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THE CURIOUS INCIDENT OF THE DOG IN THE NIGHTTIME: INTERSTATE COMPACTS AND TEXTUAL SILENCE

Sheldon H. Laskin[*]

TABLE OF CONTENTS

[*]The author received his BA and JD from Rutgers University and an LL.M. in Taxation from the University of Baltimore. He was an attorney for the Multistate Tax Commission, the administrative agency for the Multistate Tax Compact, for twenty years, during which he served as National Nexus Director, Counsel and Acting General Counsel. The author would like to thank Helen Hecht, Uniformity Counsel, Multistate Tax Commission; Bernard Bell, Professor of Law and Herbert Hannoch Scholar, Rutgers University; Nancy Prosser, General Counsel, Multistate Tax Commission and Thomas A. Tormey, Jr., Esquire, for reviewing drafts of this essay and for their helpful comments.

I. INTRODUCTION

"Scotland Yard Detective Gregory: Is there any other point to which you would wish to draw my attention?
Sherlock Holmes: To the curious incident of the dog in the night-time.
Gregory: The dog did nothing in the night-time.
Holmes: That was the curious incident." [1]

On April 18, 2023, the United States Supreme Court ended the 70-year history of the Waterfront Compact of New York Harbor because of the silence of the dog in the night-time, specifically the absence of a compact provision either authorizing or barring a member state's unilateral withdrawal. Instead, the Court used background common law principles of contract law to affirm New Jersey's right to unilaterally withdraw from the Compact. *New York v. New Jersey*, 143 S. Ct. 918 (2023).[2]

Most judges and lawyers are not as inductively brilliant as Sherlock Holmes. Nevertheless, it should have come as no surprise that the Court would resort to background common law principles to fill in gaps in a congressionally approved compact in a dispute between member states, because it has done so at least twice before, including in a case involving the identical states.[3]

This essay will examine how the Supreme Court has resolved disputes between member states arising under congressionally approved compacts when the compact is silent as to the controlling issue.

Part II will review how congressionally approved compacts are treated under our federal system of government.

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[1] Sir Arthur Conan Doyle, *The Adventure of Silver Blaze*, THE MEMOIRS OF SHERLOCK HOLMES (1894).
[2] The author has previously written about an earlier iteration of this case. Sheldon H. Laskin, The Nostalgia of Eternity: Interstate Compacts, Time, and Mortality, 49 RUTGERS L. REC. 25 (2021).
[3] New Jersey v. New York, 523 U.S. 767 (1998) (common law of avulsion supports awarding New Jersey jurisdiction over filled portions of Ellis Island because Ellis Island Compact is silent as to filled land); Tarrant Regional Water District v. Herrmann, 569 U.S. 614 (2013) (common law principles support ruling that Red River Compact does not preempt Oklahoma's water use statutes because Compact is silent on whether member state may meet its water allocation under the Compact by drawing on water located in another member state).

Part III will examine how the Supreme Court treats statutory silence in general.

Part IV will examine how the Supreme Court has treated silence in congressionally approved compacts in disputes between member states.

Part V will offer a conclusion.

II. THE NATURE OF INTERSTATE COMPACTS

Interstate compacts are a fundamental part of our federal system of government.[4] Legally, such compacts are considered to be contracts between the signatory states.[5] In addition, if the compact has been congressionally approved, it is a federal law.[6] Pursuant to the Supremacy Clause, such a compact preempts any state law that is inconsistent with the Compact.[7]

In addressing material silences in interstate compacts, it is important to keep in mind that interstate compacts are *both* contracts and federal law. The proper resolution of disputes between compacting states – the parties to the contract – requires addressing both aspects of interstate compacts. Overemphasizing the federal law aspect of compacts at the expense of the contract aspect is likely to create confusion, distort the legal analysis, and lead to an incorrect result in such cases.

States agree that congressionally approved compacts are federal law and preempt contrary state law under the Supremacy Clause. The disputes in such cases arise out of a disagreement as to the *meaning* of that federal law. Which is to say, these disputes are quintessentially contract disputes that must of necessity be

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[4] 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.

[5] *See, e.g.,* Green v. Biddle, 21 U.S. 1, 92 -93 (1823).

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

[7] *Tarrant*, 569 U.S. at 627 n. 8.

resolved by resorting to background common law principles when the compact does not contain specific textual language that addresses the dispute.[8] The questions these cases raise are binary in nature and demand an answer one way or the other.[9] Background principles of the common law are not distinct from the federal law aspect of compacts but rather are integral to those federal laws. It is to that aspect of compact law that the states must turn in order to answer these interpretative questions when the compact is silent on the issue.

