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INTERSTATE COOPERATION AND AN INTERSTATE JUDICIARY

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Our judicial system has two hierarchies of courts—state and federal. Should we make this complex system more complex by adding another court system—an interstate judiciary? Let us start with Alexander Hamilton. “If there are such things as political axioms, the propriety of the judicial power of a government being coexistence with its legislative, may be ranked among the number.”¹ I do not intend to build a case for an interstate legislature, for surely we do not need to create new sovereigns. However, there is a need for more interstate cooperation. As I read Hamilton, it seems to me that he says that any noble public policy needs a sympathetic judiciary. Do we need a judiciary that is “sympathetic” to the need for interstate cooperation? And so the real question that I would like to discuss is whether an interstate judiciary would be useful in promoting the technique of interstate cooperation, for reasons similar to those of Hamilton.

If the states are to cooperate with each other in an attempt to form “a more perfect union,” something more than a mere good faith decision to cooperate is necessary; there must also be good techniques for implementing this decision. The decision to cooperate has been made more often than most people realize. The port authority and river basin compacts are widespread.² The Uniform Commercial Code is law in all states but one.³ Lesser known compacts relating to juven-

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¹THE FEDERALIST No. 80, at 406 (M. Beloff ed. 1948). (A. Hamilton).

²See THE COUNCIL OF STATE GOVERNMENTS, INTERSTATE COMPACTS, 1783-1966 at 2-6 (1966). This compilation contains a subject matter classification of interstate compacts. Under the heading, Bridge and Tunnels, there are 14 compacts listed; Navigation lists 3; Pollution lists 8; Apportionment of Water lists 18; Water Resources lists 6.

³Louisiana is the only hold-out. 1 UNIFORM COMMERCIAL CODE 9 (Supp. 1967) (Uniform Laws Annotated Series).

iles and parole are adhered to by numerous states.⁴ An obscure uniform law dealing with attendance of witnesses in criminal cases has been adopted in almost as many states as has the commercial code.⁵ In these and many other instances several states have decided to have a common policy. It is surely desirable to see that such decisions are implemented. However, uniformity of policy can be dissipated in its administration. The officers who administer the policy (and they could be executive or judicial) may differ among themselves in their interpretation of it. My proposal is that an interstate judiciary could resolve such divergencies.

What would an interstate judiciary look like? How would it work? There are several possible schemes, but one scheme would simply draw a panel of judges from the existing state court structures and give them power to decide uniformity questions. For example, suppose that the New York Court of Appeals decides some difficult and disputed point under the Uniform Commercial Code. The losing litigant might believe that the New York court was not only wrong, but also that its decision was contrary to precedents established in Pennsylvania and California. If there were an interstate judiciary, our losing litigant could appeal his case to this court for a final decision. The minimum structure for the court would be an office in which the appeal papers could be filed and a procedure for drawing the panel of judges. An example of the type of procedure that could be used would be to have a chief judge for the court and have him select the panel for each case by drawing the panel from a list of judges. Another possibility is to devise the mechanics of drawing the panel so that the selection would be random. Both the chief judge and his associates could be members of the judiciaries of the several states.

At this point, we should ask about the obvious alternative. Why not let the federal government do this job? If there is a need for uniformity in some area, why create some new structure when there is an existing one ready at hand? Would it be desirable to enact statutes like the Uniform Commercial Code as federal laws? A constitutional theory could be constructed that would arguably permit this. Congress

⁴INTERSTATE COMPACTS, *supra* note 2, at 74, 83 lists 43 states as being members of the INTERSTATE COMPACT ON JUVENILES and all 50 states plus Puerto Rico and the Virgin Islands as being members of the INTERSTATE COMPACT FOR SUPERVISION OF PAROLEES AND PROBATIONERS.

