

ONE

HORIZONTAL FEDERALISM

The division of political power in a federal system, between the national government and the states, automatically produces relations between the latter. These horizontal relations may be cooperative as manifested by interstate compacts, uniform state laws, reciprocity statutes, administrative agreements, and regional and national associations of state government officers. Such relations, however, can be hostile. A page 1 headline in *The New York Times* in 1964 was entitled “Iowa is Called Aggressor State: Nebraska Fears Shooting War.”¹ This dispute, resolved peaceably, involved the Missouri River, the boundary line between the two states, which has shifted its course periodically.

The *U.S. Constitution*, as explained in this volume, creates a constitutional interstate web holding the economic union and the political union together by means of the interstate commerce, full faith and credit, privileges and immunities, interstate compact, and rendition clauses.

Interstate relations involve an important spectrum of economic, political, and social matters, yet there has been relatively little academic interest in the subject for more than sixty years. *The Annals of the American Academy of Political and Social Science* published three special issues devoted to intergovernmental relations and federalism. The 1940 issue contained six articles on interstate relations, but the number of articles on this subject declined to two in the 1974 issue, and to zero in the 1990 issue.² This academic neglect is surprising since the economic and political health of the nation is dependent upon comity in interstate relations.

ORIGIN OF THE FEDERAL SYSTEM

The prevalence of nonuniform state statutes relating to a large variety of subjects would suggest to a foreign observer that interstate relations generally are chaotic and the national government possesses very limited authority to

create order out of the chaos. The lack of uniformity of policy among states in many regulatory fields, a product of general state sovereignty in these fields, causes serious problems for numerous business firms and individuals as highlighted in subsequent chapters. A brief review of the *Albany Plan of Union of 1754*, *Articles of Confederation and Perpetual Union*, and *U.S. Constitution* relative to the complexities of the sharing of sovereignty by Congress and the states will promote an understanding of current interstate relations.

England and France were rivals for control of North America and fought wars, known as the French and Indian Wars, in the period from 1756 to 1763. English government officers and colonial leaders discussed the need for uniting the colonies prior to the wars. A conference was convened in Albany, New York in June 1754 to examine unification.³ Representatives of most of the colonies in the north and six Iroquois Nations participated and introduced a plan for a union drafted by Benjamin Franklin. The plan specified that the legislature in each colony would elect delegates to a continental assembly presided over by a royal governor. The plan came to naught as the home government was concerned about controlling such a colonial government and colonial legislatures were not willing to relinquish their control over local matters. Nevertheless, the plan influenced the drafting of the *United States Constitution* at the Philadelphia convention of 1787.

The federal system evolved out of a confederate system. The Declaration of Independence of 1776 made formal a revolutionary war by colonies against the British Crown, which erupted in 1775. The war involved thirteen newly declared independent states and there was no national government. However, there was a Continental Congress, composed of delegates from the states, which provided central direction for the war effort. Congress recognized the need for a national government, but rejected a unitary government because it was too centralized and they had rebelled against such a government. The only existing alternative governance system, exemplified by Switzerland and the United Netherlands, was a confederacy.

The Continental Congress in 1777 drafted the *Articles of Confederation and Perpetual Union* and submitted them to the states for ratification. The articles provided for a league of amity, but would not become effective unless ratified by all thirteen states. The articles were ratified by eight states in 1778 and by four additional states in 1779.

Ratification was delayed for four years by disputes involving title to lands west of the states. The British Crown made grants of land to the west without limit, but these grants were countered by the Mississippi Valley claims of the French Government. Connecticut, for example, claimed what today is Illinois, Indiana, and northern Ohio, and Virginia's claims were more extensive and included most of Illinois, Indiana, and Ohio, and parts of northern Michigan, Minnesota, and Wisconsin. Disputes over boundaries continue to this day and are examined in Chapter 2.

