (last visited Aug. 25, 2021). However, there is a major difference between the Port Authority and the Waterfront Commission. The nature of the Port Authority's regulated activity

Article IV of the Compact establishes the general powers of the Commission. Articles V through X govern the activities of specific classes of employees that work at the Port. Article XI establishes procedures for hearings and review of determinations. Article XII sets up employment information centers in New York and New Jersey to replace the abusive "shape-up" hiring procedures that fostered much of the criminal activity. Article XIII provides that the Commission's expenses would be paid largely by annual assessments on port employers. Article XIV governs procedures for prosecutions and penalties for violations. Article XV protects the right of Port workers to collectively bargain.[19]

Most relevant to this article is Article XVI, which provides that "[a]mendments and supplements to this compact to implement the purposes thereof may be adopted by the action of the Legislature of either State concurred in by the Legislature of the other."[20] There are no provisions for dissolving the Compact or for mediation, arbitration, or some other method of alternative dispute resolution when the two states are at an impasse. Inevitably, that eventually led to the current crisis where New Jersey seeks to dissolve the Compact, the Commission objects, and New York is silent.

B. History of Multistate Tax Compact

While the Waterfront Compact arose from the threat of criminal activity in the Port of New York, the Multistate Tax Compact arose from the threat of federal encroachment on the states' sovereign authority to tax income from a multistate business.

guarantees that these two states have an equal interest in the Port Authority's continued success. The Port Authority largely governs revenue generating transportation activities in both states. Those activities consist of three airports, bridges, tunnels, and the PATH (Port Authority Trans Hudson) transit system connecting the two states, in addition to shipping activities in the Port of New York. *See* THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, *2020 Annual Report of the Port Authority of New York and New Jersey*, *passim*, available at https://www.panynj.gov/corporate/en/financial-information/annual-report.html (last visited Sept. 30, 2021). Even in 2020 when the Port Authority sustained significant losses due to the economic shutdown caused by Covid-19, the Port Authority still realized gross operating revenue of over $4 billion. *Id.* at 162. Both states have identical financial interests in fostering the port activities that generate this specific revenue stream. In contrast, the Waterfront Commission is funded by annual assessments on port employers. Waterfront Compact, *supra* note 13, Article XIII. In 2020, those assessments totaled a bit over $17 million. *See* WATERFRONT COMMISSION OF NEW YORK HARBOR, *2019 – 2020 Annual Report of the Waterfront Commission of New York Harbor* (2020), available at http://www.wcnyh.gov/docs/2019-2020_WCNYH_Annual_Report.pdf (last visited on Sept. 30, 2021). These regulatory assessments are not designed to and cannot increase port activities. Therefore, the assessment cannot encourage bistate cooperation in regulating labor at the port. Furthermore, the passage of time has dramatically altered the location of the regulated labor management activities that are the subject of the Waterfront Compact. Today, the overwhelming portion of shipping activities and the labor that supports those activities are conducted on the New Jersey side of the Port. *Murphy*, 961 F. 3d 234, 236, *supra* note 4. This gives New Jersey a disproportionate political and economic interest in the commercial success of those activities. On the other hand, New York has a greatly attenuated direct interest in those activities.

[19] *See generally* Waterfront Compact, *supra* note 13, Article IV-XV.

[20] Waterfront Compact, *supra* note 13, Art. XVI.

A persistent theme in state tax jurisprudence has been the question of whether the states can, consistent with the Commerce Clause, tax income derived from a multistate business.[21] Even though the Commerce Clause is silent on the question, the Supreme Court has long ruled that "interstate commerce shall be free from any direct restrictions or impositions by the States."[22] For many years, the Court struck down state taxes "on the privilege of doing business" to the extent that the tax base included receipts from interstate business operations, notwithstanding that the taxes at issue imposed no "direct restrictions or impositions" on interstate commerce.[23] The Court looked "only to the fact that the incidence of the tax is the 'privilege of doing business'; [the rule] deems irrelevant any consideration of the practical effect of the tax."[24] On the other hand, taxes that the Court found to have been imposed on the net income of an interstate business were routinely sustained, even if the tax base included the identical receipts from interstate business operations that were barred by *Spector* and *Freeman.* "[I]t has been established since 1918 that a net income tax on revenues derived from interstate commerce does not offend constitutional limitations upon state interference with such commerce."[25]

N.W. States Portland Cement broke no new doctrinal ground.[26] The Court acknowledged *Spector* and *Freeman* as controlling law.[27] It merely held that the taxes in question were imposed on the corporations' net income and not on the privilege of doing business. Therefore, the states were free to impose a non-discriminatory and properly apportioned tax that included receipts from interstate commerce in the tax base.[28]

Despite its seemingly anodyne holding, *N.W. States Portland Cement* provoked a tremendous backlash, resulting in congressional action.[29] First, Congress enacted Pub. L. 86 – 272, 15 U.S.C. §381 (a), which prohibits states from imposing a net income tax where the only activity in the state is the solicitation of sales fulfilled from outside the state.[30] Second, Congress "authorized a study for the purpose of recommending legislation establishing uniform standards to be observed by the States in taxing income of interstate businesses."[31] The study, known as the

[21] The Commerce Clause of the United States Constitution vests Congress with the exclusive authority "to regulate commerce with foreign nations, *and among the several states*, and with the Indian tribes." U.S. CONST. art 1, § 8, cl. 3 (emphasis added).
[22] Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959) (citing Gibbons v. Ogden, 22 U.S. 1 (1824)).
[23] Spector Motor Serv. v. O'Conner, 340 U.S. 602 (1951); *see also* Freeman v. Hewitt, 329 U.S. 249 (1946).
[24] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 (1977).
[25] *Nw. States Portland Cement*, 358 U.S. at 458-59.
[26] Spector and Freeman were ultimately overruled by Complete Auto. In *Complete Auto,* the Court recognized that the distinction between taxes imposed on the privilege of doing business and taxes imposed on net income derived from interstate commerce exalted form over substance and had led to great confusion among the courts, the states, and taxpayers. *Complete Auto*, 430 U.S. at 285. *Complete Auto* ruled that the states could impose a non-discriminatory, properly apportioned tax on income derived from interstate business, regardless of how the tax was defined. *Id.* at 287-89.
[27] *Nw. States Portland Cement*, 358 U.S. at 458.
[28] *Id.* at 452.
[29] *United States Steel Corp.*, 434 U.S. at 455-56.
[30] The instate activity in *Nw. States Portland Cement* consisted largely of in-state solicitation for sale orders that were filled from outside the state. *Nw. States Portland Cement*, 358 U.S. at 454-56; *see generally*, Pub. L. 86 – 272, 15 U.S.C. § 381 (a).
[31] *United States Steel Corp.*, 434 U.S. at 455.

"Willis Report" for the chair of the Judiciary Committee Special Subcommittee on State Taxation of Interstate Commerce, recommended a uniform two-factor apportionment formula consisting of the amount of property and payroll in each state, as well as a blanket nexus standard that limited income tax jurisdiction to states in which a business had either real property or payroll.[32] The study was published in 1964 and 1965.[33] Although proposed legislation was introduced several times, Congress has not enacted any legislation dealing with the subject.[34]

The Willis Report aroused serious state concerns that the federal government would impose limitations on state authority to tax a multistate business. "Most states objected to the loss of sovereignty inherent in the Willis Report recommendations. Some states also feared the proposals would cause lost revenue."[35] Therefore, the National Association of Tax Administrators convened an "unprecedented" special meeting in January 1966, to consider the creation of a multistate tax compact to address the Willis Report's concerns and head off federal legislation.[36]

A draft of the Compact was presented to the states in January 1967.[37] By June 1967, nine states had enacted the Compact into law.[38] The Compact has been considered by Congress on several occasions but has never received congressional consent.[39]

The Compact, as originally drafted, consisted of the following Articles.[40] Article I establishes that the purpose of the Compact is to:

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[32] *Gillette*, 363 P.3d at 97, *cert. denied* 137 S. Ct. 294 (2016); *see also* "Apportionment, under which the measure of a tax is divided by formula, is based on the use of selected factors for attributing the tax base to the states in which the taxpayer uses its property, carries on its activity, or earns income." JEROME R. HELLERSTEIN, WALTER HELLERSTEIN, & JOHN A. SWAIN, STATE TAXATION § 8.05 (3d. ed. 2021); "Nexus in this context is jurisdiction to tax. Before a state may impose its tax on a multistate business, there must be sufficient minimum contacts, or nexus, with the taxpayer and with the activities the state seeks to tax. These requirements derive both from the Commerce Clause and from the Due Process Clause of the 14th Amendment." *See* JEROME R. HELLERSTEIN, WALTER HELLERSTEIN, & JOHN A. SWAIN, STATE TAXATION § 6.02 (3d. ed. 2021). For a discussion of corporate income tax nexus principles as applied to intangible property, *see* Sheldon H. Laskin, *Only A Name? Trademark Royalties, Nexus, and Taxing That Which Enriches*, 22 Akron Tax. J. 1 (2007).

[33] *United States Steel Corp.*, 434 U.S. at 456 and n. 3.

[34] *Id*. at n. 4.

[35] *Gillette*, 363 P.3d at 97.

[36] MULTISTATE TAX COMM., *First Annual Report, Period Ending December 31, 1968*, p. 1, available at https://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY67-68.pdf (last visited August 25, 2021).

[37] *Id*. at 2.

[38] *Id*.; *see also Member States*, MULTISTATE TAX COMMISSION (last visited July 18, 2021), https://www.mtc.gov/The-Commission/Member-States. The membership of the Compact has fluctuated over the years. Currently sixteen states are compact members who have enacted the Compact into law. Eight states are sovereignty members who endorse the purposes of the Compact. Twenty-six states are associate members who participate in some of the Commission's projects.

[39] *United States Steel Corp.*, 434 U.S. at 458, n. 8.

[40] THOMSON REUTERS, *The Multistate Tax Compact*, available at https://apps.csg.org/ncic/PDF/Multistate%20Tax%20Compact.pdf (last visited August 25, 2021) (hereinafter "*Model Compact*"). In 2015, the Commission passed a resolution modifying article IV of the model Compact to delete the equally weighted three factor formula and to allow the adopting member state to replace it with any state apportionment formula; *see Model Compact*, art. IV, § 9, as revised by the Multistate Tax Com. on July 29, 2015 (last visited Aug. 25, 2021); *See Gillette*, 363 P. 3d at 98, n. 4, *cert. denied* 137 S. Ct. 294 (2016).

