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The United States Supreme Court

A constitution, establishing a federal system with states possessing broad powers is dependent for its success, in part, upon harmonious interstate relations. Competition, cooperation, and conflict between sister states are inherent in such a system and the constitution must contain provisions promoting cooperation and providing for peaceful resolution of disputes.[1] The U. S. Constitution established the first federal system and it generally is viewed as one of the most successful. Nevertheless, disputes have arisen between states since independence was declared in 1776, and the seriousness of certain disputes is illustrated by New York's 1799 boundary suit against Connecticut, in which the New York Attorney General stated the bill of complaint he filed "is emphatically a bill of peace; since, considering the character of the parties to the principal controversy, without this remedy, the consequences upon the public tranquility can hard be conjectured."[2]

A state boundary controversy, as recently as 1964, produced a *New York Times* page one headline entitled "Iowa is Called Aggressor State: Nebraska Fears Shooting War."[3] The dispute, peaceably resolved by the U.S. Supreme Court in 1972, involved the Missouri River, which periodically shifts its course and serves as the boundary line between the two states.[4] Boundary disputes continue to this day and the 2003 New Hampshire General Court (state legislature) established a commission to study the boundary line between New Hampshire and Maine as a preliminary move to a possible attempt to reopen a boundary dispute in the U.S. Supreme Court.[5]

Unfortunately, academic interest in interstate relations in recent years has been minimal in spite of their great economic, political, and social importance. Three symposium issues of the *Annals of the American Academic of Political and*

Social Science have been devoted to intergovernmental relations and federalism in the United States. Six articles on interstate relations were included in the 1940 issue, two articles in the 1974 issue, and none in the 1990 issue. Only three books on interstate relations have been published since 1982 and no comprehensive book was published on the subject until 1996.[6] Interstate suits and their resolution have attracted even less academic interest. Articles on the subject of the original jurisdiction of the U.S. Supreme Court seldom appear in law reviews and have not been published in political science journals.[7]

To date, no theory of interstate relations has been developed. The two prominent theories—dual and cooperative—of United States federalism focus exclusively upon national-state relations. The theory of dual federalism is inapplicable to interstate relations. The theory of cooperative federalism, however, explains, in part, relations between states as the U.S. Constitution specifically authorizes them to enter into compacts with each other with congressional consent. Compacts have resolved several interstate controversies and possess the potential for settling many other controversies, thereby avoiding the necessity for the U.S. Supreme Court to invoke its original jurisdiction. The many other types of interstate cooperation, particularly written and verbal administrative agreements, comport with a broad theory of cooperative federalism.

Congress has resolved several types of interstate disputes and reduced the number of other types of disputes by enacting preemption statutes removing regulatory powers partially or completely from states. Nevertheless, one can develop a theory, which might be labeled congressional avoidance of interstate disputes, because the political branch has found it more convenient to defer to the settlement judgments of the Supreme Court.

The purposes of this book are to trace the history of, and analyze, interstate disputes and their resolution by judicial and nonjudicial means, and to encourage academics to conduct research on relations between sister states. The U.S. Supreme Court is constitutionally charged with serving as a last resort forum for the settlement of intractable interstate disputes.[8] Hampton L. Carson, in 1892, concluded that establishment of the court "was the crowning marvel of the wonders wrought by the statesmanship of America."[9] An understanding of the court's constitutional role is facilitated by a brief historical review of interstate disputes prior to the effective date of the U.S. Constitution.

Pre-Constitutional Disputes Resolution

The outbreak of the Revolutionary War led to disputes between the newly independent states over prize ships captured by privateers operating under letters of marque and reprisal issued by the second Continental Congress and various state legislatures. Appeals were made to General George Washington

to settle the controversies and he urged Congress to establish a court of admiralty to handle disputes relating to captures at sea.[10] Congress responded by enacting a resolution recommending that each state legislature should create a court of justice to handle cases of prize captures by conducting trials by jury with the right of appeal to Congress. On August 5, 1776, Congress considered the first appeal and subsequently referred appeals to ad hoc committees. To achieve uniformity in appeal decisions, in 1777, Congress established a five-member standing committee to hear and determine appeals from state courts of admiralty. Carson viewed the resolution as "the first step towards the establishment of a national judiciary" although the resolution did not create a court and procedures, or provide for original jurisdiction.[11]

In 1780, Congress created a court to hear appeals from admiralty courts. Carson reported special committees, the standing committee, and the court of appeals decided one hundred-ten prize cases and reversed the decisions of state admiralty courts in forty-five cases, affirmed the decisions of state courts in thirty-nine cases, dismissed twelve cases for failure of the parties to appear, and declined jurisdiction in two cases.[12] Four appeals were settled by the concerned states "while the final action in eight is not known, as the decrees are missing; one was stricken off because the appeal came too late, and in one the action is doubtful."[13]

Articles of Confederation

The States devoted most of their energies to the Revolutionary War immediately subsequent to the issuance of the Declaration of Independence in 1776. The wartime efforts of the thirteen newly independent nations was coordinated by the second Continental Congress, composed of delegates from each state who recognized the need for a national governance system. A unitary system was rejected because the states had revolted against such a centralized government possessing coercive powers.[14] The only other system of geographically distributing powers at the time was the confederate system such as the ones in the United Netherlands and Switzerland. In 1777, Congress drafted and submitted to each state proposed Articles of Confederation and Perpetual Union for their respective consideration and possible ratification.

