Five most important interstate clauses—full faith and credit, interstate commerce, interstate compacts, privileges and immunities, and rendition—were incorporated in the U.S. Constitution by its drafters to make perfect the economic and political union.

**Full Faith and Credit**

Section 1 of Article IV contains a mandate: “Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other State” and grants Congress authority 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) opining the statutory denial of the issuance 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. Trial judge Kevin S.C. Chang on December 3, 1996, ruled same sex couples had the constitutional right to marry. The decision’s implementation was delayed until the state legislature had an opportunity to act. It proposed and voters ratified on November 3, 1998, a constitutional amendment (Art. I, §23) reversing the Supreme Court's decision by granting the legislature “the power to reserve marriage to opposite sex couples.”

The Hawaiian Supreme Court’s decision prompted a response from Congress in the form of 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 husband or a wife” and authorizing states to deny “full faith and credit to a marriage certificate of two persons of the same sex.” On August 17, 2004, U.S. Bankruptcy Court Judge Paul B. Snyder in Tacoma, Washington, issued the first decision on the constitutionality of the act and ruled it does not violate the equal protection of the laws clause of the U.S. Constitution.

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 defense of marriage constitutional amendment defining a marriage as between a man and a woman, and voters in 11 states approved a similar proposition on November 2, 2004. Four of the latter amendments—in Montana, Mississippi, Missouri and Oregon—also preclude civil unions.

The controversy over same sex marriages was reignited 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 an important legal question: Are same sex nonresidents eligible to marry in the Commonwealth? The answer is no for some nonresidents, since a 1913 Massachusetts statute disqualifies individuals from marrying if they are ineligible to marry in their home state. The constitutionality of this law was upheld on August 18, 2004, by state Superior Court Judge Carol S. Ball.

The Massachusetts Senate requested an advisory opinion from the court whether a civil union statute would comply with the court’s decision. The court’s 4 to 3 majority on February 4, 2004, answered the question in the negative (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 drop for heterosexual marriages. Justice Martha B. Sosman, one of three dissenters, wrote “it is beyond the ability of the Legislature—and even beyond the ability of this court, no matter how activist it becomes in support of this cause—to confer a package of benefits and
obligations on same-sex ‘married’ couples that would be truly identical to the entire package of benefits and obligations that being ‘married’ confers on opposite-sex couples” (440 Mass 1201 at 1213, 802 N.E.2d 565 at 574).

The General Court in 2004 proposed a constitutional amendment reversing the Supreme Judicial Court’s 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.

In related developments, the California Supreme Court on August 12, 2004, unanimously invalidated more than 4,000 same sex marriages authorized by San Francisco Mayor Gavin Newsom, and California Attorney General William Lockyer on October 8, 2004, issued an opinion declaring a law barring same sex marriage does not violate the state constitution. New York State Comptroller Alan G. Hevesi on October 8, 2004, ruled the state pension system would treat same sex couples, involving a state employee, who legally marry in a Canadian province in the same manner as married couples of the opposite sex. He explained the congressional Defense of Marriage Act of 1996 applies only to same sex marriages in other states.

Courts in sister states commenced to be faced with 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. A Connecticut judge in 2002 dismissed a petition for dissolution on the ground the state does not recognize a civil union, but a Sioux City, Iowa, judge in 2003 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 granted in Massachusetts.

The complex problems caused by Vermont’s civil union statute are illustrated by two Virginia women who decided to move to Vermont to enter a union. Frederick County Circuit Judge John R. Prosser in Virginia on August 24, 2004, voided the visitation rights order issue by a Vermont judge for Janet Miller-Jenkins, a current resident of Vermont, who entered into a civil union with Lisa Miller-Jenkins and Janet later became pregnant through in-vitro fertilization. Lisa filed a petition in a Vermont court to dissolve the civil union and establish parental rights. The Virginia ruling was based on the ground Virginia law supersedes Vermont law because Lisa and her daughter reside in Virginia.

**Interstate Compacts**

Section 10 of Article I of the U.S. Constitution authorizes a state to enter into a compact with one or more sister states with the consent of Congress. In 1893, the U.S. Supreme Court (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, section, or national in membership, and may be classified as advisory, facility, flood control and water apportionment, federal-state, promotional, service provision or regulatory. There are 26 functional types of compacts administered by a commission or by regular departments and agencies of party states.