> "1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
> 2. Promote uniformity or compatibility in significant components of tax systems.
> 3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
> 4. Avoid duplicative taxation."[41]

Article II defines terms used in the Compact. Article III establishes that a taxpayer whose income is subject to apportionment and allocation for tax purposes in a compact state may elect to apportion and allocate its income either in the manner provided by the laws of such state without regard to the compact or in accordance with Article IV.[42]

As germane to this article, the original model Article IV provided for an equally weighted three factor apportionment formula (property, payroll, and sales) for a multistate taxpayer to use to apportion and allocate its business income in each compact state.[43] It states, "All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three."[44] Article IV also defined "business income" and "nonbusiness income" for apportionment and allocation purposes and set forth rules to source certain items of income among the states.[45]

Article V established a credit available to purchasers subject to use tax for sales tax previously paid on the purchase of the same tangible personal property. It also created a multistate resale or other exemption certificate that relieved vendors who accepted the same for liability for unpaid sales or use tax.[46]

Article VI established the Commission and provided that the head of member state tax agencies would be the member from each state.[47] Article VI also established procedures for

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[41] The use of an interstate compact to address the problems of multistate taxation that Article I seeks to redress was anticipated by Professors Frankfurter and Landis in their seminal article on the benefits of interstate compacts. "[A]s between the States there is much need for simplification, for avoidance of litigation, for equitable apportionment of common taxing resources, which … may affect the total of taxation and the inconveniences incident in the administration of our tax laws." F. Frankfurter and J. Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 YALE L.J. 685, 704 (1925).
[42] *See generally*, *Model Compact*, *supra* note 40, art. II-IV.
[43] *See id.*
[44] MULTISTATE TAX COMMISSION, *Model Multistate Tax Compact*, art. IV, available at https://www.mtc.gov/getattachment/The-Commission/Multistate-Tax-Compact/Model-Multistate-Tax-Compact-with-Recommended-Amendments-to-Art-IV.PDF.aspx (last visited August 21, 2021).
[45] "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations. *Id*., Article IV.1(a). "Nonbusiness income" means all income other than business income. *Id.*, Article IV.1(e).
[46] *Id*. art. V.
[47] *Id.* art. VI.

Commission meetings, the selection of officers, the adoption of bylaws and to make annual reports to the Governor and legislature of each member state.[48] It also provided for the creation of Commission committees.[49] Further, it empowered the Commission to:

> "(a) Study state and local tax systems and particular types of state and local taxes.
> (b) Develop and recommend proposals for an increase in uniformity or compatibility of state and local tax laws with a view toward encouraging the simplification and improvement of state and local tax law and administration.
> (c) Compile and publish such information as would, in its judgment, assist the party States in implementation of the compact and taxpayers in complying with state and local tax laws.
> (d) Do all things necessary and incidental to the administration of its functions pursuant to [the] compact."[50]

Finally, Article VI provides for the Commission's financing.[51]

Article VII authorizes the Commission to promulgate uniform regulations for the administration of the tax laws of member states.[52] However, "[t]hese regulations are advisory only. Each member State has the power to reject, disregard, amend, or modify any rules or regulations promulgated by the Commission. They have no force in any member State until adopted by that State in accordance with its own law."[53]

Article VIII authorizes the Commission to conduct multistate taxpayer audits but only if the member state has passed separate authorizing legislation and expressly requests the audit.[54]

Article IX authorized the Commission to establish a regulation to arbitrate disputes concerning apportionments and allocations.[55] "However, the Commission has never adopted such a regulation and no arbitration provisions are currently effective."[56]

Article X of the Compact is central to the theme of this law review article. It provides that the Compact would enter into force when enacted into law by any seven states. It would become effective in any other state upon its enactment in that state. Unlike the Waterfront Compact, Article X provides that "any party state may withdraw from [the Multistate Tax

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[48] *Id*.
[49] *Id*.
[50] *Id*. art. VI.3(a)-(d).
[51] *Id*. art. VI.
[52] *Id*. art. VII.
[53] *United States Steel Corp.*, 434 U.S. at 457.
[54] *Model Multistate Tax Compact*, *supra* note 44, art. VIII.
[55] *Id.* art. IX.
[56] *Gillette*, 363 P.3d at 102. California, one of the principal early members of the Compact, initially refused to join the Compact if the arbitration provision was implemented. California feared Commission arbitration would displace California institutions as the forum for tax disputes and would lead to erosion of the State's tax base.

Compact] by enacting a statute repealing the same."[57] However, there are no provisions in the Compact to govern state amendments to the Compact.

Article XI makes clear that nothing in the Compact affects the powers of the states to fix rates of taxation, impose fees to register a motor vehicle or impose a tax on motor fuel (other than a sales tax) or to withdraw or limit the jurisdiction of any state or local court or administrative agency or to supersede or limit the jurisdiction of the federal courts.[58] Finally, Article XII provides that the Compact shall be liberally construed to effectuate its purposes.[59] Article XII also contains a severability clause.[60]

III.

"*The only constant in life is change.*"[61]

A. Early Years, Early Victories

Both the Waterfront Commission and the Multistate Tax Compacts faced early challenges to their legality. And both withstood those challenges.

1. The Waterfront Compact

The Waterfront Compact's constitutionality was challenged almost immediately after it went into effect. In 1954, the United States Supreme Court sustained two federal court decisions adjudging that the Compact Act was a reasonable exercise of the police powers of the States of New York and New Jersey.[62] In *Hazelton v. Murray*, the New Jersey Supreme Court held that a provision of the Compact barring individuals who were convicted of certain crimes from holding union office was constitutional.[63] The Court held that union members were not denied equal protection of the laws in that their rights under the National Labor Relations Act were not impaired.[64]

Four years later, the United States Supreme Court ruled that a New York law that implemented the Compact and barred any person who had been convicted of a felony from soliciting or receiving waterfront union dues was not inconsistent with the National Labor Relations Act.[65]

2. The Multistate Tax Compact

[57] *Model Multistate Tax Compact*, supra 44, art. X.2.
[58] *Id*., art. XI.
[59] *Id*., art. XII.
[60] *Id*.
[61] Heraclitus of Ephesus (C. 535 – c. 475 B.C.).
[62] *Linehan v. Waterfront Com. of N. Y. Harbor*, 116 F. Supp 683, 684 (S.D.N.Y. 1953); *Staten Island Loaders, Inc. v. Waterfront Com.*, 117 F. Supp. 308, 311 (S.D.N.Y. 1953), *aff'd without opinion* 347 U.S. 439 (1954).
[63] *Hazelton v. Murray*, 21 N.J. 115, 117 (1956).
[64] *Id.* at 125-27.
[65] De Veau v. Braisted, 363 U.S. 144, 152-54, 160 (1960).

In *United States Steel Corporation v. Multistate Tax Commission*, the Supreme Court ruled that the Multistate Tax Compact was valid notwithstanding the failure of Congress to approve it.[66] The Court ruled that the subject matter of the Compact did not require congressional approval because it didn't tend to encroach upon or interfere with federal supremacy.

> This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover, … each State is free to withdraw at any time.[67]

B. Storm Clouds

1. The Waterfront Compact

There is something absurd, in supposing a Continent to be perpetually governed by an island.[68]

Ironically, the seeds of the Compact's current existential crisis were planted at the very beginning of the Compact's history. They took the form of containerized shipping.

> "On April 26, 1956, a crane lifted fifty-eight aluminum truck bodies aboard an aging tanker ship moored in Newark, New Jersey. Five days later, the *Ideal-X* sailed into Houston, where fifty-eight trucks waited to take on the metal boxes and haul them to their destinations. Such was the beginning of a revolution."[69]

Containerized shipping would radically transform the nature of the shipping industry throughout the world. In the Port of New York, it would cause the industry to largely move across the Hudson River from New York to New Jersey, leading to its greatly curtailed political and economic role in the former and its drastically expanded political and economic role in the latter.

The Port of New York was showing serious problems even before the advent of containerized shipping.[70] It was certainly true that New York handled about one-third of US seaborne imports and exports in the early 1950s, much of which was high-value freight.[71] This success masked some profoundly serious deficiencies.[72] The city's piers were located along the

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[66] *United States Steel Corp.*, 434 U.S. 466-68.
[67] *Id.* at 473.
[68] THOMAS PAINE, *Common Sense, in The Writings of Thomas Paine Vol. I* 67, 93 (Moncure Daniel Conway ed., G.P. Putnam's Sons 1894) (1776).
[69] MARC LEVINSON, *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger*, 1 (PRINCETON UNIV. PRESS 2d ed. 2016).
[70] *Id.* at 102-04.
[71] *Id.* at 102.
[72] *Id.*

Hudson and East Rivers in Manhattan and the East River in Brooklyn.[73] But prior to containerized shipping, freight was carried overland by train. And the main train connections ended in New Jersey.[74] Freight bound for the Port of New York had to be offloaded from the trains, loaded on barges, and pulled by tugboat across the Hudson to New York.[75] The only reason this was economically viable was that the Interstate Commerce Commission essentially required the railroads to provide barge service for free— they could not charge more for freight transported to New York City than they could for freight bound for New Jersey.[76]

Once in the city, the freight was again offloaded and reloaded onto trucks.[77] Those trucks then had to navigate the narrow and congested streets of Manhattan and the East River Bridges to reach the docks in Manhattan and Brooklyn.[78]Additional congestion at the piers resulted in long waits before the trucks could be unloaded and the freight reloaded onto the ships.[79] Each step of the antiquated process added delay and, above all, cost.[80]

Even worse, the port facilities were ancient and literally falling into the water. Many of the piers had been constructed in the 1870s.[81] The piers even faced the wrong way. Designed for a time when ships were tied up in port for long periods, the narrow piers pointed into the harbor, requiring ships to turn ninety degrees from the channel and point their bows toward the shore.[82]This of course meant that departing ships had to reverse the process, adding considerable time for departures.

As early as the late 1940s, The Port Authority of New York[83] offered to acquire both the city's docks and all private docks and warehouses as well and modernize them.[84] But both the Longshoremen's Union and the City pushed back. Neither wanted to lose power and influence to the Port Authority.[85] However, the city of Newark, New Jersey saw an opportunity and seized it. In 1947, Newark agreed to lease its decrepit municipal docks and its airport to the Port Authority, which spent $11 million between 1948 and 1952 to dredge channels and rebuild wharves.[86]Then it got into the steamship terminal construction business.