In 1778, eight states ratified the articles, which were described as providing for a league of amity, and in 1779, four states ratified the articles. Only Maryland failed to ratify the document. The delay in ratification is attributable to disputes over ownership of western lands. Connecticut asserted title to Illinois, Indiana, and northern Ohio; Massachusetts laid claim to western New York and the lower half of Michigan and Wisconsin; and Virginia claimed the bulk of present-day Illinois, Indiana, and Ohio, as well as smaller

areas of northern Michigan, Minnesota, and Wisconsin. The second Continental Congress (1780), in order to resolve the disputes, recommended that titles to the disputed areas be transferred to the Congress (proposed to be created by the Articles of Confederation and Perpetual Union) to be "disposed of for the common benefit of the United States and formed into distinct states which shall become members of this Federal Union, . . ."

The effective ending of the war, in 1781, confirmed by the 1783 Treaty of Paris, led to New York and Virginia ceding the lands they claimed; their lead was followed by other states, and Maryland ratified the articles. Article II stipulated: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the united States in Congress assembled." (Note the use of a lower case "u" in united designed to make clear a government was not being created.)

Article III established "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, or any other pretense whatever."

A unicameral Congress was the governing body of the confederation and was composed of two to seven delegates from each state, recallable by their respective state legislatures, who served a term not exceeding three years in a six-year period. Each state had one vote in Congress regardless of the number of delegates. Congress was authorized to appoint a presiding officer, termed the President, for a maximum term of one year during any three-year period, and a committee of the states composed of one delegate from each state to meet during congressional recesses and to exercise various powers: borrowing money, building a navy, raising an army, coining money, declaring war, negotiating treaties, establishing a postal system, determining the standards of weights and measures, and regulating relations with the Indian tribes. In addition, the committee could exercise additional powers, if authorized by six states.

The articles did not establish an executive branch or a judicial branch. Article IX, however, authorized Congress to exercise limited judicial powers to settle interstate boundary disputes and controversies involving private land disputes flowing from grants of two or more states. Specifically, Congress was empowered to act as "the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other causes whatever" subject to a prescribed procedure.

A dispute, between Connecticut and Pennsylvania over the "Wyoming territory" near the Susquehanna River, led to a battle in 1775, the second Continental Congress appointing a committee to examine the dispute, and its report urging the ending of hostilities.[15] With the ratification of the articles,

Pennsylvania petitioned for the holding of a hearing by Congress and it directed the two states jointly to appoint judges to resolve the dispute. The *ad hoc* court, on December 30, 1782, ruled "Connecticut has no right to the lands in controversy."[16] This dispute was the only interstate one settled by a court authorized by the second Continental Congress to settle such disputes. Other interstate boundary disputes were settled by negotiations during the confederacy, but the problem of interstate boundary disputes persists to this day.

Defects of the Articles

Experience quickly revealed that the articles suffered from five major defects, resulting in Congress serving primarily as a body offering advice to the states. The first was the failure of the articles to authorize Congress to levy taxes. As a consequence, it was dependent on donations from the states, including eleven which often did not send their respective quota. In consequence, Congress was unable to pay interest on loans made by France and Holland or the back pay owed to officers and soldiers of the Continental Army. Congress printed paper notes, termed "continentals," which soon lost their imprinted value. Furthermore, Congress could not borrow funds from European banks because of the exorbitant rate of interest the loans would carry as a result of Congress' poor credit rating.

The second defect was Congress' lack of authority to enforce its laws and foreign treaties. In consequence, the delegation of enumerated powers to Congress proved to be of no value, and the result was divergent state laws on a wide variety of topics. James Madison highlighted the potential problems flowing from Congress' lack of authority to require each state to honor treaties entered into with France, Great Britain, and Holland, and noted "as yet foreign powers have not been rigorous in animadverting on us."[17]

The lack of congressional authority to regulate interstate commerce was viewed as the third and most serious defect of the articles. Mercantilism motivated states to erect trade barriers against products from sister states and to impose fees upon vessels entering their harbors from other states. Virginia allowed foreign vessels to enter only specified ports. In consequence, interstate commerce came to a near standstill.

The fourth defect was the articles' failure to authorize Congress to acquire money by taxation to raise and support an army and a navy. This defect was serious, in view of the fact that the friendly French monarchy was in danger of collapsing, the British controlled Canada, and Spain occupied territory in the Southwest and Florida. The consequences of this defect were highlighted by the 1786–87 rebellion by farmers in western Massachusetts led by Captain Daniel Shays, a former officer in the Continental Army. The

farmers protested mortgage foreclosures caused by currency deflation, the postwar depression, and what were perceived to be oppressive taxes. Shays controlled western Massachusetts for approximately five months and Congress was powerless to suppress the rebellion, which was terminated when wealthy Boston citizens recruited an army, under the leadership of General Benjamin Lincoln, to restore the control of the commonwealth government. Not surprisingly, the rebellion reinforced, in the minds of property owners, the importance of a strong national government capable of assisting states in suppressing rebellions.

The final major defect was the possibility the confederation would be dissolved. In 1787, Madison noted "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."[18]

In March of 1785, Maryland and Virginia representatives negotiated an interstate compact on navigation and trade on the Potomac River and Chesapeake Bay, the first such compact is still in force today, albeit in a modified form.[19] The Maryland General Assembly ratified the compact and recommended that Delaware and Pennsylvania should be included in the deliberations leading to the development of future regulations involving commerce. The Virginia General Assembly also ratified the compact and invited all the states to attend a conference in Annapolis in 1786, to examine establishment of a uniform system of commerce. Commissioners were appointed by nine states to attend the Annapolis convention, but only five states sent a total of twelve delegates. The host state, Maryland, boycotted the convention out of fear it might decide to replace the Articles of Confederation and Perpetual Union. Alexander Hamilton of New York drafted a resolution, approved by the delegates, urging Congress to call a convention to meet in Philadelphia, in May 1787, to revise the articles. With reluctance, Congress issued the call without specifying how delegates were to be selected. State legislatures either appointed delegates, or governors did so with legislative authorization. Delegates from certain states were directed to review only the articles and not to vote for the initiation of any other action.

