CHAPTER 1

Interstate Economic Relations

The U.S. Constitution established an economic union as well as a political union of sister states in order to "establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."[1] Both unions have become more complex with continuous changes instituted in response to new challenges and emerging problems.

Much of the complexity is inherent in a federal system. Alexander Hamilton in the *Federalist,* number 82, explained:

> The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. 'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent whole.[2]

U.S. Supreme Court Chief Justice John Marshall in *Gibbons v. Ogden* in 1824 opined:

> In our complex system, presenting the rare and difficult scheme of one general government, whose actions extends over the whole, but which possesses only certain enumerated powers, and of numerous State governments, which retain and exercise all powers not delegated to the union, contests respecting power must arise.[3]

By delegating specific powers to Congress and reserving other powers to the states, the U.S. Constitution ensured there would be important daily interactions between the national and state governments, and between sister state governments. Many of these interactions were economic in nature and involved disputes or cooperation.[4] Our focus is interstate economic relations conducted under ground rules established by the U.S. Constitution and Congress as interpreted by the U.S. Supreme Court. Congress plays important roles in encouraging enactment of uniform state laws and interstate cooperation by regulating

relations between states and preempting regulatory powers of states if they are impeding the free flow of commerce in the nation.

The subject matter of interstate economic relations is broad and includes the allocation of river water; joint construction and operation of transportation facilities; erection and removal of interstate trade barriers; tax exportation; competition for industry, tourists, gamblers, professional sports team franchises, and federal government grants-in-aid and facilities; and numerous cooperative activities based upon interstate compacts and interstate administrative agreements.[5]

A review of economic and political conditions in the colonies prior to the Declaration of Independence in 1776, the prosecution of the Revolutionary War by the thirteen newly independent states, and experience under the Articles of Confederation and Perpetual Union will facilitate an understanding of the intergovernmental provisions included in the U. S. Constitution.

Development of the Constitution

Mercantilism was the prevailing economic and political policy in western Europe during the seventeenth century. England, the mother country of thirteen colonies in North America, sought to promote its political power in the world by developing strong home industries and a favorable balance of international trade.[6] The latter was to be obtained by the imposition of duties and tariffs on most imports, prohibition of other imports, and encouragement of exports. Gold, which was viewed as a major source of national power, would flow from nations with an export deficit to nations with an export surplus.

The seeds of revolt against the British crown were sowed in the Navigation Acts of 1660 and 1663 requiring colonists to purchase and sell goods only in England and to transport all goods in English ships. Eighteenth century mercantilist acts of Parliament sowed new seeds and fertilized the old seeds. A 1732 act forbade colonists to trade in woolen goods; the Molasses Act of 1733 imposed a duty on all molasses, rum, and sugar imported by a colony and thereby interfered with the colonies' trade with Spanish New World colonies; a 1750 act prohibited the manufacture of certain iron products and the shipment of pig iron to England; the Sugar Act of 1764 placed restrictions on trade in food, lumber, and other items with the West Indies; and a 1764 writ of assistance act empowered crown revenue officers combating smuggling to conduct searches and seizures, and required colonists to assist the officers. The Stamp Act of the following year was an attempt by Parliament to obtain revenue from the colonies to pay part of the cost of the French and Indian War by requiring an official stamp on various legal documents and newspapers. This act was viewed in particular as an attack on intellectual freedom. The Continental

Congress reacted by maintaining in 1765 taxes could be levied legitimately only by popularly elected colonial assemblies. Subsequently, the slogan "no taxation without representation" became popular.

The colonial break with the United Kingdom occurred in 1775 when New Hampshire declared its independence and representatives of the thirteen former colonies in 1776 signed the Declaration of Independence. Coincidentally, Adam Smith's famous book—*An Inquiry into the Nature and Causes of the Wealth of Nations*—was published in 1776 and constituted a blistering attack on the mercantilist system.[7] Emphasizing the law of comparative advantage, Smith wrote that it is best to purchase products from other nations if they can produce them at a cost lower than the cost of domestic manufacture and added ". . . in a mercantilist system, the interest of the consumer is almost constantly sacrificed to that of the producer. . . ."[8] His book represented a laissez-faire approach with respect to governmental intervention in the economy and this policy approach appealed to persons favoring individual liberties.