First, the Port Authority constructed a terminal for the Waterman Steamship Company, which moved its terminal from Brooklyn to New Jersey.[87]"The Waterman Terminal would have a fifteen-hundred-foot wharf running parallel to the shore for faster docking and easier loading –

[73] *Id.*
[74] *Id.*
[75] *Id.* at 103.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 104.
[81] *Id.* at 110 – 111.
[82] *Id.* at 110
[83] Currently the Port Authority of New York and New Jersey. *Port History*, PORT AUTHORITY NY NJ, https://www.panynj.gov/port-authority/en/about/History/port-history-history-about.html (last visited Oct. 28, 2021).
[84] LEVINSON, *supra* note 69, at 112.
[85] *Id.* at 112.
[86] *Id.* at 113.
[87] *Id.*

a feature no New York City pier could match."[88] The next Port Authority contract sealed New York City's demise as an international port, and it seemingly didn't involve shipping at all. The Port Authority built a trucking terminal for McLean Trucking in Port Newark.[89] The Port Newark location was ideal for McLean as it had plenty of room for trucks along the Newark waterfront and offered easy access to rail connections and the New Jersey Turnpike, which had recently opened.[90] Three years later, Malcolm McLean's long-term strategy in locating in New Jersey became apparent when he commissioned the *Ideal-X* to haul 58 truck containers from his Port Newark terminal to Houston. McLean didn't intend to just drive trucks from his terminal. He intended to ship them.[91]

The Port Authority continued to build terminals in Port Newark throughout the early 1950s.[92]Then in December 1955, New Jersey governor Robert Meyner announced that the Port Authority would develop a 450-acre tract of tidal marsh south of Port Newark.[93] The resulting Port Elizabeth was the largest port project ever undertaken in the United States.[94] It was planned to accommodate twenty-five oceangoing vessels at once, enabling New Jersey to handle more than one-quarter of all general cargo in the Port of New York, and in containers.[95]

Belatedly, New York made some sputtering and anemic efforts to catch up.[96] The Port Authority also showed some temporary interest in renovating twenty-seven outmoded piers in Brooklyn into twelve modern ones.[97] But it was too late. Containerized shipping had eliminated the need to transport manufactured goods any further than New Jersey to ship from the Port of New York.[98] By the mid '60s, New York gave up trying to compete for port business. The old docks are long gone, replaced largely with recreational facilities.[99]

The demise of New York City as a commercial port meant that the Waterfront Compact's raison d'etre was in jeopardy. The Compact had been written when the New York shipping industry truly was a bistate endeavor. Trains brought freight to New Jersey and barges transported it to New York from where it was shipped throughout the world. It makes sense to regulate a bistate industry with a bistate interstate compact. What Professors Landis and

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[88] *Id.*
[89] *Id.*
[90] *Id.* at 113 – 114.
[91] Upon his death in 2001, Malcolm McLean was eulogized by former Secretary of Transportation Norman Mineta as "[a] true giant, [McLean] revolutionized the maritime industry in the 20th century. His idea for modernizing the loading and unloading of ships, which was previously conducted in much the same way the ancient Phoenicians did 3,000 years ago, has resulted in much safer and less expensive transport of goods, faster delivery and better service. We owe much to a man of vision, the Father of Containerization." Scott S. Smith, *Malcom McLean Made Waves With Shipping Containers*, INVESTOR'S BUSINESS DAILY (June 25, 2014, 1:52 PM), https://www.investors.com/news/management/leaders-and-success/malcom-mclean-invented-better-shipping-containers/.
[92] LEVINSON, *supra* note 69, at 114.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 114 – 115.
[96] *Id.* at 115 – 121.
[97] *Id.* at 119 – 120.
[98] *Id.* 121 – 126.
[99] *Id.* at 127 – 130.

Frankfurter wrote of the Port Authority of New York – New Jersey in 1925 was equally true of the Waterfront Commission Compact in 1953.

> "From the point of view of geography, commerce, and engineering, the Port of New York is an organic whole. Politically, the port is split between the law-making of two States, independent but futile in their respective spheres. The scarcity of land and mounting commerce have concentrated on the New York side of the Hudson River the bulk of the terminal facilities for foreign commerce, while it has made the Jersey side … the terminal and breaking-up yards for the east-and-west-bound traffic."[100]

But after the New Jersey ports were constructed and containers replaced trains and barges, the industry simply was no longer a bistate industry. Instead, it is now two separate ports, one in New York and a much larger one in New Jersey, that operate independently of each other,

> "Since the birth of containerization in 1956, the marine terminals on the New Jersey side of the port have grown significantly in comparison to the New York terminals. Today more than 82 percent of the cargo and 82 percent of the work hours are on the New Jersey side of the port. The port and freight industry in New Jersey alone supports more than 143,000 direct jobs and 250,000 total jobs, nearly $14.5 billion in personal income, over $20 billion in business income, and nearly $4.9 billion in federal, State, and local taxes, of which State and local taxes account for $1.6 billion."[101]

In contrast, there are approximately 700 New York residents who work in the New York port.[102] They primarily work at the Global Container Terminal in Staten Island, the Red Hook Container Terminal in Brooklyn, and the Manhattan and Brooklyn cruise ship terminals.[103]

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[100] Frankfurter & Landis, *supra* note 41, at 697.

[101] N.J. STAT. ANN. § 32:23-229 (a).

[102] Declaration of Walter Arsenault, Executive Director of the Waterfront Commission of New York Harbor, Waterfront Commission of New York Harbor v. Governor of New Jersey, United States Court of Appeals for the Third Circuit Case No. 19 – 2458, Appx. Vol. 2 at 89 (on file with author) (hereinafter "Arsenault Declaration"). Executive Director Arsenault maintains "the Port is a unified whole, with workers, companies, and freight operating in, and moving through, both states." *Id.* at 88. But the same can be said of Domino's Pizza, which operates pizzerias on both sides of the Hudson and can exchange product and employees accordingly. No one would say Domino's Pizza is a bistate industry. Rather, it is a local industry in each state that sells the same products. It is clear from the preceding discussion in the text that the reason the Port of New York was considered a bi-state port prior to containerization was that the *same* freight had to be transported from New Jersey to New York for shipment. But containerization severed that essential connection. The freight that currently ships from New Jersey is wholly distinct from the freight that currently ships from New York. Today, it is more accurate to speak of two separate but adjacent ports, the larger one in New Jersey and the smaller one in New York.

[103] *Id.*

These numbers help explain the litigation positions of New Jersey and the Commission. The Compact is funded almost entirely by assessments on port employers.[104] Now that those employers are largely located in New Jersey, the assessments result in overwhelming political pressure on the New Jersey legislature.[105] The New York legislature is not under any comparable political pressure because there are so few New York assessed employers. Nor is New York under any fiscal pressure because of the assessments, as the Commission's operations are not funded through tax revenue. New York's seeming indifference to the Compact's fate is therefore entirely logical. Conversely, it makes perfect sense that New Jersey legislators have come to question whether the Waterfront Commission has any legitimate interest in continuing to regulate what is now largely New Jersey's port industry.

2. The Multistate Tax Compact

The existential threat to the Multistate Tax Compact, like the threat to the Waterfront Compact, was present at the beginning. As explained *supra*, Article IV of the Compact included an equally weighted three factor apportionment formula of property, payroll, and sales. This formula derived from the Uniform Division of Income for Tax Purposes Act (UDITPA) as promulgated by the Uniform Law Commission.[106] UDITPA was intended to provide a uniform method for states to apportion the income of multistate businesses.[107] But it was not widely accepted.[108] To fulfill the Compact's objectives – particularly to promote uniformity in taxation – the Compact incorporated the UDITPA formula in Article IV.[109] However, Article III of the Compact allowed taxpayers to elect to apportion income using either the UDITPA formula or any other apportionment formula allowed by the taxing state.

As late as 1977, the "vast majority of the income tax states" had adopted the UDITPA formula.[110] But deviations from this consensus were developing even earlier. The first member of the Compact to deviate from the UDITPA apportionment formula was Florida, in 1972. Notwithstanding that the UDITPA formula was contained in Article IV, the Compact membership unanimously ratified Florida's decision to mandate a different apportionment method.[111] A few years later, the United States Supreme Court rejected the Commission's

[104] Waterfront Commission Compact, N.J. STAT. ANN. §§32:23-56-23:23-61 (Article XIII Expenses).
[105] Speaking of their political influence, former New York Waterfront Commissioner Ronald Goldstock says, "I lived with this for 10 years (2008 – 2018) and I watched the Shipping Association and ILA buy New Jersey." Star-Ledger Editorial Board, *The Only Reason to Break Up the Waterfront Commission: Politics*, NJ.COM (March 29, 2021), https://www.nj.com/opinion/2021/03/the-only-reason-to-break-up-the-waterfront-commission-politics-editorial.html. Given the respective sizes of the New Jersey and New York ports, it is only natural that the Shipping Association and the ILA would have much more political influence in Trenton than in Albany irrespective of whether Commissioner Goldstock's characterization of that influence is accurate.
[106] *Gillette*, 363 P.3d at 96.
[107] *Id.*
[108] *Id.* at 97.
[109] Brief for Multistate Tax Commission as Amicus Curiae, Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), 1978 WL 207218, at *2.
[110] *Id.* at *24. Six years later, the United States Supreme Court described the UDITPA formula as a "benchmark against which other apportionment formulas are judged." Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 170 (1983).
[111] Graphic Packaging Corporation v. Hegar, 538 S.W.3d 89, 103 (Tex. 2017).

argument that the UDITPA apportionment formula was constitutionally required to assure non-discriminatory taxation.[112]

Moorman was a challenge by an Illinois based corporation to Iowa's single sales factor apportionment formula.[113] Illinois required a multistate business to use the UDITPA formula.[114] The nonuniform treatment of apportionment raised a real threat of double taxation. Assume two "mirror image" taxpayers, one based in a state that uses the UDITPA apportionment formula and the other in a state that uses only the sales factor in the apportionment formula, inevitably the former taxpayer will have combined apportioned income higher than the latter.[115] But the Court declined to rule that the single sales factor was constitutionally responsible for the double taxation.[116] As the *Moorman* Court pointed out, it was the lack of uniformity between the two factors that created the double taxation and not either apportionment formula standing alone.[117]

The attraction of single sales factor apportionment is by limiting the factors that go into the apportionment formula to sales, and all else being equal, businesses may be more likely to locate in the single factor state, because in-state property and payroll will not affect the company's tax in that state.[118] This attraction proved too tempting to resist. *Moorman* opened the floodgates to states, including Compact members, eventually adopting single sales factor apportionment as the exclusive apportionment method.[119] For quite a few years, taxpayers apportioned their income accordingly, until someone noticed that Article III allowed taxpayers to elect *either* the UDITPA formula or a different formula allowed by the state.[120] Before states moved away from UDITPA, the election was essentially a dead letter in most states – UDITPA was the only allowable apportionment formula. However, with both UDITPA and the single sales factor formula available, the election was suddenly meaningful. All taxpayers could now