The Constitutional Convention

The State of Rhode Island and Providence Plantations was the only state to fail to send delegates to the convention held between May 25 and September 17, 1787. Rhode Island maintained the governance system could be changed only in accordance with the stipulation, in Article XIII, the assent of all states is necessary for an amendment to become effective.

Although seventy-four delegates were selected by the participating states, nineteen either refused to accept their appointments or did not attend the convention, whose delegates elected George Washington as president. Fourteen participating delegates left Philadelphia prior to the completion of the convention's deliberations. Of particular importance was the fact twenty-eight delegates had served either in the second Continental Congress or the Congress created by the articles. Other delegates had experience in drafting their respective state constitutions.

Philosophical and sectional differences among the delegates soon became apparent. A group of delegates questioned whether a national government with significant powers would be a threat to the liberties of citizens. The nature of the states' economies ensured there would be differences between delegates from the various states. Governor Edmund Randolph of Virginia, on May 19, 1787, introduced fifteen resolutions designed to serve as the basis for a national government "in which the idea of States should be nearly annihilated."[20] By design, approval of the resolution would have established a national government similar to the British government.

It is possible the Articles of Confederation and Perpetual Union would have been amended, and not replaced, had they provided for amendments by a two-thirds or three-quarters vote of the states in place of the required unanimous approval. Five days of deliberations and negotiations led to a six-to-one vote to replace the articles with a new constitution. Absent at the time were delegates from five states.

A proposal was made to authorize the proposed national legislature to veto statutes enacted by state legislatures if they intruded upon its powers generated major debates. Madison spoke in favor of the proposal:

> The necessity of a general government proceeds from the propensity of the States to pursue their particular interests in opposition to the general interest. This propensity will continue to disturb the system, unless effectually controuled. Noting short of a negative on their laws will controul it. They can 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. . . . Its utility is sufficiently displayed in the British system. Nothing could maintain the harmony and subordination of the various parts of the empire, but the prerogative by which the Crown stifles in the birth every act of every part tending to discord or encroachment.[21]

Convention delegates rejected the proposal because it held the potential to reduce state legislatures to relative impotence and congressional review of state statutes would delay implementation of approved statutes by a year or two.

Another major dispute erupted between states with large populations and states with small populations. The latter favored the provision in the articles for equal representation of each state in Congress, whereas the large states insisted representation should be based upon population. The famous Connecticut Compromise, providing for a bicameral Congress, was a pragmatic solution allowing the two types of states to have the system of representation each favored.

A third major dispute revolved around the question of whether or not Congress should be delegated authority to levy import and export duties. Pragmatism prevailed again in the convention's decision to authorize Congress to levy only import duties.

A fourth major dispute involved whether or not the proposed national government should possess the authority to intervene in any state. Delegates approved a compromise (Art. IV, §4) under which the national government would guarantee a republican form of government in each state and protection against foreign invasions and domestic violence "on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."

The subject of the fifth major dispute was slavery, with Northern delegates generally opposed to the institution. The agreed upon compromise provided slaves could be imported for an additional twenty years and Congress could impose a tax of ten dollars on each imported slave.

Whether a national judicial system should be established was the sixth divisive issue. Max Farrand, compiler of the records of the Constitutional Convention, reported in 1913, "there is surprisingly little on the subject [judiciary] to be found in the records of the convention.[22] There was a widespread belief state courts could handle federal as well as state cases, and hence, there was no need for a national judiciary. The agreed upon compromise was the constitutional establishment of the U.S. Supreme Court to serve as the court of the new union of states and delegation of authority to Congress to create inferior courts as needed.[23] Delegates to the convention were divided with respect to whether or not the proposed Congress should appoint judges. Madison opposed such appointments and explained: "The legislative talents, which were very different from those of a judge, commonly recommended men to the favor of legislative assemblies. It was known, too, that the accidental circumstances of presence and absence, of being a member or not a member, had a very undue influence on the appointment."[24] On June 13, 1787, the Convention's committee of the whole reported and recommended the President should appoint the judges of the national judiciary, and the recommendation was subsequently approved by the Convention.[25]

The Ratification Campaign

The Constitutional Convention decided the people, and not the states, should be the source of the proposed fundamental law by inclusion of a preamble stipulating: "We the People of the United States, in order to form a more perfect union, 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, do ordain and establish this Constitution for the United States of America." The convention recognized that ratification by all states would not occur, and decided the constitution would go into effect upon ratification by nine states, which was the required number of states, under the Articles of Confederation and Perpetual Union, for the initiation of any action by the Committee of the States during the recess of Congress.[26] The framers purposely provided each state legislature should arrange for the election of delegates to a convention devoted to determining whether the proposed constitution should be ratified.

Supporters of the confederation emphasized the convention was not authorized to draft a new constitution, was limited to revising the articles, and highlighted Article XIII, which stipulated the articles could be altered only by Congress and "afterwards confirmed by the legislatures of every state." Not surprisingly, opponents of the proposed fundamental law were divided, with some contending the proposed Congress would be too strong and others holding the Congress would be too weak to cope with current and future problems.

The lack of a bill of rights was the most major criticism of the proposed constitution. Colonial charters permitted arrest and punishment only upon the filing of a specific charge and guarantees of due process of law, trial by a jury of peers in the vicinity of where the accused resided, right to petition for a redress of grievances, and levying of taxes only by elected representatives. Fear was expressed that the proposed government might enslave citizens and states would be powerless to protect their citizens. Convention supporters of the proposed constitution argued there was no need for a bill of rights in view of the fact that Congress would be allowed only to exercise enumerated powers and these powers do not include authority to abridge the liberties of citizens.