⁵9 UNIFORM LAWS ANNOTATED 50 (Supp. 1967) lists 45 states, the District of Columbia, and 3 territories as having passed the UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT A STATE IN CRIMINAL PROCEEDINGS.

has the power to provide for the law that would govern those transactions that are in fact transactions in interstate commerce,⁶ and the remaining transactions (which might be a small number under today's theories of interstate commerce)⁷ could be swept in on the theory that it is necessary for Congress to occupy the whole field in order to effectively govern that part of the field which is undoubtedly within its competence.⁸ This would not automatically create an intolerable burden for the federal district courts, since the Congress could give exclusive original jurisdiction to the state courts, reserving an appeal to the federal system to secure uniformity.⁹

While it thus seems possible to secure uniformity in these commercial matters by the exercise of congressional authority, I believe that it would be unwise. First, the appellate burden on the federal system might be intolerable. The Supreme Court is already heavily burdened. It might be possible to have appeals go from the highest court of the state to the several federal courts of appeals, but then there would be the problem of divergent interpretations among the several circuits. Second, it would give the federal judicial system appellate authority over a body of law with which it otherwise has no contact. The day to day business of resolving commercial disputes would remain in the state court system. Arguably it is unwise to have a court resolve uniformity problems when it is removed from the basic or everyday problems of the field. And finally, there is the problem of whether Congress would have the time to play its role as legislative supervisor; for the moment, the Congress does not seem to have the time to do what it is already supposed to do.

Another defect in the federal solution is that it does not easily permit uniformity which is less than national in scope. Could we enact the Uniform Commercial Code as federal law and leave out Louisiana? What about such regional cooperation devices as the New England Interstate Corrections Compact?

Another way of posing this question is to appeal to a spatial metaphor and ask if there is a middle range of problems for the solution of which the locality is too puny and the nation too clumsily big. Perhaps this type of problem does not exist; the suggestion that it does exist may be merely a product of some misguided, romantic infatuation with "local-solutions-to-local-problems." Our reluctance to cede the

⁶See Federal Bills of Lading Act (Pomerene Act), 49 U.S.C. §§ 81-124 (1964), held *constitutional* in *United States v. Ferger*, 250 U.S. 199 (1919).

⁷See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964).

⁸*Wickard v. Filburn*, 317 U.S. 111 (1942).

⁹*Cf. Testa v. Katt*, 330 U.S. 386 (1947).

problem to the federal government may be merely one more irrational example of our stereotyped fear of big government. This reluctance may be based on an aesthetic urge to have a government large enough for a problem but no larger, a sort of governmental analogue to the architectural principle of form-follows-function. At any rate, I think it would be an accurate observation (and one which a political scientist would accept) that the states are still major power centers in our polity. Our political parties are not national parties, but federations of local parties. The ordinary life of the average citizen is powerfully affected by his state and local government. Our Congressmen still function as representatives of their areas. In this discordance, there sometimes appears the perception that a common policy will serve the best interests of the disparate units. Such a perception should be reinforced, not dissipated, and an interstate judiciary could be a helpful reinforcer.

If such a court could be helpful, the main technical problems are to define its jurisdiction and to give it authority to act. In other words, an organic law must somehow be enacted (by constitutional amendment, by an interstate compact, or by congressional legislation) that would itself be valid, that would give the court authority, and that would say what it is to do.

Let us turn to some details. What, precisely, could be the business, the jurisdiction, of the interstate judiciary? I shall not attempt to give a definitive answer, but shall try to say what types of problems can arise in attempting to give an answer. So far, I have spoken of "cooperation" and "uniformity" and have made references to compacts and uniform laws, but there are, of course, problems of definition.

How do we specify just what is a "uniform law"? The Uniform Commercial Code meets anybody's criteria, since it has been adopted in 49 of the 50 states.¹⁰ Of course, it would be possible to list the uniform laws subject to the jurisdiction of the interstate judiciary in the organic law, but this would obviously be unwise, since it would make the jurisdiction of the court totally static. It would be preferable to state criteria that would permit future uniform laws to come within the jurisdiction of the court. A mechanical test would be possible; the organic law could simply state that uniform laws are those that have identical wording. The immediate fallacy in such a test is revealed by asking the question: how many identical words? There might be passages that are identical in wording but are contained in statutes that

¹⁰See note 3 *supra*.

are completely disparate in purpose. And of course the contrary is possible; a variation in wording might be no more than an accommodation to some variance in local conditions.