To resolve the boundary disputes, the Continental Congress in 1780 proposed the ceding of the lands in question to the national government to be created by the articles to be “disposed of for the common benefit of the United States and be settled and formed into distinct states which shall become members of this Federal Union, . . .”⁴ The terms federal and confederal were used interchangeably during this time period.⁵

New York and Virginia responded to the proposal in 1781 by ceding the lands they claimed and other states followed suit soon thereafter. The ceding of lands led to speedy ratification of the articles by the thirteenth state, Maryland. The articles interestingly authorized Canada to join the confederation. The Congress, created by the articles, enacted the *Northwest Ordinance of 1787* admitting parts of the Northwest Territories as states when the population of each part reached 50,000 and prohibiting slavery within the new states.⁶

The heart of the new fundamental document was Article II and its stipulation “each state retains its sovereignty, freedom, and independence,” and all powers not delegated to the unicameral Congress. Each state was authorized to send two to seven delegates to Congress, but had only one vote.

Congress was authorized to borrow and coin money, declare war, establish a postal system and standards of weights and measures, negotiate treaties with other nations, and regulate relations with the Indian tribes. The word government does not appear in the articles and there was no executive branch and no judicial branch. Article III referred to interstate relations by describing the confederation as “a firm league of friendship with each other.”

The lack of two major powers foredoomed the Congress to impotence. The articles did not authorize the Congress to tax or regulate interstate commerce. In consequence, it had to rely for funds upon the willingness of individual states to send funds and was powerless to strike down interstate trade barriers.

Martin Diamond observed, “neither the friends nor the enemies of the Confederation regarded the articles as having created any kind of government at all, weak or otherwise.”⁷ Congress was empowered to appoint a presiding officer, termed President, for a term not exceeding one year during a three-year period, and a committee of the states composed of one delegate from each state. The committee met during the recess of Congress and was granted several powers, including borrowing money, raising an army, building a navy, coining money, declaring war, and so on.

Constitutional Convention

The inadequacy of the articles as an effective governing document for a nation was apparent by 1785 when officers from Maryland and Virginia

reached an agreement relative to navigation and trade on the Potomac River and the Chesapeake Bay. In ratifying the agreement, Virginia proposed extension of the compact to all states and invited them to send delegates to a conference to be held in Annapolis in 1786 to devise a uniform system of commerce and trade.

Nine states appointed delegates to attend the conference, but only the delegates of five states participated in the deliberations. Delegate Alexander Hamilton of New York drafted a resolution, approved by the delegates, memorializing Congress to call a convention to meet in May 1787 in Philadelphia to examine needed revisions in the articles. Congress on February 21, 1787, approved a resolution calling a convention, and all states sent delegates to the convention except the state of Rhode Island and Providence Plantations.

The poor state of interstate relations was a contributing factor to the replacement of the *Articles of Confederation and Perpetual Union* by the *U.S. Constitution*. A number of observers also attributed the decision to replace the articles to the fear the United Kingdom might seek to regain control of its former colonies and the Spanish threat to the southwest.⁸

Governor Edmund Randolph of Virginia on May 29, 1787, proposed to the convention fifteen resolutions to serve as the basis for a new national government with powers similar to those of the government of the United Kingdom.⁹ These resolutions sparked five days of debate relative to whether the articles should be amended or replaced. A decision was made by a vote of six to one to replace the articles. The delegates of five states had not arrived by the time of the vote.