Although the proposed constitution did not contain a full bill of rights, the fundamental law did contain civil liberty provisions (Art. I, §9) prohibiting congressional enactment of a bill of attainder and a *ex post facto* law, and not allowing suspension of the writ of *habeas corpus* unless "in cases of rebellion or invasion the public safety may require it." In particular, George Mason of Virginia highlighted the complaint of a lack of a bill of rights by claiming the supremacy of the laws clause in Article VI overrode "the declaration of rights in the separate States," adding: "Nor are the people secured even in

employment of the benefits of the common law; (which stands here upon no other foundation than its having been adopted by respective acts forming the constitution of the several States)."[27]

Citizens in the various states redebated issues debated at the convention and raised other objections including the lack of a reference to God and a requirement federal officers must be Christians. Fear also was expressed that a new Cromwell might be created by the provision the president would be the commander-in-chief of the army and navy. Others were opposed to the prohibition of state coinage of money. Within a short period of time, popular conventions in Delaware, New Jersey, and Pennsylvania ratified the proposed constitution and were followed by convention approvals in Connecticut and Georgia. Very strong opposition existed in Massachusetts, New York, and Virginia and threatened approval of the proposed document.

The Federalist Papers and Ratification

Alexander Hamilton and John Jay of New York joined with James Madison of Virginia to write eighty-five letters to the editors of New York City newspapers during the winter and spring of 1787–88, promoting ratification of the proposed constitution by explaining its provisions. Each letter was signed by "Publius." The first thirty-six letters were published as a book in March 1787, and the remaining letters were published in May in a second volume. Collectively known as *The Federalist Papers*, they describe the defects of the Articles of Confederation and Perpetual Union and explain, in varying detail, how each provision of the proposed constitution will cure the defects of the articles. It is important to note, in reading the papers, that the terms "confederation" and "federation" were often used interchangeably. Madison, for example, wrote in *The Federalist Number 39* the proposed fundamental law would establish a system of governance "neither wholly national nor wholly federal" [confederate].[28]

To counter the strong criticisms advanced by Anti-Federalists who maintained the proposed national government would be a threat to civil liberties, Madison emphasized it would possess "few and well defined" powers in contrast to the "numerous and indefinite" powers reserved to the states.[29] Would the supremacy of the laws clause empower Congress to convert the governance system in time into a unitary one? Hamilton's answer was "no" and he added:

> If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would oth-

> erwise be a mere treaty, dependent on the good faith of the parties and not a government, which is only another word for political power and supremacy.[30]

In *The Federalist Number 80*, Hamilton justified the need for the proposed U.S. Supreme Court, by explaining the scope of the judicial power, including cases involving ambassadors, other public ministers, and consuls, and cases involving interstate controversies. Relative to the later, he wrote:

> The power of determining causes between two States, between one State and the citizens of another, and between citizens of different States, is perhaps not less essential to the peace of the Union than that which has just been examined. History gives us a horrid picture of desolated Germany prior to the institution of the Imperial Chamber by Maximilian towards the close of the fifteenth century, and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquility of the empire. This was a court invested with authority to decide finally all differences among members of the Germanic body.[31]

Hamilton continued by referring to boundary disputes between states and added: "Whatever practices may have a tendency to disturb the harmony between the states are proper objects of federal superintendence and control."[32] However, he made no reference to the power of Congress to determine the precise original jurisdiction of the United States Supreme Court.

Opponents of the proposed constitution wrote sixteen letters, signed "Brutus," to the editor of the *New York Journal*, between October 1787 and April 1788, warning readers of the dangers inherent in a unitary governance system including the grant of the power of taxation to Congress, and creation of a national judiciary, which would undermine the powers of the states.[33] Available evidence suggests Robert Yates of New York, a delegate to the constitutional convention, wrote the letters. Brutus warned: "The powers of the general legislature extend to every case that is of the least importance—there is nothing valuable to human nature, nothing dear to free men, but what is within its power. It has authority to make laws which will affect the lives, the liberty, and property of every man in the United States; nor can the constitution or laws of any State, in any way prevent or impede the full and complete execution of power given."[34]

Reacting to the charge that the proposed fundamental law would not protect the civil rights of citizens, federalists promised the first action of Congress would be the proposal of a bill of rights in the form of constitutional amendments. The constitution's drafters were convinced ratification by nine

states would induce the remaining states to ratify. New Hampshire, in the summer of 1788, became the ninth state to ratify. Subsequently, Virginia and New York ratified the document within a short period of time, but North Carolina and Rhode Island withheld their respective approval until the autumn of 1789 and the spring of 1790, respectively.

Constitutional Allocation of Powers

The unamended constitution delegated specific powers to Congress, prohibited the exercise of certain powers by the states and/or Congress, and by implication reserved all other powers to the states. Section 8 of Article I, delegated important powers to Congress including taxation; bankruptcy; borrowing funds; coinage; declaration of war; naturalization; raising an army and a navy; regulation of foreign, Indian, and interstate commerce; creation of courts inferior to the Supreme Court; and enactment of statutes "which shall be necessary and proper for carrying into execution the foregoing powers." Several of these powers are exclusive congressional ones because states are forbidden to exercise them. It should be noted that Congress possesses a resultant power on the basis of two or more delegated powers as illustrated by enactment of statutes regulating immigration, a nondelegated power, based upon the powers to regulate foreign commerce and determine the system of naturalization. Furthermore, congressional powers have been expanded by statutory elaboration, generally broad judicial interpretation of delegated powers, and several constitutional amendments.

Congress cannot be required to exercise any of its powers and did not enact a major statute regulating interstate commerce until 1887. The necessary and proper clause, also known as the elastic clause, has generated numerous controversies, including current ones, relative to the scope of the delegated powers with courts called upon to delimit the powers. The clause serves as the basis for the judicial doctrine of implied powers traceable to the U.S. Supreme Court's decision in *McCulloch v. Maryland*, opining "(l)et the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate which are plainly adapted to the end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."[35] When a statute is challenged as *ultra vires*, courts have to determine whether the cited delegated power is sufficiently broad to validate the exercise of a power implied from the delegated power.