The criteria should be whether the legislature intended its statute to be uniform with some statute of another state. The identification of this intent for uniformity could be left to the interstate judiciary, or we could require a specific declaration of such an intent by the state legislature. The latter appears to have the advantage of a lack of ambiguity as to the court's jurisdiction (which is always an advantage in jurisdictional matters).¹¹ Even so, this apparent advantage may be illusory since uniform laws are often enacted with some variation to suit local needs (imagined or real).¹² Consider the following hypothetical. A uniform law is enacted in several states dealing with the problem of the registration of title to motor boats. Let us suppose that the law contains provisions for the priority of the various types of security interests and suppliers' liens and provides for a system of recording the interests and liens. The legislature might adopt this law without making any change in the priority scheme while simultaneously changing the recording procedures somewhat (perhaps to fit motor boat recordation in with that of automobiles in that state). What would happen if the state supreme court were to hold that the change in recording made it necessary to interpret the priority scheme in a way that was different from the standard interpretation? Would it be proper for the interstate judiciary to say to the state supreme court—"You are wrong. There is a way to fit your local recording into the uniform scheme of priority"? It seems to me to be proper, and indeed to be the very sort of thing for which an interstate judiciary would be created.

The lesson of the hypothetical would seem to be that what is uniformity is bound to be a subtle thing; we can not depend upon a declaration of the legislature to solve the problem. We would need to depend to some degree on the interstate judiciary to define the term for us in the context of cases. This means, of course, that the court would be defining its own jurisdiction, just as the United States Supreme Court has had to define the jurisdiction of the federal courts, and thus its own jurisdiction, by defining what it is that "arises under the Con-

¹¹See Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE REV. 185, 187 (1969).

¹²A perusal of the statutory notes in UNIFORM LAWS ANNOTATED is the best way to find examples of this practice.

stitution, laws or treaties of the United States."¹³ Perhaps it would be simpler in the long run to give the court the jurisdiction as to uniformity and not make any legislative declarations a prerequisite.

On the face of the matter, giving jurisdiction over compacts to the interstate judiciary would seem to be easier; the goal is merely to see that the party states uniformly interpret their agreement, and so we need only identify the existence of compacts and then give the court jurisdiction over them. However, although the word "compact" is a formal sounding word, the use of this device turns out to be informal, flexible, and variable. The question of just what is a compact is more subtle than it first appears.

The first thing that must be emphasized is that the legally enforceable version of a compact is the statutes of the several states. We might ordinarily think of a compact as a document that has been agreed upon by those who have drafted the document. However, I would like to argue that this picture is too simple and varies too much from the actual practice. Consider these two propositions: when courts have occasion to interpret and apply a compact, they do not look at the document that the drafters put together, but they look at the statutes of the states; furthermore, as it turns out, the statutes of the several party states may not be identical, even though these statutes, collectively, are supposed to be a compact. I will not argue that these two propositions are always true, but I think the next several paragraphs may suggest that they are true often enough to cast doubt on certain generalities that are often made about compacts.

This all sounds a little strange, and I think that the reason that it does sound strange is that our image of a compact is still influenced by its history. As Frankfurter and Landis pointed out, the compact was originally a device for boundary settlement;¹⁴ as such, the analogy to a treaty is compelling, and this analogy influences our image. While it is true that a treaty is ratified, and while it is also true that this ratification once took the form of putting the treaty into the *Statutes at Large*,¹⁵ still the original document somehow has had primacy. The original document seemed to be the treaty, and that which went into the *Statutes at Large* was merely a copy, now enrolled into our domestic law. Please understand that I am not attempting to describe the

¹³28 U.S.C. § 1331 (1964). See, e.g., *Bowles v. Willingham*, 321 U.S. 503 (1944); *Federal Intermediate Credit Bank v. Mitchell*, 277 U.S. 213 (1928).

¹⁴Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *YALE L.J.* 685, 691-95 (1925).

¹⁵Since 1949, they are carried in *U.S. Treaties and Other International Agreements*.

reality of treaty law, but merely the way in which we are likely to perceive it. The political process of negotiation of the treaty document gives especial prominence to the original document, and this influences our perception.