The Declaration of Independence produced thirteen new independent nations, but did not create a national government. Each state sent representatives to the second Continental Congress that prosecuted the Revolutionary War by borrowing funds, raising armies, and entering into treaties with certain other nations. This Congress recognized the need for a more formal national union and, in 1777, drafted the Articles of Confederation and Perpetual Union and transmitted them to the thirteen states for ratification.

Articles of Confederation

Four years were required for ratification of the articles primarily because of boundary disputes attributable to imprecise royal land grants. New Hampshire and New York, for example, claimed what today is Vermont; Massachusetts claimed the Rochester, New York, area; and Connecticut claimed present-day Illinois, Indiana, and northern Ohio. A solution to the disputes emerged in 1780 when the Continental Congress suggested the lands in dispute should be assigned to the new Congress, which would be created by the proposed Articles of Confederation and Perpetual Union, for settlement and formation as states of the proposed confederation.[9] In 1781, New York and Virginia ceded the lands they had been claiming and their lead was followed by the other states shortly thereafter. The Congress, created by the articles, enacted the Northwest Ordinance in 1787 and provided that each of the various parts of the Northwest Territory be admitted as a state when its population reached 50,000.[10]

Provisions. Article I titles the newly created confederacy "The United States of America," and Article II clearly reveals the nature of the new confederation:

"Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressed delegated to the united States in Congress assembled." The absence of a reference to a newly established national government and the choice of the words "the united States in Congress assembled" were chosen deliberately and reflected the fear of centralized power. A new national government with legislative, executive, and judicial branches was not established.

Article III reemphasized the limited nature of the confederation by stipulating the thirteen states were entering

> into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, of any other pretence whatever.

Three important principles relating to harmonious interstate relations were incorporated in Article IV (see chapter 2). Citizens of each state were entitled to the privileges and immunities of citizens in the member states, fugitives from justice must be returned to the requesting state by the governor of the asylum state, and each state must give full faith and credit to the legislative acts, records, and judicial proceedings of sister states. These principles later were incorporated into Article IV of the U.S. Constitution.

Article V established a unicameral Congress composed of two to seven delegates from each state who were appointed annually in a manner prescribed by the state legislature and subject to the limitation that no delegate could serve in Congress for more than three years during any six-year period. Delegates could be recalled and replaced by a state at any time. Each state was allocated one vote in Congress regardless of the number of its delegates.

Although states were forbidden by Article VI to "lay any imposts or duties which may interfere with stipulations in treaties" entered into by Congress with foreign nations, no such prohibition was placed on states relative to imposts and duties being laid on products and raw materials that moved in interstate commerce. Furthermore, Article IX provided that treaties of commerce entered into by Congress may not prevent a state "from prohibiting the exportation or importation of any species of goods or commodities whatsoever . . ."

This article also authorized Congress to appoint a president as presiding officer for a period of one year during any term of three years, coin money, establish a standard system of weights and measures, regulate trade with Indians, establish post offices, and appoint "all officers of the land forces in the service of the United States excepting regimental officers . . . all the officers of the naval forces, and other officers of the United States." In addition, this arti-

cle authorized Congress to appoint "a Committee of the States," composed of one delegate from each state, to sit during congressional recesses with authority to borrow funds, coin money, declare war, establish a postal system and standards of weights and measures, negotiate treaties, raise an army and a navy, and regulate relations with the Indian tribes. This committee was empowered to exercise additional powers provided that nine states agreed to their delegation.

One of the most interesting articles is Article XI:

> Canada, acceding to this Confederation, and joining in the measures of the United States, shall be admitted into and entitled to all the advantages of this Union, but no other colony shall be admitted into the same unless such admission be agreed to by the nine States.

The limited powers delegated to Congress by the Articles of Confederation and Perpetual Union predestined the failure of the Confederation. In 1974, Martin Diamond concluded "neither the friends nor the enemies of the Confederation regarded the articles as having created any kind of government at all, weak or otherwise."[11]

Defects. The defects of the Articles of Confederation and Perpetual Union became apparent within a period of four years. The first major defect was Congress' lack of authority to levy taxes and its reliance for funds upon states which often failed to contribute their quotas in full. The result was the inability of Congress to effectively implement the powers delegated to it by the articles.