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[112] *Moorman*, 437 U.S. at 277-80 (1978); Brief for the Multistate Tax Commission, *supra* note 109 at *22-23.
[113] Iowa was not a member of the Multistate Tax Compact. Brief for the Multistate Tax Commission, *supra* note 109, at footnotes 1 and 2.
[114] "It is, of course, true that if Iowa had used Illinois' three-factor formula, a risk of duplication in the figures computed by the two states might have been avoided." *Moorman*, 437 U.S. at 277.
[115] See Appendix for more detail on the apportionment formula problem.
[116] *Moorman*, 437 U.S. at 276.
[117] *Id*. at 278.
[118] Of course, if every state had a uniform apportionment formula, no matter how many factors, the apportionment factors would not affect locational decisions assuming everything else is equal. This is why the Commission had long advocated a uniform three factor formula. Brief for the Multistate Tax Commission, *supra* note94, at *24.
[119] The move from the UDITPA apportionment formula to single sales factor apportionment was not a linear progression. States experimented with various ways to give extra weight to the sales factor while trying to retain some version of the property factor. For the most part, the progression ended with the adoption of the single sales factor as the exclusive apportionment formula. The author has simplified the progression to tighten the narrative in this article. The Federation of Tax Administrators compiles an annual list of state tax apportionment formulae. The current list is available at *State Apportionment of Corp. Income*, FED'N OF TAX ADM'R (Jan. 2021), https://www.taxadmin.org/assets/docs/Research/Rates/apport.pdf. According to the list, only five states still maintain a pure three-factor apportionment formula. *Id*.
[120] For example, Minnesota enacted its more heavily weighted sales factor apportionment formula in 1983. Yet taxpayers did not seek to elect the Compact Article IV formula until 2013, by filing a refund claim for tax years 2007 through 2009. *Kimberly-Clark v. Commissioner of Revenue,* 880 N.W. 2d 844, 845. While the delay in Minnesota was more extreme than in the other states where taxpayers ultimately sought refunds, those taxpayers also did not avail themselves of the election for years after it would have been advantageous for them to have done so. See cases cited at note 153, *infra,* (hereinafter collectively referred to as "the Gillette cases").

choose the formula that produced the lowest amount of apportioned income in every state. A taxpayer with substantial property and/or payroll in a state would choose the single sales factor formula. The same taxpayer in another state, with little or no property and/or payroll would choose the three-factor formula. As a result, the states had to react to this tax planning strategy or risk both their revenue base and any hope of uniformity being threatened.[121]

IV. Bring in the Lawyers

1. The Waterfront Compact

I'm shocked … shocked … to find that gambling is going on in here.[122]

The final act in the Waterfront Compact drama began with corruption. But not the waterfront corruption the Compact had been designed to fight. This corruption was in the Waterfront Commission itself.

In August 2009, the New York State Inspector General issued a devastating report of its investigation into the Waterfront Commission of New York Harbor.[123] The report was a searing indictment of pervasive corruption, malfeasance, and nonfeasance at all stages of the Commission's operations. The investigation resulted in both the New York and the New Jersey Commissioner being replaced. The Executive Director resigned, and the General Counsel was terminated after a lengthy suspension.[124]

Even before the scandal broke, the two-commissioner structure, plus the requirement that any change to the composition of the Commission required complementary legislation in both states and approval by Congress had resulted in "stalemates and inaction."[125] In 2007, New Jersey passed legislation to amend the Compact, to divest the Commission of its discretion in opening or closing the longshoremen's register.[126] New York failed to enact corresponding legislation.[127]

In 2014, the New Jersey legislature enacted Joint Resolution No. 61, in which the State invited New York to pass legislation consistent with the 2007 legislation. New York did not do

[121] After single-sales factor apportionment became widespread, the election had the effect of allowing taxpayers to choose disuniform apportionment formulas in all Compact member states and thereby reduce their overall tax liability. "By creating a situation in which apportionment formulas are not uniform among the states, multistate corporations can minimize their aggregate tax liability for all the states in which they do business by ensuring that the tax cuts they receive in some states are not offset by tax increases in other states." Michael Mazerov, *The Single Sales Factor Formula: A Boon to Economic Development or a Costly Giveaway?*, CENTER ON BUDGET AND POLICY PRIORITIES, (Sept. 2005), https://www.cbpp.org/sites/default/files/archive/3-27-01sfp.pdf, p. 2 (last visited November 21, 2021).
[122] CASABLANCA (Warner Bros. 1942) (quoting Claude Rains as Captain Louis Renault).
[123] STATE OF N.Y. OFF. OF THE INSPECTOR GEN., INVESTIGATION OF THE WATERFRONT COMM'N OF N.Y. HARBOR (Aug. 2009), https://www.wcnyh.gov/news/IG%20Investigation_8-11-2009.pdf.
[124] *Id.* at 11.
[125] *Id.* at 6, n.4.
[126] Waterfront Commission of New York Harbor v. Murphy, 2018 WL 2455927 (D. N.J. 2018), *2 and n.4.
[127] *Id.*

so.[128] Finally, in 2017, the majority and minority leaders in the New Jersey legislature sent a letter to the majority leaders in the New York legislature, once again urging New York to pass legislation like New Jersey's 2007 legislation.[129] New Jersey complained that the Waterfront Commission's procedures for adding workers to the longshoremen's registry "unnecessarily places the nation's third busiest gateway of international maritime commerce at a competitive disadvantage and in economic jeopardy."[130] New Jersey noted that the most recent round of hiring took more than two and a half years to hire 822 new workers and blamed the longshoremen's registry procedures for the delay.[131]

Tellingly, the Commission's defense of its longshoremen's registry procedures is that there is not enough work at the New York terminals to keep New York port workers fully employed year-round. Therefore, they need to seek employment in New Jersey.[132] But this assertion supports the economic case for dissolving the Compact. As of June 30, 2020, there were 5,801 registered and licensed dock workers in the Port of New York.[133] The 700 New York residents employed at the port are only 12% of this total.[134] If there is not enough full-time employment in New York to keep 700 port workers fully employed in New York, this confirms that the New York port is but a minor appendage of the New Jersey port. In any event, it is not immediately apparent why those workers would be less likely to find employment in New Jersey if the longshoremen's register remained open indefinitely as New Jersey proposed.

New York did nothing in response to the 2017 letter. That was the last straw; New Jersey wanted out.

On January 15, 2018, outgoing New Jersey Governor Chris Christie signed into law Chapter 324 of the 2017 New Jersey Public Laws ("the Act").[135] The Act directed New Jersey's Governor to "notify the Congress of the United States, the Governor of the State of New York, and the [Commission], of the State of New Jersey's intention to withdraw from … the [Compact]".[136] Further, the Act declared that ninety days after such notice is given, the Compact and Commission would be dissolved.[137] The Act also provided that the New Jersey State Police would assume the Commission's responsibilities and assets in New Jersey.[138]

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[128] N.J. Assembly J. Res. No. 61 (Feb. 27, 2014); Waterfront Commission of New York Harbor v. Governor of New Jersey, Case No. 19 – 2458 (3d. Cir. 2020), Appx. Vol. 2 at 243.
[129] Letter from New Jersey Legislative Leadership to New York Majority Legislative Leadership (Feb. 10, 2017) (on file with author).
[130] *Id.*
[131] *Id.*
[132] Arsenault Declaration, *supra* note 102, Appx. Vol 2 at 89.
[133] *2019 – 2020 Annual Report of the Waterfront Commission of New York Harbor*, *supra* note 19, at 12.
[134] *See* Arsenault Declaration, *supra* note 102 (on file with author).
[135] 2017 N.J. Sess. Law Serv. Ch. 324.; N.J.S.A. 32:23–229 *et seq.*
[136] N.J.S.A. 32:23–230. Governor Christie had previously vetoed virtually identical legislation because, as he noted, he was "advised that federal law does not permit one state to unilaterally withdraw from a bi-state compact approved by Congress." Petition for A Writ of Certiorari, Waterfront Commission of New York Harbor v. Governor of New Jersey, United States Supreme Court No. 20 – 772, available at https://www.supremecourt.gov/DocketPDF/20/20-772/162651/20201204143740806_20-xxxx%20-%20Waterfront%20Commission%20of%20N.Y.%20Harbor%20v.%20Governor%20of%20N.J.%20-%20cert.%20petition.pdf (last visited August 25, 2021), at 9, n.2.
[137] *Id.* § 53:2-8. ("'Transfer date' means the 90th day following the notification by the Governor...").
[138] *Id.* § 53:2-9b(1).

The Act listed several reasons for New Jersey's actions.

> The commission has itself been tainted by corruption in recent years and, moreover, has exercised powers that do not exist within the authorizing compact, by dictating the terms of collective bargaining agreements of organized labor, and by requiring stevedoring companies to hire and retain independent inspectors to examine company operations …. Further, the commission … has over-regulated the businesses at the port …. [T]he commission has become an impediment to future job growth and prosperity at the port.[139]

On January 16, 2018, the Waterfront Commission filed suit against New Jersey Governor Murphy in the United States District Court for the District of New Jersey, seeking an injunction against the implementation of Chapter 324.[140]

The Commission argued that New Jersey could not unilaterally withdraw from the Compact because the Compact was silent as to how a single state could withdraw, and the Compact required concurrent legislation for any amendment. The district court agreed.[141] But the structure of the Compact caused both New Jersey and the Commission to assert legal positions that contradicted their behavior. As will be seen, New Jersey was arguing that it was out of the Compact but behaved as if it was in, while the Commission argued that New Jersey was in but behaved as if it was out.

The problem was the question of who had the authority to file suit on behalf of the Commission. The Compact states that the Commission "shall act only by unanimous vote of both members thereof."[142] For obvious reasons, the Commission could not obtain a unanimous vote of both members in this case. Instead, the Commission's General Counsel finessed the issue. Her argument was two-pronged. First, Art. IV of the Compact provides that the Commission's powers and duties could generally be exercised by its officers, employees, and agents.[143] Second, the Commission's bylaws gave her authority to handle legal duties as assigned by the Commission or the Executive Director.[144] Therefore, the Commission's General Counsel believed she had authority to retain outside counsel to file suit without first bringing the matter to

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[139] *Id*. § 32:23 – 229b; Two years earlier, the United States Court of Appeals for the Third Circuit rejected the argument that the Commission had exercised powers not in the Compact. New York Shipping Ass'n v. Waterfront Comm'n, 835 F. 3d 344 (3d Cir. 2016) (noting Commission's rules regarding racial discrimination in employment are authorized by the Compact).