While a compact may be negotiated by a commission of notables who in some way resemble "ministers plenipotentiary," this is not necessarily done. Consider the following description:

A proposed compact is formulated by an interested group of state officials without any prior authorization and ordinarily it then is reviewed, revised and recommended by *ad hoc* conferences called for the purpose. The resulting compact is enacted by a state as a statute, the enactment constituting in effect an offer by one state. An acceptance is evidenced by enactment of the same statute by one or more other states. Thus, states today often enact compacts which are open to their prospective membership without any formal negotiation and even, in some cases, with little or no direct participation in the original formulation.¹⁶

One way of preserving the image of a compact as something that has been agreed upon is to postulate the existence of a compact and then classify what each state does as enabling legislation. Thus, the same authors have this passage in their commentary:

State enabling legislation provides a flexible tool for integrating the compact—a precise and relatively rigid instrument—into the legal and administrative system of an acting state. Unlike the compact, the enabling legislation does not have to be uniform in all party states and can be utilized to fit variations into the compactual pattern.¹⁷

Although the compact is referred to as "a precise and relatively rigid instrument," the description in fact seems to leave the compact as a mere political image, with the only thing having legal substance being the enabling legislation. How would an interstate judiciary preserve uniformity of interpretation of a document when there appears to be no document? The court would have to find the document and its uniformity before it could enforce it. Consequently, the problem is more similar to that of the uniform law than it at first appeared.

Another way of pointing up the conceptual puzzles is to compare one of the modern style interstate compacts with a reciprocal uniform

¹⁶F. ZIMMERMANN & M. WENDELL, *THE LAW AND USE OF INTERSTATE COMPACTS*

18 (1961).

¹⁷*Id.* at 20.

law. A nice comparison is available for us to look at in procedure. The interstate lawsuit has been a persistent problem of our federal system since its beginning. Part of the problem has been to make service of process of a state court effective beyond the state boundaries. Changing notions of constitutional law produced by *International Shoe*¹⁸ and its progeny have done much to re-orient our concepts, but that story is told elsewhere.¹⁹ I wish to discuss two legislative attacks on parts of the problem, one dealing with the attendance of witnesses at criminal prosecutions or grand jury proceedings, and the other with interpleader. As for witnesses, the legislative attack was made on the problem of how a state court could compel the attendance of a witness who was beyond the state boundaries. As for interpleader, the attack was on the problem of service of process on all the adverse claimants, some of whom were beyond the state boundaries. The particular solutions chosen were not the only possible solutions, but they are interesting ones, and they illuminate the similarity between interstate compacts and reciprocal uniform laws.

The law as to witnesses is called the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings."²⁰ The key sections are sections 2 and 3. Section 2 describes how the courts of the state are to proceed when another state requests assistance in getting a witness; section 3 describes how to get a witness from another state. The procedures in both sections are keyed to reciprocity. Thus section 2 begins: "If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state . . ." The "if-clause" sets up an antecedent condition of reciprocity. The section goes on to describe procedure: the judge of "that state" prepares a certificate which is presented to a judge of "this state"; the judge of "this state" then holds a hearing, and, if he determines that the conditions of the statute are met, he will then order the witness to go to "that state." The basic structure is simple; if "that state" would order a witness in a criminal prosecution to come to "this state," then by reciprocity "this state" will order the witness to go to "that state." There is nothing extraordinary about the structure of this statute, but I emphasize it so that the parallel to the interpleader statute can be developed. Section 2 having described how "this state" is to react when "that state" wants a witness, section 3 then goes on to prescribe procedures by which

¹⁸*International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹⁹See F. JAMES, *CIVIL PROCEDURE* §§ 12.1-18 (1965); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

²⁰9 UNIFORM LAWS ANNOTATED 91 (1957).

"this state" can get a witness from "that state." In all essential structural details, the two sections are identical.

Let us now compare the compact, the title of which is "The Interpleader Compact."²¹ The key operative part is Article 3, which begins: "Service of process sufficient to acquire personal jurisdiction may be made within a state party to this compact, by a person who institutes an interpleader proceeding or interpleader part of a proceeding in another state, party to this compact . . ." One obvious parallel is that the compact, like the uniform law, operates when there is a basic proceeding in one state (interpleader action compared with criminal prosecution) and then auxiliary process (service of process compared with summons of witness) in a second state.