III. LEGISLATIVE SILENCE IS A POOR INDICATOR OF THE MEANING OF A FEDERAL STATUTE

As noted *supra,* congressionally approved compacts are federal law. In weighing the weight silence is to be given in such a compact in resolving disputes between compact members, it is instructive to examine the weight to be given silence in interpreting federal statutes generally.

An examination of Supreme Court jurisprudence on legislative silence makes clear that the Court generally regards such silence as having little or no weight in discerning congressional meaning.

> Legislative intent derived from nonaction or "silence" lacks all the supporting evidences of legislation enacted pursuant to prescribed

[8] Disputes between third parties and compact authorities do not generally raise the same contract issues as do disputes between the member states, for the simple reason that third parties are not parties to the compact. They lack standing to enforce the compact, even if they receive benefits from it. Georgetown v. Alexandria Canal Co., 37 U.S. 9, 96 (1838). In a rare case, a third party may be able to establish that it has a right to compel performance of the contract as a third-party beneficiary. But it would not be typical for a third party to establish that it is a third-party beneficiary of a compact. A third-party would need to show either that the compact explicitly granted it contractual rights or that it was an intended beneficiary of the compact. A third-party who merely receives incidental benefits under the compact would not have standing to enforce it. Doe v. Pennsylvania Board of Probation and Parole, 513 F. 3d 95, 106 – 107 (CA3 2008). *Accord, Keystone Outdoor Advertising Company v. Secretary of the Pennsylvania Department of Transportation,* 2022 WL 2805335 (ED PA 2022) (third-party contract vendor of compact agency does not have standing to enforce the compact).

[9] New Jersey v. New York, 523 U.S. 767 (1998) (is filled land adjacent to Ellis Island in New York or is it in New Jersey?); Tarrant, 569 U.S. (Can Texas divert water from Oklahoma in order to meet its water allocation quota under the Red River Compact?); New York v. New Jersey, 143 S. Ct. 918 (2023) (May New Jersey unilaterally withdraw from the Waterfront Compact of New York Harbor?). Because of the similarity in names between the two cases, the author will henceforth refer to *New Jersey v. New York* as "the Ellis Island case" and to *New York v. New Jersey* as "the Waterfront Compact case."

> procedures, …. Necessarily also the intent must be derived by a form of negative inferences, a process lending itself to much guesswork.[10]

Congressional silence is a poor indicator of the meaning of a statute because there are a myriad of unknowable possible reasons why Congress failed to speak affirmatively.

> [I]t [is] impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.[11]

If anything, the difficulties of ascertaining congressional intent from silence are compounded when that silence is contained in a congressionally approved compact. Unlike a statute enacted solely by Congress, at least three legislatures would have approved a congressionally approved compact – two state legislatures and Congress. The five factors listed in the previous paragraph become at least fifteen factors teaching caution in finding silence in such a compact to have any substantive meaning whatsoever.

IV. THE SUPREME COURT HAS CONSISTENTLY USED THE COMMON LAW TO RESOLVE DISPUTES BETWEEN COMPACT MEMBER STATES WHEN THE COMPACT IS SILENT ON THE CONTROLLING QUESTION

Since at least 1998, the Supreme Court has repeatedly turned to background common law principles to resolve disputes between compact member states when the compact is silent on the controlling question in the case.

A. The Ellis Island Case

Ellis Island lies between New York and New Jersey, 1,300 feet from Jersey City, New Jersey and one mile from the tip of Manhattan.[12] Pursuant to an 1834

[10] Cleveland v. United States, 329 U.S. 14, 23 n. 5 (1946) (Rutledge, J., concurring).
[11] Johnson v. Transportation Agency, Santa Clara County, California, 480 U. S. 614, 670 (1987) (Scalia, J., dissenting).
[12] Ellis Island, 523 U.S. at 771.

Compact between the states, the state border is at the middle of the Hudson River.[13] However, the Compact gave New York jurisdiction over Ellis Island, notwithstanding its proximity to New Jersey.[14]

In January 1892, the United States opened an immigration station on Ellis Island.[15] The island proved to be too small for the flood of immigration to New York.[16] As a result, the federal government added enough fill to the surrounding submerged lands over the years to enlarge the original 3-acre island by roughly 24.5 acres.[17]

The Compact gave New York jurisdiction over the submerged land.[18] However, the Compact was silent as to which state had jurisdiction over any filled land.[19] New Jersey brought an original action against New York in the United States Supreme Court, seeking a declaration that the portions of the island added by filled land were within the jurisdiction of New Jersey.[20]