The second major defect was the failure to authorize Congress to regulate interstate commerce. Alexander Hamilton in the *Federalist* number 11 reflected the views of Adam Smith: "An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets."[12] He contended in the *Federalist* number 22 "[t]he interfering and unneighborly regulations of some States . . . have, in different instances, given just cause of umbrage and complaint to others, and . . . if not restrained by a national control, would be multiplied and extended till they became . . . injurious impediments to the intercourse between the different parts of the Confederacy."[13] Frederick H. Cooke in 1908 commented "[o]ne of the chief evils of the confederation was the power exercised by the commercial states of exacting duties upon the importation of goods destined for the interior of the country or for other states."[14]

The third major defect was Congress' inability to enforce its statutes and treaties with other nations because states were not obliged to respect them. James Madison reported in 1787 states had violated the Peace Treaty of 1783

with the United Kingdom, the Treaty with the Kingdom of France, and the Treaty with Holland, and added no foreign power had yet "been rigorous in animadverting on us."[15] Hamilton noted in the *Federalist* number 16 "[t]he measures of the Union have not been executed; and the delinquencies of the States have step by step matured themselves to an extreme, which has, at length, arrested all the wheels of the national government and brought them to an awful stand."[16]

The first defect was responsible for the fourth major defect: The lack of funds to raise and support an army and a navy during a period when the friendly French monarchy was in danger of collapse, Spain controlled the territory to the southwest and closed the Mississippi River, and Canada was under British control and excluded U.S. citizens from the St. Lawrence River. John Jay in the *Federalist* number 4 expressed concerns relative to the ability of the individual states to raise armies and navies and asked: "If one was attacked, would the others fly to its succor and spend their blood and money in its defense?"[17] Shays' Rebellion (1786–1787) in western Massachusetts demonstrated the inability of a state government to suppress a rebellion that was put down by a private army funded by wealthy citizens. Hamilton, a major supporter of the proposed U.S. Constitution, was convinced "[a] firm Union will be of the utmost moment to the peace and liberty of the States as a barrier against domestic faction and insurrection."[18]

The possible fracturing of the Confederation into a series of smaller confederacies was viewed as a distinct possibility. Madison wrote in 1787 "a breach of any of the Articles of Confederation by any of the parties to it absolves the other parties from their respective obligations, and gives them a right if they choose to exert it of dissolving the Union altogether."[19] Citing the historical division of Great Britain into three nations and constant wars between them, John Jay in the *Federalist* number 5 feared the "United States" would be divided into three or four nations and "they would always be either involved in disputes and war, or live in the constant apprehension of them."[20] Referring to commerce between states, Hamilton added a disunion "would occasion distinctions, preferences, and exclusions" on the part of individual states against other states.[21]

The 1787 Constitutional Convention

Observers were aware of the defects of the Articles of Confederation and Perpetual Union as early as 1785. In recognition of the importance of harmonious interstate relations, Maryland's and Virginia's state officers drafted, in 1785, a navigation and trade agreement for the Potomac River and Chesapeake Bay. In ratifying the interstate compact, the Maryland General Assembly suggested that Delaware and Pennsylvania be included in future negotiations on

interstate-commercial relations. The Virginia General Assembly enacted the compact into law and invited the other states to send delegates to a convention—to be convened in Annapolis, Maryland—in 1786, for the purpose of developing a uniform system of interstate commerce.

Nine states appointed commissioners to attend the conference, but only twelve commissioners from five states participated. They endorsed a memorial, drafted by Alexander Hamilton of New York, requesting Congress to convene in May 1787 a convention to examine the Articles of Confederation and Perpetual Union and to propose amendments as needed. On February 21, 1787, Congress called such a convention to convene in Philadelphia on May 25, 1787, but let each state determine the method of selecting delegates. Seventy-four delegates were selected by the state legislatures or appointed by the governors under legislative authorization. Nineteen selected delegates either refused their appointments or did not attend the convention. An additional fourteen delegates, including New York delegates Robert Yates and John Lansing who objected to the approach taken by the majority of delegates, departed the convention prior to convention approval of the proposed U.S. Constitution. The State of Rhode Island and Providence Plantations failed to send delegates because it saw no need for a convention since Article XIII of the Articles of Confederation and Perpetual Union provided they could be amended by the concurrent affirmative actions of the Congress and each state legislature.

Four days after the convention opened. Governor Edmund Randolph of Virginia unveiled fifteen resolutions serving as the foundation for a national government possessing powers similar to those of the United Kingdom Government.[22] These resolutions generated a major debate relative to whether the Articles of Confederation and Perpetual Union should be amended or replaced. Prior to the arrival of delegates from five states, the convention voted, six to one, to replace the articles and draft a new national fundamental law.