The type of reciprocity to trigger the compact is joint membership in the compact. When one looks at just how a state joins the compact, it does not look markedly different from the uniform law situation. Thus Article 6(a) provides: "This compact shall enter into force . . . as to a state one year from the date it has taken whatever action may be necessary . . . to make this compact part of the laws of such state and . . . have deposited a duly authenticated copy . . . with . . . each of the states party thereto." Article 6(b) provides: "Unless the statute . . . shall specify otherwise . . . such adoption shall apply to all other states then party to or who may subsequently become party to this compact." The network of reciprocity will expand as more and more states adopt the compact, which is the case with the uniform law. Furthermore, this open-ended expansion will take place when the lawmakers of the state perform the same type of public act as they do when they pass a statute. Of course, some official will have to see to it that there is "deposited a duly authenticated copy," but this simple bureaucratic act is surely more a matter of form than of substance.

The main difference between the compact and the uniform law is that the compact defines "state" to include "a state of the community of nations and any component governmental unit of such a state which under the laws thereof may validly become party to this compact."²² In light of this, the open-endedness of the compact is in part limited by a delegation of power to the chief executive of the state to say, "No," to any "state" that passes the compact.

What is, then, the difference between a compact and a reciprocal

²¹ME. REV. STAT. ANN. tit. 14, §§ 6351-6403 (1964); N.H. REV. STAT. ANN. §§ 5-A:1 to 3 (Supp. 1969); N.J. STAT. ANN. §§ 2A:41A-1 to 3 (Supp. 1969); N.Y. CIV. PRAC. LAW § 1006, note (McKinney 1963); PA. STAT. ANN. tit. 12, §§ 591-94 (Supp. 1969).

²²INTERPLEADER COMPACT art. 2.

law? There is, after all, supposed to be one. Traditionally, our theory has been that a compact is an agreement between the states, and the analogy to treaty law and contract law has influenced us. But what is an agreement? New York agreed with New Jersey to set up the New York Port Authority. These same states are both parties to the Interpleader Compact. Is the Interpleader "agreement" one different in kind from the Port Authority "agreement"? Is there an agreement between states when they both pass reciprocal laws? Why not extend the concept of "agreement" to the reciprocal laws situation?²³

Aside from whether there is a conceptual puzzle about the difference, is there a practical difference? Could the interpleader compact have been enacted as a uniform reciprocal law? It has been argued in a footnote that it could not.

The importance of the fact that the proposal is in the form of an agreement has been stressed in this article. In this connection it should be pointed out that the use of reciprocal legislation for interpleader would have definite weaknesses. An arrangement by reciprocal legislation would not be binding upon the party states who would be free to modify or to withdraw at anytime without formal notice. Contrast this with the contractual nature of the Interstate Compact. *Dyer v. Sims*, 341 U.S. 22 (1951); *Green v. Biddle*, 8 Wheat. 1 (U.S. 1823). The compact assures uniform provisions combined in a simple document with a definite understanding as to the states which are participating. There can be no doubt under the compact as to the obligations of the party states. Reciprocal legislation often leads to questions as to whether there is reciprocity. Finally, a reciprocal law as a unilateral act of a single state cannot bind the courts of a foreign jurisdiction. The compact as a bilateral or multilateral enactment governs in all jurisdictions party thereto.²⁴

Is this argument valid? A full analysis would require a major essay

²³As an aside on the issue of agreement, we might consider *Atlantic & D. Ry. v. Hooker*, 194 Va. 496, 74 S.E.2d 270 (1953). VA. CODE ANN. § 58-638 (Repl. Vol. 1969) imposes a gross receipts tax upon the intra-state operations of interstate carriers, but VA. CODE ANN. § 46.1-20 (Repl. Vol. 1967) provides for waiver of the tax under conditions of reciprocity. The procedure prescribed by the statute calls for the Governor to enter into "reciprocal agreements." However, for administrative convenience, the Governor issued a "unilateral declaration" which spelled out the details of the reciprocal tax exemption. The particular administrative convenience was the ease in administering one set of rules instead of a series of agreements. In light of the negotiations that proceeded the declaration, the court said substance was more important than form and so a "unilateral declaration" equaled a "reciprocal agreement."

