The Silence *of* Congress

State Taxation of Interstate Commerce

Joseph F. Zimmerman

The Silence of Congress

This page intentionally left blank.

The Silence of Congress

State Taxation of Interstate Commerce

Joseph F. Zimmerman

State University of New York Press

Published by
State University of New York Press, Albany

Printed in the United States of America

For information, contact State University of New York Press, Albany, NY
www.sunypress.edu

Production by Kelli W. LeRoux
Marketing by Anne M. Valentine

Library of Congress Cataloging-in-Publication Data

Zimmerman, Joseph Francis, 1928—
The silence of Congress : state taxation of interstate commerce /
Joseph F. Zimmerman..
p. cm.
Includes bibliographical references and index.
ISBN 978–0–7914–7205–7 (alk. paper)
1. Intergovernmental tax relations—United States. 2. Interstate commerce—Taxation—United States—States. I. Title. II. Title: State taxation of interstate commerce.

HJ275.Z56 2007
336.2′01373—dc22

20066100301

10 9 8 7 6 5 4 3 2 1

This book is dedicated with love to
Kieran Thomas Taylor

This page intentionally left blank.

Contents

Preface

The United States Constitution established the world's first federal system encompassing an economic union and a political union whose central characteristic is dual sovereignty with Congress possessing delegated powers and states possessing reserved or residual powers. A federal system automatically raises questions pertaining to the nature of appropriate relations between the national government and state governments at the boundary lines of their respective authority and between sister states each possessing equal powers. Relations between states in such unions may be cooperative, competitive, and/or conflictive in general and with respect to taxation of interstate commerce in particular.

The constitution reserves substantial powers, including taxation, to state legislatures and the result has been the enactment of nonuniform state taxation laws that may or may not cause interstate relations problems and result in a state filing a motion in the U.S. Supreme Court for permission to file a complaint in equity against another state seeking to invoke the court's original jurisdiction. The passage of time witnessed state legislatures enacting an increasing number of tax credits and exemptions for a wide variety of purposes including economic development and research. Collectively, these statutes resulted in nonharmonious state laws levying taxes on interstate commerce that often produce taxpayer inequities, costly taxpayer compliance costs, and law suits by individuals and multijurisdictional corporations seeking equity in taxation.

The constitution delegates to Congress two most important powers to solve problems prevalent under the Articles of Confederation and Perpetual Union. The constitutional authority to levy taxes to raise revenues relieved Congress of its former dependence on voluntary contributions of funds by states that often were not made or were made in part. The plenary power to regulate commerce among the several states was granted in the expectation Congress would enact statutes, reinforced by the supremacy of the laws clause, to invalidate barriers, tax and others, to interstate commerce erected by state legislatures disrupting the economic union. Congress in its first session in 1789 exercised its taxation powers by imposing imposts on imports. However, the national legislature did not enact a statute regulating interstate commerce until 1887. Failure to exercise this delegated power led to the use of the term "the Silence of Congress" and the U.S. Supreme Court in 1824 developing its dormant commerce clause doctrine in order to allow state and U.S. courts to adjudicate controversies involving state-erected barriers to interstate commerce.

Although Congress subsequently on a gradual basis enacted laws regulating such commerce, no statute regulating state taxation of interstate commerce was enacted until 1959 and this statute and eighteen of the nineteen subsequent statutes regulating such taxation are minor ones. The exception is the prohibition of taxation of Internet sales that deprives state and local governments levying a sales tax of revenues in excess of $16 billion annually.

State and U.S. courts adjudicate interstate taxation controversies and private citizen and corporate challenges of state taxes levied on interstate commerce. The U.S. Supreme Court and individual justices on several occasions issued opinions calling on Congress to harmonize such state taxation as Congress, the political branch representing the people, possesses plenary authority to address problems created by nonuniform state taxation of interstate commerce and is better equipped, in terms of staff and hearings, to fashion comprehensive remedies than the court. The latter acts spasmodically after invoking its original jurisdiction or agreeing to review the decision of a lower court and in both types of cases its jurisdiction is limited to the narrow issue in controversy. Furthermore, academics specializing in taxation of interstate commerce, other tax experts, and multijurisdictional corporations urged Congress to initiate action to make state taxation of interstate commerce more uniform. The congressional response has been very limited and designed principally to protect specified taxpayers.

