STATES UNBOUND: EXAMINING THE AUTHORITY OF THE MULTISTATE TAX COMPACT IN A MODERN, MULTIJURISDICTIONAL ECONOMY

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ABSTRACT

Recent decisions from the high courts of several states have brought attention to a meaningful tension in the goals of the Multistate Tax Compact, an agreement between states. Though the federal government has ruled that no congressional approval is necessary based on the Compact Clause of the U.S. Constitution, this agreement between states has taken its place as an important accord among the vast majority of jurisdictions. Having operated as the most effective solution to the problems identified by Congress in the 1960's Willis Report, the Compact simultaneously disavows its binding authority and relies on the reliance of States on it to meet its goal of promoting uniformity in state tax administration. With billions of dollars of much needed tax revenue at issue, this article seeks to examine the intricacies of the legal principles applied to this contract among states while understanding its role in the modern economy.

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TABLE OF CONTENTS

> Interstate commerce is a rich tax base. It has, moreover, special political fascination. A state or local tax levied upon it falls largely upon people in other states. Here is a legislator's dream: a lush source of tax revenue, the burden of which falls largely on those who cannot vote him out of office.[1]

PART I: INTRODUCTION

From the inception of the United States,[2] courts and legislatures have grappled with the problem of creating a series of tax rules in various jurisdictions[3] that work together to create a fair, predictable and organized system that will result in the free flow of commerce between and among jurisdictions while appropriately compensating the relevant governments.[4] After the U.S. Supreme Court's 1959 ruling in *Northwestern States Portland Cement Co. v. Minnesota*, which held that net income of a foreign corporation may be taxed by a state if that tax is fairly apportioned,[5] Congress established the Special Subcommittee on State Taxation and Interstate Commerce, which published a four volume report that became known as the "Willis Report," and passed P.L. 86-272.[6]

Originally enacted with the intent to be a "stopgap" measure until the question could be properly addressed, this legislation recently celebrated its 50th anniversary.[7] The specter of federal legislation to limit the rights of the

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[1] Emmanuel Celler, *The Development of a Congressional Program Dealing with State Taxation of Internet Commerce*, 36 FORDHAM L. REV. 385, 397 (1968) (citing Mendelson, Epilogue to F. Frankfurter, The Commerce Clause at 118 (Quadrangle Paperback, ed. 1964)).

[2] *See* THE FEDERALIST NOS. 30-36 (Alexander Hamilton) (explaining balancing of authority when taxing individual states (especially nos. 31-32)); *see also* U.S. CONST. amend. V; U.S. CONST. art. I, § 8 cl. 3.

[3] The Commerce Clause grants authority to Congress to limit the ability of the individual States to impose a tax where such tax would be a burden on interstate commerce. The "Dormant" Commerce Clause has developed by judicial opinion and has become an accepted grant of authority to the Federal government to limit powers of individual States to tax even in the absence of Federal legislation. *See generally* Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992) (discussing the dormant commerce clause).

[4] *See* U.S. CONST. art. I, § 8 CL. 3; *see generally* International Harvester Co. v. Department of Taxation, 344 U.S. 435 (1944); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959); Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

[5] *Portland Cement Co.*, 358 U.S. at 452.

[6] P.L. 86-272 (Interstate Income Tax Act of 1959).

[7] Natsha Varyani, *A Contract among States: Capturing Income of the World's*

States to impose state-level tax led to the creation of the Multistate Tax Compact ("Compact"), an agreement between and among states with the facially conflicting goals of promoting uniformity and state autonomy.[8] After the Supreme Court considered the authority of the Compact in *U.S. Steel Corp. v. Multistate Tax Commission*,[9] and applied the law as it has stood since the 1960's, the economy has continued to evolve. Understanding the inherent tensions built into the issue, the Multistate Tax Commission ("Commission"), created by the Compact,[10] has, since its inception, managed its member states.

A feature of the Compact was the creation of the Model Apportionment Formula, which has influenced the division of income in every jurisdiction.[11] The Compact granted taxpayers of member-states authority to use the state provided apportionment formula or to elect the formula contained in the Compact.[12] As technology pushes a more rapid evolution of the economy than ever before, States and taxpayers are attempting to find ways to most efficiently apply existing rules within the bounds of the Constitution. Recent challenges to legislation at the highest levels of state courts reveal a tension between the goals of uniformity and autonomy. In addition, the role of the Compact has faced new constitutional challenges.[13] The Founding Fathers anticipated that the power to impose a tax was central to defining the role and identity of various jurisdictions and has accordingly been considered by Congress, the Supreme Court, and the states throughout this country's history.[14]

This article seeks to explore the applicability of those early principles to determine how to begin shaping a solution that will satisfy constitutional requirements and that is palatable to states and taxpayers alike. While the tension between the federal government and the states with regard to the power to tax has a long and complicated history, this article seeks to uncover only the parts of that story that may color our understanding of the narrow subject at hand, and conclude with an exploration of how states and taxpayers might continue to refine the place of this agreement between states.

Multijurisdictional Taxpayers, U. OF BOLOGNA L. REV. 219, 220 (2016).

[8] *See generally* MODEL MULTISTATE TAX COMPACT (MULTISTATE TAX COMM'N 2015), http://www.mtc.gov/The-Commission/Multistate-Tax-Compact.

[9] U.S. Steel Corp. v. Multistate Tax Commission, 434 U.S. 452 (1978).

[10] *See* MODEL MULTISTATE TAX COMPACT art. VI (MULTISTATE TAX COMM'N 2015), http://www.mtc.gov/The-Commission/Multistate-Tax-Compact.

[11] *See* MODEL MULTISTATE TAX COMPACT art. IV (MULTISTATE TAX COMM'N 2015), http://www.mtc.gov/The-Commission/Multistate-Tax-Compact.

[12] *See* MODEL MULTISTATE TAX COMPACT art. III (MULTISTATE TAX COMM'N 2015), http://www.mtc.gov/The-Commission/Multistate-Tax-Compact.

[13] *See infra* Part III.

[14] *See infra* Part II and Part III.

PART II: HISTORY

It is through the lens of history that we can uncover recurring themes in the formation of the current system and best understand the ideal direction for a set of rules for a new age of commerce. The United States was born from a fight to free itself from a greater and larger government seeking to oversee its trade and revenues. The American Revolution was motivated in part by the desire to conduct an independent government free from the English levying taxes on activities in the colonies.[15] It is not surprising, then, that in drafting the Constitution that would come to govern the United States, the Founding Fathers considered and debated the rights of the various jurisdictions (federal and state) to collect revenues.[16]

A: The Intent of the Framers and its Impact on the Current System

While the Due Process Clause and the Commerce Clause in the U.S. Constitution continue to direct the relationship between the federal government and the states' power to tax, the ideas contained in the Federalist Papers reveal the mindset and intention of the Founding Fathers and their reaction to public sentiment.[17] In beginning to consider the taxing power of the Federal and State governments, Alexander Hamilton was keenly aware of the social, economic and political force that came with the power to impose tax on citizens.[18] As stated in the Federalist Papers:

Revenue is as requisite to the purposes of the local administrations as to those of the Union; and the former are at least of equal importance with the latter to the happiness of the people. It is therefore as necessary, that the state governments should be able to command the means of supplying their wants, as that the national government should possess the like faculty in respect to the wants of the Union. But an indefinite power of taxation in the LATTER might, and probably would in time, deprive the FORMER of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature.[19]

It is fitting that the first Secretary of the Treasury of the United States should be the same individual articulating the tensions relating the power to tax, and the necessary complications of a successful tax system. Given the

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[15] THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776).
[16] THE FEDERALIST NO. 12 (Alexander Hamilton).
[17] *See generally* THE FEDERALIST NOS. 30-36 (Alexander Hamilton).
[18] *See* THE FEDERALIST NO. 31 (Alexander Hamilton).
[19] *Id.*

recent revolution and break from colonial rule, Hamilton showed awareness that an overstepping tax authority will only deepen the cracks in society that lead to revolution.

Recognizing that the states in the new Union would be wary of unlimited federal authority to tax, Hamilton conceded that "the justness of the reasoning … require[d] that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants."[20] The desire of the states' protection of their authority, both in the general police powers contained in the Constitution and the ability of the states to tax is balanced against the practical need for citizens to manage compliance with rules and revenue collections in multiple jurisdictions. Though multi-jurisdictional taxpayers were not prevalent enough to warrant policy consideration at the time of the drafting of the Federalist Papers, Alexander Hamilton could foresee the tension that drives policy even in the technology driven economy that has evolved since his time. In considering the rights of the states to set rules and taxes specific to the local customs, Hamilton understood that the grant of that authority would mean the death of uniformity: "[t]his must be necessarily exclusive; because if each State had the power to prescribe a DISTINCT RULE there could be not be a UNIFORM RULE."[21] Hamilton proved prescient in his identification of the issue relating to the choice between a system with distinct rules and one with uniform rules; it is the tension that underlies policy arguments made hundreds of years later by state legislatures, the state and federal judiciaries, taxpayers, and the Multi-State Tax Commission, a body created to manage this very issue.