[140] Waterfront Comm'n of N.Y. Harbor v. Murphy, 429 F. Supp. 3d 1 (D.N.J. 2019), *rev'd and remanded for dismissal*, 961 F. 3d 234 (3d Cir. 2020), *cert. denied* No. 20 – 772, -- S. Ct. --, 2021 WL 5434352 (2021).) Philip Murphy became Governor of New Jersey on Jan. 16, 2018, the day the Waterfront Commission litigation was filed. The majority leaders of both houses of the New Jersey legislature subsequently intervened in the action as defendants.

[141] *Waterfront Comm'n,* 429 F. Supp. 3d at 7-12.

[142] Waterfront Compact, *supra* note 8, art. III, §3.

[143] *Id.* art. IV, §14 ("The powers and duties of the commission may be exercised by officers, employees and agents designated by them, …").

[144] *Murphy*, 429 F. Supp. 3d at 5, n. 7.

the Commission.[145] The District Court agreed.[146] But that left the Commission in an awkward position; it was proceeding against one of the two parties to the Compact without an authorizing vote from *any* Commissioner. Without such a vote, the Commission could not be sure of its authority to file this very controversial suit. It is one thing to assert that staff can initiate suit to enforce the Compact against a shipping company or union. It is quite another thing to say that staff can file suit against one of the two parties to the Compact without at least an authorization from the other party. The dilemma for the Commission was how to allow the New York Commissioner to vote without allowing the New Jersey Commissioner to do the same. The solution was to persuade New Jersey Commissioner Michael Murphy to recuse himself from the issue.[147]

The General Counsel took the position that the New Jersey Commissioner's fiduciary duty was to the Commission, not to the State of New Jersey. The General Counsel was of the view that Commissioner Murphy's employment as a lobbyist and leadership position in a government affairs firm, as well as his close personal relationships with members of the New Jersey legislature, might reasonably be expected to impair his objectivity and independence of judgment regarding the lawsuit. Commissioner Murphy consulted with a private attorney and recused himself.

On June 5, 2020, the Third Circuit reversed the District Court decision. The Court ruled that the Commission's action was barred by the Eleventh Amendment.[148] The next day, the New Jersey Commissioner attempted to unrecuse himself.[149] The General Counsel reiterated her view that his participation in this case would be unethical. Commissioner Murphy raised the issue with New Jersey Governor Murphy (no relation) and the matter was referred to the New Jersey State Ethics Commission. The Ethics Commission staff informally ruled that the New Jersey Commissioner did not have a conflict of interest under New Jersey law. The Commission General Counsel then requested a formal Ethics Commission ruling. On October 19, 2020, the Ethics Commission affirmed that the New Jersey Commissioner had no conflict of interest under

[145] Running throughout the recent history of the Waterfront Compact is a recurring theme of Commission staff making decisions that, as a matter of public policy if not of law, ought properly to be made by the Commission members. This is a classic example of Aristotle's dictum that "nature abhors a vacuum." If the Commission cannot reach agreement because of the unanimity requirement, then inevitably staff will fill that vacuum.

[146] *Waterfront Comm'n,* 429 F. Supp 3d at 4-7 (D.N.J. 2019). The Circuit Court later declined to decide the issue as doing so was unnecessary to its decision; Waterfront Comm'n of N.Y. Harbor v. Governor of N.J., 961 F.3d 234, 237 n.3 (3d Cir. 2020).

[147] The discussion of Commissioner Murphy's recusal and later attempt to unrecuse himself is taken from an Advisory Opinion of the New Jersey State Ethics Commission dated Oct. 19, 2020 (Case No. 34 -20). *In the Matter of Commissioner Murphy, Waterfront Commission of New York Harbor*, https://www.nj.gov/oag/newsreleases21/20.10.19-WaterfrontSECfinalDecision.pdf (last visited July 26, 2021).

[148] *Waterfront Comm'n of N.Y. Harbor*, 961 F.3d 234 (3d Cir. 2020). The Court ruled that the Commission's lawsuit had a direct fiscal impact on New Jersey's revenues and was therefore not subject to Ex Parte Young, 209 U.S. 123 (1908). *Id.* at 240-41. *Ex Parte Young* allows state officials to be sued in federal court for injunctive relief, but not if the suit has a nonancillary effect on state revenues. The Third Circuit also ruled that the Commission's suit was barred by the Eleventh Amendment because it was a proscribed suit for specific performance of a contract. *Id.* at 241.

[149] The remaining discussion in this paragraph of Commissioner Murphy's recusal and subsequent attempt to unrecuse himself is taken from Advisory Opinion of the New Jersey State Ethics Commission dated Oct. 19, 2020 (Case No. 34-20). *In the Matter of Commissioner Murphy, Waterfront Commission of New York Harbor*, https://www.nj.gov/oag/newsreleases21/20.10.19-WaterfrontSECfinalDecision.pdf.

state law. However, the Ethics Commission noted that it lacked jurisdiction to decide whether Commissioner Murphy has a fiduciary obligation to the Waterfront Commission. The General Counsel relies on that disclaimer to continue to prevent the New Jersey Commissioner from voting on the issue.[150]

The author finds the Waterfront Commission's position on the ethical issue to be unpersuasive. It is difficult to see why any conflict of interest is likely. The position of any Commissioner is inherently political. Undoubtedly, the New York Commissioner has similar political connections. The author sees no more reason to believe that Commissioner Murphy's anticipated vote not to authorize the litigation would be any more conflicted than New York Commissioner Goldstock's eventual vote to "fully authorize and ratify" the General Counsel's actions.[151] But the key point for this article is that, while the Waterfront Commission maintains New Jersey cannot unilaterally withdraw from the Compact, it simultaneously prevents New Jersey from acting as a party to the Compact.

New Jersey's conduct is equally contradictory. New Jersey maintains it has lawfully withdrawn from the Compact. But the New Jersey Commissioner has voted both to recuse himself and to unrecuse himself. Neither action is consistent with New Jersey's position that it is no longer in the Compact and that the Compact no longer exists. Logically, the New Jersey Commissioner should have resigned, and Governor Murphy should have declined to name a replacement.

The contorted litigation positions of the parties are a direct result of the structure of the Commission – one member from each state and a requirement of unanimity. Had the Commission prevailed in the Supreme Court, it would have been a hollow victory. Such a decision would have left two states locked in a toxic relationship, with apparently no way to resolve the impasse in a mutually satisfactory way.

2. The Multistate Tax Compact

The Waterfront Commission litigation happened because one member state desperately wants out of the Waterfront Compact. The Multistate Tax Compact litigation happened because the member states very much wanted to stay in the Compact, but not at the expense of allowing taxpayers to continue to choose an apportionment election that was tied to an obsolete apportionment formula.

Between 2010 and 2015, the same California law firm filed taxpayer refund claims in Michigan, California, Minnesota, Texas, and Oregon. The refund claims sought to utilize the Compact Article III election to apportion the taxpayer's business income using the UDITPA three factor formula in Article IV. Each state denied the claims on the basis that the state required taxpayers to use single sales factor apportionment. In each case, the taxpayer appealed

[150] Respondents' Joint Brief in Opposition to Certiorari, Waterfront Commission of New York Harbor v. Murphy, United States Supreme Court No. 20 – 772 at 25-26 (March 1, 2021), available at https://www.supremecourt.gov/DocketPDF/20/20-772/170325/20210301110321608_20-772_Brief%20in%20Opposition.pdf (last visited July 26, 2021).
[151] *See Waterfront Comm'n*, 429 F. Supp 3d at 6.

ultimately to the state's supreme court.[152] Each state supreme court sustained the state's denial of the refund claim and in three of the cases, the United States Supreme Court denied certiorari.[153]

Unlike the Waterfront Compact, the Multistate Tax Compact allows for unilateral withdrawal.[154] But also unlike the Waterfront Compact, it contains no provision for amending the Compact. Therefore, the taxpayers asserted in the Gillette cases that, while each state was free to unilaterally withdraw from the Compact and thereby end the apportionment election, it was contractually required to maintain the election if it chose to remain in the Compact. The courts were unanimous in rejecting this argument, either on the ground that the Multistate Tax Compact is not a contractual compact at all or that, even if it was a contract for some purposes, nothing in the Compact created a contractual obligation to maintain the apportionment election in perpetuity.[155]

During the pendency of the Gillette cases, the risks of litigation prompted California, Michigan, and Minnesota to withdraw from the Compact before the cases were finally decided.[156] All three states were longstanding, very active members of the Compact that contributed substantially to the Commission's work.[157] But they had no choice. "If the taxpayers had prevailed in these cases, each of the states would have needed to issue hundreds of millions of dollars in refunds. California estimated that its potential refund claim liability alone might have exceeded $750 million".[158] There is little doubt that if the taxpayers had succeeded in the Gillette litigation, the Multistate Tax Compact would no longer exist.

V. Suggested Tools to Revitalize Aging Compacts

It is inevitable that as compacts age, some of their provisions will become obsolete, unworkable, or at least, problematic. There is no way to anticipate every eventuality that can threaten the continued relevance of the compact. Nevertheless, there are standard legal tools that can be used to mitigate those threats when they arise. Had they been available in the Waterfront Compact or the Multistate Tax Compact, those compacts may have avoided the crises that they encountered.

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[152] As the Multistate Tax Compact is not a congressionally approved compact, there was no basis for federal court jurisdiction.

[153] Gillette Com. Operations v. Dep't. of Treasury, 878 N.W. 2d 891 (Mich. Ct. App. 2015), *appeal denied* 880 N.W.2d 230 (MI 2016), *cert. denied* 137 S. Ct. 2157 (2017); Gillette Co. v. Franchise Tax Board, 363 P.3d 94 (Cal. 2015), *cert. denied* 137 S. Ct. 294 (2016); Kimberly-Clark Co. v. Comm'r of Revenue, 880 N.W. 2d 844 (Mich. 2016), *cert. denied* 137 S. Ct. 598 (2016); Graphic Packaging Corp. v. Hegar, 538 S.W.3d 89 (Tex. 2017); Health Net. Inc. v. Dep't. of Revenue, 415 P.3d 1034 (Or. 2018).

[154] Multistate Tax Compact, Article X.2.

[155] *See generally* cases cited, *supra*, note 153.