The purposes of this book are to examine (1) the desirability of Congress's decision to leave prime responsibility for resolving taxation controversies involving interstate commerce to state and U.S. courts, (2) tax regulatory actions that could be initiated by Congress and the prospect for their enactment, (3) alternative methods of achieving uniform state laws levying taxes on interstate commerce, and (4) actions Congress should initiate to encourage enactment of uniform state laws and interstate regulatory compacts.

The volume concludes by adding three maxims involving state taxation of interstate commerce to the four developed by Adam Smith in 1776 and presenting the outline of a broad theory of interstate relations encompassing the subject of state taxation of interstate commerce.

Acknowledgments

The literature on state taxation in the United States is large, and searching such literature is time-consuming. I have been most fortunate in having highly competent research associates who identified and obtained copies of pertinent books, government reports, journal articles, Ph.D. dissertations, conference papers, and other unpublished documents.

I am most pleased to acknowledge a special debt of gratitude to Paul Alexander, Winston R. Brownlow, and Katherine M. Zuber, who performed their assignments in a most conscientious, professional, and timely manner. Without their assistance, completion of a scholarly manuscript on the subject of state taxation of interstate commerce would have been delayed significantly.

As usual, I compliment Addie Napolitano for excellence in preparing the manuscript for publication and for solving word processing problems. Any errors of act or misinterpretation are solely my responsibility.

This page intentionally left blank.

Chapter 1

State Competition for Tax Revenue

Adam Smith in 1776 established four famous tax maxims for all nations. A tax, a compulsory extraction of funds, should (1) fall equally on each taxpayer, (2) be certain and not arbitrary, (3) be convenient in terms of payment, and (4) be economical to collect.[1] These maxims remain valid, but were developed prior to the establishment in 1789 of the first federation—the United States of America—and its complex system of national, state, and local taxation including the national graduated personal income tax that suggests the first maxim should be modified to read "fall equally on each taxpayer according to his or her ability to pay." The federal system has revealed the need for additional maxims (see chapter 9).

A confederate or a federal system may encourage states to increase their respective revenues by enacting taxes whose incidence, directly or indirectly, falls primarily on business firms and residents in sister states and one or more foreign nations. New York during the confederacy established by the Articles of Confederation and Perpetual Union, for example, levied import duties on goods entering the state's ports from overseas, including goods destined for sister states, a form of tax exportation.

The extent of tax exportation is determined in part by the constitution establishing a federation. The U.S. Constitution delegates to Congress broad regulatory and taxation powers and reserves to the states powers to provide services, regulate, and tax. States, in turn, have delegated specific taxation powers to general-purpose local governments that may levy a tax with an extraterritorial effect. Our principal focus is state taxation of interstate commerce. The two prominent theories of federalism—dual and cooperative—are devoted exclusively to national-state relations and provide no guidance on the subject of state taxation of interstate commerce.

The reasons why a state exports taxes are apparent. A governor and a state legislature seek to keep the tax burden placed on the state's business firms and citizens relatively low by imposing taxes payable in part by firms and citizens of other states. Such a policy is popular with elected officers and will help their reelection campaigns. The taxes exported vary greatly as some are conventional taxes with an extraterritorial incidence such as the commuter income tax imposed on nonresidents who earn all or part of their income in the state, the city, or both. States also seek to tax the income of corporations and residents of foreign nations with respect to income earned within each state. Such taxes may be subject to provisions of bilateral or multilateral treaties entered into by the United States with foreign nations. It also should be noted that states engage in competition to attract major business firms, gamblers, filmmakers, sports franchises, and tourists as sources of tax revenues.[2] Tax credits play an important role in the interstate competition to attract business firms and increase the complexity of state taxation of interstate commerce.

State legislatures not uncommonly levy higher taxes on foreign business corporations (chartered in another state) and alien corporations (chartered in another nation) than on domestic corporations by limiting tax credits to domestic firms. Taxes discriminating against foreign firms often beget retaliatory state taxes that may become the subject of an original jurisdiction trial in the United States Supreme Court when one state challenges the constitutionality of a tax levied by a sister state (see chapter 5).[3] In addition, business firms can challenge the constitutionality of a tax in a state court or the U.S. District Court.

States often face major court challenges in their attempts to tax fairly the income of multistate and multinational corporations, and income taxes levied on the latter corporations have generated international controversies as explained in chapter 5. An equitable state corporate income tax requires that the income of multistate and multinational corporations be apportioned fairly among the states. Forty-five states and the District of Columbia levy a corporate income, business profits, or franchise tax and corporations today face a major compliance burden because of the nonuniformity of provisions of these taxation statutes and may be overtaxed or undertaxed. Congress possesses plenary power to regulate state taxation of interstate commerce. Its relative silence on the subject has resulted in a major burden placed on state courts and the U.S. District Court to determine the balance between the tax policies of a state designed to raise adequate revenue and the national policy of ensuring the free flow of commerce between sister states.