²⁴*Zimmerman, Wendell & Heller, Effective Interpleader Via Interstate Compact*, 55 COLUM. L. REV. 56, 68 n.59 (1955).

on constitutional law that is well beyond the scope of this article. For the present, it is enough to establish that the argument is disputable, and that the disputable nature of it is relevant to the topic of an interstate judiciary.

First, the quoted footnote contains the point that reciprocal legislation would permit withdrawal or modification without formal notice. True enough, but the interpleader compact itself in Article VII(1) permits withdrawal with formal notice. Since the formality of the notice seems less important than the fact of withdrawal, the point seems *de minimis*. Another point is made that the compact approach assures "uniform provisions contained in a single document" and that there will be "no doubt . . . as to the obligations of the party states." I have already made my objections to the "single document" theory,²⁵ and so I will not repeat them here. Even if we accept a "single document" theory, we may ask what are its consequences, what are the implications? Are we to believe that because there is a single document that there will not be divergent interpretations? The vast litigation we have spawned about our legal documents (constitutions, deeds, contracts, and so forth) would warn against such an implication. And next, what is the meaning of, and the implications of such a meaning, of "no doubt . . . as to obligations"? Are we talking about the obligations of the governor and the clerks of courts? If so, I would point out that the significant problem is not what they are supposed to do, but what the legal consequences of their actions are to be. A bit of history since the footnote was written may reinforce my arguments. I have already described how the compact limits its open-ended membership provision by giving the chief executive the power to veto (as to his state) a new member state. The Pennsylvania statutes²⁶ merely designate the Governor as the chief executive, *i.e.*, the holder of this power. However, the New York statutes have an additional provision: "The Governor shall take appropriate action pursuant to paragraph (c) of article seven of the interpleader compact so as not to become party thereto with any state not recognized by the United States of America or with any state the features of whose legal system make the equitable operation of said compact impracticable."²⁷ Does this difference mean that there is no "single document"?

The next point that is made in the footnote is that the compact approach permits "a definite understanding as to the states which are

²⁵Text at p. 6 *supra*.

²⁶PA. STAT. ANN. tit. 12, § 594 (Supp. 1969).

²⁷N.Y. CIV. PRAC. LAW § 1006, note (McKinney 1963).

participating Reciprocal legislation often leads to questions as to whether there is reciprocity." Although there is some state official who knows what states are bound into the compact, what is the practitioner to do? A New York lawyer who reads section 1006 of the New York Civil Practice Law and the note that follows it will not find out who the member states are. (The Pennsylvania annotators were more helpful.) However, the elaborate annotations of Uniform Laws Annotated show all states that have adopted the law, give current citations, flag all the divergent wordings, and cite judicial interpretations. The question of annotations is merely a quibble, so I shall push it no further. However, I would again insist that since there is no "single document," there can be "reciprocity problems" in interstate compacts. For example, one might consider the advice that the Supreme Court of Massachusetts gave the Massachusetts Senate on the New England Interstate Corrections Compact.²⁸ A question posed to the court by the Senate was "If the text of the compact authorized in any state differs materially in substance from the text of the compact authorized in another state, would there be an effective compact in force between such states?" The question was relevant since as already enacted in five states there were variations, and since the Massachusetts Senate wished to introduce some more variations. The court asked to be excused from giving an unqualified answer to the question; it pointed out that the compact appeared to be a framework for negotiating further agreement, and that none of the differences appeared to upset the basic framework. It seems to me that an agreement that needs further agreement is at least as uncertain as reciprocal legislation that is ambiguous enough to raise questions as to whether there is reciprocity.

The final point made in the footnote is that "a reciprocal law as a unilateral act of a single state cannot bind the courts of a foreign jurisdiction." The problem with this argument is that it looks at the theory of reciprocal laws from too close up. It is true that when each state passes a reciprocal law that this legal action is the "unilateral act of a single state." But when many states have acted, the consequence of it all is something that is not the act of a single state. Look back at the law on the attendance of witnesses. Let us say that New York wants a witness that is in Florida and that both states have passed this law. In order for New York to get this witness, she will need an order from the Florida courts. While it is true that there is nothing in the New York statutes that can "bind the courts" of Florida, there is now some-

²⁸Opinion of the Justices, 344 Mass. 770, 184 N.E.2d 353 (1962).