B: *Northwestern States Portland Cement Co. v. Minnesota*

In February of 1959, the Supreme Court of the United States made a landmark ruling in *Northwestern States Portland Cement Co. v. Minnesota*,[22] which held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State."[23] The Court consolidated this case from the Supreme Court of Minnesota with another decided by the Supreme Court of Georgia, *T.V. Williams v. Stockham Valves & Fittings, Inc*.[24] High courts in two jurisdictions came to opposing conclusions, and thirty-five states at the time

[20] THE FEDERALIST NO. 32 (Alexander Hamilton).
[21] *Id.*
[22] 358 U.S. 450 (1959).
[23] *Id.* at 452.
[24] *Id.*

imposed a net income tax on corporations.[25] Where the Minnesota Supreme Court upheld the state tax in *Portland Cement Co*., the Georgia Court in *T.V. Williams* invalidated a similar tax on the grounds that it was in violation of both the Commerce Clause and the Due Process Clauses of the Federal Constitution.[26] The Supreme Court validated Minnesota's position that a state may impose such a tax while acting within the bounds of the limits placed by the federal Constitution. However, the dissenting Justices were careful and emphatic in urging congressional inquiry into this matter as it would profoundly impact commerce within the United States.[27]

1: Taxpayer Activities & Challenged Statutes

During the periods at issue, Minnesota law imposed a tax on the taxable net income of four different classes of taxpayers based on whether or not they were residents of Minnesota.[28] The statute set out different classes of taxpayers upon whom tax would be imposed, including: "Domestic and foreign corporations . . . which *own property* within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both."[29] In determining what portion of the income these taxpayers were subject to under Minnesota law, the statute took the average of three ratios, using the location of the sales, payroll and property of the entities both in state and in all locations.[30]

The Minnesota case examined a taxpayer that was an Iowa corporation engaged in the cement business in Iowa, not far from the Minnesota border.[31] The corporation's activities in Minnesota consisted entirely of solicitation of sales which required approval from the plant in Iowa.[32] Through the taxpayer's systematic solicitation of sales, approximately forty-eight percent of the sales were made to dealers in Minnesota.[33] The taxpayer also maintained and leased a three-room sales office and had three employees who worked out of the office in Minnesota soliciting sales that

[25] *Id.* (granting both cases certiorari, but were briefed, argued and submitted separately).

[26] *Id.* at 453-57.

[27] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 476-77 (1959) (Whittaker, J., dissenting).

[28] MINN. STAT. § 290.03 (1945) (amended 1987).

[29] *See Portland Cement Co.*, 358 U.S. 450 at 360 (emphasis added).

[30] MINN. STAT. § 290.19 (1945) (repealed 1987) §290 M.S.A. (using these ratios and resulting formula closely resembles what many States, and indeed, the modern Multistate Tax Commission use as their apportionment formula, which takes an average of three ratios to "apportion" income to the state. The fairness or accuracy of the formula was not at issue in this case).

[31] *Portland Cement Co.*, 358 U.S. 450 at 453.

[32] *Id*. at 454.

[33] *Id.*

were submitted to the office in Iowa for approval.[34] Likewise, those employees in Minnesota were paid from the home office of the taxpayer in Iowa.[35] Portland Cement had no bank account, owned no real estate, and warehoused none of their merchandise within Minnesota.[36] During the periods at issue, the taxpayer did not file any income tax returns in Minnesota, and was assessed by the Commissioner of Revenue for unpaid tax, interest and penalties.[37]

In the consolidated case, the Georgia Commissioner of Revenue assessed and collected tax for the periods at issue on Stockham Valves & Fittings, Inc. ("Stockham"), a Delaware corporation with its principal place of business in Birmingham, Alabama.[38] Stockham was in the business of supplying valves and pipe fittings through local wholesalers,[39] but maintained no warehouse or storage services for their products in Georgia. The taxpayer maintained a sales office in Atlanta which serviced five states and was the home office to one sales man and one "woman secretary" employed and paid by Stockham.[40] All orders required approval from the home office in Birmingham, and were shipped to customers directly from Alabama on a "f.o.b. warehouse" basis.[41] Stockham had no property in Georgia, no bank accounts or funds there, and did not store any merchandise in the state, with the exception of some office equipment, supplies and advertising literature used for the purpose of soliciting sales.[42]

Georgia imposes a tax on net income "received by every corporation, foreign or domestic, owning property or doing business in this State" and defines "doing business" as "any activities or transactions" in Georgia "for the purpose of financial profit or gain" but without regard to any connection to interstate commerce.[43] Like Minnesota, Georgia also "apportioned" the net income that was taxable in state, but the formula was based on the factors of inventory, wages, and gross receipts.[44] After the Commissioner assessed taxes, and Stockham was denied its refund claim, this suit was filed based only on the constitutionality of Georgia's statute.[45] The claim was based on

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[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 455.
[38] *Id*. at 455-57.
[39] *Id.* (encouraging these local wholesalers to carry an inventory by offering a special price concession to those that did).
[40] *Id.*
[41] *Id.* at 456.
[42] *Id*. at 455.
[43] *Id.* at 456-57 (quoting GA. CODE ANN §92-3102 (1937)).
[44] *Id*. at 457 (citing GA. CODE ANN §92-3102 (1937)).
[45] *Id*.

the Due Process Clause and the Commerce Clause of the United States Constitution, and sought to define the limits those clauses place on a state's right to impose tax on an out of state taxpayer.[46]

2: The Analysis and Holding of the Majority

In both cases, the taxpayer challenged the constitutionality of a state statute imposing a tax on a taxpayer whose only activity in state is related to interstate commerce. Despite the statutes being similar on their face, the Minnesota statue was upheld by the Minnesota Supreme Court while the Georgia Supreme Court invalidated the Georgia statute on the grounds that it violated both the Due Process clause and the Commerce Clause of the U.S. Constitution.[47] In the opinion of the Court, Justice Clark stated that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing state forming sufficient nexus to support the same."[48]

While this decision attempted to apply a complicated standard, the Justices also called on Congress to clarify its intent with regard to states' power to tax foreign corporations based on their interstate activities.[49] Congress had failed to regulate the increasingly important issue of taxation of Commerce between states. The Court acknowledged the long line of cases testing the limits on taxation of out of state entities.[50] Understanding the tension between states seeking to get some compensation for the benefit they provide to out of state taxpayers, and those corporate taxpayers operating across state lines, the Court recognized the need to provide some guidance on the topic.[51] Having hundreds of opinions on this topic through federal courts, this opinion set out to outline some consistent themes in those rulings and establish some boundaries on which states and taxpayers could rely.[52]

a: The Commerce Clause

Congress has been granted exclusive power to regulate interstate

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[46] *Id.*

[47] *Id.* at 450.

[48] *Id*. at 452.

[49] *Id.* (stating that at the time of this decision, thirty-five jurisdictions imposed a direct net income tax on corporations).

[50] *Id.* at 457.

[51] *Id*.

[52] *Id.* at 458 (quoting Justice Clark "from the quagmire there emerge . . . some firm peaks of decision which remain unquestioned.").

commerce.[53] As Justice Clark wrote the opinion for the majority, Congress had taken no action in the area of taxation on interstate commerce.[54] The Commerce Clause itself, however, required that interstate commerce not be burdened by any actions by the states. Justice Clark undertook the task of providing a brief history of case law on this matter and traced the evolution of the standard to be applied. [55] In doing so, Justice Clark outlined the following relevant guidelines:

> First, despite Congress' inaction, states may not impose any restrictions on interstate commerce;[56] second, states may not impose their jurisdiction on taxpayers that are temporarily present or "passing through;"[57] third, states may not impose a tax on the privilege of interstate commerce, either by creating a system of taxation that provides a direct advantages to local (not interstate) business, or one that will subject multi-state taxpayers to taxation of the same income in multiple jurisdictions.[58] States that have attempted to impose a tax in those cases have had those taxes invalidated under the Commerce Clause, which does not allow "one single tax-worth of direct interference with the free flow of commerce.[59]

In 1918, the Court "distinguished between an invalid direct levy which placed a burden on interstate commerce and a charge by way of net income derived from profits from interstate commerce,"[60] but unlike the case at hand, that line of cases dealt with taxpayers who had established a commercial domicile in the taxing state. In the two cases at hand, though neither taxpayer is domiciled, incorporated, or has its principal place of

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[53] U.S. CONST. art. I, § 8 cl. 3.

[54] *Portland Cement Co*., 358 U.S. at 458.

[55] *See Id.* (citing Gibbons v. Ogden, 22 U.S. 1 (1824)).

[56] 358 U.S. at 458.

[57] *See Id.* (citing Robbins v. Taxing Dist., 120 U.S. 489, 493-94 (1887) (holding that a state may not impose a tax on itinerant drummers due to the temporary nature of their presence in state).

[58] *See Portland Cement Co*., 358 U.S. at 458 (citing Spector Motor Serv. v. O'Connor, 340 U.S. 602 (1951); Memphis Steam Laundry Cleaner v. Stone, 342 U.S. 389 (1952); Nippert v. City of Richmond, 327 U.S. 416 (1946); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954); Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938)).

[59] *Portland Cement Co.*, 358 U.S. at 458 (quoting Freeman v. Hewitt, 329 U.S. 249, 256 (1946)).

[60] *Portland Cement Co.*, 358 U.S. at 459 (citing United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918)); *see also* Underwood Typewriter Co. v. Chamberlin, 254 U.S. 113 (1920); Memphis Natural Gas v. Beeler, 315 U.S. 649 (1942).

business in the taxing state, both conduct substantial business operations there.[61]

The Supreme Court, in a series of cases, found fact patterns where taxpayers had business dealings in the state seeking to impose a tax but no domicile, incorporation or principal place of business.[62] These holdings resulted in the principle that "a tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, does not conflict with the commerce clause."[63] This distinction is vital to the application of the Commerce clause as it applies to the right of states to impose tax on multi-jurisdictional businesses engaged in interstate commerce, which have been increasingly prevalent from the mid-twentieth century to current day. The Court recalled the intent of the Founding Fathers in shaping a rule that can be applicable to an economy that was and is rapidly developing; it is axiomatic that the Founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the state. The levies are *not privilege taxes* based on the right to carry on business in the taxing state."[64]

The Court recognized the extent to which the states' decisions to levy a net income tax was outside the scope of their authority, and in doing so acknowledged the rights of states to decide what tax policy is optimal for each particular jurisdiction.[65] The "economic realities" presented, however, required the Court to articulate the rule that prohibits the burden of multiple burdens on the same net income.[66] As an "unapportioned tax . . . by its very nature makes interstate commerce bear more than its fair share"[67] the Court accordingly finds that a tax that *is* apportioned will prevent discrimination against interstate activities that would place interstate commerce at a disadvantage.[68] Already, the court is beginning to outline the balance between ensuring that there is no restriction or even burden placed on interstate commerce while simultaneously ensuring that states are justly compensated for the benefits they confer on taxpayers. While acknowledging that varied

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[61] *Portland Cement Co.*, 358 U.S. at 459.