A constitutional convention would be successful in drafting a new fundamental law only if the major regional interests were able to reach compromises on contentious proposals. There were sharp differences of opinion between the northern and southern states, the eastern and western states, and states with large populations or small populations. The latter, endorsed the New Jersey plan introduced by William Patterson, providing equal state representation in Congress, a continuation of the representation system established by the articles. The large states favored the Virginia Plan and argued equity demanded representation based upon population in view of the fact the large states would pay the bulk of the taxes levied by the proposed Congress. The issue was debated in the Committee of the Whole for several weeks prior to the so-called Connecticut Compromise solving the representational problem by providing equal state representation in the Senate and representation

based upon population in the House of Representatives with the proviso that each state have a minimum of one representative.

Disputes over slavery and import and export duties threatened to produce a deadlocked convention. The southern states desired a provision allowing the importation of slaves, a provision opposed by the northern states. A compromise was reached in the form of Article I, §9, of the proposed constitution allowing the importation of slaves for a period of twenty years and granting Congress authority to impose a maximum tax of ten dollars on each imported slave. The northern states favored the levying of import and export duties to raise revenue for the proposed new national government, and southern states opposed such duties on the grounds that they imported most manufactured products and exported most of the products they produced. A logical compromise was reached in Article I, §8: Congress may levy only import duties.

A proposal to grant authority to Congress to disallow state statutes contravening the powers delegated to it provoked a major controversy. James Madison argued state legislatures could "pass laws which will accomplish their injurious objects before they can be repealed by the General legislature or be set aside by the national tribunals," hence a congressional negative was essential.[23] Not surprisingly, the convention rejected the proposal because the proposed constitution would significantly reduce the powers of the states, implementation of state laws would be delayed for several months while the statutes were reviewed by Congress, and the proposal would allow Congress—without constitutional criteria—to declare state statutes *ultra vires* and possibly convert the governance system into a unitary one.

The delegates fashioned the first federal constitution in the world that incorporated elements of a unitary system and elements of a confederate system by establishing an *Imperium in Imperio*. Specific powers were delegated by the supreme law to Congress which is forbidden to exercise specified powers. All other powers, unless prohibited, are reserved to the states. Most powers delegated to Congress are not exclusive and states possess concurrent authority to exercise these powers provided they do not violate the supremacy of the law provision of Article VI, which stipulated that all acts of Congress and treaties entered into by the United States were the supreme law of the land "any thing in the Constitution or Laws of any State to the contrary notwithstanding." As explained in chapter 4, the U.S. Supreme Court developed a dormant commerce clause doctrine under which the court in the absence of congressional legislation struck down state and/or local government laws as violative of the clause.

The proposed constitution established two branches of government that did not exist under the Articles of Confederation and Perpetual Union: an executive branch headed by the president and a judicial one consisting of a

Supreme Court. Congress was authorized to create courts inferior to the Supreme Court. The convention-produced document included a number of provisions, primarily ones governing interstate relations, contained in the articles. A major distinction between the two documents involved the source of governmental powers. Under the articles, Congress derived its powers from the thirteen states. The proposed constitution, reverting to the language of the Declaration of Independence, identifies the people as the source of the proposed new government.

Convention delegates were aware that the articles were popular with most citizens who feared a strong national government and to persuade all states to ratify the proposed constitution would be an impossible task. In consequence, they incorporated a provision in Article VII stipulating ratification by nine states would establish "this Constitution between the States," a provision that mirrored Article X of the Articles of Confederation and Perpetual Union, which permitted nine states in Congress assembled to delegate any or all of its powers to the Committee of the States for execution during recesses of Congress. The framers apparently were convinced that ratification of the proposed fundamental law by nine states would persuade the remaining four states to ratify it. The convention resolved on September 17, 1787, that each state should elect delegates to a convention to consider ratification of the proposed constitution.