States voluntarily surrendered part of their sovereignty by ratifying the constitution. The Tenth Amendment to the U.S. Constitution was designed to make clear that the delegation of enumerated powers would not lead to the conversion of the federal governance into a unity one: "The powers not dele-

gated to the United States by the Constitution, nor prohibited by it to the State, are reserved to the States respectively, or to the people."

Each State possesses concurrent powers, such as taxation, and important and inherent residual powers including an exclusive one definable only in the most general terms. The police power is the exceptionally broad authority of states to regulate persons and property in order to promote and protect public convenience, health, morals, safety, and welfare. State legislatures have delegated this power to general-purpose local governments. Exercise of the power must be in conformance with the due process of law requirement of the Fourteenth Amendment to the U.S. Constitution. The police power and the power to tax have been the sources of numerous interstate disputes with some settled through negotiations, including entrance into interstate compacts, and others resolved by the U.S. Supreme Court.

Interstate Relations

The drafters of the constitution responded to interstate boundary disputes and state erection of barriers to interstate commerce by including six most important provisions in the fundamental law to promote harmonious interstate relations. First, Congress was granted the power to regulate interstate commerce, apparently on the assumption Congress would utilize the power to invalidate state-erected trade barriers. The failure of Congress to exercise the power during the early decades of the federal system resulted in the U.S. Supreme Court developing its dormant commerce clause doctrine, holding a state statute may offend the unexercised interstate commerce power.[36]

Second, the framers of the constitution recognized the value of interstate cooperation and the danger to the federation if states were allowed, unilaterally, to enter into agreements with each other and/or with a foreign nation, and hence incorporated section 10 of Article I in the fundamental document, prohibiting such actions by states without the consent of Congress.[37] Interstate compacts facilitate joint action to solve public problems and have been used on many occasions to settle disputes over state boundary lines as illustrated by the interstate boundary compact enacted by both the Georgia General Assembly and South Carolina General Assembly, which received the consent of Congress in 1999 (see chapter 6).[38]

Third, section 2 of Article III grants the U.S. Supreme Court original jurisdiction over interstate disputes and in 1789, Congress made the court's jurisdiction exclusive.[39] As explained in Chapter 2, the court exercises this jurisdiction on a discretionary basis. It is somewhat surprising that the records of the constitutional convention contain little information on the court's original jurisdiction.[40]

Fourth, section 1 of Article IV of the constitution stipulates each state must accord "full faith and credit . . . to the public acts, records, and judicial proceedings of every other State" and authorizes Congress to "prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof." The full faith and credit provision dates in origin to a 1777 resolution of the second Continental Congress and Article IV of the Articles of Confederation and Perpetual Union. The purpose of the requirement is to promote interstate commerce and national unity by the establishment of a national legal system. An individual state, however, does not always extend full faith and credit to its citizens, particularly ones who recently moved to the state.[41]

Fifth, section 2 of Article IV contains a clause providing "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." The goal of the provision is the establishment of interstate citizenship. No definitions of privileges and immunities are contained in the constitution. Courts are called upon to determine the scope of the clause and the U.S. Supreme Court has opined specified beneficial services and political privileges do not fall within the guarantee of the clause.[42]

Sixth, section 2 of Article IV establishes the requirement, similar to the one contained in Article IV of the Articles of Confederation and Perpetual Union, that each state must return a fugitive from justice to the requesting state.[43] The requirement is similar to one contained in an extradition treaty entered into by two nation states.

The United States Supreme Court

Section 8 of Article I of the U.S. Constitution authorized Congress to create "tribunals inferior to the Supreme Court." Article III is devoted to the judicial branch of government and section 1 vests "(t)he judicial power of the United States . . . in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." The Constitution does not stipulate the number of Supreme Court justices and it has varied from six, authorized by the *Judiciary Act of 1789*, to five in 1801, seven in 1802, nine in 1837, ten in 1861, seven in 1866, and nine since 1869.[44]

Section 2 of Article II authorizes the president to appoint judges to the Supreme Court, and other judges with the consent of the Senate. Section 1 of the Article III stipulates all judges hold life tenure and receive a salary "which shall not be diminished during their continuance in office."

The scope of the judicial power is defined in section 2 of Article III as extending "to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and

consuls;—to all cases of admiralty and maritime jurisdictions;—to controversies to which the United States shall be a party;—between citizens of different states;—between citizens of the same state claiming lands under grants of different States."[45] Cases are to be distinguished from controversies. The former involve civil and criminal proceedings and the latter relate only to civil matters.

Farrand reported "[t]hat the jurisdiction of the supreme court should be original in cases affecting foreign ministers and cases in which a state should be a party and appellate in all other cases, was accepted without question, except that the appellate jurisdiction was made to be 'both as to law and fact.'"[46] The Eleventh Amendment, ratified in 1795, removed from the judicial power of the United States two types of cases: "between a State and citizens of another State" and "between a State, or the citizens thereof, and foreign States, citizens, or subjects."

This section also grants original jurisdiction to the Supreme Court with respect to "all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party" without specifying the *modus operandi*. This grant can not be enlarged or restricted by Congress, which in the *Judiciary Act of 1789* made the court's jurisdiction over interstate disputes exclusive, but has not established procedures for the invocation of the court's jurisdiction over such controversies.[47] In consequence, the court established criteria for the invocation of its original jurisdiction (see chapter 2).

