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

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"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."

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. 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, leading to litigation over its right to do so? 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?

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. 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. Congress would usually need to approve any change to such a compact. 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.

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