Securing Ratification

Proponents faced a daunting task persuading nine states to ratify a document viewed by many citizens as a threat to their individual liberties because of the broad powers delegated to the proposed Congress. Article I, §9, of the proposed fundamental law contained three civil liberty provisions—prohibition of enactment of a bill of attainder and an ex post facto law, and suspension of the writ of habeas corpus except during an invasion by a foreign power. These guarantees did not satisfy opponents of the document who referred to colonial charters guaranteeing due process of law and right to petition for redress of grievances, levying of taxes only by approval of elected representatives, and prohibited of arrest and punishment without a specific charge. Certain critics also objected to the omission of any acknowledgment of God and to the requirement that all public offices be held by a Christian. The image of Oliver Cromwell was raised by the provision (Art. II, §2) designating the president as "commander in chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States. . . ." Furthermore, opponents maintained that the convention was called by Congress—created by the Articles of Confederation and Perpetual Union, for the sole purpose of amending the articles and the constitutional convention lacked authority to replace them.

The Federalist Papers. Opposition to the proposed constitution was particularly strong in New York where Alexander Hamilton enlisted John Jay and James Madison to join him in writing eighty-five letters to editors of New York City newspapers, all of which were signed *Publius* and collectively referred to as *The Federalist Papers,* which supported the handiwork of the convention during the winter and spring of 1787–1788. The first thirty-six letters were published in book form in late March 1788, and subsequently the remaining letters were published. Each letter, as noted, identified defects of the Articles of Confederation and Perpetual Union or explained and justified a provision of the proposed new fundamental document. These letters remain the best expositions on the unamended U.S. Constitution. The reader should be warned that the terms confederation and federation often were used interchangeably in the letters. Madison in the *Federalist* number 39 explained the proposed governance system would be "neither wholly national nor wholly federal" [confederate].[24]

The *Federalist* number 14, authored by Madison, sought to assure readers the proposed government would be one with limited powers and state governments would not be abolished.[25] In the *Federalist* number 45 he reiterated this point by writing "[t]he powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[26] Madison continued by maintaining the congressional delegated powers would concern external affairs, including the regulation of foreign commerce, and the reserved powers of the states would be broad.

Hamilton in the *Federalist* number 17 addressed the fear of a "too powerful" national government in the following terms:

> It will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities. The proof of this proposition turns upon the greater degree of influence which the State governments, if they administer their affairs with uprightness and prudence, will generally possess over the people.[27]

He repeated this argument in the *Federalist* number 31 and in number 32 assured readers each state would "possess independent and uncontrollable authority to raise their own revenues for the supply of their own wants" and an attempt by Congress to abridge this authority "would be a violent assumption of power, unwarranted by any article or clause of its Constitution."[28] He placed exclusive national powers in three categories:

> where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in

> another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant.[29]

The Anti-Federalist Papers. Hamilton's, Jay's, and Madison's arguments were countered, generally by a series of letters termed the Anti-Federalist papers. Sixteen essays, signed Brutus, were published in the *New York Journal* in the period October 1787 to April 1788. These essays were not printed as a single document during the debates on ratification of the proposed U.S. Constitution. The identify of Brutus has not been proved conclusively, but available evidence suggests it was Robert Yates, a New York delegate to the Philadelphia Convention. Other letters opposing ratification of the proposed constitution were signed Cato who might have been Governor George Clinton of New York.

Brutus advanced several major objections to the work of the convention. He contended in his first letter a unitary system would develop in time because the proposed government would "possess absolute and uncontrollable power" inherent in the necessary and proper clause and the supremacy of the laws clause of the U.S. Constitution.[30] A second major objection, outlined in his sixth letter, was the authorization for the proposed Congress to levy and collect duties, excises, and taxes, which combined with the necessary and proper clause, would result in the states lacking "the power to raise one shilling in any way, but by the permission of the Congress."[31]

Brutus in his eleventh letter examined the proposed judicial system that was designed to be independent of Congress and the citizenry. He concluded: "That the judicial power of the United States will lean strongly in favour of the general government and will give such an explanation to the constitution as will favour an extension of the jurisdiction is very evident from a variety of considerations."[32] Brutus added that the Constitution's use of general terms combined with the necessary and proper clause suggests the constitution was not to be interpreted strictly.

Cato in his fourth letter took up the theme of the term of office of the proposed president and powers granted to the incumbent, and warned readers this combination "would lead to oppression and ruin."[33] Cato's fifth letter objected to biennial terms of office for proposed members of the House of Representatives on the ground annual terms are a democratic safeguard, and added the method of selecting members of the Senate will create an aristocracy, and emphasized "the slave trade is, to all intents and purposes, permanently established."[34]

In his seventh letter, Cato expressed in strong terms his distrust of "rulers."