New York primarily argued that it had jurisdiction over the entirety of Ellis Island because, in 1834, adding landfill to submerged land in New York Harbor was such a widespread practice that it was unnecessary to explicitly mention filled land in the Compact.[21]

The Supreme Court declined to draw any inference from the Compact's silence as to filled land.[22] Instead, the Court applied the common law of avulsion to find that New Jersey had jurisdiction over the filled land.[23] The common law of avulsion provides that sudden shoreline changes (as through artificial filling), have no effect on boundaries.[24] Therefore, the Court found that "this common-law rule speaks in the silence of the Compact", and determined that New Jersey had jurisdiction over the filled land.[25]

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[13] *Id*. at 773.
[14] *Id*.
[15] Id. at 775.
[16] Ellis Island Foundation, Overview + History Ellis Island, StatueofLiberty.org, (last visited on July 5, 2023) https://www.statueofliberty.org/ellis-island/overview-history. Immigration peaked at Ellis Island in 1907, when 1.25 million European immigrants arrived.
[17] *Ellis Island,* 523 U.S. at 775 – 776.
[18] *Id*. at 773.
[19] *Id*. at 779.
[20] *Id*. at 778.
[21] *Id*. at 781.
[22] Ellis Island, 523 U.S. at 783.
[23] *Id*. at 783 – 784.
[24] *Id*.
[25] *Id.*

B. The Red River Compact Case

The Supreme Court next had occasion to examine the effect of silence in a congressionally approved compact in determining the member states water allocation rights under the Red River Compact.[26]

The issue in *Tarrant* was whether a Texas regional water district could draw on water located in Oklahoma in order to meet its water apportionment quota under the Red River Compact, of which both states were members.[27] The Compact was silent on the question.[28] Tarrant asserted that the Compact's granting each member state equal rights to water runoff created a borderless common in which each of the four signatory states could draw on water in any of the other states to meet its apportionment quota under the Compact.[29]

The Court rejected this atextual argument. Instead, the Court relied on a "background understanding of the Compact's drafters that state borders were to be respected within the Compact's allocation."[30]

> "If any inference at all is to be drawn from [such] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens."[31]

In rejecting Tarrant's argument that state borders were to be disregarded because of the Compact, the Court made clear that its "interpretation of interstate compacts"

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[26] *Tarrant*, 569 U.S. (2013). *Tarrant* was not formally a suit between Texas and Oklahoma. The suit was filed in federal district court by the Tarrant Regional Water District, a political subdivision of the State of Texas under article XVI, section 59 of the Texas Constitution. TEX. WATER CODE ANN. § 51.011; Tarrant Regional Water District v. Gragg, 43 S.W. 609, 614 (Ct. App. 2001). The defendants were the members of the Oklahoma Water Resources Board, "a body politic and an instrumentality, agency and department of the State of Oklahoma." 82 OKL. ST. ANN. §1085.1. Exercise by the Board of its statutory powers "shall be deemed and shall be held to be an essential governmental function of the State of Oklahoma." *Id.* Although the case reached the Court under its certiorari jurisdiction and not as an original jurisdiction suit between states, the Court analyzed the case as it would a compact dispute directly between the states. The author believes it is reasonable to treat the case as if it were such a suit.

[27] *Tarrant*, 569 U.S. at 626 – 627.

[28] Id. at 627 – 628.

[29] *Id*. at 626 – 627.

[30] *Id*. at 628.

[31] *Id.* at 632, citing Virginia v. Maryland, 540 US 56, 67 (2003) and Ellis Island, 523 U.S. 783, n. 6, (1998) ("[T]he silence of the Compact was on the subject of settled law governing avulsion, which the parties' silence showed no intent to modify").

has long been "informed by" "[t]he background notion that a State does not easily cede its sovereignty."[32]

After *Ellis Island* and *Tarrant,* it should have been clear that the Court relies on background principles of the common law to interpret silence in congressionally approved compacts to resolve disputes between member states. Nevertheless, in the *Waterfront Compact* case, New York once again, as it had done unsuccessfully in the Ellis Island case, urged the Court to read substantive meaning into total silence.