[62] *See Id.* at 459-60 (citing West Publ'g Co. v. McColgan, 328 U.S. 823 (1946) (per curiam) (holding that the income that was taxed arose purely from an interstate operation where the employees of West were given space in the offices of attorneys in exchange for the use of books stored in those offices); Memphis Nat. Gas Co. v. Beeler, 315 U.S. 649 (1942); United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918); Interstate Busses Corp. v. Blodgett, 276 U.S. 245 (1928); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

[63] *Portland Cement Co.*, 358 U.S. at 461 (quoting West Publ'g Co. v. McColgan 166 P.2d 861, 863 (Cal. 1957)).

[64] *Portland Cement Co*., 358 U.S. at 461-62 (emphasis added).

[65] *Id*. at 462.

[66] *Id*.

[67] *Id.*

[68] See *Id*. (citing Cent. Greyhound Lines of N.Y. v. Mealy, 334 U.S. 653, 661 (1948)).

apportionment formulas *may* result in multiple taxation, the Court is very clear that the question before it is whether the particular statues being considered are a burden on interstate commerce under the Commerce Clause.[69] In completing its Commerce Clause analysis, the Court concluded that the tax statutes considered are "based only on the net profits earned in the taxing state" and that the levy of those taxes afford a "valid 'constitutional channel' which the states have utilized to 'make interstate commerce pay its way.'"[70] The Court held that the taxes that are imposed are reasonably related to the powers of the state and do not discriminate against interstate commerce, which, like local commerce, must compensate the state where necessary for the benefit conferred.[71]

b: The Due Process Clause

Where the Commerce Clause raises the question of whether the tax at issue imposes an undue burden on interstate commerce, the Due Process Clause contained in the U.S. Constitution asks a question about the fundamental fairness of a state subjecting the taxpayers to its laws.[72] The Due Process Clause requires some "definite link, some minimum connection" between the taxpayer and the taxing jurisdiction.[73] While this question has gotten more attention in subsequent cases,[74] as applied to the taxpayers in the cases at hand, there was no question of a link to the taxing jurisdiction that satisfied that the taxpayers had sufficient nexus within each jurisdiction to be subject to the tax imposed.[75] Both *Portland Cement Co.*, in Minnesota and *Stockham* in Georgia engaged in courses of conduct that resulted in a significant portion of their income producing activity, which allowed the Court to quickly dismiss any argument about the fundamental fairness of the state to tax. In stating the rule, the Court reiterated a precedent by asking the "controlling question [of] whether the state has given anything for which it can ask

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[69] *Portland Cement Co.*, 358 U.S. at 462.

[70] *Id*. at 464 (quoting Spector Motor Serv. v. O'Connor, 340 U.S. 602, 608 (1951)).

[71] *See Portland Cement Co.*, 358 U.S. at 464.

[72] *See Id*. at 464-65.

[73] *See Id*. at 465 (quoting Miller Bros. Co. v. State of Maryland, 347 U.S. 340 at 344-45 (1954)). *See also* Ott v. Miss. Valley Barge Line Co., 336 U.S. 169 (1949); International Shoe Co. v. Washington, 326 U.S. 310 (1945); West Publ'g. Co. v. McClorgan, 328 U.S. 823 (1946).

[74] *See generally* Natasha Varyani, *Taxing Electronic Commerce: The Efforts of Sales and Use Tax to Evolve with Technology*, 39 OKLA. CITY U. L. REV. 151 (2014) (referring to the Multi-State Tax Commission cases discussed herein).

[75] *See generally Id.* (discussing the Due Process analysis becomes more complicated as commerce and business are increasingly sophisticated and based in the digital realm which continues to be a question that is frequently analyzed by States, taxpayers, courts and scholars).

return."[76] The resounding answer in the cases at hand, is that the states have clearly provided the taxpayer with a benefit, and the limits of the Due Process Clause are not tested.

3: Concurring and Dissenting Opinions: A Call to Congress

Justice Whittaker wrote a vigorous dissent that was joined by Justices Frankfurter and Stewart based on a "disagreement with the Court . . . over . . . constitutional fundamentals."[77] The dissent believed that the Court's ruling was contrary to established precedent, and that the ruling allowed, for the first time, states to directly regulate interstate commerce.[78] The conclusion of the dissent rests both on the grounds that both the Commerce Clause and the Due Process Clause were violated because the statutes imposed a tax on income that was derived exclusively from interstate commerce (therefore violating the Commerce Clause) and it was upon income that was outside the jurisdiction of Minnesota and Georgia (thereby violating the Due Process Clause).[79] Unlike the majority, which characterized the precedent on this topic as a "quagmire," the dissent argues that those same cases are "remarkably consistent" and outlines steps for discerning whether the tax statues in question have violated limits placed on states by the U.S. Constitution.[80] Accordingly, the dissent applies its interpretation of the facts through the lens of the same precedential cases used by the majority. The dissent has a fundamental disagreement about the use and application of the Commerce Clause by the Court.

Citing the language of the Commerce Clause, that "Congress shall have power . . . to regulate Commerce . . . among the several States,"[81] Justice Whittaker argues that it "by its own force created an area of trade free from interference by States."[82] Taxation of interstate commerce, the dissent argues, is a burden on interstate commerce, and as such may only be regulated by Congress.[83] Further, the dissent argues, while taxes may be imposed on multi-jurisdictional entities engaged in intrastate business, revenues derived from interstate commerce are beyond the reach of the states due to the limitations

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[76] *Portland Cement Co.*, 358 U.S. at 465 (quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940)).

[77] *Portland Cement Co.*, 358 U.S. at 477 (Whittaker, J., dissenting).

[78] *Id.*

[79] *Id.* at 482-83 (Whittaker, J., dissenting).

[80] *Id.* at 485 (Whittaker, J., dissenting).

[81] U.S. CONST. art. I, § 8 cl. 3.

[82] *Portland Cement Co*., 358 U.S. at 486 (Whittaker, J., dissenting) (quoting Freeman v. Hewitt, 329 U.S. 249, 252 (1946)).

[83] *Portland Cement Co.*, 358 U.S. at 486 (Whittaker, J., dissenting) (quoting Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888).

the Commerce Clause set forth in order to protect such business activity.[84]

In response to the majority contention that the taxing income that is fairly apportioned to the state does not violate the Commerce Clause, Justice Whittaker argues that "the fact that such taxes may be fairly or 'properly apportioned' is without legal consequence, for 'the constitutional infirmity of such tax persists no matter how fairly it is apportioned to business done within the state.'"[85] He argues that the statutes in question amount to Minnesota and Georgia imposing taxes on interstate commerce and thereby regulate that which only the U.S. Congress has the power to regulate.[86] He argues that the "Commerce Clause denies state power to regulate interstate commerce. It vests that power exclusively in Congress" and the decision of the majority allows improper action on the part of the states to stand.[87] In a second dissent, Justice Frankfurter further expands on the rights to regulate interstate commerce and calls on Congress to step in.[88] In doing so, he outlines the fundamental roles of the branches of government when emphasizing that the "court can only act negatively" to "determine whether a specific state tax is imposed in violation of the Commerce Clause" and that it is not able to make a "detailed inquiry" into the underlying question of the various burdens on states and taxpayers, and also does not have the tools to devise appropriate standards for dividing revenue.[89] Justice Frankfurter's dissent is a clear call to action for congress: "The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of taxing freedom of the States and the needed limits of such taxing power."[90] Congress heeded that call.

C: Congress' Swift Reaction: A Legislative Stopgap - Public Law 86-272

The decision in *Northwestern States Portland Cement Co. v. Minnesota* [91] had a significant impact on taxpayers who echoed the dissent in that case in compelling Congress to act.[92] Prior to that ruling, taxpayers testified to a widely held belief that a state could not impose tax unless the

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[84] *Id.* at 486 (Whittaker, J., dissenting).

[85] *Id.* at 495 (Whittaker, J., dissenting) (quoting Spector Motor Service v. O'Connor, 340 U.S. 604, 609 (1951)).

[86] *Id.* at 496-97 (Whittaker, J., dissenting).

[87] *Id.*

[88] *Id.* at 470-76 (Frankfurter, J., dissenting).

[89] *Id.* at 476 (Frankfurter, J., dissenting).

[90] *Id.*

[91] 358 U.S. 450 (1959).

[92] H.R. Rep. No. 1480, 88th Congress, 2d Session (1964).

taxpayer engaged in at least some *intrastate* commerce within the state.[93] Businesses were concerned with the possibility of having to comply with multiple, diverse and complex schemes of apportionment and taxation. They believed this could result in overlapping tax and doubted their ability to comply with such and administrative burden.[94] Congressional response was swift: shortly after the Supreme Court's holding in *Portland Cement Co.*, the Senate Select Committee on Small Business, the Senate Finance Committee, and the House Judiciary Committee all set to work to provide relief.[95] The result was Public Law 86-272,[96] which was reported out of Congress and became effective for tax years ending on or before September 14, 1959, just nine months after the decision in *Portland Cement Co*.

This new Federal statute was a pointed and direct response to the Supreme Court's decision in *Portland Cement Co*. In simplest terms, it prohibited a state from imposing income tax on an entity whose only activity in-state was solicitation of orders by a salesman or sales through independent contractors.[97] In short, it would have protected Portland Cement Co. and Stockham Valves from being subject to net income tax in Minnesota and Georgia respectively, as their activities in the States imposing taxes were limited to the solicitation of orders or making sales through independent contractors. Though this congressional action was responsive to taxpayer concerns and the call of the dissent in the Supreme Court, both chambers of the legislature understood that action was far from complete. Both the House of Representatives and the Senate understood and indeed designed this legislation to be a temporary "stopgap" to prevent expansion of judicial reach while a complete and thorough study of the issues surrounding the regulation of interstate commerce was undertaken.[98]

As it was a direct response to the decision in *Portland Cement Co.*, the scope of P.L. 86-272 was limited to income tax.[99] It quickly became clear to states and to taxpayers that other forms of tax could also have a profound, potentially discriminatory impact on interstate commerce that similarly required Congressional action. Shortly after the enactment of P.L. 86-272,

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[93] *Id.*

[94] *Id*.