> Hitherto we have tied up our rulers in the exercise of their duties by positive restrictions—if the cord has been drawn too tight, loosen it to the necessary

> extent, but not entirely unbind them—I am no enemy to placing a reasonable confidence in them; but such an unbounded one as the advocates and framers of this new system advise you to, would be dangerous to your liberties; it has been the ruin of other governments, and will be yours, if you adopt with all its latitudinal powers—unlimited confidence in governors as well as individuals is frequently the parent of deception.[35]

Influenced in part by the promise of proponents, the first order of business of the new Congress would be the proposal of a series of constitutional amendments collectively termed the Bill of Rights. The requisite number of states ratified the proposed Constitution by June 1788, when the New York convention convened. At this point in time, the New York delegates had to make the decision whether the state should become a member of the union of states. Hamilton and other supporters of the Constitution presented strong arguments which were challenged by anti-Federalists and particularly by Melancton Smith.[36] The proponents won the debate and also won the debate in Virginia. The remaining noncommitted states—North Carolina and Rhode Island and Providence Plantations—ratified the fundamental law in the autumn of 1789 and spring of 1790, respectively.

The Framers' Motives

Charles A. Beard in a 1913 book addressed the question of the motives of the framers of the U.S. Constitution.[37] His research uncovered the fact many delegates to the constitutional convention were owners of government bonds, land mortgages, and paper money that was nearly worthless, and suggested these delegates could benefit financially from the establishment of a strong national government with taxation powers. The book was subjected to strong criticism.

The author explained in 1935 the book had been criticized by former president William H. Taft and a number of prominent historians, including professor Albert Bushnell Hart who, in Beard's words, "declared that it was little short of indecent."[38] Beard reported the text of the 1935 edition was the same as the original text and denied the critic's charge the book accused the delegates of seeking financial gain.

Writing in 1937, political scientist William Bennett Munro explained the Declaration of Independence was drafted by men of wealth who clearly were not motivated by economic gain and natural leaders would have been excluded from the convention had wealthy persons not served in the constitutional convention.[39] Similarly, historian Robert E. Brown uncovered evidence a number of wealthy citizens in various states were opponents of the proposed Constitution that was favored by relatively poor persons.[40] Political

scientist William H. Riker in 1964 endorsed Brown's views and suggested the need for a strong army and navy to counteract potential threats from Great Britain and Spain was the primary motive of delegates who favored a strong national government.[41]

The evidence produced by the above and other scholars suggests the delegates had multiple motives in drafting the Constitution with economic considerations and the need for a strong military force the primary ones. Each of these motives supported the other motive; that is, a strong army and navy required a strong national economy and vice versa.

The Distribution of Powers

The framers of the U.S. Constitution, according to the *Federalist Papers,* did not provide for a complete national government, but instead limited it to expressed delegated powers and reserved all other powers not prohibited to the states and the people including concurrent powers. The powers delegated to this partial government, however, are substantial.

The Delegated Powers

Section 8 of Article I contained the following list of powers exercisable by Congress:

> To lay and collect taxes, duties, imposts and excises, to pay the debts and to provide for the common defence and general welfare of the United States, but all duties, imposts, and excises shall be uniform throughout the United States;
>
> To borrow money on the credit of the United States;
>
> To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;
>
> To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;
>
> To coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures;
>
> To provide for the punishment of counterfeiting the securities and current coins of the United States;
>
> To establish post offices and post roads;
>
> To promote the progress of sciences and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;
>
> To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committee on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriations of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Relative to the sphere of economic activities, delegated powers authorizes Congress to tax and spend for the general welfare; borrow money; regulate interstate commerce, foreign commerce, and commerce with the Indian tribes; enact uniform bankruptcy laws; coin money; and establish copyright and patent systems.

Additional powers are delegated to Congress by constitutional amendments. The Thirteenth, Fourteenth, and Fifteenth Amendments grant powers to Congress to enforce their civil liberties provisions, the Sixteenth Amendment authorizes Congress to levy a graduated income tax, and the Nineteenth Amendment delegates to Congress the power to enforce the guarantee of the right of women to vote in elections. The reader should be aware Congress does not have to exercise any delegated power and did not enact a major statute based on the authority to regulate interstate commerce until 1887.