thing in the Florida statutes that will bind the Florida courts. This example is not hypothetical, as it went to the United States Supreme Court where the procedure was held constitutional.²⁹

Once again, let me repeat that I do not pretend that I have fully analyzed the differences between reciprocal laws and compacts. An argument with a footnote is too weak a carrier for such a heavy load. The point is that there is a problem. We have two techniques for interstate cooperation—reciprocal laws and compacts—as to which the actual differences between them, if there are any, appear to be subtle enough to be nonapparent after the first thrust of a short analysis. We can sometimes see and state the differences in form, but we are less able to state the differences in substance. Does this mean that we are using tools that we do not understand? If an interstate judiciary were given jurisdiction over reciprocal laws and interstate compacts, this problem might be analyzed in the context of facts. It is the prejudice of a case-oriented lawyer that this is the best context in which to analyze problems, and thus I would like to see an interstate judiciary given this jurisdiction, with the hope that, in time, we would come to understand these problems.

What types of additional problems might the interstate judiciary have to deal with in its jurisdiction over reciprocal laws and interstate compacts? As with uniform laws, it would deal with uniformity of meaning, consistency of interpretation. It would have the further problem of dealing with what I shall call deference. By deference, I mean the respect that officials in one state pay to the determinations made by officials of another state. The deference issue arises because the operation of compacts and reciprocal laws are often characterized by an official in one state doing something to which an official in another state is supposed to respond.

Let us take some examples. Two young girls run away from their parents' home in Massachusetts and go to their sister's home in New York. The parents wish to have a court direct the girls to return home, and so they invoke the procedures of the Interstate Compact on Juveniles.³⁰ A woman in Virginia wishes her ex-husband in Missouri to contribute to the support of their ten year old son. The ex-wife wants a court order without traveling to Missouri, and so she invokes the procedures of the Uniform Support of Dependent's Law.³¹ In each ex-

²⁹New York v. O'Neill, 359 U.S. 1 (1959).

³⁰Application of Chin, 41 Misc. 2d 641, 246 N.Y.S.2d 306 (Sup. Ct. 1963); Chin v. Yen, 41 Misc. 2d 650, 246 N.Y.S.2d 316 (Sup. Ct. 1963).

³¹Ivey v. Ayers, 301 S.W.2d 790 (Mo. 1957).

ample, the procedure that is called for by the compact or the reciprocal law is to ask some state official to do an act that triggers it and thus results in some official activity in another state.

As these two officials coordinate their activity, should either of them reconsider something that has already been decided by the other official? We could compare these examples to a lawsuit that is being managed by more than one judge. On this analogy, one judge would not reconsider what the other judge had decided unless some new matter came before him that made it seem necessary. An example drawn from the federal courts would be one judge issuing the pre-trial order and a second conducting the trial. Another example might be a deposition conducted in a judicial district other than the one in which the trial is conducted. In this situation the court where the deposition is being taken may be called upon to give an order in aid of the deposition. Is the sort of deference that the two federal judges would pay to each other appropriate in the context of two officials in different states operating under interstate compacts or reciprocal laws?

The type of issues that are involved in such deference were explicitly discussed in the example of the woman in Virginia trying to get support payment from her ex-husband in Missouri. The wife began the proceeding by filing papers in the Juvenile and Domestic Relations Court in Richmond, Virginia. The judge of that court issued a certificate which recounted the examination under oath of the "divorced wife" made by him, and this certificate and the petition were forwarded to the Circuit Court of Macon County, Missouri. In the Missouri court, the prosecuting attorney of the county appeared on behalf of the wife.

The issue that I have called the deference issue was discussed under the heading of due process. The defendant had two complaints: that he had no notice of the Virginia hearing; and that he had no opportunity to cross-examine his ex-wife at that hearing. The Missouri court rejected the first point and worked out a compromise on the second. As to the first point, the court noted that the Virginia procedure did not determine or adjudicate any rights, and so lack of notice is not constitutionally objectionable. As to this, the court was both correct and orthodox. Somewhat more interesting, however, is some additional language of the court which was directed toward the particular context of the case as one arising under a reciprocal law. The Missouri court thought that one court could initiate the lawsuit and the second court could dispose of it. At one point in the discussion the court's language³² suggests that it was drawing an analogy to the clerk's office, where a lawsuit is instituted. The observation was made that one does not have

to give notice of filing papers with the clerk, but rather papers are merely filed and notice is then given of subsequent proceedings that will be based upon the papers. In short, one must give notice of a lawsuit, but one need not give notice of starting a lawsuit. At some point, there is no notice; one merely starts.