[156] CAL. REV. & TAX. CODE §§ 38011 – 38021 (West 2011), repealed by Stats.2012, c. 37 (S.B.1015), §3, eff. June 27, 2012; M.C.L.A. 205.581 to 205.589. Repealed by P.A.2014, No. 282, § 1, eff. September 12, 2014; M.S.A. §290.171. Repealed by Laws 2013, c. 143, art. 13, § 24, eff. July 1, 2013. In addition, the District of Columbia, Oregon, and Utah repealed and reenacted the Compact, without Articles III and IV. D.C. Code Ann. § 47-441 (West 2013); ORS 305.653, eff. October 7, 2013; U.C.A. 1953 § 59-1-801.5, eff. July 1, 2013.

[157] Minnesota and Michigan are currently sovereignty members of the Commission. California is currently an associate member. Since they are no longer members of the Compact, they have no representation on the Commission and cannot participate in its governance.

[158] JEFFERY B. LITWACK, INTERSTATE COMPACT LAW: CASES & MATERIAL 86 (4th ed. 2020).

A. The Waterfront Compact Must Either Be Repealed or Drastically Restructured

Before discussing more general mitigation tools, the author wants to address the unique problem contained in the Waterfront Compact; its structure is inherently dysfunctional and must be dramatically changed if the Compact is to continue. If the Supreme Court ultimately agrees New Jersey cannot unilaterally withdraw from the Compact, then what? A two-member compact that requires unanimity to function is simply unworkable if the economics are such that one party – New Jersey – has an overwhelming economic and political interest in the Port while the other – New York – has at best a very attenuated interest. It is telling that throughout the lawsuit, New York has maintained absolute silence on its position regarding the continued existence of the Compact. The state has not intervened in the Commission's lawsuit, either as a party or an amicus. Nor has it filed an original action against New Jersey in the United States Supreme Court.[159] Is the state interested in maintaining the Compact or not?

Should New York now file an original action against New Jersey, it is imperative that the governors of New York and New Jersey intervene to study the structure of the Compact and the Commission and make any necessary changes. Perhaps the governors can establish a joint select committee to conduct the study and make recommendations for legislative action. Each governor could appoint one member and those members could appoint a third member. The committee would be empowered to study all aspects of the Commission's operations, budget, and financing. The committee would also be empowered to study alternatives to the Compact that would be effective in policing the Port.[160]

The first order of business must be to analyze whether it truly makes sense for the Compact to continue to exist. It isn't enough for the Commission to rest on the language of the Compact requiring unanimity or for New Jersey to maintain the Commission is corrupt or abusing its power.

As for the Commission, in 2009 the New York Inspector General found:

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[159] 28 U.S.C. § 1251(a) (2021) (vesting the Supreme Court with original and exclusive jurisdiction over suits between states).

[160] One possibility that would be worth exploring is to absorb the Waterfront Commission's functions into the Port Authority of New York and New Jersey. As explained *supra* at note 19, the Port Authority currently exercises regulatory authority over shipping activities in the Port of New York. Therefore, the Port Authority would already be familiar with labor activities in the Port. Furthermore, unlike the Waterfront Commission, the Port Authority enjoys broad support in both New Jersey and New York. *See supra*, note 19. The Port Authority's exponentially larger revenues assure that it could likely easily absorb the additional responsibilities without a great deal of supplemental funding. Finally, the Port Authority Police Force employs over 2,200 police officers that are expert in transportation and counterterrorism policing. *See* Port Authority Police Department Mission & History, Port Authority Police Department, Port Authority Police Department Mission & History, https://www.panynj.gov/police/en/about/history.html (last visited September 30, 2021). Of course, reciprocal legislation in both states would be required to effectuate this merger. Former New Jersey Senator Ray Lesniak sponsored a bill in the 2010 New Jersey legislature that would have assigned the Waterfront Commission's enforcement authority to the Port Authority. *Waterfront Commission Argues Busts Prove Effectiveness but Lesniak Not Sold – Yet* Observer, January 21, 2011, available at https://observer.com/2011/01/waterfront-commission-argues-busts-prove-effectiveness-but-lesniak-not-sold-yet/ (last visited October 3, 2021). No similar bill was introduced in New York.

> "[t]he only outside audit or review conducted of the Waterfront Commission since its inception in 1953 was conducted by … the State Comptroller of New York. On January 4, 2005, the State Comptroller issued a report regarding the Waterfront Commission's hiring practices. The audit, covering January 1, 2000 through March 31, 2004, found that the Waterfront Commission lacked a comprehensive set of procedures regarding the issuance of licenses to individuals and companies applying to work on the waterfront."[161]

The Comptroller had found that the Commission failed for over 28 years to maintain a manual to govern its core function of issuing licenses to port personnel and companies.[162] Perhaps even more astounding was the Commission's position "that the State Comptroller has no statutory authority to audit the Commission. The Commission is a "bi-state" agency and there is no specific reference to the Commission under [the Comptroller's] authority."[163] The implications of the Commission's position are staggering. If the New York Comptroller cannot audit the Commission, what state agency of either New York or New Jersey can?[164] Essentially, the Commission is asserting that it is accountable only to itself. The New York Inspector General precisely recognized this problem in his 2009 report, finding "that the unique constitution of the Waterfront Commission as a bi-state entity had produced a climate of abuse and lack of accountability by perceived immunity from oversight by outside entities."[165]

It is an unacceptable position for any governmental body to assert that it cannot be audited by an outside entity. Furthermore, this position is contrary to the Commission's status as "an instrumentality of the States of New York and New Jersey."[166] Surely, each state has the

[161] NEW YORK INSPECTOR GENERAL REPORT, *supra* note83, at 10.
[162] Letter from Carmen Maldonado, Audit Director, Office of the State of New York Comptroller, to Michael Axelrod, New York Waterfront Commissioner (Jan. 4, 2005) (available at https://web.osc.state.ny.us/audits/allaudits/093005/03s48.pdf.)
[163] *Id.* at App. A (where the Commission's General Counsel noted that the Commission voluntarily submitted to the audit).
[164] This is not to say that either state can unilaterally impose its rules on the Commission's investigations of shipping companies, the ILA, or individuals. The Compact contains detailed provisions regarding investigations conducted *by* the Commission. Waterfront Compact, Article XI. Those provisions supersede any law on the subject adopted by only one member state. *See* In Re Application of Waterfront Commission of New York Harbor, 35 N.J. 62 (1961), *aff'd in part, vacated in part* Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964) (Commission not bound by New Jersey statute extending witness immunity to federal crimes. Commission's grant of immunity limited to state crimes. Compact, Article II, §5-b). But the Compact is silent regarding any investigation *of* the Commission. Therefore, there is no authority for the Commission's position that neither New Jersey nor New York can unilaterally audit the Commission's operations. The notion that silence on the subject somehow precludes a member state's audit of its instrumentality is contrary to any conception of governmental transparency and accountability. This attitude precluded *any* outside audit of the Commission's operations for over 50 years.
[165] STATE OF N.Y. OFF. OF THE INSPECTOR GEN., INVESTIGATION OF THE WATERFRONT COMM'N of N.Y. Harbor (Aug. 2009), https://www.wcnyh.gov/news/IG%20Investigation_8-11-2009.pdf.
[166] WATERFRONT COMMISSION ACT OF 1953 (NYWCA), 1953 N.Y. Laws, art. III.

authority to hold its instrumentality accountable to it.[167] Clearly, there must be an objective, outside study of whether the Compact should go forward. If the committee determines it should not, then the committee should present a "winding down" proposal to the governors.[168] The governors in turn should introduce complementary legislation in the legislatures of both states to implement that proposal.

On the other hand, contrary to New Jersey's justifications for withdrawing from the Compact, there may well be value in continuing it. That was the conclusion of the Editorial Board of the Star-Ledger, New Jersey's newspaper of record, in its editorial in reaction to New Jersey's attempt to leave the Compact.[169] As the Editorial Board noted,

> "When 11 members of the Gambino crime family pled guilty to racketeering and wire fraud in federal court in Brooklyn in January [2021], the federal prosecutor thanked the Waterfront Commission for its assistance.
> When the acting boss and two soldiers from the Lucchese family went away for life for murder and racketeering [in July 2020], the US Attorney for the Southern District commended the Waterfront Commission again.
> When six members of the Genovese family were sentenced in a loansharking racket known as "Operation Fistful" in Sept. 2019, Attorney General Gurbir Grewal thanked the Waterfront Commission for its partnership."[170]

If the select committee decides there is value to continuing the Compact, it should propose a restructuring program to the governors. At the very least, the Commission should consist of an odd number of Commissioners, with the Chair perhaps rotating annually between the two states.[171] The two governors could appoint two members each and those members could

[167] The Commission's position on its immunity from audit is identical to the position the Commission's General Counsel takes regarding the New Jersey Commissioner's recusal. In both cases, the Commission behaves as if it is the principal and the member states are its instrumentalities, rather than the other way around.
[168] Such a winding down provision would include a plan to dispose of the Commission's assets. Such a plan presumably would not duplicate the blatantly overreaching wind down plan that New Jersey included in Chapter 324 whereby New Jersey seeks to just take the Commission's New Jersey assets. Whether or not New Jersey can unilaterally withdraw from the Compact, surely it cannot just seize the Commission's assets for itself.
[169] Star-Ledger Editorial Board, Editorial, *supra* note 105.
[170] *Id.* The fact that federal and state officials thanked the Commission for its role in these cases shouldn't be dispositive in deciding whether the Compact should continue. But these official views are clearly relevant to the decision-making process.
[171] In Jewish law, all courts have an odd number of judges, either 3, 23 or 71. Mishnah Sanhedrin 1, available at https://www.sefaria.org/Mishnah_Sanhedrin.1.1?lang=bi, (last visited September 27, 2021). The federal courts also typically use an odd number of judges at all levels – one in the district courts, three in the circuit courts and nine on the Supreme Court. Indeed, should the Supreme Court hear a case with less than nine justices, the decision has no precedential effect if the case ends in a tie vote. Ohio ex rel. Eaton v. Price, 364 U.S. 263, 264 (1960). A tie vote is impossible where there is an odd number of decision makers. If the Commission had an odd number of members, there would be no necessity for decisions to be unanimous.

choose a fifth member by majority vote. Since the Compact is congressionally approved, perhaps a federal official could be named to the Commission as well.[172]

Next, given the Commission's recent troubled history and its position that it is not subject to unilateral audit by either New York or New Jersey, a revised Compact should include provisions to require and govern outside audits. This will eliminate any doubt as to the legality of such audits and will make the Commission more accountable to its member states.

Finally, the select committee should give serious consideration to changing the Commission's funding mechanism. The current system of funding the Commission through assessments on port employers, most of whom are in New Jersey, only exacerbates the political pressure the Shipping Association and the ILA put on New Jersey legislators. In addition, it results in New York legislative disinterest in the Commission given the reality that relatively little of the port's commercial activities take place in New York. Paying for the Commission out of general tax revenue would both relieve the political pressure in New Jersey and give New York more of a stake in the Commission's operations.

