

## SYMPOSIUM: Interstate Cooperation



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# Trends in Interstate Relations

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*This article identifies trends in relations between sister states by noting the importance of the full faith and credit and interstate compact clauses of the U.S. Constitution, and summarizes developments involving interstate cooperation and controversies.*

**T**he drafters of the U.S. Constitution included in the fundamental document five most important clauses—full faith and credit, interstate commerce, interstate compacts, privileges and immunities, and rendition—governing relations between sister states.

### Full Faith and Credit

This clause (Art. IV, §1) stipulates: “Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.” Congress by general law is authorized to “prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.” This authority was exercised in 1790, 1804, 1980, 1994, 1996 and 1999. The 1996 clarification was prompted by the Hawaiian Supreme Court’s 1993 decision in *Baehr v. Miike* (852 P.2d 44 at 57-72) holding that the statutory denial of a marriage license to same sex couples violated equal protection provision and equal rights amendment to the state constitution and remanding the case for a trial. On December 3, 1996, trial judge Kevin S.C. Chang ruled same sex couples had the constitutional right to marry. Implementation of the decision was delayed until the state legislature had an opportunity to act. Voters on November 3, 1998, reversed the decision of the Supreme Court by ratifying a legislatively proposed constitutional amendment (Art. I, §23) granting the legislature “the power to reserve marriage to opposite sex couples.”

Congress responded to the Hawaiian Supreme Court’s decision by enacting the Defense of Marriage Act of 1996 (110 Stat. 2419, 1 U.S.C. §1) defining a marriage as “a legal union between one man and one woman as husband and a wife” and the term “spouse” as “a person of the opposite sex who is hus-

band or a wife” and authorizing states to deny “full faith and credit to a marriage certificate of two persons of the same sex.” Currently, 39 states have enacted a state defense of marriage act, and Maryland, New Hampshire, Wisconsin and Wyoming have statutes or court decisions banning same sex marriages. Missouri voters on August 3, 2004, and Louisiana voters on September 18, 2004, ratified a proposed defense of marriage constitutional amendment. Georgia, Kentucky, Mississippi, Oklahoma and Utah will vote on the question of prohibiting same sex marriages on November 2, 2004.

The controversy over same sex marriages was re-ignited on

November 18, 2003, by the 4 to 3 decision of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Health* (440 Mass. 309, 798 N.E.2d 941) holding unconstitutional a statute denying “the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry.” The decision immediately raised the question whether same sex nonresidents could marry in the Commonwealth. The answer is found in a 1913 Massachusetts statute disqualifying individuals from marrying if they are ineligible to marry in their home state.<sup>1</sup>

The Massachusetts Senate requested an advisory opinion from the Court whether a civil union statute would comply with the court’s decision. The answer rendered on February 4, 2004, was no (440 Mass. 1201, 802 N.E.2d 565), but indicated the General Court (state legislature) had the option of not calling a same sex civil union a marriage if the term was dropped for heterosexual marriages.

The General Court, convened in 2004 as a constitutional convention, proposed a constitutional amendment reversing the Supreme Judicial Court’s

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decision. This proposal will not appear on the referendum ballot unless the General Court approves the proposal for a second time in 2005. Should the proposition appear on the 2006 ballot and voters approve it, same sex couples who married between May 17, 2004 and November 7, 2006, will be in a legal limbo as they were legally married, but their marriage will be illegal after adoption of the constitutional amendment. Furthermore, same sex married couples are not entitled to federal health care and nursing home benefits, or authorized to obtain a divorce in other states.

A number of courts in sister states have commenced to receive petitions for dissolutions from persons united in a civil union in Vermont since July 2000. To be eligible for dissolution of a civil union in Vermont, one party must be a resident of the state for one year. Courts in other states have to wrestle with the question whether they have authority to dissolve a union. In 2002, a Connecticut judge dismissed a petition for a dissolution on the ground the state does not recognize a civil union, but in 2003, a Sioux City, Iowa, judge granted a dissolution petition. On March 24, 2004, Essex County Probate and Family Court judge John Cronin granted a petition for dissolution of a Vermont civil union, the first such dissolution in Massachusetts.