As is well-known, the constitution contains several compromises between the large and small states, northern and southern states, and eastern and western states. The end product was a new system of governance based upon a geographical distribution of political powers between the Congress and the states with each possessing sovereignty relative to its exclusive powers and sharing concurrent powers. Congress was granted enumerated powers, including levying taxes, borrowing money, coining money, establishing post offices and post roads, and raising and supporting armies and a navy, among other powers. The inability of Congress under the articles to prevent states from implementing mercantilistic policies, which brought interstate trade to a nearly complete standstill, was to be rectified by granting Congress broad discretionary powers to regulate interstate commerce, foreign commerce, and trade with the Indian nations.¹⁰ Although Congress has been delegated broad powers to regulate interstate relations, the national legislature to date generally has played a minimalist intervention role with respect to interstate relations, preferring to leave the settlement of controversies to negotiated settlements or the U.S. Supreme Court rather than fashioning a general policy under its powers to preempt state regulatory authority.¹¹

All powers not delegated to the Congress and not prohibited to the states are reserved to the states and the people as the *Tenth Amendment* to the *U.S. Constitution* attempts to make clear. These residual or reserved powers are indefinable except in the broadest of terms. The most important power of the states, other than the power to tax, is the police power which enables states to regulate persons and property to protect and promote public convenience, health, morals, safety, and welfare. This power is employed by state legislatures on occasions to create interstate trade barriers. Although an extremely broad power, its use is limited by the interstate commerce clause and the due process of law clause of the *Fourteenth Amendment* to the *U.S. Constitution*.

The reader should recognize that not all powers delegated by the *U.S. Constitution* to Congress are exclusive powers. Unless the fundamental law specifically prohibits states from exercising a power, such as the power to coin money, states are free to utilize concurrent reserved powers to borrow funds, establish courts, and levy taxes. This division and sharing of powers is referred to as dual sovereignty and serves as a basis for the theory of dual federalism.

Several reserved powers, the power to tax is an example, are not subject to preemption by Congress provided they do not create interstate trade barriers. Other powers, such as the power to abate environmental pollution, may be exercised by the states until or unless Congress decides to preempt completely or partially the regulatory powers of the states. The latter on occasion recognize a problem can not be solved on the basis of the full cooperation by sister states and call upon Congress to exercise its power of preemption as illustrated by the *Commercial Motor Vehicle Safety Act of 1986*.¹²

INTERSTATE CONSTITUTIONAL PRINCIPLES

The *U.S. Constitution* contains seven important interstate relations provisions. The drafters of the fundamental document employed general terms without definitions, which necessitate that courts in particular cases determine the applicability of the provisions. The U.S. Supreme Court in resolving constitutional disputes does not define constitutional terms and acts on a case-by-case basis.

The interstate constitutional provisions are designed to perfect the economic union and the political union. Nevertheless, they are not always applicable to newly evolving interstate developments. The Nebraska State Legislature in 2008, for example, enacted a safe haven law to solve the problem of newborn babies who are abandoned (dumpster babies) and might be left in the open by unmarried young mothers. The law covers children to the age of nineteen. In 2008, an Iowa resident abandoned a fourteen-year-old girl in Nebraska, thereby raising a series of legal and public policy questions.¹³ Subsequently, thirty-six older children, including many ten to seventeen in age,

were dropped off at hospitals.¹⁴ The state legislature on November 21, 2008, amended the law to limit the drop-offs to infants thirty days old or younger. Nebraska could initiate one of three actions relative to the thirty-six older children: assume custody of each child, return the child to her home state, or negotiate to have the Iowa Child Protection Agency assume custody.

Legal Equality

The *U.S. Constitution* establishes a union in which each state is legally equal to every other state. Vermont and Kentucky were admitted to the Union on March 4, 1791, and June 1, 1792, respectively, with no conditions. Vermont specifically was admitted “as a new and entire member of the United States of America.”¹⁵ In 1796, Congress declared Tennessee to be “one of the United States” which was “on an equal footing with the original states in all respects whatsoever.”¹⁶ The two newest states, Alaska and Hawaii, possess the same reserved powers guaranteed by the *Tenth Amendment* as any of the original thirteen states. The only distinction the fundamental law makes among states is the number of representatives in the U.S. House of Representatives and the number of presidential and vice presidential electors, a distinction based upon population.