Recent developments include congressional consent (116 Stat. 2981) for an amendment to the New Hampshire-Vermont Interstate School Compact stipulating debts to finance capital projects may be incurred 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. Enactment by 35 state legislatures is required for activation. Arkansas is dissatisfied with the Interstate Compact on the Placement of Children because each of the 50 member states has individual laws pertaining to participation in the compact, thereby causing bureaucratic delays.

The Registered Nurses and Licensed Practical or Vocational Nurses Interstate Compact dates to 1998 when Utah Gov. Michael O. Leavitt signed Senate Bill 149 enacting the compact subsequently enacted by 20 additional state legislatures. The National Council of State Boards of Nursing on August 16, 2002, approved an Advanced Practice Registered Nurses Interstate Compact. The Utah Legislature on March 15, 2004, became the first state to enact this compact.

State legislatures regulated the business of insurance until 1944 when the U.S. Supreme Court (322 U.S. 533, 64 S.Ct. 1162) opined the business was interstate commerce. Congress, reacting to pressure from states, enacted the McCarran-Ferguson Act of 1945 (59 Stat. 33, 15 U.S.C. §1011) overturning the court’s decision by devolving authority to states to regulate the insurance industry. Unhappy with the
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continuation of nonharmonious state regulation of the industry, insurance companies lobbied Congress to preempt specific areas of state insurance regulatory authority. The Gramm-Leach-Bliley Financial Modernization Act of 1999 (113 Stat. 1353, 15 U.S.C. §6751) preempted 13 specific areas of state insurance regulation 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 continuing threat 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 State Legislature in 2003 enacted the compact and its lead has been followed by eight other state legislatures. Forty-nine state legislatures enacted the Producer Licensing Model Act and 39 states implemented state licensing reciprocity.

A deadlock on the Republican River Interstate Compact Administration led to the U.S. Supreme Court on May 19, 2003, settling an original jurisdiction dispute—Kansas v. Nebraska and Colorado (538 U.S. 720, 123 S.Ct. 1898)—involving the 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 anticipated the court would order Nebraska 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.

A number of prominent certified public accountants 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 an administrative procedure act compact for interstate compact commissions.

The California, Delaware, District of Columbia, Idaho, Indiana, Mississippi, Montana, Nebraska, North Dakota, South Dakota, Texas and West Virginia state legislatures enacted the Interstate Enforcement of Domestic Violence Protection Orders Act drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL). South Carolina in 2004 amended the NCCUSL’s Uniform Electronic Transaction Act to grant U.S. Postal Service’s electronic postmark the same legal validity and enforceability as certified or registered mail. Forty-six states, the District of Columbia and the U.S. Virgin Islands have enacted the uniform act. NCCUSL’s Uniform Trust Code was enacted by 10 states and the District of Columbia, but the Arizona Legislature repealed the code because of complaints it endangers estate plans, favors creditors, and invades the privacy of families. The Colorado and Oklahoma state legislatures in 2004 rejected the code. Twenty-three state legislatures, however, enacted the Streamlined Sales and Use Tax Interstate Agreement.

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 the larger the jackpot the larger the ticket sales. Twenty-eight states participate in the Multi-State Powerball Lottery formed by an administrative agreement between the states, the District of Columbia and the U.S. Virgin Islands; 11 states participate in the Mega Millions Lottery; seven states operate the Big Game Lottery; three states participate in the Tri-State Megabucks Lottery; and three states are members of Lotto South. Recent developments include the 2003 decision by the Texas Lottery Commission to become a member of Mega Millions Lottery, the 2004 decisions of Maine and Tennessee to join the Powerball Lottery, and the newly established Tennessee Lottery Board in 2003 terminating 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 from regular brands, to contribute to the escrow account in each state. In consequence, 35 states by 2004 established directories of brands approved for sale.

Other 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 Allegheny Energy, Inc., based in Pennsylvania, for emitting air pollution causing smog, acid rain, and respiratory problems in Pennsylvania and the other suing states. Eight states and the city of New York in 2004 filed suit against several electric energy companies operating 174 fossil fuel plants emitting annually an estimated 640 tons of carbon dioxide, the first suit targeting and seeking to reduce such emissions.

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.

Seven states—Illinois, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin—in 2004 joined as amici curiae a lawsuit filed in December 2003 by a number of environmental groups seeking to force EPA to initiate actions to prevent foreign fish and plant species from invading the Great Lakes. The EPA responded that it is working with the U.S. Coast Guard to implement the National Invasive Species Act to prevent introduction of exotic species through ballast water discharge.