The no-cross-examination point is more difficult. The court was unable to reject it entirely, but had to accommodate it. One way of setting up this interstate lawsuit would be to take the wife's evidence in Virginia and the husband's evidence in Missouri, and then give the ultimate responsibility for putting the two sets of evidence together to the Missouri court. This, of course, is precisely what the defendant objects to, since he was unable to cross-examine the Virginia evidence. In the case, the court accepted this objection, but proposed three alternative solutions. Two of the three solutions (the wife's case might be made by putting the husband on the stand, or the wife might travel to Missouri and testify) were not very helpful to the wife and do not involve any further use of the Virginia courts. However, the third solution appears to involve cooperation of the two judiciaries—the wife may prove her case by putting in evidence a deposition. Apparently this would mean a return of the case to Virginia to take the wife's testimony for a second time (and the defendant-husband would have notice and an opportunity to cross-examine) and then a transmittal of the transcript back to Missouri. This gives the husband a partial, and rather hollow, victory. The husband may harass the wife by demanding the deposition, but in most cases it will not be of any practical advantage. It takes two steps to do what was attempted in one step.

I have summarized the case, but what does it all add up to? In particular, and staying with the topic, what consequence for interstate deference does the case have? One consequence is that a lawsuit may be started in a state other than the state that shall decide the case. Furthermore, the case may be bounced back and forth between the states to put together the evidence. Two separate judiciaries may have to cooperate in the management of a single lawsuit. As the technique of this type of lawsuit is advanced, the process of cooperation and deference

²²As to the initial proceeding in Virginia, the Missouri court commented:

[T]he Virginia court took the procedural acts which enabled the petitioner [the ex-wife] to submit her claim against defendant [the ex-husband], without the necessity of her personal presence, to the jurisdiction of the circuit court of Missouri.... There is no more denial of due process... than there is in the failure of the statutes to require notice to a defendant that an ordinary civil suit is to be filed against him...."

Id. at 796.

can become richer and more complex. The ultimate problem that I would pose is: how is a decision to give or deny deference to be made? Should it be made unilaterally by the judiciary of one state? Would it not be better for the several judiciaries to consult on the matter? And would this not be an apt item of business for an interstate judiciary?

So far, I have written as though the states were free to pursue problems of uniformity without regard to the obvious fact that this pursuit would have to be attempted within the federal system. There are several additional questions that arise from the existence of the federal system. Would there be appeals from the interstate judiciary to the United States Supreme Court, and if so, on what types of issues? What would be the appropriate way to enact the organic law—a constitutional amendment, congressional legislation, interstate compact, or reciprocal legislation? Given the present structure of the jurisdiction of the federal courts, cases that we might envision starting in the state courts and being appealed to the interstate judiciary might well be started in the federal district courts. Should there be provision for appealing some of these cases from the federal district courts to the interstate judiciary? What about the theory that interstate compacts are governed by federal law? Is this theory a product of comparing compacts to treaties, and if so, does the theory need to be abandoned or modified?

None of these questions need be answered unless we conclude that the proposed scheme for an interstate judiciary is a good idea. For the moment I hope that it is sufficient for me to say that the problems raised by these questions do not seem insuperable.

CONCLUSION

There are several techniques available to the states of our complex federal system that can be used to eliminate some of the diversities that are inherent in the system. Uniform laws, reciprocal laws, and interstate compacts are three well known and widely used techniques. However, these techniques can fail. If those who are responsible for administering them do not agree on what they mean and how they should be interpreted, then they will not do what they are designed to do. Moreover, the differences between these techniques, and the circumstances in which one is preferable to another, need more analysis. There are practical problems of the deference an official of one state should pay to the decisions of the officials of another. An interstate judiciary could be helpful in solving these problems of technique.