Congress occasionally imposed on a territory, seeking admission as a state to the Union, conditions with which it must comply prior to admission. Conditions pertaining to federal property in the new state or grants of land or money to the state to be used for specific purposes are enforceable judicially.¹⁷

A condition prohibiting a newly admitted state from making a change in its government or internal organization maybe ignored. The Oklahoma Territory, for example, was required to establish Guthrie as the capitol as a condition of admission to the Union. Subsequent to admission, the state legislature moved the capitol to Oklahoma City and the legislature’s authority to move the capitol was upheld by the U.S. Supreme Court in 1911 which opined:

“This Union” was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission.¹⁸

This statement underlies the judicial equal footing doctrine.

Interstate Suits

Several delegates argued at the constitutional convention there was no need for a national judiciary since state courts were capable of adjudicating national as well as state controversies. Proponents of a national judiciary maintained reliance upon state courts might result in the issuance of different interpretations of the same constitutional or congressional statutory provision, thereby promoting national disunity.

Experience with interstate disputes under the *Articles of Confederation and Perpetual Union* convinced the drafters of the *U.S. Constitution* that a judicial forum for settling such disputes must be established. Section 1 of Article III of the fundamental law established the U.S. Supreme Court and section 2 grants it jurisdiction “in law and equity” over all “controversies between two or more states; . . .”¹⁹ Section 1 also authorizes Congress to establish courts inferior to the Supreme Court. As explained in Chapter 2, the court uses its discretionary authority when deciding whether to invoke its original jurisdiction over an interstate dispute when requested by a state which is a party to the dispute.

The drafters of the basic law assumed no state could be sued by a private citizen without its consent since the *English Common Law* provided the king (state) can do no wrong and hence there are no grounds for a suit. The U.S. Supreme Court in 1793, however, interpreted section 2 of Article III of the *U.S. Constitution* as permitting a citizen of South Carolina to sue Georgia even though this citizen could not sue his own state.²⁰ This decision generated pressure by the states on the Congress to propose the *Eleventh Amendment*, prohibiting such suits, which was quickly ratified by three-fourths of the state legislatures and became effective in 1795.

The Supreme Court plays a crucial role in interstate relations because of its constitutional responsibility to adjudicate interstate controversies and interpret the *U.S. Constitution* and statutes. Chapter 2 explains the exercise of the court’s original jurisdiction when one state seeks to sue another state, Chapters 3 and 4 analyze the court’s role relative to full faith and credit guarantees and privileges and immunities guarantees, and Chapters 7 and 9 highlight the court’s actions to strike down interstate trade barriers and exportation of taxes by a state.

Interstate Compacts

An interstate compact is a valuable mechanism for promoting interstate cooperation or centralizing certain powers on a regional basis for purposes of provision of services, construction and operation of physical facilities, such as bridges and tunnels, and for regional or nationwide regulation. Article VI of the *Articles of Confederation and Perpetual Union* authorized states to

enter “into any treaty, confederation, or alliance” provided Congress gave its consent. The 1785 interstate compact between Maryland and Virginia, governing use of the Potomac River and Chesapeake Bay, was one of the several compacts approved by Congress under the articles and remains in effect in the twenty-first century in a modified form.

Section 10 of Article I of the *U.S. Constitution* contains a similar provision because its drafters recognized the desirability of interstate cooperation and the possibility compacts could disrupt the economic union and the political union. Hence, a compact does not become effective if Congress refuses to grant formal consent. Chapter 3 explains the U.S. Supreme Court opined not all compacts require formal congressional consent to become effective. Furthermore, there is no constitutional restriction upon the authority of a state to conduct its relations with other states on the basis of reciprocity or for administrative officers of sister states to enter into cooperative agreements.

Full Faith and Credit

To what extent must one state observe the statutes, judicial proceedings, and records of other states? Although no national governance document existed until the *Articles of Confederation and Perpetual Union* became effective in 1781, the Continental Congress in 1777 approved a resolution providing each state should grant full faith and credit to the statutes, judicial proceedings, and records of other states. The resolution subsequently was incorporated into the articles and into the *U.S. Constitution*.