[95] Hearings on State Taxation of Interstate Commerce Before Senate Select Committee on Small Business, 86th Congress, 1st Session (1959); Senate Finance Committee: S. Rep. No. 658, 86th Cong., 1st Sess. (1959), reporting S.2524; House Judiciary Committee: H.R.J. Res. No. 936, 86th Cong., 1st Sess. (1959), reporting H.J. Res. 450.

[96] 15 U.S.C. §§ 381-384 (2018) (despite its official place in the United States Code, this piece of legislation continues to be known and referred to as "P.L. 86-272" by those in the business community. The long title of the legislation is the Interstate Income Act of 1959).

[97] 15 U.S.C. § 381 (2018).

[98] *See* H.R.J. Res 450; 105 Cong. Rec. 16354 (remarks of Senator Byrd).

[99] 15 U.S.C. §§ 381, 383 (2018).

the Supreme Court ruled that a State could impose a use tax on shipments made to in-state purchasers when the seller had no presence in the taxing state.[100] Again in response to the Court's holding, both chambers of the legislature, acutely aware of the ever broadening scope of this issue, introduced various pieces of legislation related to the regulation of interstate commerce through state taxation, specifically, to expand the protection of P.L. 86-272 to forms of tax other than income tax. Despite deep concern in Congress about the impact of the Court's decisions, Congress was reluctant to take more action without a thorough study. In the end, Congress was charged not just with studying the impact of income, sales, and use tax, but "all matters pertaining to the taxation of interstate commerce."[101] This eventually resulted in the Willis Report.

D: The Willis Report[102]

Under the Chairmanship of Representative Edwin E. Willis of Louisiana, a Special Subcommittee of the House Judiciary Committee was initiated in 1961. According to Representative Willis, the primary objectives of the study were "to develop a body of factual information, hitherto unavailable, as to the number and characteristics of interstate companies, the pattern of their activities across state lines, the cost of complying with state and local tax laws, the degree to which they were able to comply, and the effect on businesses and State revenues of various possible remedial proposals."[103] The resulting report was indeed comprehensive. Over a four and half year period, the Subcommittee conducted the exhaustive study that was published in four volumes known as the Willis Report.[104]

Though it contained countless nuances in the data and analysis contained in its volumes, the Willis Report categorized four major defects in the system as it existed at the time. First, that there was widespread noncompliance of state tax laws as well as non-enforcement of those same laws. Congress found that most companies did not file tax returns in states where they had no place of business, and further, that for ninety seven and one-half percent of companies where there was a tax liability for an entity

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[100] Scripto v. Carson, 362 U.S. 207 (1960).

[101] 75 STAT. 41 (1961).

[102] Special Subcommittee on State Taxation of Interstate Commerce of the House Comm. On the Judiciary, Report on State Taxation of Interstate Commerce, H.R. Rep. No. 1480, 88th Cong., 2d Sess., vols 1 and 2 (1964); H.R. Rep. No. 565, 89th Congress, 1st Sess., vol. 3 (1965); H.R. Rep. No. 952, 89th Congress, 1st Sess., vol. 4 (1965). *Herein* referred to as "Willis Report."

[103] H.R. Rep. No. 69, 90th Congress, 1 Sess. 4 (1967).

[104] *See generally* Emmanuel Celler, *The Development of a Congressional Program Dealing with State Taxation of Interstate Commerce*, 36 FORDHAM L. REV. 385 (1968).

without a place of business in state, no return at all was filed.[105] The Report also found that where taxpayers did file returns, many of them were not in compliance with state and local rules. As a result, the Willis Report found, the system left broad discretion to the Commissioner in each taxing jurisdiction with regard to selecting where to rigorously enforce existing statutes. In addition, the report considered the cost of compliance for the business community and found it to be overly burdensome.

Second, the Subcommittee found that the present system as it existed at the time resulted in wildly inconsistent results when it came to finding the appropriate measure of tax. In the income tax area alone, some companies were taxable on well over one hundred percent of their income when all apportionment formulas were applied while other taxpayers were subject to tax on a total substantially lower than one hundred percent.[106] Third, the Subcommittee found that there were a number of provisions in local laws that conferred benefits on locally based companies that were not available to those based outside the taxing state.[107] Though many of the examples of this problem involved non-income measure tax types, it contributed to an overall unfairness of the system.[108] This leads to the fourth and most serious conclusion of the Subcommittee which is also the most difficult to address: there existed a general attitude among taxpayers that the rules are inherently unworkable and could not possibly be enforced in any systematic way by tax administrators. That conclusion gave rise to a resistance to any assumption of responsibility and meant that companies simply disregarded the state and local taxing requirements.[109]

Subsequent to the promulgation of the Willis Report, the Subcommittee proposed legislation and continued to hold hearings to understand the impact on all relevant stakeholders. During the course of those hearings, state officials made it clear that one of their primary considerations was the desire to preserve as much autonomy for state and local taxing authorities as possible.[110] As efforts to find a solution in a quickly evolving economy progressed, states continued and still continue today to try to preserve some autonomy. While understanding that uniformity among states may result in a system that is more manageable and predictable, the extent to which the Constitution

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[105] Willis Report, *supra* note 102, at vol. 4 at 1127, and vol. 1 at 303.

[106] Willis Report, *supra* note 102, at vol. 1 at 408-11, and vol. 4 at 1127.

[107] Willis Report, *supra* note 102, at vol. 4 at 1127-28.

[108] Willis Report, *supra* note 102, at vol. 3 at 819-20.

[109] Willis Report, *supra* note 102, at vol. 4 at 1128, Hearings before Special Subcommittee on State Taxation of Interstate Commerce of House Comm. on the Judiciary, 89th Cong., 2d Sess., ser. 14 (1966).

[110] *See* Hearings Before the Special Subcommittee on State Taxation of Interstate Commerce of the House Comm. on the Judiciary, 89th Cong., 2d Sess., ser. 14, vol. 1, 76-111 (1966).

protects the states' ability to preserve that autonomy to benefit its citizens must be balanced with federal congressional authority to regulate burdens on interstate commerce, including state taxation. Congress was caught in the conundrum that:

> [The] policy of seeking continually to expand each state's jurisdictional reach beyond its own limits of effective enforcement has broad ramifications, not only because of its effect on the national economy, but also because it undermines the political vitality of the states themselves. The more each state is successful in shifting its tax burden onto persons who are without political representation in the state government, the more those persons will exact political pressure on the federal government to play a primary role in state and local affairs.[111]

In acting, Congress sought to understand and balance the position of all stakeholders, and in balancing those interests, failed to pass a permanent solution.[112]

E: The States Respond

The failure of Congress to pass legislation relating to the regulation and taxation of interstate commerce is due to the reaction of the States. In response to the Willis report and legislation proposed by the same special subcommittee[113] the National Association of Tax Administrators and the Council of State Governments systematically opposed the H.R. 2158. The states took the position that Congress should discontinue its efforts to enact further legislation and should instead authorize the negotiation of an interstate compact. Responding to Congress gave rise to the Multi-State Tax Compact, an organization that has continued to shape state tax policy up to the current

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[111] Emmanuel Celler, *The Development of a Congressional Program Dealing with State Taxation of Internet Commerce*, 36 FORDHAM L. REV. 385, 398 (1968).

[112] Enacted as a temporary 'stop-gap' measure, P.L. 86-272 continues to be in effect today and is the last time Congress spoke on this issue. *See* Varyani, *supra* note 7, at 220-21.

[113] H.R. 2158 before the 90th Congress. The first bill introduced was H.R. 11798 in 1965, and after hearings, a new bill, H.R.16491, still a direct result of the Willis Report, was introduced on September 7, 1966 before the 89th session of Congress shortly before it adjourned. H.R. 2159, identical to H.R.16491, was introduced before the 90th session of Congress and on March 7, 1967, the House Judiciary Committee reported the measure favorably with several amendments made largely by State tax administrators and was reported by the Committee on Rules. H.R. 2159 passed the house in the 90th Session of Congress, which adjourned before the Senate took any action.

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PART III: THE MULTISTATE TAX COMPACT

At the January 1966 meeting of the National Association of Tax Administrators, the idea of creating the Multistate Tax Commission was unanimously approved.[114] Created in 1967 by Article III of the Multistate Tax Compact, the Commission was created "as an effort by states to protect their tax authority in the face of . . . proposals to transfer the writing of key features of state tax law from the state legislature."[115] Today, the voting members that manage the Commission are tax officials from member states who work to serve both state governments and taxpayers.[116] The prevalence of the standards set by the Commission and the impact it has on the system of taxing multijurisdictional taxpayers reveals that it is the most successful solution to the problems identified in the Willis Report that this country has seen to date.

A: Mission and Goals

Created by the Multistate Tax Compact, the Commission is charged with:

> Facilitat[ing] proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes[,] [promoting] uniformity or compatibility in significant components of the tax systems[,] [f]acilitat[ing] taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration[, and] [a]void[ing] duplicative taxation.[117]

The stated objective of the Commission has been and is "to achieve and provide maximum uniformity in the administration of state taxes as they

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[114] Second Annual Report of the Multistate Tax Commission for period ending June 30, 1969 *15 (Dec .22, 1969), http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY68-69.pdf.

[115] *The Commission*, THE MULTISTATE TAX COMMISSION, http://www.mtc.gov/The-Commission.

[116] *Officers & Executive Committee Members*, THE MULTISTATE TAX COMMISSION, http://www.mtc.gov/The-Commission/Officers-Executive-Committee.

[117] ORIGINAL MODEL MULTISTATE COMPACT art. I (MULTISTATE TAX COMM'N 1967), http://www.mtc.gov/getattachment/The-Commission/Multistate-Tax-Compact/Original-Model-Multistate-Tax-Compact.pdf.aspx.

affect companies engaged in multistate business."[118] In its early stages, the MTC believed that proposed federal legislation posed a "direct threat to the independent authority and political integrity of every state as a direct result of inevitable Federal dictation of state tax administration . . ."[119] and was charged with opposing such legislation, which it did successfully by providing an alternative solution in the form of the Compact. From the early stages of the organization, balancing the competing principles of uniformity and autonomy for states has been central to the purpose of the Commission, and that tension continues to underlie actions taken.