Whether the select committee recommends that the Compact be repealed or reformed, the governors must commit themselves to introduce legislation that corresponds with the committee's recommendations and to vigorously support that legislation.

B. Sunset Clauses

Nothing lasts forever. It may be legally correct to speak of compacts as contracts that can only be modified by their terms. But life simply refuses to conform to contracts. If changing economic realities dictate that the UDITPA three factor formula is obsolete, all the contractual clauses in the world won't preserve it. If a bi-state port based on trains, barges, trucks, and ships has evolved into two state ports based on containerized shipping, it is all well and good to say that one state cannot unilaterally leave an outdated bistate compact. But that compact is functionally dead anyway because the economic realities that gave it birth have long since changed and the state with the much larger port therefore wants out. Far better would it have been for the drafters of these compacts to acknowledge the "nostalgia of eternity" and draft these compacts in anticipation of the reality that they are functionally *not* eternal and will inevitably become ossified, in whole or in part. A sunset clause in each compact would have helped address the crises both compacts encountered.[173]

While one purpose of a sunset clause is to allow a statute to expire if the passage of time has rendered the statute obsolete, such a clause also serves the very valuable purpose of forcing the legislature to periodically reexamine an expiring statute to determine if it makes sense to extend the life of the statute, either in its original or a modified form.

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[172] It is not uncommon for congressionally approved Compacts to include federal representatives. *See* Upper Colorado River Basin Compact, Article VIII(a); Susquehanna River Basin Compact, Article 2.2; Delaware River Basin Compact, Article 2.2; Ohio River Valley Water Sanitation Compact, Article IV.

[173] A sunset clause is a "statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed." Sunset Law, BLACK'S LAW DICTIONARY (8th ed. 2004).

> "By conferring a temporary character to a law, sunset clauses manage legislative inertia since the continued validity of a law will be contingent upon a new legislative decision. These dispositions limit the duration of extraordinary powers and guarantee a more frequent dialogue between the executive and [the legislature]. Sunset clauses were therefore originally employed to improve political accountability and transparency[…]"[174]

The Waterfront Compact clearly would have benefited from a sunset provision that would take effect after a reasonably lengthy initial period, unless the Compact was renewed by the legislatures of both states.[175] If there had been a sunset clause, the Waterfront Commission would likely have been much more transparent and accountable in all facets of its operations to build support for compact renewal. Instead of resting on the bare legal requirement of unanimity in Commission decisions, the Commission would have had the incentive to actively seek true unanimity by seeking to address New Jersey's legitimate concerns. New Jersey in turn would have had more incentive to try to make the Compact work if the New York legislature had felt compelled to try to meet New Jersey halfway rather than silently declining to address any of its partner state's concerns. One tremendous virtue of sunset clauses is they "create more room for political bargaining and swiftly achieve the social and political consensus that would have otherwise been absent among legislators."[176] A critic might reply, "but what if the states cannot reach consensus?" The response is what better indication is there that it is time to allow the compact to sunset than that the members cannot find a mutually agreeable path forward? Surely that is preferable to continuing a toxic relationship merely because the Compact does not provide for unilateral withdrawal. Allowing a compact to sunset need not be viewed as a failure. Likely, all it would mean is that the compact had achieved its purpose. Nothing lasts forever.

A somewhat different purpose would have been served by a sunset provision for the apportionment formula in Article IV of the Multistate Tax Compact.[177] As explained *supra*, the problem with Article IV was not that any of the member states were unhappy with the Compact or the Commission. The problem was that the UDITPA apportionment formula contained in Article IV had become obsolete. The states simply could not afford to keep it. Had the Article IV apportionment formula been subject to a sunset provision when the Compact was adopted, the problem would have been self-correcting without the necessity of litigation. Sunset clauses should be considered whenever a compact provision similarly affects the rights or responsibilities of third parties.

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[174] *Snoozing Democracy*, *supra* note 2, at 34.

[175] The author could not find an interstate compact with a state level sunset clause. However, the Northeast Dairy Compact, a congressionally approved compact, contained a sunset provision for congressional approval. Congress failed to include any wind down provisions in the event of congressional sunset. Such provisions are critical if a compact is to contain a sunset provision. The Organic Cow, LLC v. Center for New England Dairy Compact Research, 335 F. 3d 66 (2d Cir. 2003).

[176] *Snoozing Democracy*, *supra* note 2, 25 MINN. J. INT'L LAW 56, footnotes omitted. at 56.

[177] Because of the structure and purposes of the remainder of the Compact, it is highly unlikely that any other provision would require a sunset clause. No other provision provides an opportunity for taxpayers to choose the lowest possible tax. Instead, the remainder of the Compact governs internal Commission programs and procedures, such as the audit program and the Commission's advisory uniformity projects. These provisions do not create conflicts among the member states.

C. Sunrise Clauses

A sunset clause is an excellent vehicle to determine if the members of a compact continue to believe there is ongoing value in the compact. But such member "buy in" can also be obtained at the front end by including sunrise provisions in the compact that only take effect if the member takes additional action beyond enacting the compact into law.[178] The Multistate Tax Compact has contained two such provisions from its inception.

Article VIII of the Multistate Tax Compact authorizes the Commission to conduct multistate taxpayer audits but only if the member state has passed separate authorizing legislation and expressly requests the audit. Twenty-eight states currently participate in the MTC Audit Program, either for income tax or sales tax audits or for both.[179] The requirement that each state must request each audit guarantees ongoing member authorization both for the Audit Program and for the resulting audits in which each state participates.

The Audit Program is an example of a "sunrise provision" that implemented a provision of the Multistate Tax Compact. Such a clause however can also reveal a lack of member enthusiasm for a compact provision and allow the compact authority to avoid an unnecessary dispute between members. Such was the fate of the Compact's Article IX which authorized the Commission to establish a regulation to arbitrate disputes concerning apportionments and allocations. As explained *supra*, the Commission never adopted such a regulation because of opposition from California. Had the Compact simply mandated an arbitration provision, California would never have joined. The Compact, the Commission and the other member states would therefore have been deprived of the valuable contributions California made in the formative days of the Multistate Tax Compact.[180]

D. Opt Out Clauses

Another way to gauge state support for specific compact provisions and to allow members some flexibility in implementing the compact is to use opt out clauses. An opt-out clause allows a member state to participate in the compact without signing off on every provision of the compact. For example, the Interstate Insurance Product Regulation Compact establishes a

[178] A sunrise clause is "a clause in a law that provides for the coming into force rather than the termination of portions of the law … after a specified date in the future and upon the satisfaction of specific conditions." Mark Freeman, Necessary Evils: Amnesties and the Search for Justice, 142 (2009). A sunrise clause therefore is the converse of a sunset clause.

[179] *Audit Member States*, MULTISTATE TAX COMMISSION, https://www.mtc.gov/Audit-Program/Member-States (last visited August 11, 2021).

[180] California didn't join the Compact until 1974. However, both the California Franchise Tax Board and the California Board of Equalization contributed several key personnel to the Multistate Tax Commission in its early years. These individuals were instrumental in forming and organizing the Commission's audit program. Interview by David Brunori with Gene Corrigan, the first Executive Director of the Multistate Tax Commission, State Tax Notes (November 15, 1999) (on file with author).

procedure by which member states can opt out of uniform insurance standards promulgated by the Interstate Insurance Product Regulation Commission.[181]

> "A Compacting State may opt out of a Uniform Standard, either by legislation or regulation duly promulgated by the Insurance Department under the Compacting State's Administrative Procedure Act. If a Compacting State elects to opt out of a Uniform Standard by regulation, it must (a) give written notice to the Commission no later than ten (10) business days after the Uniform Standard is promulgated, or at the time the State becomes a Compacting State and (b) find that the Uniform Standard does not provide reasonable protections to the citizens of the State, given the conditions in the State. The Commissioner shall make specific findings of fact and conclusions of law, based on a preponderance of the evidence, detailing the conditions in the State which warrant a departure from the Uniform Standard and determining that the Uniform Standard would not reasonably protect the citizens of the State. The Commissioner must consider and balance the following factors and find that the conditions in the State and needs of the citizens of the State outweigh: (i) the intent of the legislature to participate in, and the benefits of, an interstate agreement to establish national uniform consumer protections for the Products subject to this Act; and (ii) the presumption that a Uniform Standard adopted by the Commission provides reasonable protections to consumers of the relevant Product.
> Notwithstanding the foregoing, a Compacting State may, at the time of its enactment of this Compact, prospectively opt out of all Uniform Standards involving long-term care insurance products by expressly providing for such opt out in the enacted Compact, and such an opt out shall not be treated as a material variance in the offer or acceptance of any State to participate in this Compact. Such an opt out shall be effective at the time of enactment of this Compact by the Compacting State and shall apply to all existing Uniform Standards involving long-term care insurance products and those subsequently promulgated."[182]

Another virtue of an opt-out provision as contained in the Insurance Product Regulation Compact is that the ability of a state to opt out is not open ended. Ten days after the promulgation of a regulation or standard is a reasonable time for a state to choose to opt out. And

[181] *But see* Amica Life Ins. Co. v. Wertz, 462 P.3d 51 (Colo. 2020) (Interstate Insurance Product Regulation Compact opt out provision held insufficient to overcome improper legislative delegation of authority to establish multistate uniform life insurance suicide exclusion standard contrary to Colorado statutory suicide exclusion).
[182] *Interstate Insurance Product Regulation Compact*, art. VII. 4, https://www.insurancecompact.org/sites/default/files/legacy/documents/compact_statute.pdf (last visited November22, 2021).

a state must show specific good cause to opt out. That is a reasonable way to balance a need for interstate regulation against a more compelling need for state autonomy. A state is more likely to join such a compact if it has some ability to demonstrate that a particular compact provision ought not apply to it.

E. Using Compact Recommendations Instead of Requirements

Following the Gillette litigation, Article IV of the Multistate Tax Compact was amended to provide a *suggested* state income tax apportionment formula instead of a required apportionment formula. As currently written, Article IV. 9 of the Model Multistate Tax Compact provides,

> "All apportionable income shall be apportioned to this State by multiplying the income by a fraction, [State should define its factor weighting fraction here. Recommended definition: 'the numerator of which is the property factor plus the payroll factor plus two times the receipts factor, and the denominator of which is four.']"[183]

In drafting compact provisions that affect the rights or responsibilities of third parties, compact members should consider whether they want to lock themselves into one mandatory rule for dealing with those rights or responsibilities. Members should keep in mind that economies constantly evolve. Therefore, it might be best to limit the compact to making recommendations for such provisions and leave it to the states to promulgate rules outside of the compact.