The full faith and credit principle, incorporated in section 1 of Article IV, is designed to establish a national legal system to promote interstate intercourse and national unity. Unfortunately, full faith and credit is not always extended by individual states to citizens who move to their states, thereby creating jurisdictional disputes, and the clause generally has been ineffective in guaranteeing all child support obligors make complete and timely payments to the custodial parent residing in another state. The complexities of the full faith and credit clause are examined in detail in Chapter 4.

Privileges and Immunities

The framers of the *U.S. Constitution* sought to establish interstate citizenship by including in section 2 of Article IV a guarantee “the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.” The constitution does not define the terms privileges and immunities, but the U.S. Supreme Court over the decades has struck down as violative of the guarantee state laws advantaging their citizens over

citizens of sister states. Nevertheless, the court excluded certain beneficial services and political privileges from the protection of the clause. Chapter 5 explores this guarantee in detail and notes the *Fourteenth Amendment* to the *U.S. Constitution* also contains a guarantee of privileges and immunities.

Interstate Rendition

Interstate rendition involves a process similar to the one established by extradition treaties between nations providing for the return of a fugitive from justice from the asylum nation to the requesting nation. Section 2 of Article IV of the *U.S. Constitution* incorporates a rendition provision nearly identical to the rendition provision in the *Articles of Confederation and Perpetual Union*. In contrast to nations which can not be forced to return a fugitive from justice to the requesting nation, the governor of a state must return a fugitive provided the fugitive fled from the requesting state and proper procedures are followed. Rendition is the subject of Chapter 6.

Internal Free Trade

The mercantilistic actions of individual states between 1781 and 1787 convinced the drafters of the *U.S. Constitution* that Congress must be granted authority to regulate commerce among the several states, and such authority was included in section 8 of Article I. Furthermore, section 10 of Article I forbids states to levy import or export duties except to finance their inspection activities with any surplus dedicated to the U.S. Treasury or to “lay any duty of tonnage.”

To prevent discrimination against individual states and to promote internal free trade, section 9 of Article I forbids Congress to give preference “to the ports of one State over those of another nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another.” Chapter 7 explores states’ use of their police, license, proprietary, and tax powers to create interstate trade barriers, and the methods by which the barriers may be removed.

The interstate commerce clause clashes relatively often with the broad police power of the states to regulate in order to promote public health, convenience, safety, morals, and welfare, leading to court challenges of state statutes and administrative regulations. In general, as described in greater detail in subsequent chapters, courts give broad scope to Congress’ interstate commerce power.

The court’s dormant interstate commerce doctrine, positing a state action violating the unexercised commerce power is invalid, is employed often by companies and individuals challenging a state action. Such challenges are not always successful. The U.S. Supreme Court in 2008, for

example, rejected a taxpayers' class action seeking a declaratory judgment that the Commonwealth of Kentucky's income tax provision exempting interest on bonds issued by the commonwealth or its subdivisions from the state income tax and taxing such interest income on bonds issued by sister states and their political subdivisions violated the dormant interstate commerce clause. The court opined the market-participant exception to the clause is applicable to states that go beyond regulation and participate in the market by exercising their right to favor their residents over residents of sister states.²¹

Of particular importance in terms of generating recent interstate disputes are attempts by individual states to export their taxes to business firms and residents of sister states, and to require mail order firms to collect the use tax imposed by their states in conjunction with the sales tax. Severance taxes on minerals exported to other states generated interstate controversies and are examined in Chapter 9. States also engaged in competition to attract industrial firms by offering tax abatements, grants, and loans as inducements to firms. This competition at times results in poor interstate relations as explained in Chapter 8.

The lack of uniform trade policies in many regulatory areas places burdens upon multistate and multinational business firms. These burdens can be removed through reciprocity, interstate or federal-interstate compacts, congressional preemption of state regulatory authority, and congressional employment of crossover sanctions and tax credits to promote national uniformity, subjects explored in Chapters 7 and 9.