The U.S. Code currently stipulates:

a. The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.
b. The Supreme Court shall have original but not exclusive jurisdiction of:
   1. All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties.
   2. All controversies between the United States and a State.
   3. All actions or proceedings by a State against the citizens of another State or against aliens.[48]

In 1941, Robert H. Jackson, who served as Solicitor General and Attorney General of the United States, wrote:

> As created, the Supreme Court seemed too anemic to endure a long contest for power. It has no function except to decide "cases" and "controversies," and its very jurisdiction to do that was left largely to the control of Congress. It has no force to execute its own commands, its judgments being handed over to the Executive for enforcement. Its Justices derive their offices from the favor of the other two branches by appointment and confirmation, and hold

> them subject to an undefined, unlimited, and unreviewable Congressional power of impeachment. They depend annually for the payment of their irreducible salaries and the housing and staff of their Court upon appropriations by Congress. Certainly so dependent an institution would excite no fears."[49]

In 1986, Supreme Court Justice William H. Rehnquist traced the development of the court from a part-time one to a full-time one by presenting statistics on the number of cases on the court's docket during the first hundred years: Fewer than 50 cases during its first decade when each justice was riding a specific circuit to sit with a circuit judge to conduct trials: 92 cases in 1840; 253 cases in 1850; 310 cases in 1860; 636 cases in 1870; 1,200 cases in 1880; and 1,816 cases in 1890.[50] The 1891 Congress responded to the court's work load by creating Circuit Courts of Appeals and stipulating appeals from the judgments of trial courts in diversity of citizenship case as of right went to the Courts of Appeals with subsequent review by the Supreme Court determined on a discretionary basis.[51] Appeals from trial court decisions involving questions of constitutional or statutory law bypassed the new appeals court and continued to be taken directly to the Supreme Court. The work load of the court was reduced further by the *Judiciary Act of 1925*, also known as the *Certiorari Act*, granting the court discretionary authority in most instances to decide whether to review the decisions of lower state and federal courts.[52]

We examine below, the grant of concurrent original jurisdiction to the U.S. Supreme Court over cases involving ambassadors, ministers, and consuls of foreign nations by examining briefly the rationale for the grant and court decisions relating to the immunity of such foreign officers. Chapter 2 is devoted to the constitutional grant of original jurisdiction to the court with respect to interstate disputes which the *Judiciary Act of 1789* made exclusive.

Ambassadors, Ministers, and Consuls

The drafters of the constitution apparently decided that cases involving ambassadors, ministers, and consuls of foreign nations should be heard only in the most prestigious national court because of the delicate nature and importance of United States intercourse with foreign governments. Hamilton, in *The Federalist Number 80*, justified the constitutional provision defining the judicial power of the United States relative to official diplomatic representatives of sister nations:

> . . . the peace of the whole [the nation] ought not to be left to the disposal of a part. The Union will undoubtedly be answerable to for-

> eign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.[53]

He conceded that a distinction could be made between cases relating to treaties and laws of foreign nation and cases "which may stand merely on the footing of the municipal law" and be subject to the jurisdiction of state courts.[54]

In *The Federalist Number 81*, Hamilton reemphasized it was essential to grant the U.S. Supreme Court original jurisdiction in such cases: "Public Ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation."[55]

He explained the activities of consuls in a strict sense do not have diplomatic character, but they nevertheless represent their respective nations and merit inclusion in the original jurisdiction of the court.

Congress implemented the constitutional provision by enactment of the *Judiciary Act of 1789*, containing section 13, defining original jurisdiction:

> The Supreme Court shall have original and exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party.[56]

The term "domestics," at the time, included wives of diplomats.

Congress enacted the *Diplomatic Relations Act of 1978* to conform U.S. law with the Vienna Convention on Diplomatic Relations of April 18, 1961, by amending the grant of exclusive jurisdiction to the Supreme Court to

encompass only interstate disputes and continuing its nonexclusive jurisdiction over foreign diplomats, controversies between the United States and a State, and proceedings by a State against citizens of a sister state and aliens.[57] The act requires diplomatic personnel with immunity to have liability insurance, and stipulates a judicial action brought against immune personnel, by motion, may be dismissed. In addition, the president is authorized to grant more or less favorable diplomatic privileges and immunities than the ones contained in the convention.

In 1981, the Maryland Court of Appeals ruled the *Diplomatic Relations Act* was not retroactive in a criminal case involving an employee of the French Embassy, who at the time he committed an act outside the scope of his employment, was immune from criminal prosecution under the sweeping grant of immunity of the repealed statute.[58]

U.S. Supreme Court Decisions

The Supreme Court's original jurisdiction over ambassadors, public ministers, and domestics is seldom invoked, but when invoked must be employed consistent with the law of nations.[59]

In 1793, the U.S. Circuit Court for the District of Pennsylvania was called upon to determine whether a Consul from Genoa, indicted for a misdemeanor for sending anonymous and threatening extortion letters to the British Minister and a citizen of Philadelphia, was entitled to diplomatic immunity and the quashing of the indictment.[60] The defendant had sought to quash the indictment on the grounds of his official character and the exclusive jurisdiction of the U.S. Supreme Court over such cases. The majority opinion acknowledged the Constitution vests original jurisdiction in the Supreme Court over such cases, but opined the Constitution "does not preclude the Legislature from exercising the power of vesting a concurrent jurisdiction, in such inferior courts, as might by law be established."[61] Mr. Justice James Iredell dissented and wrote "it appears to me, that for obvious reasons of public policy, the Constitution intended to vest an exclusive jurisdiction in the Supreme Court, upon all questions relating to Public Agents of Foreign Nations. Beside, the content of the judiciary articles of the Constitution seems fairly to justify the interpretation, that the word original, means exclusive, jurisdiction."[62] In a trial before Chief Justice John Jay and Justice Peters, the Consul was found guilty by a jury in 1794, but was subsequently granted a presidential pardon on the condition he surrender his commission and *exequatur*.