States quickly responded to the Willis Report and proposed federal legislation regarding the regulation of interstate commerce through state tax. The Multistate Tax Compact became effective on August 4, 1967.[120] At the first organizational meeting, eleven states were represented and involved in conceiving the Compact, which by its terms, would be effective when it had seven-member states.[121] As directed by those early members, states became members by enacting the Compact into the laws of their state. By December 31, 1968, fifteen states had passed legislation that enacted the Multistate Compact into state law, and by 1972, there were twenty-one member states.[122] By the early 1970s, the Compact was such an influence on state tax policies, that multi-jurisdictional taxpayers challenged its validity in what has become a landmark case in the history of the Multistate Tax Commission.[123] Gathering members to the compact is essential for its existence: in order for a uniform system to work, it is necessary for states to agree. The status of the relationship between members, however, and the extent to which the Compact binds states to that uniformity, is the question that State courts are visiting today. Preserving the autonomy of states and protecting their power to tax is as central to the goal of the Compact as is providing uniformity.

B: Congressional Consent and Authority of the Compact

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[118] Second Annual Report of the Multistate Tax Commission for period ending June 30, 1969 *16 (Dec. 22, 1969).

[119] *Id.* at 17.

[120] *About the Multistate Tax Compact with Suggest Enabling Act*, MULTISTATE TAX COMM'N (June 15, 2015), http://www.mtc.gov/getattachment/The-Commission/Multistate-Tax-Compact/About-the-Compact-and-Suggested-Enabling-Act.pdf.aspx.

[121] First Annual Report of the Multistate Tax Commission for period ending December 31, 1968 *4 (Jan. 28, 1969) (stating that the original states present were: Arkansas, Idaho, Illinois, Kansas, Missouri, Nebraska, Nevada, New Mexico, Oregon, Texas and Washington and that an additional twenty-two states and the District of Columbia had present "discussion participants" at the organizational meeting).

[122] *Id*. at 14; *see also* U.S. Steel Corp. v. Multistate Tax Comm'n., 434 U.S. 452, 454 (1978).

[123] U.S. Steel Corp. v. Multistate Tax Comm'n., 434 U.S. 452 (1978).

At the inception of the Compact, before even the first meeting of the members, the creators were aware that it was necessary to examine the ways in which the agreement between states should be structured to achieve their purposes. Accordingly, a select committee was appointed to consider the question of whether the consent of Congress must be secured to make the Compact legally effective.[124] In its grant of congressional authority, in what has come to be known as "The Compact Clause," the U.S. Constitution says that "[n]o state shall, without the consent of Congress . . . enter into any Agreement or Compact with another state."[125] The MTC noted the U.S. Supreme Court's interpretation of the intent for this particular provision was that "prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[126] The group also noted that the Court has consistently held that only a small fraction of agreements entered into between states require approval of Congress in the form of federal legislation.[127] Nevertheless, they sought to determine whether congressional approval was necessary both to determine whether public funds could be used in furtherance of the mission of the Compact and because three states had conditioned their membership on congressional approval in those early stages.[128] Congressional approval of a compact results in it being considered both a contract and a federal law. Having the force of federal law allows access to federal courts, while compacts without congressional approval have only the binding force of a contract.[129] It was clear that the question of congressional approval needed to be addressed.

In October 1967, still in the initial stages of the Compact, a meeting was held in Washington D.C. for planning a response to the Willis Bills and

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[124] First Annual Report of the Multistate Tax Commission for period ending December 31, 1968 *3 (Jan. 28, 1969). There are a number of "Compacts" that exist in the United States currently, including the Interstate Civil Defense and Disaster Compact, which is operational in all 50 states; the Vehicle Equipment Safety Compact, enacted in 44 states; the Interstate Compact on Juveniles, which is in force in 42 states; and the Interstate Compact to Conserve Oil and gas, which is operational in 30 states. *See* Civil Defense and Disaster Compact, NATIONAL CENTER FOR INTERSTATE COMPACTS (2011), http://apps.csg.org/ncic/Compact.aspx?id=34.

[125] U.S. CONST. art. I., §10, cl. 3.

[126] *See* Virginia v. Tennessee, 148 U.S. 503, 519 (1893) (stating that the Court considered a boundary dispute between two states and in attempting to resolve the dispute by agreement between the two states, considered the Compact Clause).

[127] First Annual Report of the Multistate Tax Commission for period ending December 31, 1968 *3 (Jan. 28, 1969).

[128] *Id*. Subsequently, those three states removed that conditional language and became members without Congressional approval after the Special Committee concluded its legal analysis.

[129] *See* Michael Herbert & Bryan Mayster, *The Journey of the MTC's Joint Audit Program*, STATE TAX NOTES, Sept. 30, 2013.

further refining the proposed solution of the Multistate Tax Compact.[130] An important agenda item in that meeting was a presentation of the analysis of the special committee appointed to study the extent to which congressional approval was necessary.[131] The Committee chairman reported that "an analysis had been made of each article of the Compact to determine whether consent was needed for that part, and that since there was found no part for which congressional consent was needed, the Compact as a whole did not require such consent."[132] Despite this, however, the report encouraged obtaining congressional approval "because the Compact is of the type for which consent traditionally has been sought and obtained, and for policy reasons it would be desirable to have a declaration of the support of Congress for this cooperative state action."[133] This was an understandable position in the early days of the Compact, when the effort to attract member states to an enterprise required some showing of validity and importance. In the end, however, the Multistate Compact did not require the consent of Congress to demonstrate or achieve its goals.[134]

Approximately a decade later, the Supreme Court ruled directly on the validity of the Compact regarding the language contained in Article I of the Constitution in *U.S. Steel Corporation v. Multistate Tax Commission*.[135] In 1972, there were twenty-one member-states of the Multistate Tax Compact, which had received no form of approval from Congress. On behalf of all multistate taxpayers that were subject to or threatened by audits of the Multistate Tax Commission, U.S. Steel Corporation brought this suit on three grounds: first, it challenged the validity of the Compact under Article I §10 of the U.S. Constitution as the Compact had not received congressional approval; second, that the Multistate Tax Compact was invalid because it was an unreasonable burden on interstate commerce; and third, that it violated the due process of multi-jurisdictional taxpayers as provided in the Fourteenth Amendment to the Constitution. [136] In holding that the Multistate Tax Compact was NOT invalid under the standard set in *Virginia v.*

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[130] First Annual Report of the Multistate Tax Commission for period ending December 31, 1968 *3 (Jan. 28, 1969).

[131] *Id.* at *4 (Item 8).

[132] *Id.*

[133] *Id.*

[134] *See generally* Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent*, 42 COLUM. J. L. AND SOC. PROBS. 511 (2009).

[135] U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978). Justice Powell delivered the opinion of the court joined by Justices Burger, Brennan, Stewart, Marshall, Rehnquist and Stevens joined. Justice White delivered a dissenting opinion in which Justice Blackmun joined.

[136] *See Id.* As the third argument of the taxpayers related to Due Process was held to be "irrelevant to the facial validity of the Compact" this argument is beyond the scope of this article.

Tennessee,[137] the court articulated a modernized standard for when an agreement between states required congressional approval.

The first part of the Court's analysis focused on whether the Multistate Tax Compact enhanced the power of states "at the expense of federal supremacy."[138] The majority held that no power was granted to the states by the Compact that each state could not exercise by themselves, nor was there any delegation of sovereign power that was delegated by the MTC, so the agreement could not be categorized as an impermissible grant of power that the Compact Clause was designed to protect against.[139] In addition, the Court noted that participation in the Multistate Tax Compact was voluntary and that each state maintained the power to adopt or reject any regulations of the MTC, or to withdraw entirely at any time.[140]

The Court also rejected that argument that activities of the Multistate Tax Commission placed an unreasonable burden on interstate commerce and encroached upon federal authority in doing so, and also on the grounds that there was no procedure or requirement that the MTC granted which any individual state could not enact on its own.[141] Further, the court held that even if there was some "enhancement" in the power of states, it was not at the expense of federal authority.[142] The Multistate Tax Compact has enjoyed confidence that their endeavor is safely within the bounds of the U.S. Constitution since this decision was promulgated in 1978. The question of the extent to which the member states are bound to one another, however, was beyond the scope of the court's holding, and is being addressed by states today.

C: Articles III & IV: Election Provision & Three Factor Apportionment

As the purpose of the Multistate Tax Compact is to deal with taxpayers that conduct business in more than one state, its primary feature can be found in Article IV, entitled "Division of Income."[143] This was created in response to the legislation to come out of the Willis Report, which used the factors of property and payroll to divide the income of multi-jurisdictional

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[137] *See Id.* at 472-79 (citing Virginia v. Tennessee, 148 U. S. 503 (1893) (stating the standard set forth in the late 19th century by this case concerned itself with whether the agreement between states increased the political power of the states such that it threatened, encroached or interfered with the supremacy of the federal government).

[138] *U.S. Steel Corp.*, 434 U.S. at 472.

[139] *Id.* at 472-73.

[140] *Id.*

[141] *Id.* at 473-78.

[142] *Id.*

[143] MULTISTATE TAX COMPACT, art. IV, http://www.mtc.gov/The-Commission/Multistate-Tax-Compact.

taxpayers.[144] The major distinction between those proposals and the formula contained in the Compact today is the addition of the Sales Factor, which allows taxpayers to consider where their sales are made in dividing their income in addition to just whether their property and payroll are located.