Implied and Resultant Powers. The "elastic" or "coefficient" clause of section 8 of Article I authorizes Congress to enact "all laws . . . necessary and proper for carrying into execution" the powers specifically delegated to Congress "and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." This clause is the basis of the judicial doctrine of implied congressional powers first enunciated in *McCulloch v. Maryland* in 1819.[42] The broad judicial interpretation of the clause enlarged significantly the powers of Congress (see chapter 4).

A resultant power is one inferred from two or more specifically delegated powers. The U.S Constitution, for example, does not grant a specific power to Congress to regulate immigration, yet such a power can be inferred from the authority granted to Congress "to establish a uniform rule of naturalization" and to regulate commerce "among the several States."

The Reserved Powers

States surrendered part of their sovereignty when they ratified the U.S. Constitution which delegates several exclusive powers to Congress and the president, authorizes Congress to use its delegated powers in combination with the supremacy of the laws clause to preempt the regulatory authority of states, and prohibits the exercise of specified powers by states. To clarify that the U.S. Government is a limited government, the Tenth Amendment stipulates: "The powers not delegated to the United States, nor prohibited by it to the States are reserved to the States respectively, or to the people."

The reader should be aware the reserved powers of states are subject to preemption by treaties negotiated by the president with foreign nations and approved by a two-thirds vote of the U.S. Senate.[43] The constitutionality of a treaty entered into by the United States with the United Kingdom in 1916, which provided for the regulation of many bird species migrating between Canada and the United States, was challenged in 1920 on the ground the treaty violated the Tenth Amendment. Justice Oliver Wendell Holmes of the U.S. Supreme Court delivered its decision in *Missouri v. Holland* upholding the constitutionality of the treaty and opined:

> The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.[44]

The North American Free Trade Agreement (NAFTA) of 1993—between Canada, the United Mexican States, and the United States—and the General

Agreements on Trade and Tariffs (GATT) of 1994 have significantly reduced the power of states to engage in economic regulation of interstate commerce.

The U.S. Constitution contains no specific references to the powers of states other than the small number of powers listed in section 10 of Article I, including entrance into interstate compacts, exercisable by states with the permission of Congress. These reserved powers may be placed in four categories, are undefinable except in the broadest of terms, and are important ones affecting the daily activities of citizens and business firms.

The Taxation Power. States possess wide discretion in designing their respective systems of taxation. They may impose any type of tax and determine the rate of taxation. Two constitutional limitations are placed on the taxing authority of states. First, no tax can be levied that significantly burdens interstate commerce. Chapter 3 explains the congressional ground rules for state taxation and chapter 4 examines judicial review of state taxes allegedly burdening interstate commerce. Second, the Constitution requires states to obtain the permission of Congress prior to levying import and export duties that may be imposed only for the expressed purpose of financing the execution of their inspection statutes with any surplus revenue dedicated to the U.S. Treasury (Art. I, §10).

The Police Power. Justice Oliver Wendell Holmes of the U.S. Supreme Court in 1911 opined this "power extends to all great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and predominant opinion to be greatly and immediately necessary to the public welfare."[45] State legislatures have delegated this regulatory power in broad terms to general purpose local governments who employ it to regulate persons and property in order to protect and promote public health, safety, welfare, and morals.

A state or local government may exercise the police power summarily in emergency situations, but in all other situations must exercise the power in accordance with the due process of law guarantee of the Fourteenth Amendment to the U.S. Constitution that requires advance notice of a proposed governmental action, an opportunity for a hearing before the concerned governmental department, and the right to appeal the department's decision.

Chapter 5 explains that the use of the police power, along with other reserved powers, to erect interstate trade barriers. Decisions by the U.S. Supreme Court, based upon the First Amendment as incorporated into the Fourteenth Amendment, have placed nearly insurmountable obstacles in the path of subnational governments desiring to utilize the police power to suppress nude dancing, obscene literature, and pornographic films and videos.

Provision of Services. The U.S. Constitution authorizes Congress to provide only one service—the postal system—directly to citizens within states with the exception of provision of services on federally owned properties such as military installations. Subnational governments provide a wide variety of services to their respective citizens with most services provided by local governments.

These services may be grouped into six broad types. The first is public protection and involves police, fire, and emergency services. The second type is education provided by independent school districts and cities ranging from kindergarten to secondary schools. State governments operate universities and specialized schools such as a agricultural school, ceramic institute, fashion institute, or maritime academy.