The U.S. Supreme Court, in 1798, addressed the question of whether a Consul General of the French Republic, as a drawer of several bills of exchange totaling $70,052.46, acted in his official capacity or had pledged his

private credit. The court opined "the credit was given to it as an official engagement; and that, therefore, there was no cause of action against the present Defendant."[63]

Juan Gualberto de Ortega was indicted, in the Circuit Court of the United States for the Eastern District of Pennsylvania, for assaulting Hilario de Rivas y Salmon, the charge d'affaires of His Catholic Majesty, the King of Spain, in the United States in contravention of the law of nations and a congressional statute. A jury found Ortega guilty and he appealed on the ground the Circuit Court lacked jurisdiction because the United States Supreme Court has jurisdiction over cases affecting and ambassador or other public minister. In 1826, the Supreme Court opined the case is not one "affecting a public minister, within the plain meaning of the constitution," but rather is a case "of a public prosecution," in which the minister, although injured, "has no concern, either in the event of prosecution, or in the costs attending it."[64]

Are Indian tribes, which entered into treaties with the United States confirmed by the Senate, constitutionally entitled, as foreign nations, to invoke the original jurisdiction of the Supreme Court? The answer is "no." The Cherokee Nation sought to invoke the court's jurisdiction in an original action seeking to enjoin the Georgia General Assembly by arguing that treaties the Nation entered into with the United States (in 1785, 1791, 1792, 1794, 1805, 1806, 1807, 1816, and 1819) recognized the Cherokee Nation as a sovereign and independent state. In 1831, Chief Justice Marshall, writing for the Court, in *Cherokee Nation v. Georgia*, described the tribes as "denominated domestic dependent nations. . . . Their relation to the United States resembles that of a ward to his guardian."[65] Marshall added: "That part of the bill which respects the land occupied by the Indians . . . may be more doubtful. . . . The bill requires us to control the legislature of Georgia, and to restrain the execution of its physical force. The propriety of such an interposition may be well questioned. It savours too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question."[66]

Another case, involving the consul general of the King of Saxony, reached the high court in 1833. The consul general appealed an adverse decision of the New York Supreme Court, a general trial court, to the New York Court for the Correction of Errors, which confirmed the local court's decision, and an appeal was made to the U.S. Supreme Court. After explaining it could examine only the record to determine what the trial court decided, the Supreme Court determined the fact that the plaintiff in error was a consul general was not denied and opined the immunity of a consul of a foreign nation to suit in a state court is a privilege of the foreign nation and is not a mere personal privilege, and noted the *Judiciary Act of 1789* grants the U.S. District Court exclusive jurisdiction of all suits against consuls and vice-consuls.[67]

In 1853, the New York Court of Appeals, the highest state court, ruled a consul of the Republic of Ecuador for the port of New York residing in the United States is not susceptible to suit in a state court, and an exemption can not be waved, as a personal privilege as the exemption is a privilege of the foreign government and not of the person.[68] The court reinforced its opinion by noting the privileges of consuls are frequently governed by treaties, and the *Judiciary Act of 1789* grants U.S. courts exclusive jurisdiction over all cases affecting a consul.

In 1876, an action at law was brought by the receiver of the New Orleans National Banking Association against a vice-consul and subject of the Kingdom of Italy in Philadelphia. The case involved the former Bank of New Orleans, chartered by the State of Louisiana, which secured a national government charter under provisions of the *National Bank Act of 1864* and chose the name the New Orleans National Banking Association.[69] The bank failed in 1873 and sought the protection of a receiver and liquidation under the act. The defendant owned fifty shares of the capital stock of the association with a par value $30 per share, was held liable for $1,500 of the association's debts, and refused to pay. The court opined the record established was ample proof to sustain the plaintiff's case against the vice-consul.[70]

Similarly, in 1884, an action was brought in the U.S. Circuit Court for the Southern District of New York, seeking to recover damages for the alleged unlawful conversion by the consul for the Kingdom of Norway and Sweden of merchandise for his personal use. The answer denied the allegations of the complainant and, by way of counterclaim, sought a judgment against the plaintiff for stated amounts. A replication was filed to the counterclaim and a jury trial resulted in a judgment for the plaintiff. The jurisdiction of the Circuit Court to hear and determine a suit against the consul was questioned in the assignments of error to the Supreme Court and made reference to the fact the defendant did not, in the court, plead exemption on the basis of his official character.

The Supreme Court referred to its 1833 decision in *Davis v. Packard et al.*, holding the exemption of a consul from suit is a privilege of the foreign government and not of the person. Furthermore, the court ruled the Circuit Court was without jurisdiction because the defendant was not an alien or a citizen of a sister state, but was a citizen of the same state as the plaintiff.[71] The judgment was reversed and the case was remanded for further proceedings consistent with the court's opinion.

The high court, in 1890, addressed the question as to whether or not Consul General Jacob Baiz of the Republic of Guatemala was invested with and exercising the principal diplomatic functions of Guatemala. Baiz was sued for libel in the U.S. District Court for the Southern District of New York and petitioned the Supreme Court to forbid the District Court from exercising

jurisdiction over an action against him on the ground he was a public minister. The court explained Baiz is a United States citizen, "it is a state maxim that one of its own subjects or citizens is not to be received as a foreign diplomatic agency," and opined the District Court had jurisdiction over the case."[72]

In 1925, the court opined, in a case brought by a U.S. citizen, it "is without original jurisdiction" to issue a writ of *mandamus* requiring the U.S. consul general in Montreal, Canada, to visa a passport or certificate of origin and identity issued by the Government of Russia to a relative of the applicant seeking leave to file a petition.[73] The court specifically noted the clause granting the court original jurisdiction referred "to diplomatic and consular representatives accredited to the United States by foreign powers, and not to those representing this country."[74]