Many states today tax visiting nonresident professional athletes for each playing day, training day, or both in the state (see chapter 4). Nonresidents visiting a sister state who make purchases pay sales taxes unless their purchases are shipped to their homes and also may pay highway tolls. Similarly, sojourners pay excise taxes when they purchase alcoholic beverages and tobacco products. A taxpayer does not necessarily have to visit another state in order to pay one of its taxes. A severance tax is levied on natural resources, such as coal and natural gas, and the bulk of these resources are exported to other states where the incidence of the tax falls (see chapter 3) and a nonresident may be required to pay an estate tax (see chapter 6).

In 1993, the City of Virginia Beach, Virginia, developed an ingenious scheme to raise additional revenue by means of tax exportation. The city levied a personal property tax on three satellite transponders owned by International Family Entertainment Incorporated. The devices are located on communications satellites circling the globe. The company challenged the constitutionality of the tax and the Virginia Beach Circuit Court ruled the city possessed no authority to tax the transponders.[4] Acting on an appeal, the Virginia Supreme Court in 2002 upheld the lower court decision because the state statute relied on by the city as authority to levy the tax "does not contain any rules for the determination of a situs for transponders or the satellites to which the transponders are affixed."[5]

New Hampshire, a major tourist state, does not levy an earned income tax or a sales tax, but does levy a 5 percent tax on dividend and interest income. The state and many of its cities and towns have employed innovative methods to export taxes. The state relies in part for revenue on hotel and motel occupancy, motor vehicle rental, and restaurant meals taxes, and also raises substantial revenues through the sale of alcohol beverages at relatively low prices in its state-operated liquor stores, which attract customers from many states and Canadian provinces. The state's policy of keeping its excise tax on cigarettes low also has attracted nonresidents who make their purchases in the state.

Furthermore, the lack of a sales tax attracts shoppers from neighboring states and thereby allows the state to export part of its 8.5 percent business profits tax. The board of selectpersons in the neighboring town of St. Johnsbury, located in Caledonia County, Vermont, employed a professional firm which estimated county merchants lost approximately $36 million in retail sales in 2005 to New Hampshire merchants.[6]

The 1991 New Hampshire General Court (state legislature) raised $35 million by levying an unique statewide *ad valorem* 0.64 percent property tax on a nuclear power plant owned jointly by twelve utilities with eleven located in sister states. This tax induced Connecticut, Massachusetts, and Rhode Island to file an original jurisdiction bill of complaint in equity against New Hampshire in the U.S. Supreme Court (see chapter 5). In 1987, a study of 63 cities and towns revealed that nonresident owners of vacation and recreation property paid more than 8.1 percent of local government property taxes.[7] An example of tax exportation by a New Hampshire local government is the Town of Newbury, with frontage on Lake Sunapee and a population of 900, which received 70 percent of its property tax revenue from nonresidents in 1987.

Massachusetts decided to help its merchants compete with New Hampshire merchants by exempting from its 5 percent sales tax on purchases under $2,500 on August 13–14, 2004. New Hampshire responded with advertisements in the *Boston Globe* containing the slogan "365 vs. 002 . . . Tax-Free Shopping Days (for those of you keeping score)."[8] The state's division of travel and tourism development reported the state welcomes twenty-seven million visitors annually.

Vermont in 2005 held its first auction of hunting permits that raised $21,517 for the state fish and wildlife department's conservation education programs.[9] The top bid for one of five moose hunting permits was $7,777 and bids for the other permits were lower. Each successful bidder also has to purchase a hunting license ($16 for residents and $90 for nonresidents) or hunting permit fee ($100 for residents, $350 for nonresidents).

States also initiate action to prevent tax evasion. Each state with a sales tax also has a compensating use tax at the same rate applicable to items purchased by their residents in other states and nations. Enforcement of the use tax is difficult with the exception of the purchase of motor vehicles in another state or nation. The home state requires payment of a use tax on a vehicle purchased outside the state as a condition for registering the vehicle. A number of motorists, in order to avoid taxes and high insurance premiums also purchase and register their vehicles in a state with no sales tax and lower insurance premiums. The problem is severe near the Massachusetts–New Hampshire boundary and

Massachusetts encourages its residents to use a toll-free hotline—1-800-l-Pay-Tax—to report residents who have out-of-state license plates on their vehicles.

An increasing number of owners of motor homes recreational vehicles (RV) commenced in the early years of the twenty-first century to drive to Montana, which lacks a sales tax and has a maximum RV registration fee of $305.50, to create a limited liability corporation (LLC) to avoid paying taxes and to trade in their RV to purchase a new one at a Montana dealer.[10] The cost of establishing a LLC ranges from $750 to $1,000 and attorneys representing RV owners examine the statutes of their respective home state to ensure a use tax will not be levied. Under California law, for example, the purchaser of a RV in a sister state may not bring the vehicle to California for one year without paying the use tax.

An understanding of the constitutional foundations of the federal system, including interstate provisions, is essential if one is to comprehend fully the complexities of interstate tax revenue competition, resultant problems, and proposed solutions.

THE ARTICLES OF CONFEDERATION AND PERPETUAL UNION

The Second Continental Congress superintended the prosecution of the Revolutionary War following the signing of the 1776 Declaration of Independence by representatives of the thirteen states. This Congress was not a national government, recognized the need for a formal national governance document, and drafted the Articles of Confederation and Perpetual Union containing Art. 3 establishing "a firm league of friendship" of the states.

Art. 2 proclaimed: "Each State retains its sovereignty which is not by this confederal expressly delegated to the united States in Congress Assembled." The lower case "u" purposely was utilized to emphasize a government with powers derived from the people was not established. A unicameral Congress, with two to seven delegates from each state, was the governing body, but no executive branch or judicial branch was created. The articles were submitted to the states in 1777 for ratification, but boundary disputes delayed ratification by the thirteenth state until 1781.

The authors of the articles were convinced it was essential to include articles governing relations between sister states. Art. 4 required each state to (1) extend privileges and immunities to sojourners, (2) render fugitives from justice on a request from the governor of a sister state, and (3) give full faith and credit "to the records, acts, and judicial proceedings of the courts and magistrates of every other state." Art. 4 authorized states to enter into agreements with each other with "the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continued."

Only a short period of time was required to demonstrate the major defects of the confederation established by the articles. Alexander Hamilton, John Jay, and James Madison, in a series of letters to editors of New York City newspapers, examined the defects in detail and explained the provisions of the proposed U.S. Constitution between October 27, 1787, and August 16, 1788.[11]

Defects

The first defect was the reliance placed upon each state voluntarily to send its full quota of funds to Congress and their failure to do so deprived Congress of revenues essential for the implementation of its limited delegated powers as Hamilton explained in "The Federalist No. 21."

The second defect was the absence of a provision authorizing Congress to regulate commerce among the several states. Disputes developed as individual states, acting in a mercantilist fashion, erected trade barriers against goods from other states and by 1786 trade between the states had come to a near standstill. Hamilton in "The Federalist Number 22" highlighted the serious nature of this defect:

> The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union have, in different instances, given just cause of umbrage and complaint to others, and it is feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

Madison in "The Federalist No. 21" focused on tax exportation by states with gateway seaports and stressed the need for congressional superintendence of foreign commerce as interior states import and export products through states with seaports which would "load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former."[12] As a consequence, animosities would be created between states and the interior states would resort to less convenient routes for importing and exporting products in order to avoid the duties levied by states with seaports.The third defect was Congress's lack of authority to enforce its statutes and treaties with foreign nations. Under the Articles, no state was required to respect the statutes enacted by the Congress as described by Hamilton in "The Federalist No. 21" or the treaties entered into with foreign nations including the Peace Treaty with the United Kingdom of 1783. Nonobservance of the terms of treaties by various states generated poor relations with foreign nations.

Fourth, the lack of an army and a navy was a serious defect caused by the inability of Congress to acquire the necessary funds. This defect was a particularly important one in view of the facts, outlined by John Jay in "The Federalist No. 4," that Canada was controlled by the United Kingdom and excluded U.S. citizens from the St. Lawrence River, the southwest was under the jurisdiction of Spain which closed the Mississippi River, and the friendly French monarchy appeared to be close to a collapse. Furthermore, as Hamilton noted in "The Federalist Papers Nos. 6, 25, 28, and 74," former Continental Army Captain Daniel Shays led a rebellion by farmers in Massachusetts in 1786–87 and captured control of all of the Commonwealth west of Worcester which is located forty miles from Boston. The confederation was powerless to help the Commonwealth put down the insurrection that was suppressed when wealthy Boston residents raised funds and sent General Benjamin Lincoln with an army to restore Commonwealth control of rebellious areas.

The fifth defect was the absence of a mechanism to resolve interstate disputes. Hamilton in "The Federalist No. 6" referred to the dangers "which will in all probability flow from dissensions between the States themselves . . . " and in "The Federalist No. 7" cited the battle between Connecticut and Pennsylvania military forces over the Wyoming territory in present-day Pennsylvania.[13]

The sixth defect was the danger the confederation would dissolve. In 1787, James Madison wrote "a breach of any of the Articles of Confederation by any of the parties to it absolves the other parties from their obligations, and gives them a right if they choose to exert it of dissolving the Union altogether."[14] John Jay in "The Federalist No. 5" expounded on the turmoil which would result from a breakup of the confederation.

Representatives of Maryland and Virginia in 1785 signed an interstate compact governing fishing and navigation on the Potomac River and the Chesapeake Bay. The Maryland General Assembly enacted the compact and invited Delaware and Pennsylvania to become involved in commercial regulations in the future. The Virginia General Assembly enacted the compact and invited all states to attend a convention in Annapolis, Maryland, in 1786 for the purpose of developing a uniform commerce and trade system.

Commissioners were appointed by nine states to attend the convention. However, only commissioners from five states participated and approved a resolution, drafted by Alexander Hamilton, memorializing Congress to call a convention to meet in May 1787 in Philadelphia for the expressed purpose of amending the Articles of Confederation and Perpetual Union. Congress on February 21, 1787, issued the convention call without specifying the method to choose delegates. The governor or the state legislature appointed the delegates with several instructed to take no action other than revising the articles.

THE UNITED STATES CONSTITUTION

All states, except Rhode Island and Providence Plantations, sent delegates to the 1787 convention, which met from May 25 to September 17. Rhode Island maintained changes to the articles could only be made in conformance with the art. 8 requirement providing they could be altered only if approved by Congress and "confirmed by the legislatures of every state."

Although seven-four delegates were appointed by the states, only fifty-five accepted their appointments and attended the convention. Fourteen delegates left Philadelphia prior to the official closure of the convention. George Washington was elected president of the convention.

Ideological and sectional factions developed in the convention. The former factions were divided on the question of whether a strong national government would be a threat to the liberties of individuals. The latter factions reflected sectional differences over issues such as slavery and whether Congress should be authorized to levy import and export duties. Another issue involved the potential in a federal system for a conflict between a congressional statute and a state statute. Madison favored a proposal granting Congress the power to disallow state statutes contravening the delegated powers of Congress, but the proposal was rejected as the convention added the supremacy of national laws and treaties clause to the draft constitution to resolve conflicts between congressional statutes and state statutes.[15] In addition, there was a major division between states with large populations and states with small populations over the issue of the system of representation in the proposed unicameral Congress. The controversy was removed through the Connecticut Compromise providing for equal state representation in the Senate and representation in accordance with population in the House of Representatives with the guarantee each state would have at least one member. A similar division occurred between the free states and the slave states over the issue of whether slaves should be counted as part of a state's population. The issue was resolved by incorporating in art. 1, sec. 2 a provision stipulating apportionment of seats would include "three fifth of all other persons" (slaves). Whether states should be allowed to import slaves was another divisive issue producing the compromise in art.1, sec. 9 providing slaves may continued to be imported until 1808 and Congress may imposed a tax of ten dollars on each slave imported.

Alexander Hamilton in "The Federalist Number 82" focused on national-state relations under the proposed constitution and admitted problems with such relations were to be expected:

> The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and there may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. "This time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent whole."[16]

Ratification

The convention, on approving the draft constitution, sent copies to each state with a directive that the state legislature should convene a convention of elected delegates to consider the question of ratification of the proposed fundamental law. The constitution's framers were aware it would be impossible to secure the immediate ratification of the document by all thirteen states, and included in art. 7 a provision that ratification by conventions in "nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same." The divisions among convention delegates were replicated in the states when debate began on ratification of the proposed constitution. The assumption was made that ratification by nine state conventions would persuade the other states to ratify.

Many objections were raised against the proposed constitution including the charges (1) only the unanimous approval of the thirteen state legislatures could replace the Articles of Confederation and

Perpetual Union with the proposed constitution, (2) the proposed government either would be too strong or too weak, (3) the lack of a Bill of Rights, similar to ones in state constitutions, was a fatal weakness, (4) the president as commander-in-chief of the army and navy was too powerful and might become another Oliver Cromwell, (5) the absence of a reference to God was sacrilegious, (6) the document should require national government officers to be Christians, and (7) states should not be deprived of the power to coin money. The proposed constitution did contain civil liberty guarantees including the prohibition of congressional enactment of a bill of attainder and an ex post facto law or suspension of the writ of habeas corpus except "when in cases of rebellion or invasion the public safety may require it." For details, consult *The Antifederalist Papers*.[17] Proponents argued there was no need for a bill of rights because Congress could exercise only delegated powers that did not include the power to abridge freedoms of assembly, the press, religion, and right to petition the government for a redress of grievances.

The strongest opposition to the proposed fundamental law was in states with a small population and located in the interior of the country. Farmers, who traditionally were in debt, and other debtors were supporters of cheap paper money issued by states and were opposed to the constitution because of the provision in section 10 of Article I forbidding states to "make any thing but gold and silver coin a tender in payment of debts."

Conventions in Delaware, New Jersey, and Pennsylvania within a short period of time ratified the proposed constitution and their actions were followed by ratification by the Connecticut convention and the Georgia convention. Opposition remained strong in Massachusetts, New York, and Virginia, the most populous state. Absent their ratification, the proposal was doomed to defeat. *The Federalist Papers* were designed to convince New York, one of the largest states, to ratify the proposed constitution and the papers undoubtedly promoted support for the constitution in other states.

The proposed U.S. Constitution was ratified by the required ninth state, New Hampshire, in 1788, and became effective in 1789. Two unions were produced by the Constitution—an economic union and a political union. Each union is exceptionally complex in nature, intertwined with the other union, and designed to eliminate serious problems plaguing the United States under the Articles of Confederation and Perpetual Union.

Power Distribution

It should be noted that a federal system exists between Congress and the states, and a unitary system exists between Congress and the District of Columbia and territories, including the Commonwealth of Puerto Rico.

The unamended constitution delegates important powers to Congress, but is silent with respect to the powers of the states other than listing in section 10 of Article I completely prohibited powers—entrance into a treaty, alliance, or confederation, granting of letters of marque and reprisal or titles of nobility, coinage, emitting bills of credit, making "any thing but gold and silver coin a tender in payment of debts," and enactment of a "bill of attainder, or law impairing the obligation of contracts." The section also authorizes states, with congressional consent, to levy import and export duties to raise revenue to finance their inspection laws, "lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Powers of Congress. In theory, the powers of Congress are limited to the following ones delegated byThe U.S. Constitution, art. 1 sec. 8:

> To lay and collect taxes, duties, imposts and excises, to pay the debts and to provide for the common defense and general welfare of the United States, but all duties, imposts and excises shall be uniform throughout the United States;
>
> To borrow money on the credit of the United States;
>
> To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes;
>
> To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;
>
> To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;
>
> To provide for the punishment of counterfeiting the securities and current coin of the United States;
>
> To establish post offices and post roads;
>
> To promote the progress of sciences and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;
>
> To constitute tribunals inferior to the supreme court;
>
> To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;
>
> To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
>
> To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
>
> To provide and maintain a navy;

> To make rules for the government and regulation of the land and naval forces;
>
> To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;
>
> To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;
>
> To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States; and the acceptance of Congress, become the seat of the government of the United States; and to exercise like authority over all places purchased by the consent of the legislature in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and
>
> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Implied and Resultant Powers. Implied powers are essential if specifically enumerated powers are to be fully implemented. The "necessary and proper" clause, also known as the elastic clause, is the basis for the judicial doctrine of implied powers that increased the powers of the national government. In 1819, the U.S. Supreme Court in *McCulloch v. Maryland* opined: "Let 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."[18]

The term "appropriate means" is a broad one and has included enactment of statutes chartering national banks and other institutions, creation of executive departments and agencies, and authorization of numerous activities based on the delegated powers to levy taxes to provide for the general welfare and national defense. Congressional acts based on implied powers are subject to a court challenge to determine whether the scope of a specific delegated power is broad enough to authorize the exercise of a power implied from it.

A resultant power is based on two or more specific powers delegated to Congress. The constitution authorizes Congress "to establish a uniform rule of naturalization," but does not delegate a specific power to Congress to regulate immigration. This power, in conjunction with the delegated power to regulate foreign commerce and the power of the Senate to confirm treaties negotiated by the president, serves as the constitutional authority for congressional regulation of immigration. A second example of a resultant power is congressional authorization of the printing of paper money as legal tender. The power is derived from the grant of power to borrow funds and to coin money and determine the value thereof.

Concurrent Powers. As noted, states are forbidden to exercise specified powers and may exercise other specified powers only with the consent of Congress. Congress is granted only one power—coinage—that is an exclusive one as states are forbidden to exercise this power. Other powers, including regulation of interstate commerce, delegated to Congress are concurrent ones exercisable by state legislatures. Congress, however, can exercise its power of preemption to remove specific regulatory powers completely or partially from states. Enactment of a complete preemption statute, for example, converts a concurrent power into an exclusive congressional one.[19]

Indian Tribes. Federally recognized Indian tribes are semisovereign with respect to their respective reservation and possess powers varying with provisions of treaties, dating from the Articles of Confederation and Perpetual Union to the present, between individual tribes and the United States. States with recognized Indian tribes lose tax revenues as purchases by nonresidents on reservations are exempt from state taxes unless a tribe has entered into a compact with the governor authorizing the tribe to operate casinos under provisions of the congressionally enacted *Indian Gaming Regulatory Act of 1988* and requiring the tribe to collect state excise taxes on alcoholic beverages, cigarettes, and motor fuels sold on the reservation to nonresidents.[20]

Interstate Constitutional Principles. Seven provisions were incorporated in the U.S. Constitution to govern relations between sister states. The framers utilized general terms and courts are called on in individual cases to determine the applicability of the provisions. The reader should be aware the U.S. Supreme Court acts on a case-by-case basis and does not define constitutional terms.

Legal Equality of States. The U.S. Constitution, art. 4, sec. 3 grants Congress the absolute power to admit new states to the Union, but does not indicate whether a newly admitted state is legally equal to each of the original thirteen states. This section also stipulates "no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junctions of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress."

Congress admitted Vermont to the Union on March 4, 1791, with no conditions by stipulating the state is "a new and entire member of the United States of America."[21] Alaska and Hawaii, the most recently admitted states have the identical reserved powers as those possessed by the original thirteen states.

On the one hand, conditions on occasion may be imposed as part of the process of admitting a new state to the Union. When called on, courts may enforce conditions pertaining to United States property in the state or national grants of land or money for stated purposes.[22]

On the other hand, conditions restricting a newly admitted state from changing its governmental institutions or internal organization can be ignored as the results of a 1911 U.S. Supreme Court decision. The controversy involved the Oklahoma territory and its agreement in the form of an irrevocable ordinance, as a condition of admission to the Union, to establish its capital in Guthrie. The state legislature's decision to remove the capital to Oklahoma City was challenged and the Oklahoma Supreme Court in 1911 upheld the constitutionality of the removal.[23] An appeal was made to the U.S. Supreme Court and it held:

> "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.[24]

Full Faith and Credit

A federation can be successful as an economic and a political union only if there is a constitutional requirement that each state extend full faith and credit to the laws, judicial proceedings, and records of sister states.

Although there was no written constitution during the Revolutionary War, the Second Continental Congress approved in 1777 a resolution that stipulated: "Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state."

This resolution was incorporated into art. 4, the interstate article, of the Articles of Confederation and Perpetual Union, effective in 1781, and subsequently incorporated into the U.S. Constitution, art. 4, sec. 1 with slightly different wording: "Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; and the Congress may by general laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved, and the effect thereof." Madison in "The Federalist No. 42" described the grant of prescription power as "an evident and valuable improvement on the clause" in the articles.[25]

Congress prescribed in 1790 and 1804 the authentication method for records and judicial proceedings, and in 1804 extended this guarantee to acts, thereby determining the extraterritorial effects of acts, records, and judicial proceedings of each state.[26] Congress in 1980, 1994, 1996, and 1999 enacted clarification statutes. The most famous full faith and credit prescription is the *Defense of Marriage Act of 1996* that (1) defines a marriage as "a legal union between one man and one woman as husband and wife," (2) declares the term "spouse" designates "a person of the opposite sex who is a husband or a wife," and (3) grants authority to a state to deny full faith and credit to a marriage certificate of two persons of the same sex.[27]

Each state legislature is free to enact a statute containing less stringent full faith and credits standards than the national ones with respect to authenticating judicial proceedings of other states, yet may not deny to its courts jurisdiction over cases involving duties and rights created by statutes of sister states. A state court must enforce a full faith and credit duty or right even if the court is convinced the sister state court's reasoning is invalid.