The third type is public welfare services that have expanded greatly since they first were provided in the seventeenth century by towns in the Massachusetts Bay Colony. Historically, these services were the responsibility of local governments, but three states—Delaware, Massachusetts, and Vermont—assumed complete responsibility for the services.

Public health services are the fourth type and, in common with welfare services, have expanded greatly in scope. Although most such services are provided by local governments, the State of Rhode Island and Providence Plantations assumed complete responsibility for public health services in 1966.

The fifth type is transportation services. The U.S. Constitution authorizes Congress to construct post roads, yet it has not done so and has provided grants-in-aid to state governments to construct such roads. Most highways in cities, towns, and villages are the responsibility of local governments with the exception of major state and interstate highways. Many local governments operate bus systems and large cities or state public authorities operate subway systems. A number of authorities also operate bus systems.

Agricultural, conservation, and recreational services are the final type of service. Each state conducts agricultural research, promotes soil conservation, and provides assistance to farmers and citizens; develops water resources including reservoirs of drinking water; operates parks and recreational facilities; and engages in fish and game stocking.

The Local Government System. The newly independent states possessed complete control over their respective local government system as a unitary relationship existed between the two planes of government. Courts applied the *ultra vires* rule and defined local governments as creatures of the state subject to modification at will by the state legislature or even abolished.[46] A reform movement, termed "home rule," developed strength in the latter half of the nineteenth century and most state constitutions were amended to place one or more restrictions upon the power of the state legislature to intervene in the affairs of general purpose local governments.

Constitutions in a number of states were amended, commencing in the 1920s, to establish an *Imperium in Imperio* or federal system within a state. Depending upon the state, the state constitution granted cities and other specified local governments complete control over their organizational structure, property, and local affairs. Constitutional amendments, commencing in the 1950s, were adopted in many states devolving broad powers upon general purpose local governments subject to preemption by general law. The "home rule" movement has achieved considerable success. Nevertheless, the state legislature continues to exercise significant supervisory powers over local governments in all states.

An Overview

Interstate economic relations date to the Declaration of Independence in 1776 and apparently were generally cooperative during the prosecution of the Revolutionary War. As noted, such relations degenerated under the Articles of Confederation and Perpetual Union, and pressures grew for the amendment of the articles, among other purposes, to address the problems created by interstate-trade barriers. To resolve these problems, the U.S. Constitution grants Congress broad regulatory authority over commerce among the several states, with foreign nations, and with the Indian tribes. Congress has not fully exercised its interstate-commerce regulatory authority and interstate-trade barriers continue to be erected by states. On the other hand, Congress has employed incentives to encourage states to cooperate with each other on many matters.[47]

Chapter 2 examines seven provisions in the U.S. Constitution, as interpreted by the U.S. Supreme Court, which establish ground rules for interstate economic relations and an eighth ground rule promulgated by the U.S. Supreme Court.

Chapter 3 focuses on the interstate economic relations ground rules enacted by Congress, examines the limits of congressional powers, and addresses the question of why Congress has not employed its interstate-regulatory powers more fully.

The subject of chapter 4 is judicial ground rules for interstate economic relations. The U.S. Supreme Court annually is called upon to resolve a number of disputes between states involving economic matters.

Chapter 5 reviews direct and indirect interstate trade barriers based upon the police power, licensing, and taxation power of the states, the importance of the barriers, and their removal by interstate reciprocity agreements, congressional preemption statutes, and court decisions.

Interstate tax revenue competition is described and analyzed in chapter 6. Congress could play a greater role in curbing certain types of revenue com-

petition while the U.S. Supreme Court, by default, is requested by plaintiffs to strike down certain types of competition as violative of the U.S. Constitution.

Chapter 7 focuses on interstate competition for business firms, professional sports franchises, tourists, and gamblers. Competition by states to attract tourists commenced with the development of railroad passenger service and accentuated with the advent of the motor vehicle. Interstate competition for business firms began in earnest shortly after the conclusion of World War II. Competition for professional sports franchises and gamblers is a more recent development.

The subject of chapter 8 is direct and indirect interstate economic cooperation, by means of interstate compacts and interstate administrative agreements, involving all subjects within the constitutional competence of the states.

The concluding chapter is a prescriptive one offering recommendations to Congress to play a more significant role as a innovator and facilitator of cooperative interstate economic relations. Additional recommendations are directed to the president and state governments, and a note is made of the important role played by national associations of state government administrators in promoting cooperative interstate economic relations.