More recently, the court summarily denied:

1. the 1971 motion for leave to file a bill of complaint, by the Founding Church of Scientology, against the British Ambassador,
2. the 1972 motion of a citizen of Ohio for leave to file a bill of complaint against the U.S. ambassador to the Paris Peace Talks,
3. the 1973 motion of Quimet J. Petersen for leave to file a bill of complaint against the Chancellor of the Consulate Royal of Greece at New Orleans, Louisiana,
4. the 1985 motion of a Bulgarian consular officer for leave to file a bill of complaint, and
5. the 1987 motion to file a writ of *habeas corpus* in the Matter of the Republic of Suriname, *ex rel*. Etienne Boerenveen.[75]

Generally, the lower U.S. courts have established principles with respect to diplomatic immunity and the scope of the Article III provision relating to "ambassadors, other public ministers, and consuls," and accept the U.S. State Department's determination of the status of these officials.[76] For example, the U.S. District Court in 1949 accepted the determination of the State Department that defendant Valentine A. Gubitchev, charged with violation of espionage laws, was not an emissary of the Union of Soviet Socialist Republics entitled to diplomatic immunity while serving as an employee of the United Nations in New York City.[77] Mr. Gubitchev, previously, was a third secretary of the Soviet Ministry of Foreign Affairs and arrived in the United States with a Soviet diplomatic passport bearing a United States diplomatic visa. The court concluded this fact raised a political question and a determination was sought from the State Department. Upon receiving the determination, the court ruled Mr. Gubitchev as a member of the Soviet Delegation to the United Nations "is not technically an emissary to a sovereign since the United Nations is not a sovereignty, having neither land, nor a people, nor a government controlling them."[78]

In 2003, the Supreme Court agreed to review lower court decisions involving what is popularly known as the *Alien Tort Statute* (ATS), a part of the *Judiciary Act of 1789*.[79] The key question was whether or not the statute authorizes a suit in a federal court for damages resulting from violation of the "law of nations." Recently, several plaintiffs have relied on the statute to sue United States corporations with investments in foreign nations.

The two appeals involved the same individual. Dr. Humberto Avalrez-Machain was kidnapped by a Mexican police officer in Guadalajara and transported to California, where he had been indicted by a federal grand jury for the torture and murder of a Drug Enforcement Administration (DEA) agent. He was tried, acquitted, and brought lawsuits in the U.S. District Court for the Southern District of California against the United States for false arrest and against Jose Francisco Sosa, who had kidnapped the doctor.[80] The doctor won an award against Mr. Sosa, but the case against the United States, brought under the *Federal Tort Claims Act*, was dismissed.[81]

Appeals were launched in both cases. The U.S. Court of Appeals for the Ninth Circuit upheld the award and reinstated the case against the United States.[82] In 1992, the Supreme Court reversed the Court of Appeals decision by opining the District Court possessed jurisdiction to try Dr. Alvarez-Machain.[83] The Court of Appeals, in 2003, held he lacked standing to bring a claim under the *Alien Tort Claims Act*, dismissed the claims under the *Federal Tort Claims Act*, opined federal common law applied to the determination of damages, and ruled DEA officers were liable for false arrest.[84]

The Supreme Court, in 2004, reversed the judgment of the Court of Appeals by opining the alleged liability of the United States for the alien's arrest by Mexican citizens at the instigation of the U.S. Drug Enforcement Administration falls under the "foreign country" exception to the waiver of the United States Government's immunity under the *Federal Tort Claims Act*.[85] The Court admonished District Courts to exercise caution when deciding to hear claims under the *Alien Tort Statute* as "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors . . . and individual actions arising out of prize captures and piracy may well have also been contemplated."[86]

An Overview

Chapter 2 examines the original jurisdiction of the U.S. Supreme Court over disputes between sister states covering a wide variety of issues. Particular attention is paid to the criteria developed by the court to determine whether

its original jurisdiction should be invoked. The court in effect fashioned a common law of interstate relations reflecting in part principles of international law.

The special master is the subject of chapter 3. The court, upon receiving a motion from a state to file a bill of complaint in equity against a sister state(s), appoints a special master to collect and analyze facts pertaining to the dispute and to develop recommendations for resolving the dispute. Relatively little is known about the role of special masters in the settlement of interstate disputes other than the fact their reports on a number of occasions have spurred the involved states to renew negotiations for an out-of-court settlement subject to court approval.

Most interstate disputes involved boundary lines, financial matters, and water allocation, diversion, and pollution. Chapter 4 is devoted to an examination of boundary controversies with most involving disputes over rivers.

Chapter 5 reviews suits involving the escheat by two or more states of unclaimed property and taxation disputes commonly concerned with state use of tax credits.

Major water disputes—involving allocation, diversion, and pollution of lake and river waters—are the subjects of chapter 6.

Chapter 7 is devoted to relatively unique decisions of U.S. Supreme Court decisions involving bonds of one state held by a second state, the pre-Civil War debt of Virginia, sale of convict made articles, quarantines, and the electoral college voting system.

Chapter 8 describes and analyzes alternative mechanisms for resolving controversies between sister states: Interstate boundary compacts, interstate regulatory compacts, and the following congressional initiatives: Grant of original jurisdiction to the U.S. District Court to hear interstate disputes; create a court with original jurisdiction to hear interstate disputes; increase the number of U.S. Supreme Court justices; promote the formation of interstate compacts by granting consent-in-advance to specific types of compacts; enact federal-interstate compacts; employ preemption powers to remove state regulatory powers causing interstate controversies; enact interstate policy statutes such as river water allocation between states; and direct U.S. departments and agencies to work closely with states to devise solutions for major interstate problems such as water shortages.