F. Alternative Dispute Resolution Provisions

Finally, states should consider including mandatory alternative dispute resolution provisions in the Compact, to attempt to resolve disputes among the members, prior to allowing litigation to proceed. Recent compacts, especially interstate professional licensure compacts, contain ADR provisions to resolve disputes among member states. For example, the Interstate Medical Licensure Compact provides,

> "(a) The Interstate [Medical Licensure Compact] Commission shall attempt, upon the request of a member state, to resolve disputes which are subject to the Compact and which may arise among member states ….
> (b) The Interstate Commission shall promulgate rules providing for both mediation and binding dispute resolution as appropriate."[184]

[183] *Model Multistate Tax Compact*, supra note 44, art. IV.9.
[184] *Interstate Medical Licensure Compact*, Section 19, available at https://www.imlcc.org/wp-content/uploads/2021/02/IMLC-Compact-Law.pdf (last visited on August 12, 2021).

It is at least possible that an objective third party arbitrator or mediator might have been able to resolve the dispute between New Jersey and the Waterfront Commission before it devolved into litigation.[185] The Compact should provide that the arbitrator or mediator shall be a member of the American Arbitration Association's roster of arbitrators or mediators.[186]

ADR can only reduce the number of disputes among compact members that result in litigation. At the very least, ADR can help the parties think through and clearly articulate their respective positions in ways that litigation is ill designed to do. For example, about all we know of the Waterfront Commission's litigation position is that the Compact does not allow unilateral withdrawal. The Commission has articulated almost nothing to explain why the Compact's continued future existence is more desirable than each state policing its port facilities independently. On the other hand, New Jersey appears to make a compelling economic case to dissolve the Compact. But that case stands unrebutted precisely because litigation allows the Commission to rest its argument entirely on the absence of a unilateral withdrawal provision. Assuming the Commission is correct, New Jersey will be a captive and disgruntled, unhappy partner in the Compact. That is in no one's interest. ADR and not litigation is the appropriate vehicle to reduce such irreconcilable conflicts.

VI. Conclusion

Interstate compacts continue to play a vital role in addressing multistate issues in our federalist system of government.[187] But like all living things, interstate compacts naturally experience aging issues as legal and economic developments render compact provisions obsolete or at least, difficult to apply to current conditions. Legislators and compact administrators need to be sensitive to the reality that time ultimately defeats the best intention to make compacts permanent legal instruments. Compacts, like people, have a natural life cycle and will eventually die. In drafting compacts, lawyers need to be sensitive to the fact that those compacts are not immortal. Just as the law has provided for such tools as living wills and advance directives to help address human mortality, compact drafters and administrators must be proactive in seeing that the compacts they work with are as flexible and adaptable to changed realities as is possible.

Postscript

On November 22, 2021, the United States Supreme Court denied the New York Waterfront Commission's petition for a writ of certiorari in *Waterfront Commission of New York*

[185] As discussed *supra* the *Murphy* case was between the Commission and New Jersey, not between New York and New Jersey. New York's silence regarding the case calls into question how seriously the state really supports the Compact. An arbitrator or mediator would have had the authority to compel the attendance of an independent New York state official to explain the state's position on the Compact's continued existence. Allowing the Commission to take the lead in the case calls into question whether the Commission speaks for the state, or just for itself. New York State is the relevant compact member. The Commission is merely its instrumentality.

[186] *See* "What We Do", AMERICAN ARBITRATION ASSOCIATION. https://www.adr.org/Arbitration and https://www.adr.org/Mediation (last visited November 19, 2021).

[187] "[T]there is a scholarly consensus that compacts are a useful tool to deal with regional issues and that their full value has yet to be realized." Matthew S. Tripolitsiotis, Bridge Over Troubled Waters: The Application of State Law to Compact Clause Entities, 23 YALE L. & POL'Y REV. 163, 172–73 (2005), footnotes omitted.

Harbor v. Murphy, et al.[188] Therefore, the Third Circuit's holding that the Eleventh Amendment precludes the Commission's federal suit against New Jersey is final.

While the Supreme Court's cert. denial puts an end to the Commission's lawsuit against New Jersey, it does not necessarily put to rest the underlying issue – can New Jersey unilaterally withdraw from the New York Waterfront Compact? Should the State of New York choose to do so, it could file an original action in the Supreme Court against New Jersey, pursuant to 28 U.S.C. § 1251(a), which provides that "[t]he Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States".[189]

Notwithstanding that Section 1251(a) vests the Supreme Court with original *and exclusive* jurisdiction over such lawsuits, the Court, over the dissent of Justices Thomas and Alito, has consistently interpreted its 1251(a) jurisdiction as being discretionary.[190] It is therefore not clear whether the Court would accept New York's petition, should the state choose to file one.

Nor is it at all clear that New York could file an action against New Jersey in the lower federal courts. Because 1251(a) confers exclusive jurisdiction on the Supreme Court for suits between states, it seems unlikely that the lower federal courts would have jurisdiction over such a suit, although there is contrary authority in the Second Circuit.[191]

Assuming New York State does have an interest in preserving the Waterfront Compact in some form, the mutual litigation risks that currently exist for both states suggest that now is the best time to attempt to negotiate the contents of a revised Waterfront Compact that both can support. Such a revised Compact must reflect the realities of the shipping industry in the Port of New York in 2021 and not the industry that existed in 1953. Today's shipping industry is much less labor intensive and is instead highly automated.[192] Above all, a revised Compact must recognize that the Port is currently overwhelmingly located in New Jersey. The structure, governance and functions of the Compact must recognize that New Jersey has a vastly greater economic interest in the Port than does New York; the New Jersey politics of the Port are therefore complex and problematic.[193] The weakness in the Waterfront Commission's case

[188] Waterfront Commission of New York Harbor v. Murphy, 961 F. 3d 234 (CA 3 2020), *cert denied* No. 20 – 772, -- S. Ct. --, 2021 WL 5434352 (2021). This article was accepted for publication prior to the Court's ruling on the petition for certiorari. The editors of the Rutgers Law Record have graciously allowed the author to submit this brief postscript to address possible future developments regarding the open question of whether New Jersey could unilaterally withdraw from the Compact.

[189] 28 U.S.C. § 1251(a).

[190] Nebraska v. Colorado, 577 U.S. 1211 (2016), (Thomas and Alito, JJ., dissenting); Texas v. California, 141 S.Ct. 1469 (2021), (Thomas and Alito, JJ., dissenting).

[191] *See* Connecticut v. Cahill, 217 F.3d 93, 99 (2d Cir. 2000) (action did not implicate New York's core sovereign interests and so could proceed in federal district court); *But see id.* at 105 (Sotomayor, J., dissenting) (Supreme Court's 1251(a) jurisdiction is exclusive); Safe Streets Alliance v. Hickenlooper, 859 F.3d 865, 913 (10th Cir. 2017) (Supreme Court's 1251(a) jurisdiction is exclusive, citing then-Judge Sotomayor's dissent in Cahill).

[192] Alan Feuer, *On the Waterfront, Rise of the Machines*, N.Y. TIMES, Sept. 28, 2012, available at https://www.nytimes.com/2012/09/30/nyregion/in-new-yorks-port-the-rise-of-the-machines.html (last visited November 24, 2021).

[193] Political support in New Jersey to withdraw from the Compact is bipartisan and nearly universal. The New Jersey Senate approved repealing the Compact by a unanimous vote of 38 – 0. The Assembly's vote to repeal was nearly as

wasn't necessarily the law— perhaps the Compact does bar New Jersey from unilaterally withdrawing. The weakness was that it is impossible *as a practical matter* to maintain a bistate compact when one state no longer believes that its interests are served by that compact. After all, the word compact literally means "agreement."[194] If there is no longer an agreement, there is no longer a functional compact.

If the two states wish to attempt to negotiate a revised Waterfront Compact, perhaps New York could file a motion for leave to file an original action against New Jersey and the two states could stipulate that the Court should stay consideration of that motion while the parties try to reach a new agreement. It would be helpful if the two states retained a mediator to help them get to "yes." Of course, if New York chooses not to further defend the Compact, that will be the end of the matter. Only time will tell if that is a desirable outcome. But the saga of the Waterfront Compact is a perfect exemplar of the Nostalgia of Eternity. The Compact had a good run – almost three score years and ten.[195] But nothing lasts forever.

lopsided, with 66 Assembly members supporting repeal and only 1 opposed. Press Release, Sweeney Welcomes Legal Victory on Waterfront Commission (June 5, 2020), available at https://www.njsendems.org/sweeney-welcomes-legal-victory-on-waterfront-commission/ (last visited November 1, 2021). Such near universal political opposition to the Compact was not likely to be overcome even had the Commission prevailed on the merits.

[194] *Compact*, VOCABULARY.COM, https://www.vocabulary.com/dictionary/compact (last visited October 26, 2021).

[195] "The days of our years are threescore years and ten; and if by reason of strength they be fourscore years, yet is their strength labour and sorrow; for it is soon cut off, and we fly away." *Psalms 90:10*, THE HOLY BIBLE: KING JAMES VERSION.

Appendix

Moorman Apportionment Explanation

Iowa Company

	Illinois	Iowa
Property	.2	.8 (ignore)
Payroll	.2	.8 (ignore)
Sales	.15	.15

Net income: $1 Million (all apportionable)

a) Illinois taxable income $\frac{.2 + .2 + .15}{3}$ X $1 million = $183,333

b) Iowa taxable income

.15 X $1 million = $150,000

Total taxable income in 2 states: $333,333

Illinois Company

	Illinois	Iowa
Property	.8	.2(ignore)
Payroll	.8	.2 (ignore)
Sales	.15	.15

Illinois taxable income $\frac{.8 + .8 + .15}{3}$ X $1 million = $583,333

b) Iowa taxable income

.15 X $1 million = $150,000

Total taxable income in 2 states: $733,333

Therefore, Iowa company's total taxable income in these 2 states is $400,000 less than the Illinois company's total taxable income. This is because the property and payroll factors are

disregarded for both companies in Iowa. The Iowa company would see its Iowa taxable income increased if the Iowa property and payroll factors were included (large numerators, small denominators), while the Illinois company would see its Iowa taxable income decreased if its Iowa property and payroll factors were included (small numerators, large denominators). But, as the Court notes, Iowa treats both companies identically; they have the same taxable income in Iowa. It is only in conjunction with the Illinois tax that there is a disparity in treatment.