### Interstate Compacts

The U.S. Constitution (Art. I, §10) authorizes a state to enter into a compact with one or more sister states with the consent of Congress. The U.S. Supreme Court in 1893 (148 U.S. 503 at 520) opined the consent requirement applies only to political compacts encroaching upon the powers of the national government. A compact may be bilateral, multilateral, sectional or national in membership, and may be classified as advisory, facility, flood control and water apportionment, federal-state, promotional, service provision, and regulatory. There are 26 functional types of compacts administered by a commission or by regular departments and agencies of party states.<sup>2</sup>

Recent developments include congressional consent (116 Stat. 2981) for an amendment to the New Hampshire-Vermont Interstate School Compact authorizing incurring debts to finance capital projects when approved by a majority vote at an annual or special district meeting of voters conducted by a secret ballot. The newly drafted Interstate Compact for Juveniles was enacted first by the North Dakota Legislative Assembly on March 13, 2003, and its lead has been followed by 20 additional state legislatures in 2003 and 2004. Arkansas is dissatisfied with the Interstate Compact on the Placement of Children because each of the 50 member states have individual laws pertaining to participation in the compact, thereby causing bureaucratic delays. The American Public Human Services Association established a task force to review the compact and the American Bar Association's Center on Children and the Law is also reviewing possible compact amendments.

The Registered Nurses (RNs) and Licensed Practical or Vocational Nurses (LPN/VNs) Interstate Compact dates to 1998, when Utah Gov. Michael O. Leavitt signed Senate Bill 149 adopting the compact subsequently enacted by 20 additional

state legislatures. The National Council of State Boards of Nursing (NCBN) on August 16, 2002, approved an Advanced Practice Registered Nurses (APRNs) Interstate Compact. The Utah Legislature on March 15, 2004, became the first state to enact this compact.

The business of insurance was regulated by state legislatures until 1944 when the U.S. Supreme Court (322 U.S. 533) opined the business was interstate commerce. Congress overturned this decision by enacting the McCarran-Ferguson Act of 1945 (59 Stat. 33, 15 U.S.C. §1011) devolving to states authority to regulate the insurance industry. Continuation of nonharmonious state regulation of the industry encouraged firms to lobby Congress to preempt specific areas of state regulatory authority. The Gramm-Leach-Bliley Financial Reorganization Act of 1999 (113 Stat. 1353, 15 U.S.C. §6751) preempted 13 specific areas of state regulation of insurance and threatened to establish a federal system of licensing insurance agents if 26 states did not establish a uniform licensing system by November 12, 2002. This threat was averted when 35 states were certified as having such a system on September 10, 2002. Recognizing the danger of preemption, the National Association of State Insurance Commissioners drafted the Interstate Insurance Product Regulation Compact creating a commission with regulatory authority and the Utah Legislature in 2003 enacted the compact and its lead has been followed by eight other state legislatures.

The U.S. Supreme Court on May 19, 2003, settled an original jurisdiction dispute—*Kansas v. Nebraska* and *Colorado* (538 U.S. 720, 123 S.Ct. 1898)—involving the Republican River Interstate Compact and failure of Nebraska to deliver water to Kansas by issuing a decree approving the final settlement stipulation executed by the parties and filed with the special master on December 16, 2002. It provides “all claims, counterclaims, and cross-claims for which leave to file was or could have been sought...prior to December 15, 2002, are hereby dismissed with prejudice...” Kansas had anticipated Nebraska might have to pay up to \$100 million in damages.

Other developments relating to the interstate compact device include continuing pressure for restoration of the Northeast Dairy Compact that became inactive on October 1, 2001, when Congress refused to extend its consent for the compact. U.S. Sen. Charles Schumer of New York in 2003 proposed an expansion of the original compact to include Delaware, Maryland, New Jersey, New York, Pennsylvania and West Virginia. A number of certified public accountants (CPA) are advocating a CPA interstate licensing compact and the Section on Administrative Law of the American Bar Association in 2003 established a committee to draft a administrative procedure for interstate compact commissions. Currently, commissions rely upon a 1981 model administrative procedures act drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) or the federal administrative procedure act. Both have disadvantages for interstate compact commissions.

In a related development, 13 state legislatures have enacted the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act drafted by the NCCUSL. In 2004, South Carolina

added the U.S. Postal Service electronic postmark to the *Uniform Electronic Transactions Act* as an alternative to certified or registered mail. Forty-six states, the District of Columbia, and the U.S. Virgin Islands have enacted the uniform act.