Many states use the Three Factor Apportionment system in Article IV for computing taxation of multi-jurisdictional corporate taxpayers.[145] If not used in its pure form, the method is used by states as the basis for their tax laws.[146] In short, it outlines a formula that averages three ratios: that of property in state to property everywhere; payroll in state to payroll everywhere; and finally, sales in state to sales everywhere.[147] The average of those three ratios is taken to determine the percentage of income of the taxpayer that should be "apportioned" to and therefore subject to the tax of that particular jurisdiction. It can be illustrated as follows:[148]

Property Factor	**Payroll Factor**	**Sales Factor**		**Apportionment**
Property in State	Payroll in State	Sales in State	Total ÷ 3	Average in State
Total Property	Total Payroll	Total Sales	Total ÷ 3	Average Everywhere

Although each factor is nuanced in its application, this general formula was designed by the Multistate Tax Compact both to respond to the proposals contained in the legislation introduced from the Willis Committee and, to address the lack of uniformity among the various state apportionment schemes.[149]

The Compact allows taxpayers in member states that are subject to a net income tax in other member states to elect the formula contained in Article IV.[150] When states enact the entire Compact, it includes this provision

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[144] *See generally*, Willis Report, *supra* note 102, at vol. I.

[145] MODEL MULTISTATE TAX COMPACT art. VI (MULTISTATE TAX COMM'N 2015), http://www.mtc.gov/The-Commission/Multistate-Tax-Compact.

[146] *Id*.

[147] *Id*.

[148] MULTISTATE TAX COMPACT, art. III *supra* note 145.

[149] Third Annual Report of the Multistate Tax Commission for the period ending June 30, 1970 *2 (Oct. 10, 1970), http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY69-70.pdf.

[150] Jurisdictions have different ways of electing the Compact. The MTC has promulgated a list and categorized jurisdictional membership. *Member States*, THE MULTISTATE TAX COMMISSION, http://www.mtc.gov/The-Commission/Member-States.

that allows taxpayers to choose what may be considered an alternative apportionment formula. It is for states to manage the remaining alternatives for apportioning income in their statutes.

D: Modern Use of the Multistate Tax Compact

From the time of its creation to present day, the apportionment formula contained in Article IV of the Compact has, indeed, addressed the lack of uniformity in state tax laws and improved the administrative burden for multistate taxpayers while strengthening the system of collecting revenues for states. As was anticipated by Alexander Hamilton, courts, legal scholars, legislators, drafters of the Multistate Tax Compact, and members of the Multistate Tax Commission have found that a common thread of balancing the usefulness of uniformity of states laws with the autonomy of states, has been and continues to be present in the evolution of the application of these rules.[151] The usefulness of the Compact, and indeed the Commission that it created, is rooted in the faith and agreement given to it by member states. Despite the encouragement of early members to gain congressional approval to strengthen its validity and force,[152] the fact that the Compact does not have the force of federal law has come to be an important attribute to the way that it is currently used both by member states, as well as multijurisdictional taxpayers.

In order to understand the role of the Compact and the Commission among member states, it is important to understand the mechanics of membership. Membership with the Multistate Tax Commission has evolved. Today, there are different types of members: Compact Members, Sovereignty Members, Associate Members, and Project Members.[153] Fifteen states[154] and the District of Columbia are Compact Members, which is defined as states (as represented by Commissioners or head of those agencies that administer corporate tax) that have enacted the Multistate Tax Compact into their state law.[155] These states are charged with and have the authority to govern the Commission created by the Compact.[156] Seven states[157] are Sovereignty Members, which provide financial support for and general participation in

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[151] *See* MULTISTATE TAX COMPACT, art. IV *supra* note 145.

[152] *See* MULTISTATE TAX COMMISSION, *supra* note 130, at *4.

[153] *Member States*, MULTISTATE TAX COMMISSION, http://www.mtc.gov/The-Commission/Member-States.

[154] *Id*. (listing Alabama, Alaska, Arkansas, Colorado, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah and Washington).

[155] *Id*.

[156] *Id.*

[157] *Id.* (listing Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey and West Virginia).

the activities of the Commission.[158] Though these members may participate in shaping the tax policy and administration efforts of the Commission, they are not governing members.[159] Lastly, there are twenty-six states[160] that are Associate and Project Members, which participate in meetings of the Commission, consult, and cooperate with the MTC and other member states.[161]

In total, forty-eight states are, in some form, members of the Multistate Tax Compact, which considers itself to be a body with no regulatory authority. The Commission views the Compact, or any part of it, including the formula contained in Article IV, as a model rule.[162] While state legislatures may choose to enact or modify any or all parts of the Compact, no such changes will alter the Compact itself. In other words, while states are free to enact whatever apportionment formula they wish, they are not free to modify the Compact itself.[163] Indeed, member states have modified the versions of the Compact's apportionment formula that are enacted and applied to multi-state taxpayers. States are vested in preserving their right to create a tax scheme that is consistent with the culture and goals of the state, so long as they can be considered "fairly apportioned" by the standards set forth in *Northwestern States Portland Cement Co. v. Minnesota*.[164] In the modern economy, the ability to create a system of corporate tax which may provide an incentive for large multistate taxpayers to establish a presence in-state is an important tool for states to manage both their revenues and the general economic health of the state and its residents. While the Multistate Tax Compact's goal of uniformity has come a long way through the administration of corporate tax filings, the protection of a state's right to choose is an equally important goal. As rapidly changing technology impacts

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[158] *Id.*

[159] *Id.*

[160] *Id.* (listing Arizona, California (Franchise Tax Board and Sales Tax Board), Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin and Wyoming).

[161] *Member States*, THE MULTISTATE TAX COMMISSION, http://www.mtc.gov/The-Commission/Member-States.

[162] *Multistate Tax Compact*, MULTISTATE TAX COMMISSION, http://www.mtc.gov/The-Commission/Multistate-Tax-Compact (stating that the Multi-State Tax Compact was written as a model law). The three factor apportionment formula contained in Article IV is very similar to the one contained in the Uniform Division of Income for Tax Purposes Act ("UDITPA") which was drafted by the National Conference of Commissioners on Uniform State Laws. *See* Uniform Division of Income for Tax Purposes Act, NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS (July 8-13, 1957) (comments amended 1966), http://www.uniformlaws.org/shared/docs/uditpa/uditpa66.pdf.

[163] Herbert & Mayster, *supra* note 129, at 847.

[164] *See supra* Part II, Section B.

all three of the apportionment factors,[165] states and taxpayers are increasingly seeking ways to manage the amount of tax paid. Most recently, large multi-jurisdictional corporate taxpayers have taken to questioning the role of the Compact in light of the decision in *U.S. Steel Co. v. MTC*. Taxpayers are seeking to rely on their ability to select an apportionment formula that optimizes their tax liability based on the status and validity of the Compact as a multi-lateral contract among states.

In 2015, the Multistate Tax Commission passed a resolution modifying the Compact to allow the adopting member states to use any apportionment method the state sees fit.[166] The motivation underlying this amendment as well as the potential ramifications are best considered after a review of some recent state case law on the election provision contained in Article III of the Compact.

PART IV: STATES RESPOND TO TAXPAYER ELECTIONS

Recently, large multi-jurisdictional corporate taxpayers have taken to questioning the role of the Compact. Taxpayers are seeking to rely on their ability to select an apportionment formula that optimizes their tax liability based on the status and validity of the Compact as a multi-lateral contract among states. Three major decisions made by the highest state courts have been published on this topic beginning in July of 2014 with *International Business Machines Corp. v. Department of the Treasury*[167] decided in the Michigan Supreme Court. Subsequently, on December 31, 2015, the California Supreme Court published an opinion in the matter of *The Gillette Company* (with *et al. v. Franchise Tax Board*.[168] Most recently, on June 22, 2016, the Supreme Court of Minnesota weighed in on the matter of in the decision of *Kimberly-Clark Corporation & Subsidiaries v. the Commissioner of Revenue*.[169] Though similar cases are pending in other states, this article will focus on these three as seen through the lens of the tensions, principles and actions that

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[165] Electronic commerce and the rise of digital goods has changed the fundamental nature of a sales factor and has encouraged a recent proposed amendment to the "sourcing" of sales. In addition, the question of where intangible property is "used" and where employees work are also becoming increasingly complex. *See* South Dakota v. Wayfair Inc., 901 N.W.2d 754 (S.D. 2017), *cert. granted*, 86 U.S.L.W. 3351 (U.S. Jan. 12, 2018) (No. 17-494).

[166] MODEL MULTISTATE TAX COMPACT art. IV §9 (MULTISTATE TAX COMM'N 2015), http://www.mtc.gov/getattachment/*Uniformity*/Article-IV/Model-Compact-Article-IV-UDITPA-2015.pdf.aspx.

[167] Int'l Bus. Mach. Corp. v. Dept. of Treasury, 496 Mich 642 (2014).

[168] Gillette Co. v. Franchise Tax Bd., 62 Cal. 4th 468, 363 P.3d 94 (2015).

[169] Kimberly-Clark Corp. v. Comm'r of Revenue, 880 N.W. 2d 844 (Minn.), *cert. denied sub nom*., Kimberly-Clark Corp. & Subsidiaries v. Minnesota Comm'r of Revenue, 137 S. Ct. 598, 196 L. Ed. 2d 476 (2016).

have brought us to this point, and will conclude with a brief exploration of a few of the most likely potential outcomes in this area of litigation.

A: IBM in Michigan

The central question in this case was whether the taxpayer, International Business Machines Corp. ("IBM") which had operations and income in a number of different states, was entitled to elect the three factor apportionment formula contained in the Multistate Tax Compact[170] instead of using the single sales factor apportionment formula codified into Michigan's law.[171] Central to this question is whether Michigan's enacted Business Tax Act ("BTA"),[172] which contained an apportionment formula distinct from the Compact's three factor formula, served to *implicitly* repeal the election to be a part of the Multistate Tax Compact. In order to fully understand the ways in which Michigan's membership in the Compact related to the enacted BTA and the impact of that on taxpayers, it is important to briefly review the history of corporate tax statutes in Michigan, as well as its membership to the Multistate Tax Compact.