INDIAN NATIONS

A federal system is described aptly as an *Imperium in Imperio*; i.e., an empire within an empire. As noted, the U.S. Government is sovereign relative to its constitutionally delegated powers and each state is sovereign relative to its reserved regulatory powers that are not subject to congressional preemption. The system of governance within a state with federally recognized Indian tribes also can be described as an *Imperium in Imperio* since each tribe has sovereignty over its respective reservation as provided by the treaty entered into by the U.S. Government with the tribe. In consequence, a state lacks sovereignty over an Indian reservation.

To what extent can an Indian tribe decide the benefits of tribe membership without supervision by the U.S. Government? The U.S. Supreme Court in 1978 in *Santa Clara Pueblo v. Martinez* rejected an equal protection of the laws challenge by ruling a tribe possesses sovereign immunity and only a tribal court could decide the issue.²²

Various treaties exempt Native Americans residing on reservations from payment of state and local government taxes and fees, and also

may exempt the Native Americans from state licensing requirements. As explained in Chapter 9, sales of alcohol, motor fuels, and tobacco products to non-Indians on reservations have triggered disputes with state governments concerned with the loss of state excise tax revenues.

Approximately 53 million acres of land are held in trust by the United States for Indian tribes with the Navajo reservation occupying nearly 16 million acres of land in Arizona, New Mexico, and Utah. The United States in 1778 entered into its first treaty with an Indian tribe—the Delawares. The *U.S. Constitution*, ratified in 1788, delegates authority to Congress “to regulate commerce . . . with the Indian tribes; . . .” Congress in 1790 enacted the first statute pertaining to Indian tribes and the U.S. Supreme Court in 1832 in *Worcester v. Georgia* started to clarify the legal status of the relationships between the United States, states, and Indian tribes under the *U.S. Constitution* and treaties entered into by the U.S. Government with various Indian tribes.²³ The court in this case opined Congress possesses exclusive power to regulate commerce with the Indian tribes and states lack authority in Indian country unless delegated authority by Congress.

Relations between a state and Indian reservations remain ill-defined in the twenty-first century with a growing number of controversies brought to the courts for resolution. Increasingly, tribes are seeking federal recognition that would grant them sovereignty over certain matters which currently are subject to the jurisdiction of the state government.²⁴ The attempts to gain federal recognition have been stimulated by the *Indian Gaming Regulatory Act of 1988* which has resulted in tribes signing 332 tribe-state compacts relating to gambling on reservations as of 2009.²⁵

Gambling on Reservations

The National Association of Attorneys General (NAAG) at its 1985 annual meeting approved a resolution calling upon Congress to authorize states to regulate gambling on Indian reservations. Congress responded by enacting the *Indian Gaming Regulatory Act of 1988* classifying gaming as Class I, II, and III. Class I includes social games conducted for prizes of minimal value that are engaged in as part of tribal celebrations and ceremonies. Class II consists of games of chance, such as bingo and lotto, which are regulated by tribal governments with oversight by the National Indian Gaming Commission, a U.S. government agency. Class III games are regulated jointly by tribal governments and the concerned state government under provisions of a state-tribal agreement.

The 1988 act does not mandate that a state must permit tribal governments to conduct a specific game, but authorizes a tribal government to engage in the same types of gaming activities as the ones conducted by other organizations in the state. The act authorizes the governor of a state

to enter into a compact with an Indian tribe. The Kansas Supreme Court in 1992, however, held the governor lacks authority to bind the state to a compact under the *Indian Gaming Regulatory Act*.²⁶

The 1988 act allows a tribe to operate a casino outside its reservation provided the U.S. secretary of the interior and the governor of the concerned state approve. The Seneca Indian Nation tribe operates casinos in Buffalo, Niagara Falls, and Salamanca in the western part of the state under a state-tribal compact signed by Governor Mario M. Cuomo in 1990 known as the Salamanca settlement.

The value of such a contract to an Indian tribe is illustrated by the Oneida Indian Nation in 1995 offering to share slot machine gaming profits with New York if Governor George E. Pataki will sign a compact with the nation allowing it to operate a casino in Monticello which is 90 miles north of New York City and 100 miles south of the Nation's reservation.²⁷ The governor, anxious to increase state revenues, signed such a state-tribal compact in 2001 allowing the Seneca Indian nation to construct and operate up to three casinos outside the reservation in their ancestral region, and any Indian tribe to construct and operate up to three casinos in the Catskill Mountains.²⁸ The casinos had not been constructed by 2009 because the U.S. Secretary of the Interior during the administration of President George W. Bush refused to allow tribes to operate casinos off reservation lands.

State-Indian Disputes

The loss of tax revenue resulting from sales on Indian reservations where state and local government sales taxes are inapplicable is a perennial cause of concern to state and local governments and U.S. courts often are called upon to resolve disputes. The U.S. Supreme Court in 1993, for example, opined Oklahoma could not levy income taxes or motor vehicles taxes on tribal members who live in "Indian country."²⁹ The latter includes reservations, dependent Indian communities, and Indian allotments.³⁰ In 1995, the court opined Oklahoma may not tax motor fuels sold by the Chickasaw Nation in Indian country, but may tax the income of all persons, Indians and non-Indians, residing outside Indian country.³¹

Writing in *The National Law Journal*, Robert N. Clinton maintained the purpose of the Indian commerce clause is to prevent state government encroachment on the authority of Congress to regulate Indian affairs and criticized the U.S. Supreme Court for ruling "a state in many contexts possesses inherent power to tax and regulate non-member activities in Indian country without congressional delegation of authority."³² States, of course, disagree with Clinton's contention and argue they have authority to tax sales to non-members on Indian reservations.

Many Indian reservations are located in the arid west and disputes arise between Indian tribes, the U.S. Government, and states relative to river water apportionment. In 1908, the U.S. Supreme Court ruled in *Winters v. United States* that when Congress established Indian reservations it reserved water for them.³³ This ruling conflicts with the water laws of states. After years of litigation, the federal government decided to employ negotiations to end water disputes in places of litigation. Daniel McCool studied the results of the negotiations and concluded:

1. Negotiations may or may not be as time-consuming as litigation; in most cases it has proven to be a complicated process that can take years to bear fruit.
2. The settlements are often quite expensive. In some cases, they are more costly than a litigated settlement. . . .
3. Many settlements have failed to achieve finality and certainty.
4. Negotiations, like litigation, are risky and may result in unexpected negative outcomes.
5. Negotiation does offer the potential for substantive, flexible agreements that can be tailored to specific situations.
6. Negotiation is, by nearly all accounts, more humane. Indian-Anglo relations have long been fraught with high-intensity conflict; any process that can help alleviate that hostility while still maintaining respect for each party's interests is an achievement.³⁴

Available evidence suggests states with Indian reservations will continue to have disputes with tribes relative to the sales of tax exempt products on reservations to non-Indians as explained in Chapter 9, and arid states will experience difficulties in resolving conflicts over water rights with Indian tribes.

INTERSTATE DYNAMICS

The nature of interstate relations has changed dramatically over the decades. There was little interstate cooperation during the early decades of the economic union and the political union, in part because of the relative lack of need for such cooperation. Disputes between states were more common and typically involved boundary issues generated by imprecise colonial land grants. The rapid development of new means of transportation and communications, in conjunction with increasing industrial development and

urbanization during the post-Civil War period, increased the need for uniform or parallel state statutes and interstate cooperation, but also produced more disputes between sister states.

The drafters of the *U.S. Constitution* foresaw the need for cooperation by sister states and authorized them to enter into compacts with each other provided Congress grants its consent. Nevertheless, the compact device was little used until the twentieth century and no interstate development or regulatory agency was created by a compact until the third decade of the twentieth century as explained in Chapter 3.

The nature of interstate problems in the U.S. federal system today is complex and diverse. States often discover it is in their respective interest to work cooperatively to solve a common problem. In 1994, for example, it was discovered that 425 residents of Newark, New Jersey, who were collecting welfare payments in Newark, also were collecting welfare payments in nearby New York City.³⁵ This revelation induced Governor Mario M. Cuomo of New York on March 6, 1994, to write to Governor Christine M. Whitman of New Jersey to inform her that the New York State commissioner of social services would contact his counterpart in New Jersey and other border states to examine methods of preventing individuals from welfare double-dipping. New York State also exchanges computer tapes of welfare benefit recipients with Connecticut, District of Columbia, Florida, New Jersey, Pennsylvania, Vermont, and Virginia.³⁶

It is apparent individual state boundaries do not encompass completely a number of important problems and states have broad powers whose exercise can have major extraterritorial repercussions. These facts over the years have led to numerous proposals to reduce the number of states by forming larger regional states with a geographical scale sufficient to permit each state to solve most problems internally.

Proposals to establish such states have an attractive rational basis, but unfortunately are politically naive. It is unrealistic to suggest replacement of existing states since the *U.S. Constitution* guarantees the territorial integrity of each state and such replacement would require either a constitutional amendment or the consent of the Congress and each concerned state.³⁷

Chapters 2 through 10 describe and analyze in detail the constitutional rules governing relations between two or more states; treatment of sojourners by a state; extraterritorial validity of a state's statutes, records, and judicial proceedings; interstate disputes and methods employed to resolve them; various aspects of multistate cooperation; state competition for industry and tax revenues; and lingering transboundary problems.

It is apparent only Congress can solve certain interstate problems. In 1993, for example, it was discovered many debtors, including felons, who filed for bankruptcy protection were able to shelter millions of dollars in assets from seizure by the U.S. Bankruptcy Court by establishing resi-

dence in Florida where a state statute forbids the seizure of a person's legal residence and certain other assets—including annuities and pensions—in a bankruptcy proceeding.³⁸ The Florida State Legislature has not placed a limit on the homestead exemption and residences worth several million dollars are protected.³⁹ Although Congress preempted state court adjudication of bankruptcy proceedings in 1898, Congress allows individual state legislatures to determine whether a homestead and certain other exemptions should be exempt from seizure.⁴⁰ This interstate problem involving debtors in states, such as New York, sheltering assets in other states can be solved only by Congress.

The process of congressional enactment of formulas for the distribution of funds to states commonly generates lobbying by regional groupings of states with one region opposed to a specific proposed formula and another region in favor of the proposal. In 1995, the northern states opposed a Republican proposal to replace seven categorical welfare grant programs by a block grant with no state matching requirements because funds would be shifted from the northern states to southern and western states.⁴¹

The concluding chapter assesses current interstate relations and presents a model for improving such relations to enhance the full economic and social development of the fifty states. In particular, the model outlines the roles Congress, states, and associations of state government officers can play in harmonizing the policies of the states, while promoting the advantages of policy diversity associated with a federal system and encouraging cooperative and conjoint actions.

The model is a political document, but does not outline a role for the two major political parties because they are decentralized organizations that have become progressively weaker in recent decades. The parties are incapable of acting as centralizing forces to promote interstate cooperation or congressional preemption to solve multistate problems.

Chapter 2 is the first substantive chapter and examines the role of the U.S. Supreme Court in resolving interstate disputes. Subsequent chapters highlight three other important court functions—use of the dormant interstate commerce clause to invalidate mercantilistic state statutes and regulations, interpretation of the scope of congressional preemption statutes, and deciding whether a congressional preemption statute is *ultra vires*.