The New England Compact Assessment Program was established by New Hampshire, Vermont and Rhode Island in 2004 as a common system for measuring student achievement and save 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 discounts 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. Arizona and New Mexico signed the first interstate homeland security agreement. And the governors of Montana, Oklahoma, Oregon and Washington launched a multi-state AMBER alert web portal designed to distribute to law enforcement officers and others information about abducted children and the suspected perpetrators.

In 1991, the Pacific Northwest Economic Region (PNWER) was established by the state legislatures of Alaska, Idaho, Montana, Oregon and Washington, provincial legislatures of Alberta and British Columbia, and legislature of the Yukon Territory. PNWER created in 2001 the Partnership for Regional Infrastructure Security that launched several initiatives to improve the security of all types of infrastructure.

The Multistate Anti-Terrorism Information Exchange (MATRIX), an interstate administrative agreement, 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 as members. MATRIX promoters were convinced the computer-driven program would integrate data and information from 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.

Taxation Developments

Many interstate controversies involve taxation and the courts are called upon to resolve them because of the failure of Congress to initiate remedial legislation. Resource rich states levy severance taxes that are passed along to consumers in sister states. The differential in the excise tax rates for cigarettes and alcohol has led to significant tax revenue loss by high tax states whose residents make purchases in neighboring states. So-called jock taxes levied by states on professional athletes are increasing in number and affect interstate relations. And Congress’s decision to phase out its inheritance tax is encouraging wealthy citizens to establish residence in tax friendly states.

The Excise Tax Problem

Recent sharp state 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 who 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) which expired in 2003. Congress, however, enacted the Internet Tax Freedom Act of 2004 (118 Stat. 2615, 47 U.S.C. §809). Cigarette sales and excise tax revenues in Delaware and New Hampshire increased dramatically as nonresidents made additional purchases in these states to avoid high excise taxes in their home states levied to discourage smoking.

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1088, 18 U.S.C. §1341) as a violation is a felony. In 2004, the U.S. Bureau of Immigration and Customs Enforcement (ICE) 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. ICE and the U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) have stepped up their enforcement efforts as reflected in the seizure of 79,277 cartons of counterfeit and genuine cigarettes in fiscal year 1998 and 225,981 cartons in fiscal year 2003.

Jock Taxes
These taxes date to 1991 when the California Legislature extended its income tax to the Chicago Bulls basketball team members and the Illinois General Assembly retaliated by levying a jock tax on nonresident professional athletes who are residents of a state levying a similar tax. Twenty states, Puerto Rico, Alberta and six cities impose such a tax on professional athletes. The nature of the tax varies with New York levying its personal income tax on a nonresident athlete based upon his income and the number of games played in the state in contrast to other states which based their respective income tax on the basis of the athlete’s income and the number or preseason training days, practice days, and game days.

Estate Taxes
Congress enacted the Federal Revenue Act of 1926 (44 Stat. 9) providing taxpayers an 80 percent credit against the federal inheritance and estate tax for a similar tax paid to a state. The purpose of the act was to encourage state legislatures to enact a uniform tax based upon the national tax.

In revising the internal revenue code in 2001, Congress increased the exemption from the federal estate tax and reduced the tax credit to 75 percent in 2002, 50 percent in 2003, 25 percent in 2004, and 0 percent in 2005. Nineteen states levy an estate tax with exemptions ranging from $675,000 in Rhode Island and Wisconsin to $3,100,000 in Ohio. Congress’ decision encourages wealthy individuals to establish residence in the 25 states not levying an estate tax and/or make gifts prior to their deaths.

Intangible Holding Companies
The 1992 U.S. Supreme Court in Quill Corporation v. North Dakota (504 U.S. 298, 112 S.Ct. 1904) ruled a state may not tax a corporation lacking a substantial nexus (physical presence) in a state. This decision encouraged certain national retail corporations to create intangible holding companies (passive investment companies) in states, particularly Delaware, not taxing royalty income. Such a corporation assigns its trademarks to its intangible holding company and it leases the trademarks to retailers who pay a fee to the company. Where allowed, the retailer takes advantage of a deduction of the fee, thereby reducing its gross corporate income subject to tax and state tax revenues. In 2004, Louisiana filed suits against Toys “R” Us Incorporated and Wal-Mart Stores Incorporated seeking corporation income taxes avoided by means of the intangible holding company.