This complex and important principle, designed to promote interstate intercourse and national unity, must be read in conjunction with the Constitution, art. 3, sec. 2 granting diversity of citizenship jurisdiction to U.S. courts. A literal reading of the clause suggests a state or a federal court adjudicating a conflict between acts of two sister states would displace the act of the first state with the act of the second state.

The U.S. Supreme Court has clarified the guarantee and in early decisions mandated that full faith and credit be accorded to judicial decisions of sister states.[28] Commencing in 1866, the court struck down choice of law decisions as unconstitutional as illustrated by the decision invalidating New York's application of its law in determining the effect to be given to the judgment of the court of a sister state.[29] The court in 1877 opined explicitly the full faith and credit clause limits choice of law.[30] In 1935, the court changed direction by announcing it would evaluate "the governmental interests of each jurisdiction" and base the court's decision "according to their weight"; the court found California's interests to be superior to Alaska's interests.[31] This decision was reversed in 1939 when the court held "the very nature of the federal union . . . precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."[32]

Interstate Compacts. Interstate compacts, with the consent of Congress, date to 1785 when Maryland and Virginia entered into a compact, under provisions of art. 4 of the Articles of Confederation and Perpetual Union, regulating fishing and navigation on the Chesapeake Bay and the Potomac River.[33] Although U.S. Constitution, art. 1, sec. 10 stipulates states may enter into compacts with each other with the consent of Congress, the U.S. Supreme Court in 1893 opined that only political compacts encroaching upon national powers were subject to such consent.[34]

Compacts cover a wide variety of subject matters, including taxation, and are administered by a commission or departments and agencies of compacting states. The Multistate Tax Compact, which established an advisory commission, has been enacted by twenty-one states and the District of Columbia. An additional twenty-three states are associate members of the compact and three other states participate in certain commission projects. The United States Steel Corporation challenged the constitutionality of the compact because Congress had not granted its consent. The U.S. Supreme Court in 1978 upheld the constitutionality of the compact on the ground the compact does not "authorize the member states to exercise any powers they could not exercise in its absence."[35]

The reader should be aware the U.S. Constitution does not contain barriers to states conducting relations with sister states on the basis of reciprocity or the officers of the various states entering into formal and informal cooperative administrative agreements such as the exchange of income tax computer tapes and other tax information.[36]

Interstate Free Trade. Experience with the mercantilistic actions of states under the Articles of Confederation and Perpetual Union led the drafters of the U.S. Constitution, art. 1, sec. 8 to grant Congress plenary power over interstate and foreign commerce. As noted, art. 1, sec. 10 forbids states to levy tonnage duties, or import or export duties except to finance their inspection activities with any resulting surplus automatically dedicated to the U.S. Treasury. To promote free trade, art. 1, sec. 9 stipulates: "No preference shall be given by any Regulation of Commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one State, be obligated to enter, clear, or pay duties in another."

The commerce powers of Congress on occasions clash with the exceptionally broad reserved police power of the states that allows them to regulate persons and property in order to promote public health, safety, welfare, morals, and convenience. Suits challenging the constitutionality of state regulatory statutes and/or administrative regulations as violating the interstate commerce clause typically are successful as courts, particularly the U.S. Supreme Court, tend to give an expansive reading to the scope of the clause. In addition, tax exportation by individual states often leads to court challenges.

Privileges and Immunities. The U.S. Constitution, art. 4, sec. 2 seeks to establish interstate citizenship by the guarantee that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states," but does not define the term privileges and immunities. The U.S. Supreme Court has excluded beneficial services and political privileges from the guarantee and since 1870 often has struck down a number of taxes imposed on nonresidents. In 1870, the court invalidated a Maryland act requiring the payment of $300 per year license fee by nonresidents for the privileges of trading in products manufactured in sister states.[37]

The court in 1920 disallowed a New York State nonresident income tax on the ground that each resident taxpayer was granted a personal exemption for himself or herself and each dependent, but a nonresident taxpayer was denied the exemptions.[38] In 1948, the court voided a state law levying a $2,500 license fee on each shrimp boat owned by a nonresident and a license fee of $25 on each boat owned by a resident and emphasized the clause guarantees a citizen of one state has the right to conduct business in a sister state "on terms of substantial equality with the citizens of that state."[39]

Austin v. New Hampshire involved a privilege and immunities challenge and a Fourteenth Amendment equal protection of the laws challenge of a commuter income tax, a form of tax exportation. The New Hampshire General Court imposed a tax of 4 percent on a nonresident's