### Interstate Administrative Agreements

State legislatures have delegated broad discretionary authority to department heads to enter into administrative agreements with their counterparts in sister states. Numerous such agreements, formal written and verbal, are in effect, but it is impossible to determine the precise number.

The 39 states operating lotteries became aware that the larger the jackpot, the larger the ticket sales. In consequence, 27 states, the District of Columbia, and U.S. Virgin Islands by administrative agreement are members of the Multi-State Powerball Lottery, 11 states participate in the Mega Millions Lottery, seven states operate the Big Game Lottery, three states are members of the Tri-State Megabucks Lottery, and three states are participants in Lotto South. Recent developments include the 2003 decision by the Texas Lottery commissioner to become a member of the Mega Millions Lottery, the 2004 decisions of Maine and Tennessee to join the Powerball Lottery, and in 2003, the newly established Tennessee Lottery Board termination of negotiations with the Georgia Lottery Corporation to form a joint operation because of fears lawsuits would reduce the amount of money available for scholarships.

Attorneys general continue to form cooperative administrative partnerships to conduct investigations and file lawsuits against companies. Their greatest success in terms of a settlement was the recovery of \$246 billion in Medicaid costs from five tobacco companies. The settlement does not require manufacturers of other brands, often sold at a major discount, to contribute to the escrow account in each state. In consequence, 35 states by 2004 established directories of brands approved for sale.

Other recent developments include legal actions in May 2004 by the attorneys general of Connecticut, New Jersey and New York and the Pennsylvania Secretary of Environmental Protection against Pennsylvania-based Allegheny Energy, Inc., for emitting air pollution causing smog, acid rain, and respiratory problems in Pennsylvania and the other suing states. The action was initiated in response to a decision by the U.S. Environmental Protection Agency to change its clean air enforcement policy in late 2003 and terminate 50 investigations. Joint actions by attorneys general in 2004 also resulted in Medco agreeing to pay \$29.3 million to settle complaints by 20 states the company violated consumer protection and mail fraud statutes by switching patients to more expensive drugs and a group of rare stamp dealers agreeing to create a \$680,000 restitution fund to settle a lawsuit brought by California, Maryland and New York charging them with a 20-year conspiracy to rig stamp auctions.

New Hampshire, Vermont and Rhode Island in 2004 formed the New England Compact Assessment Program to establish a common system for measuring student achievement and saving money. The U.S. Department of Health and Human Services in 2004 approved plans by five states—Alaska, Michigan, Nevada,

New Hampshire and Vermont—to pool their purchasing powers in order to obtain larger discount on prescription drugs for their Medicaid recipients. Illinois, Indiana, Maine, New Hampshire and Virginia have joined the E-Zpass consortia, an electronic toll network for motor vehicles extending from the Canadian border to the mid Atlantic States and the Midwest. And Arizona and New Mexico signed the first interstate homeland security agreement.

The Pacific Northwest Economic Region (PNER), a statutory public-private organization, was created by the state legislatures of Alaska, Idaho, Montana, Oregon and Washington, provincial legislatures of Alberta and British Columbia, and the legislature of the Yukon Territory. In 2001, PNER organized the Partnership for Regional Infrastructure Security to develop and coordinate action to protect all types of infrastructure.

One interstate administrative agreement—Multistate Anti-Terrorism information Exchange (MATRIX)—appears to be dissolving. Utah on March 25, 2004, became the eighth state to drop out of the agreement. Florida, Michigan, Ohio and Pennsylvania remain members. MATRIX promoters were convinced the computer-driven program would integrate data and information from various sources including criminal records, driver's licenses, vehicle registrations, etc. Concerns over privacy were expressed by the American Civil Liberties Union, Electronic Privacy Information Center, and Electronic Frontier Foundation.

### The Excise Tax Problem

Each state is free to determine the amount of excise and sales taxes (if any) to be levied on various products. The wide variation in excise taxes on alcoholic beverages and tobacco products results in buttlegging and bootlegging which often involve organized crime. Recent sharp excise tax increases for cigarettes in a number of states offered new incentives for buttleggers and are responsible for the dramatic increase in the number of domestic and foreign online sellers of cigarettes which are required by law to report sales to state tax officials, but who seldom do so and cite the Internet Nondiscrimination Act of 2001 (115 Stat. 703, 47 U.S.C. §151). Cigarette sales and excise tax revenues in Delaware and New Hampshire also increased dramatically as nonresidents make purchases in these states to avoid high excise taxes in their home states.

Congress enacted the Jenkins Act of 1949 (63 Stat. 844, 15 U.S.C. §375) prohibiting use of the postal service to evade excise tax payments, but a violation is only a misdemeanor. U.S. attorneys prefer to prosecute violators under the Mail Fraud Act of 1909 (35 Stat. 1088, 18 U.S.C. §1341) as a violation is a felony. In 2004, the U.S. Bureau of Immigration and Customs Enforcement arrested 10 persons and charged them with trafficking in a multi-billion dollar black market in counterfeit major brands of tobacco products made in Asia.

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protect incapacitated elderly adults. The report highlighted specific breakdowns in collaboration between states and federal programs that jeopardized the safety of seniors, specifically in the areas of state court operation, accountability and consistency, state jurisdictional fluctuations, a lack of systematic information sharing between and among varying agencies and levels of government and a lack of adequate tracking of elder guardianship statistics. These problems, similar to issues already encountered in the juvenile justice and adult corrections fields, may be effectively addressed via an interstate compact.

#### ■ *Bioterrorism Preparedness*

Regional cooperation for bioterrorism preparedness is on the minds of many state officials. Health care surge capacity, multi-state training and prearranged payment provisions, chain-of-command issues and identified roles for key players are critical to an effective response. While other agreements may tackle broader cooperation issues, specific agreements might be crafted to promote independent regional responses based on that region's unique need.

While the National Center for Interstate Compacts seeks to directly assist states with the revision and creation of interstate compacts in addition to a range of training, education and technical assistance services, limitations will exist. The creation of new interstate agreements must be a state motivated solution with state officials and stakeholder experts supporting and driving the compact process. As the integral players to crafting state solutions, states must ultimately be in a position to support the enactment and implementation of the mechanism.

In large part, the National Center and its capacities for assisting states are reactive, but reactive to the trends of public policy in that interstate compacts are an ideal and often the only effective response for addressing the current and emerging cooperative policy needs of our states.

#### Endnotes

<sup>1</sup>Michael L. Buenger, Richard L. Masters, "The Interstate Compact for Adult Offender Supervision: Using Old Tools to Solve New Problems," *The Roger Williams University Law Review*, 1, 9 (Fall 2003).

<sup>2</sup>Michael H. McCabe, *Interstate Compacts: Background and History*, (The Council of State Governments, 1997).

<sup>3</sup>William K. Voit, *Interstate Compacts and Agencies, 1998*, (The Council of State Governments, 2000).

<sup>4</sup>Michael L. Buenger.

#### Bio

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### Summary and Conclusions

Court legalization of same sex marriages in Massachusetts and same sex civil unions in Vermont will continue to result in controversies in states lacking a defense of marriage act relative to enacting such an act. It will also raise questions whether courts in sister states possess authority to dissolve a Massachusetts same sex marriage or a Vermont same sex civil union.

Interstate cooperation generally continues to be excellent as additional states enact interstate compacts and enter into interstate administrative agreements on a wide variety of subjects. Compacts and enactment of harmonious regulatory laws have been promoted as a means to discourage Congress from exercising its powers of preemption removing regulatory authority completely or partially in specified fields from states. Nevertheless, disparate state regulatory statutes, increasing globalization of the domestic economy, international trade treaties, lobbying by interest groups, and technological developments will result in Congress enacting preemption statutes in addition to the 499 enacted since 1789.

#### Endnotes

<sup>1</sup>*Massachusetts Laws of 1913*, chap. 360, §2, and *Massachusetts General Laws*, chap. 207, §11.

<sup>2</sup>Joseph F. Zimmerman, *Interstate Cooperation: Compacts and Administrative Agreements*, (Westport, CT.: Praeger Publishers, 2002) and Ann O'M. Bowman, "Trends and Issues in Interstate Cooperation," *The Book of the States, 2004* (Lexington, KY: The Council of State Governments, 2004), 34-40.

#### Bio

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