Sixteen states have responded by enacting statutes establishing a combined income reporting system utilizing a formula to determine the in-state taxable income of a corporation. Eight other states enacted more limited statutes forbidding a corporation to deduct payments made to an intangible holding company in a sister state or include payments to the intangible holding company in the total taxable income of a corporation. Corporations with intangible holding companies have lobbied state legislatures not to enact statutes designed to prevent tax avoidance and governors to veto such bills. In 2003, the governor of Maryland vetoed such a bill.

Interstate Commerce
Disputes between states over interstate commerce trade barriers date to the Articles of Confederation and Perpetual Union which failed to provide a mechanism for resolving the disputes. The drafters of the U.S. Constitution decided it was essential to grant Congress plenary power to regulate interstate commerce (Art. I, §8) in order to make more perfect the economic and political union. The assumption apparently was made that Congress would enact a statute, backed by the Supreme Law of the Land clause (Art. VI), invalidating any interstate trade barrier established by a state statute or a regulation based upon a state’s police, proprietary, and taxation powers. Congress, however, did not enact a major statute based upon its interstate commerce power until Congress enacted An Act to Regulate Commerce (24 Stat. 379, 49 U.S.C. §1) in 1887. References often were made to the silence of Congress during the 19th century and even today Congress has not exercised fully its power to regulate commerce between sister states. In consequence, heavy reliance historically has been placed upon courts to remove barriers not susceptible to removal by negotiations between party states.

Congress since 1965 has exercised its power of preemption to remove completely or partially regulatory authority from states. Republican control of Congress, commencing in 1995, slowed only slightly

A major dispute involves the direct interstate shipment of wine to consumers and raises the question whether the dormant interstate commerce clause supersedes the grant of authority to states to regulate the sale and consumption of alcoholic beverages by the 21st Amendment to the U.S. Constitution. The U.S. Court of Appeals for the 6th Circuit in 2003 in Heald v. Engler (342 F.3d 517 at 524) reversed the decision of the U.S. District Court for the Eastern District of Michigan granting summary judgment in favor of Michigan’s scheme regulating the sale of wines by holding the state regulation is a constitutional violation of Michigan’s scheme regulating the sale of wines by holding the state regulation is a constitutionally benign product of the state’s three-tier regulatory system and consequently a valid exercise by the state of its 21st Amendment authority. The appeals court specifically ruled the Michigan “regulatory scheme treats out-of-state and in-state wineries differently, with the effect of benefiting the in-state wineries and burdening those from out-of-state.”

A New York state law requiring wineries to sell their products through New York state wholesalers was challenged; 25 other states have similar laws or regulations. Judge Richard M. Berman of the U.S. District Court for the Southern District (232 F.Supp.2d 135 at 144) on November 12, 2002, held the New York law to be an unconstitutional barrier to interstate commerce because the exceptions for New York wineries allowed them to avoid wholesalers, and thereby allowed them to sell wines at a lower price. On February 13, 2004, the U.S. Court of Appeals for the 2nd Circuit (358 F.3d 228) reversed Judge Berman’s decision and opined New York’s regulatory scheme “is within the ambit of the powers granted to States by the 21st Amendment. New York’s regulatory scheme allows licensed wineries, whether in state or out of state, direct access to a market of sophisticated oenophiles” and hence “(t)he scheme does so in a non-discriminatory manner, while targeting valid state interests in controlling the importation and transportation of alcohol.” Challenges based upon the Privileges and Immunities Clause and the First Amendment also were rejected. The U.S. Supreme Court in October 2004 agreed to hear appeals of the two Circuit Court decisions.

Summary and Conclusions
The Massachusetts Supreme Court’s decision legalizing same sex marriages and the Vermont General Assembly’s enactment of a same sex civil union statute will continue to result in controversies in sister states lacking a defense of marriage act relative to enactment of such an act and to raise questions whether courts in these states possess authority to dissolve a Massachusetts same sex marriage or a Vermont same sex civil union.

In general, interstate cooperation continues to be excellent as additional states enact interstate compacts and enter into interstate administrative agreements on a wide variety of subjects. Compacts, agreements and enactment of harmonious regulatory laws have been promoted as means to discourage Congress from exercising its powers of preemption removing regulatory authority completely or partially in specified fields from states. Nevertheless, we conclude disparate state regulatory statutes and regulations, 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 522 enacted since 1790.

Notes
1Massachusetts Laws of 1913, Chapter 360, Section 2, and Massachusetts General Laws, Chapter 207, Section 11.

About the Author