C. The Waterfront Compact Case

The New York Waterfront Commission Compact neither expressly allows nor expressly prohibits unilateral withdrawal by New Jersey or New York, the members of the Compact.[33] Nevertheless, in 2018 New Jersey enacted a statute authorizing the state to withdraw from the Compact.[34] After the Waterfront Commission's case against New Jersey was dismissed by the Third Circuit on sovereign immunity grounds, New York filed an original jurisdiction action in the United States Supreme Court seeking to enjoin New Jersey from unilaterally withdrawing.[35]

Recognizing that the Compact neither expressly allows nor forbids unilateral withdrawal, the Court once again "look[ed] to background principles of law that would have informed the parties' understanding when they entered the Compact."[36] The Court found this background principle of contract law controlling: a contract calling for continuing performance "for an indefinite time is to be interpreted as stipulating only for performance terminable at the will of either party."[37] Citing the Ellis Island case, the Court once again made clear that this default contract-law rule "speaks in the silence of the Compact."[38] Therefore, New Jersey could unilaterally withdraw from the Compact.[39]

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[32] *Tarrant*, 569 U.S. at 631.
[33] *Waterfront Compact Case*, 143 S. Ct. at 922.
[34] *Id*. at 923.
[35] *Id.*
[36] *Id*. at 924.
[37] *Id.*
[38] *Id*. at 925.
[39] *Waterfront Compact Case*, 143 S. Ct. at 925. Ironically, New York maintained that both states could agree to terminate the Compact, even though the Compact no more explicitly authorizes joint withdrawal than it does unilateral withdrawal. New York's Cross-Motion for Judgment on the Pleadings and Brief in Support of Cross-Motion and in Opposition to New Jersey's Motion, New York v. New Jersey, 143 S. Ct. 918 (2023) (No. 156), 2022 WL 16239889, at *9. New York infers such a power from the fact that the Compact required the Waterfront Commission to submit an annual report to the Governors of both states, including a recommendation as to whether there was a continuing need for the Compact. *Id.* But nothing in the Compact made that report self-executing.

V. CONCLUSION

The author finds it striking that, after losing the Ellis Island case, New York's arguments in the Waterfront Compact case never even attempted to address the holding of that case that background common law principles "speak in the silence of the Compact" to resolve disputes between compact members.[40] Instead, New York relied on the fact that *some* compacts that were enacted around the same time as the Waterfront Compact (1953) were understood to prohibit unilateral withdrawal notwithstanding that the text was silent on the point.[41] But as the Court noted, those compacts generally governed water rights or boundaries, neither of which would be governed by the default contract rule.[42] New York also relied on the law of treaties, which is equivocal as to whether unilateral abrogation is allowed.[43] Finally, New York asserted that because New York and New Jersey had *previously* resolved their differences under the Compact, the Compact somehow prohibited unilateral withdrawal. The Court summarily rejected this argument as saying "little about whether New York or New Jersey could unilaterally withdraw."[44]

It is the author's view that New York's arguments were overly reliant on the principle that congressionally approved compacts are federal law. For example, in urging the Court to reject New Jersey's argument that compacts creating vested

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Even if both states agreed that the Compact *should* be dissolved, nothing in the Compact established bilateral procedures to dissolve it. The Court implicitly acknowledged this by recognizing only "Congress's authority to 'alter, amend, or repeal the Compact."' *Waterfront Compact Case*, 143 S. Ct. at 922. Of course, New York is correct – both states could agree to dissolve the Compact. But the authority to do so, like the right to withdraw unilaterally, is not contained in the text of the Compact. It is contained in a related background principle of contract law. "If a party, before he has fully performed his duty under a contract, manifests to the other party his assent to discharge the other party's duty to render part or all of the agreed exchange, the duty is to that extent discharged without consideration." RESTATEMENT (SECOND) OF CONTRACTS § 275 (AM. LAW INST. 1981).

[40] In contrast, New Jersey's argument was centered on the principle that background common law principles are used to resolve such disputes "in the silence of the Compact." Brief in Support of New Jersey's Motion for Judgment on the Pleadings, *New York v. New Jersey*, 143 S. Ct. 918 (2023) (No. 156), 2022 WL 3758566 at *18, *24. Unlike New York, New Jersey never claimed that the Compact *itself* provided the rule of decision for the case. To the contrary, New Jersey's argument was predicated on the fact that the Compact's text was incapable of providing the rule of decision, because it was silent on the point. "[T]his Compact does not address withdrawal. The Compact mentions neither "withdrawal" nor "termination" in any relevant context." *Waterfront Compact Case*, 143 S. Ct. at 923 – 924.

[41] *Waterfront Compact Case*, 143 S. Ct. at 925 – 926.

[42] *Id.*

[43] *Id*. at 926.

[44] *Id.*

rights would not be affected by the background contract law principle it was advancing, New York said,

> *[A]ll* agreements formed under the Compact Clause – no matter their subject matter – are federal law and thus preempt contrary state action.[45]

Leaving aside the fact that it is state laws that are preempted, and not undefined state "actions," the effect of New York's argument is that state laws would be preempted even if the Compact explicitly said absolutely nothing about the subject. Silence in the compact would be defined as preempting *any* state action that arguably touched upon the Compact. This argument would justify Commission staff barring New Jersey's commissioner from voting on whether to authorize the Commission's prior suit against New Jersey because staff feared New Jersey would vote against authorizing the suit. After all, such a negative vote would be "contrary" to the very existence of the Compact.[46]

New York was not alone in asserting that silence in a Compact preempts state common law contract principles, thereby reading the contract aspects of compacts out of existence in favor of an approach to compact interpretation that federal law answers any and all questions, even if the federal answer is silence. Its amici made the same argument.[47]

It is puzzling why both New York and its amici failed to engage with the background common law rule previously announced in Ellis Island and Tarrant. The reason could be that most compact litigation is not between the member states. Rather, most such cases are between third parties and interstate compact agencies or a state compact member.[48] As explained *supra* at n. 8, these cases do not implicate the contract aspects of compact law at all because these third parties are not parties to the compact. Nor do third party challenges to compacts implicate the sovereignty issues that so concerned the Court in *Tarrant.* In third-party disputes,

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[45] New York's Cross-Motion for Judgment on the Pleadings & Brief in Support of Cross-Motion & in Opposition to New Jersey's Motion, *supra* note 39, at 38.

[46] The example in the text is not hypothetical. This is precisely what Commission staff did to avoid a tie vote on whether to authorize the lawsuit. N.J. State Ethics Comm'n, *In re* Michael Murphy, Comm'r, Waterfront Commission of New York Harbor, Case No. 34-20 (Oct. 19, 2020), available at https://www.nj.gov/oag/newsreleases21/20.10.19-WaterfrontSECfinalDecision.pdf.

[47] Brief Amici Curiae of Professors Jeffrey B. Litwak, Phillip J. Cooper et al., in support of Plaintiff State of New York, New York v. New Jersey at 7, 8, New York v. New Jersey, 143 S. Ct. 918 (2023) (No. 22O156), 2022 WL 16699309 at *7, 8.

[48] *See generally* Matthew S. Tripolitsiotis*, Bridge Over Troubled Waters: The Application of State Law to Compact Clause Entities,* 23 YALE L. & POL'Y REV. 163 (2005).

only one party has sovereignty interests. In contrast, contract disputes between the members of the compact require a balancing of sovereignty interests, both of which are entitled to respect. Federal preemption principles were developed largely in third-party suits. This could explain why New York and its supporters totally minimized the central role of contract law in the very different context of suits between the parties to the contract. In such cases, the contract law aspects of compacts simply cannot be ignored. Rather, they must be given equal treatment to the federal law aspects.

To be sure, the Court acknowledged that "a compact is not just a contract," but also "a federal statute enacted by Congress that preempts state law."[49] But the Court went on to make clear that "when the compact does not speak to a disputed issue, background contract-law principles have informed the Court's analysis."[50] Both New York and its amici converted the preemptive effect of a congressionally approved compact into a non-sequitur that determines the outcome of any case based on the mere existence of the compact rather than on what the compact actually says. Had the compact explicitly prohibited unilateral withdrawal, New Jersey's unilateral withdrawal would of course have been preempted. But it didn't; it was silent. It was therefore necessary to look to background principles of the common law that were understood at the time the compact was enacted to find the controlling rule of decision. The Supreme Court has now three times made clear that those background principles are *part of* the compact. They are not preempted by federal law because they are themselves federal law.

Nor does relying on background common law principles to resolve disputes between compact members raise the very difficult choice of law and conflict of laws issues that arise when state law is used to resolve third party compact litigation.[51] Only the Supreme Court has jurisdiction over suits between states.[52] In the exercise of its exclusive jurisdiction over such cases, the Court appears to be developing a unique federal common law jurisprudence to "speak in the silence of the Compact" in suits between compact members. This developing jurisprudence cannot create potential conflicts between state and/or lower federal courts, regardless of the source of the common law principles adopted by the Court. Those principles will be applied on a uniform nationwide basis. Identifying and applying

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[49] *Waterfront Compact Case*, 143 S. Ct. at 924 (citing Tarrant Reg'l Water Dist. v. Herrman, 569 U.S. 614, 627, n. 8 (2013)).
[50] *Id*.
[51] Because the Supremacy Clause generally bars applying state laws to interstate compacts, third-party compact challenges often result in anomalous and unjust results. For example, government workers in Pennsylvania and New Jersey have the right to form unions but employees of an interstate bridge authority between the two states have no such rights. Tripolitsiotis, *supra* note 48, at 169.
[52] 28 U.S.C. §1251(a).

the controlling background principles should prove to be a more reliable method of resolving these cases than assigning substantive meaning to inscrutable silence.