After adopting its first corporate income tax three years earlier,[173] Michigan became a member of the Multistate Tax Compact in 1970,[174] recognizing that traditional tax administration was inefficient and burdensome to both states and taxpayers. In joining the Compact, Michigan included those provisions that were required to be enacted in order to become a member state. In 1976, Michigan replaced the corporate income tax with the Single Business Tax Act which taxed activity instead of income and functioned as a "value added tax" instead of the more traditional income tax that it replaced.[175] In enacting the Single Business Tax Act, the state legislature expressly amended or repealed the provisions of the prior tax to the extent that was in conflict, but did not expressly repeal the Multistate Tax Compact.[176]

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[170] IBM used the election provision contained in Article III of the Multistate Tax Compact that was codified into Michigan Law at MICH. COMP. LAWS § 205.581, *repealed by* 2014 Mich. Pub. Acts 282, § 1, which states that a taxpayer may use the three factor apportionment formula contained in Article IV of the Compact, or "may elect to apportion and allocate his income in the matter provided by the laws of such state … without reference to the Compact…".

[171] *See generally IBM*, 496 Mich 642 (2014).

[172] MICH. COMP. LAWS ANN. § 208.1101 et seq. (West 2018).

[173] The Income Tax Act of 1967, MICH. COMP. LAWS § 206.61 (1967) (*repealed by* 1975 Mich. Pub. Acts 233, § 2), was measured by net income activities of the taxpayer.

[174] MICH. COMP. LAWS § 205.581, *repealed by* 2014 Mich. Pub. Acts 282, § 1.

[175] MICH. COMP. LAWS § 208.1, *repealed by* 2006 Mich. Pub. Acts 325 § 1.

[176] *See* 1975 Mich. Pub. Acts 233.

In 2008, the Michigan Legislature enacted the Business Tax Act ("BTA"), and in doing so, expressly repealed the Single Business Tax Act but again did not expressly repeal the Compact.[177] The BTA, the statute in effect during the tax periods at issue in this case, was in effect only until January 1, 2012, when Michigan expressly repealed the BTA and returned to a Corporate Income Tax. From the time that Michigan has imposed a tax on business, it has always required the apportionment of income for multi-jurisdictional taxpayers in order to keep from violating the limits of the U.S. Constitution.[178] Another consistency in the system of corporate taxation in Michigan has been the presence of the Compact on the statutes. Since it was enacted through the tax periods at issue, through repeals of prior and inconsistent tax statutes, the Compact has remained in effect.[179] Since the Compact was not expressly repealed in 2008, the Michigan Supreme Court was charged with deciding whether the Compact's election provision was repealed by implication when the BTA was put into effect. The majority held that there was no repeal by implication because it can read in pari materia[180] the BTA and prior tax statutes with which the Compact has coexisted. Accordingly, IBM maintained the right to elect to use the three-factor apportionment formula instead of the sales factor apportionment, which was outlined with apparently mandatory language in the BTA.[181]

In 2011, the Michigan legislature expressly amended the provision of the Compact that allowed taxpayers to elect to use the three factor apportionment formula contained in Article IV of the Compact and then required taxpayers to use the apportionment formula contained in the BTA.[182] This amendment to the statute was made retroactive and applied beginning January 1, 2011.[183] The Michigan Supreme Court, in its holding, recognized that the "[l]egislature could have – but did not – extend this retroactive repeal to the start date of the BTA."[184] The court held that by repealing the election provision of the Compact to the beginning of the year instead of to the effective date of the BTA, "it created a window in which it did not expressly preclude use of the Compact's election provision for BTA taxpayers."[185] Based on this reasoning, the majority did not reach the issue of whether the Multistate Tax

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[177] 2007 Mich. Pub. Acts 36, MICH. COMP. LAWS ANN. 208.1101 et. seq. (West 2018); MICH. COMP. LAWS ANN. 208.1201 et seq. (West 2018).

[178] *See also* Malpass v. Dept. of Treasury, 494 Mich 237 (2013).

[179] Int'l Bus. Mach. Corp. v. Dept. of Treasury, 496 Mich 642, 648-50 (2014).

[180] *Id.* at 653 (stating that a designation that applies to statues that were enacted at different times but apply to the same subject matter).

[181] *Id*.

[182] *Id.* at 658-59 (citing 2011 MICH. PUB. ACTS 40).

[183] *Id.* (citing 2011 MICH. PUB. ACTS 40).

[184] *Int'l Bus. Mach. Corp.*, 496 Mich at 659.

[185] *Id*.

Compact was a binding contract between and among states.[186]

In response to this ruling, on September 11, 2014, the Michigan legislature once again repealed the elective provision contained in the Compact as codified in Michigan law, but did so back to the effective date of the BTA.[187] Though taxpayers have challenged this retroactive repeal of the election on constitutional grounds, the Michigan courts have held the legislature's repeal to be effective, and have denied taxpayers appeals. On September 29, 2015 the Michigan Appellate Court upheld the state's retroactive repeal of its membership in the Multistate Tax Compact, holding that the Compact was not a binding contract under state law and retroactive repeal did not violate state or federal contract clauses.[188] The court also held that the retroactive repeal did not violate state or federal due process clauses on a number of grounds, including the determination that taxpayers did not have a vested right in the state's tax laws.[189] In that decision, the appellate court held that the Multistate Tax Compact was an advisory agreement, not a binding compact or a contract, and accordingly, removal from the Compact was not prohibited by its terms.[190] Most recently in June of 2016, the Michigan Supreme Court declined to review the appellate court decision which consolidated claims of over fifty multijurisdictional taxpayers.[191] A dissent was filed with the refusal opining that the constitutional issues raised by the taxpayers should be heard by the court. Though taxpayers have exhausted their options in Michigan courts, a writ of certiorari may be filed by taxpayers with the U.S. Supreme Court.

B: Gillette in California

California became a member state of the Compact in 1974, when it enacted the entire text of the Compact in its statutes.[192] At the time,

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[186] The concurring opinion in this case agreed that IBM was entitled to use the Compact's apportionment formula, and that the tax base at issue was an income tax, but said it would not have reached the question of whether there was a repeal by implication. *See Id.* at 668-70 (Zahra, J., concurring). The dissenting opinion in this case understood an "unambiguous directive" from the state legislature. The majority read the dissent's argument as "tantalizingly simple" but countered that it relied on a reading of the BTA without regard to similar statues or context. *See Id.* at 670-84 (McCormack, J., dissenting).

[187] MICH. COMP. LAWS § 205.581-.589, *repealed by* MICH. PUB. ACTS 242 (SB 156) (2018). Michigan enacted SB 156, retroactively repealing MCL sections 205.581 to 205.589, Michigan's Multistate Tax Compact (MTC) provisions, effective Jan. 1, 2008.

[188] *Int'l Bus. Mach. Corp*., 496 Mich at 646.

[189] *Id*.

[190] *Id*.

[191] Gillette Commercial Operations N. Am. & Subsidiaries v. Dept. of Treasury, 499 Mich 960 (2016).

[192] Gillette Co. v. Franchise Tax Bd., 62 Cal. 4th 468, 472 (2015).

California's prior existing law was identical to the formula contained in the Compact. In 1993 the California legislature adopted a new apportionment formula[193] which, since first becoming a member state, varied from the Compact formula.[194] The legislation passed in 1993 did not in modify or amend the election provision set forth in the Compact, or the apportionment formula contained therein, nor did it in any way change the member status of California to the Compact. In this appeal, *Gillette* and five other multijurisdictional entities sought to establish that the legislature is bound to permit the taxpayer to choose the three-factor apportionment formula contained in the compact, notwithstanding the existence of a different apportionment formula contained elsewhere in the corporate tax code.[195]

In its decision, the California Supreme Court did not reach the issue of whether the Compact takes precedence over state law because it held that the Compact *is not* a binding contract among member states.[196] In its analysis, the court considers the Multistate Tax Commission's view of the Compact as non-binding, but an "advisory compact . . . which is more in the nature of model uniform laws."[197] As the taxpayers point out, the Compact's fundamental goal of uniformity distinguishes the Compact somewhat from a model law. Though both can be enacted and repealed according to the will of the legislature, the Compact's fundamental purpose of uniformity can only be achieved if a critical number of member states use its provisions, and "member states commitment to the UDITPA [Compact] formula is what prevented congressional intervention," the specter of which gave rise to the compact in the first place.[198]

The court considered the origins of the Compact and distinguished the status of state laws at the time of the creation of the Compact from present day, separating it entirely from the question of whether the Compact creates any reciprocal binding obligation among members.[199] Whether or not the goal of uniformity is better served if more states enact the formula is a separate question from whether or not a binding, multi-lateral contract has been created. The court found no evidence of the creation of such contract.[200] After a brief discussion of how the amendment of the corporate tax did not violate the "Reenactment Rule" in California,[201] the court went on to conclude

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[193] A "double weighted sales" apportionment formula, in which the sales factor accounts for half of the apportionment formula. *Id*. at 475.

[194] *Id*. (citing REV. & TAX § 25128 (amended by 1993 Cal. Stat. 5441)).

[195] *Id*.

[196] *Id*. at 476-79.

[197] *Id*. at 477.

[198] *Gillette*, 62 Cal. 4th at 479.

[199] *Id.*

[200] *Id.*

[201] A procedural rule designed to "make sure legislators are not operating in the blind

that the legislature had both the authority and intent to eliminate the Compact's election provision. Though the authority is clear from a review of the state constitution which gives broad and plenary authority to the legislature when it comes to the powers of taxation, it relies both on the mandatory nature of the language in the statute as enacted, as well as the legislative history that indicates a preference to require taxpayers to use the new apportionment formula.[202]

C: Kimberly-Clark in Minnesota

The Minnesota Supreme Court has considered whether the state's membership in the Compact required it to have the three-factor apportionment formula contained in Article IV available to taxpayers, despite having repealed Articles III and IV of the compact.[203] During the tax years at issue, the parties agreed that taxpayers, when apportioning their income, had the option to (1) use the formula set forth in the Minnesota statute[204] or (2) to petition the Commissioner to permit the use of an alternative formula.[205] Kimberly-Clark argued that there was a third option: to use the apportionment formula contained in the Multistate Tax Compact that was enacted in Minnesota's statute in 1983, but repealed in 1987.[206] Despite the repeal of the section of the Compact that contained the apportionment formula, Kimberly-Clark argued that the election provision that was enacted in 1983 (and repealed in 1987) was part of a binding multi-state compact and accordingly, Minnesota was obligated to make that formula available to taxpayers until it fully withdrew from the Compact.[207] Kimberly-Clark contended that by enacting the Compact and becoming a member state, Minnesota relinquished a bit of its autonomy "in order to benefit from the collective action of multiple states" and that in 1983, by enacting the Compact, Minnesota created a binding obligation that would only be terminated by a complete withdrawal from the Compact.[208]

The Minnesota Supreme Court held that there was no commitment

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when they amend legislation and to make sure the public can become apprised of changes in the law. *Id*. at 483 (citing St. John's Well Child & Family Ctr. v. Schwarzenegger, 50 Cal. 4th. 960, 983 (2010)).

[202] *Gillette*, 62 Cal. 4th at 484-85.

[203] *See* Kimberly-Clark Corp. & Subsidiaries v. Comm'r of Revenue, 880 N.W.2d 844 (Minn.), *cert. denied sub nom.* Kimberly-Clark Corp. & Subsidiaries v. Minnesota Com'r of Revenue, 137 S. Ct. 598, 196 L. Ed. 2d 476 (2016).

[204] *Id.* at 846 (citing MINN. STAT. §290.191(d)(2) (2008)).

[205] *Kimberly-Clark*, 880 N.W.2d at 846.

[206] *Id.*

[207] *See Id.* (stating that Minnesota repealed the remaining provisions of the Compact from its statues in 2013, after the tax periods at issue in this case).

[208] *Id.* at 848.

binding Minnesota that was violated when the election provision was repealed. The court based its holding on the grounds that the Compact was enacted into the Minnesota code and the legislature had the authority and intent to amend it without violating any agreement that the state had entered when it became a member.[209] The Multistate Tax Commission holds itself out to be advisory and non-binding in nature and prides itself on allowing the states to modify and repeal the provisions of the Compact at will.[210]

The court further held that even if Minnesota did enter into a binding agreement when enacting the Compact, the legislature did not and could not relinquish any of its authority on the subject of tax.[211] Indeed, the Minnesota Constitution states that the "power of taxation shall never be surrendered, suspended or contracted away."[212] Lastly, the court considered the function of the "unmistakability doctrine" to support its finding that the legislature gave up no authority when becoming a member of the Compact, and acted within the scope of its power in repealing Sections II and IV of the Compact.[213] Under this doctrine, sovereign powers remain intact unless relinquished in unmistakable terms. The court found no clear indication that the legislature intended to relinquish any authority to amend the system of taxation when becoming members of the Compact. In finding that the taxpayer did not have the option to elect the apportionment formula in the Compact, the court relied on federal and state constitutional principles, state legislative history and construction, and a very particular evolution of the corporate tax statues.

D: Amici Curiae & Other Stakeholders

The Multistate Tax Commission filed amicus briefs in the three above mentioned cases as well as others in the country.[214] Decisions in Oregon and Texas have also supported the position of the state and the Multistate Tax

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[209] *Id*. at 850.

[210] *Uniformity Charter*, THE MULTISTATE TAX COMMISSION, http://www.mtc.gov/Uniformity/Uniformity-Charter.

[211] *Kimberly-Clark*, 880 N.W.2d at 850.

[212] *Id.* (citing MINN. CONST. art X, § 1).

[213] *Kimberly-Clark*, 880 N.W.2d at 850 (citing State v. Philip Morris USA, Inc., 713 N.W.2d 350, 359 (Minn. 2006)).

[214] Other cases include Health Net, Inc. & Subsidiaries v. Dept. of Revenue, 22 Or. Tax 128 (2015) (holding that the Legislature in Oregon "effectively disabled" the taxpayer from making the election to use the three-factor apportionment formula contained in the Compact. This case is currently being reviewed by the Oregon Supreme Court which selected it for direct appellate review). *See also* Graphic Packaging Corp. v. Hegar, 471 S.W.3d 138 (Tex. App. 2015) (holding that the Texas Franchise tax was not an income tax pursuant to the definition in the Compact, and so the taxpayer was unable to elect to use the MTC's apportionment formula).

Commission though on grounds specific to each jurisdiction. [215] The Multistate Tax Commission has maintained the position that the Compact is non-binding, and its member states are free to amend and repeal the Compact at will.[216] While, at first blush, it may seem antithetical for the Commission to argue that it lacks authority, taking its twin goals of uniformity and autonomy into consideration reveals the logic behind its position. When its twin goals of uniformity and autonomy are considered the logic of the position is revealed. The balance of promoting uniform state laws while preserving the rights and powers of the states is a difficult one to strike. Though the system among states created by the Compact is constantly growing and adjusting along with the economy, the mission and purpose of the MTC conceived in 1967 has been fulfilled. The issues identified by the Willis Report are no longer present. Taxpayers not only respect and comply with multiple taxing jurisdictions, but there is also a respect for the law that is consistent.

The Council on State Taxation ("COST") has also filed numerous Amicus briefs in support of the taxpayers on this issue, and argued state by state that taxpayers have the right to elect the apportionment formula.[217] Whether based on constitutional principles, theories of contract law, or the history of the MTC legislation in various states, COST, in representing large multijurisdictional taxpayers, argues for the strength of authority of the MTC in order to protect the right to elect the optimal apportionment formula.[218]

PART V: THE FUTURE OF THE MULTISTATE TAX COMPACT ELECTION

The revenue impact of these decisions alone is sufficient to result in continuing efforts on both sides to shape the issue.[219] While taxpayers are

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[215] *Kimberly-Clark*, 880 N.W.2d at 850.

[216] S*ee* Gillette Co. v. Franchise Tax Bd., 62 Cal. 4th 468, 472 (2015) ("The FTB recommends that we consider the extrinsic evidence of this "course of conduct" in ascertaining whether the Compact is reasonably susceptible to an interpretation that renders its taxing provisions nonbinding and capable of being amended, superseded and repealed, in whole or part, by member states."); *see also* Herbert & Mayster, *supra* note 129, at 847 ("Thus, the commission in 1967 understood that while states are free to enact whatever apportionment scheme they wish, they are not free to modify the compact itself, including the Article III election.").

[217] *COST Amicus Briefs*, COUNSEL ON STATE TAXATION, http://www.cost.org/state-tax-resources/cost-amicus-briefs/.

[218] *COST Policy Positions*, COUNSEL ON STATE TAXATION, http://www.cost.org/state-tax-resources/cost-policy-positions/.

[219] Amy Hamilton, *Michigan Owes $1.1 Billion in Tax Refunds Following IBM Decision*, TAX ANALYSTS (Aug. 7, 2014), http://www.taxhistory.org/www/features.nsf/Articles/D23458C825ADB62485257D2D0045BD92?OpenDocument.

more anxious than ever to lower their effective tax rates, after years of budget shortfalls, states are equally concerned about collecting sufficient revenue to maintain operating budgets.[220] Although the U.S. Supreme Court would be the proper arbiter of the constitutional issues at stake, including interpretation of the Commerce Clause, Due Process Clause, and agreements among states, the holdings across states and state legislature responses may lead the Court to decline to review the issue on the grounds that the system is continuing to function.[221] The Court may rely on its precedent in *U.S. Steel Corp v. Multistate Tax Compact* and allow state courts to continue to apply the principles contained therein. Federal intervention in the form of legislation seems even less likely than action by the courts. In a time of historically low productivity from Congress, with unprecedented partisan divide, neither the House nor Senate is likely to take up a tax matter that will not result in any revenue for the federal government.

Given the slim prospect of federal intervention and the nature of the question as it currently exists, this issue should be resolved by the states. The decision about the extent to which each state is bound to the Compact is not a concern for the Commission, but rather depends on the specific history of each state. The Commission has plainly articulated its intent to be non-binding. Yet the success of the entire endeavor that began in response to the Willis Report depends on the willingness of states to work with one another in a committed, if not binding, way.

Stakeholders in this debate, including large multi-jurisdictional taxpayers, state courts, and legislatures, each of which have a distinct and substantial way they would like to see the law go. The leadership of the Multistate Tax Commission is made up of Commissioners of Revenue and other high-ranking figures in the tax administration of each state, which results in an alignment of the goals of the states and the Commission.[222] The goal of autonomy for states remains a fundamental tenant for the Commission and each state seeks to optimize its revenue position for its citizens. Some jurisdictions attempt to optimize their revenues by creating a system of tax that attracts large, multijurisdictional taxpayers, while others seek to maximize revenue from those taxpayers that operate in state. It is the ability to make this choice in the context of all the other variables considered by states that is the heart of the reason for maintaining autonomy, and not far from what

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[220] *See generally As Illinois Goes Bankrupt, Michigan Embraces Bold Pension Reforms*, INVESTOR'S BUSINESS DAILY (July 2, 2017), https://www.investors.com/politics/editorials/michigan-just-prevented-a-fiscal-crisis-are-other-states-paying-attention/.

[221] Gillette Co. v. California Franchise Tax Bd., 62 Cal. 4th 468, 476 (2015), *cert. denied*, 85 U.S.L.W 3164 (U.S. Oct, 11, 2016) (15-1442).

[222] *Officers & Executive Committee Members*, THE MULTISTATE TAX COMMISSION, http://www.mtc.gov/The-Commission/Officers-Executive-Committee.

Hamilton predicted in the Federalist Papers.

On the other hand, all the states that have found the Compact to be non-binding hold elections for judges in their highest courts.[223] Despite the distinction between politics and policymaking, those taxpayers with the most at stake may also have the resources and capability to exert political influence on policymakers – both in the legislatures as well as state courts. As Oregon and other states continue to grapple with the legal history on this issue, with the intricacies of the laws as enacted and applied in each state, this debate will be one that has the potential to shift. To date, the Multistate Tax Compact has shown success in managing its goals, but it may also demonstrate a need for some adjustment of course.

[223] *Fact Sheet on Judicial Selection Methods in the States*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf.