CHAPTER ONE

The Federal System

The U.S. Constitution established the world's first federal system that combines elements of a unitary system and elements of a confederal system by establishing an *imperium in imperio*, which has proven to be an exceptionally flexible economic union and an exceptionally flexible political union. The flexibility is attributable in large measure to: (1) the broad latent regulatory powers delegated to Congress, reinforced by the supremacy of the laws clause, enabling the national legislature when it so desires to be the principal architect continually readjusting the regulatory competences of the states by preempting some of their reserved regulatory powers and devolving some of its regulatory powers to states; (2) the ability of the U.S. Supreme Court to issue opinions providing definitive interpretations of the Constitution's provisions and determining the constitutionality of congressional and state statutes; and (3) congressional proposal and state ratification of constitutional amendments.

The theory of dual federalism suggests there are two separate planes of government with relatively little interaction between them. On the other hand, the cooperative theory posits continuous interactions between the national and state planes on the basis of comity. Abundant evidence reveals that the cooperative theory possesses more explanatory value than the dual federalism theory although the former theory does not fully explain the operation of the United States federal system which has evolved into an intricate web of regulation. The concluding chapter suggests a general non-equilibrium theory of federalism incorporating national-state, national-local, interstate, and state-local relations, and pertinent decisions of the U.S. Supreme Court.

Daniel J. Elazar in 1962 documented in detail national-state cooperation in the United States during the nineteenth century.[1] Writing in 1936, Jane P. Clark observed: "The Great War [World War I] impelled federal utilization of state administrative machinery because of the need for a nation-wide army organized by means which would make available concrete knowledge of local situations and personalities," including administration of the selective

service system.[2] She also provided examples of deputization of state officers by federal officers as illustrated by the food and drug administration issuing commissions to state officers, and deputization of federal officers by state officers as illustrated by state governments deputizing U.S. forest officers as state deputy fish and game wardens.[3] Similarly, federal and state officers signed a number of formal joint activity agreements and entered into informal agreements for the loan of personnel.

The focus of this volume is congressional actions facilitating exercise by states of their reserved powers to solve public problems. Interestingly, V. O. Key Jr. in 1940 authored an article—"State Legislation Facilitative of Federal Action"—pertaining to congressional New Deal acts and explaining, "The speed with which legislation was enacted by most of the states to facilitate Federal programs may be partly accounted for by the fact that most governors were in sympathy with the general aims of the National Administration."[4] He added that "it appears that there has been developed, more or less without design, a new method of linking Federal and state powers through interrelated Federal and state action."[5]

Congress assists states by enacting statutes: (1) expediting the return of fugitives from justice in asylum states, (2) devolving some of its constitutionally enumerated regulatory powers to states, (3) criminalizing the acts of a person(s) transporting across state lines of items acquired in violation of state laws, (4) providing grants-in-aid to states, (5) promoting state enactment of harmonious laws in the form of regional and national interstate compacts and uniform laws, and signing of administrative agreements, and (6) preempting state powers in a state-friendly manner. Relative to the first action above, Congress in 1793 enacted a statute outlining the procedures for the return of a fugitive from justice to settle a dispute between the governors of Pennsylvania and Virginia arising from the fact that Section 2 of Article IV of the U.S. Constitution does not contain rendition procedures.[6]

A description of the development of the federal system since 1789 will promote an understanding of the role of Congress in facilitating state actions.

Constitutional Developments

The signing of the Declaration of Independence in 1776 officially dissolved the ties of thirteen former colonies to the United Kingdom and established them as nation-states that formed a loose military alliance. The Second Continental Congress, a unicameral body composed of an equal number of members from each state, was responsible for superintendence of the prosecution of the Revolutionary War.

Articles of Confederation

Recognizing the need for a more permanent governance structure, the Congress in 1777 proposed the Articles of Confederation and Perpetual Union providing for a league of amity, but boundary disputes delayed ratification and the thirteenth state, Maryland, did not ratify the Articles until 1781.

Article II emphasized that "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." A lower case "u" was used in united to emphasize that a national government had not been established and the Articles were a treaty that united the states for only expressed purposes.

Article IV contained three important provisions promoting harmonious interstate relations. Citizens of a state were entitled to the privileges and immunities of citizens in each state visited, the asylum state governor must return fugitives from justice to the requesting state, and each state was required to give full faith and credit to the legislative acts, records, and judicial proceedings of sister states. Article IV of the U.S. Constitution incorporates these provisions as they are essential for the health of a confederate or a federal union.

Article V authorized each state legislature to appoint two to seven delegates to the unicameral Congress subject to recall. A three-year term limit over a six-year period was established for delegates appointed annually in a manner determined by the state legislature. The delegates from each state collectively possessed a single vote. No executive or judicial branch was established.

The powers of Congress were few in number and limited: borrow and coin money, declare war, establish a postal system and standards of weights and measures, negotiate treaties with foreign nations, regulate relations with Indian tribes, and set quotas for each state to furnish men and funds for the army. These limited powers and the lack of authority to levy taxes predestined the confederacy to failure.

Defects

Experience quickly exposed the defects of the Articles and the weakness of the Congress. The specific defects were Congress' reliance upon voluntary state contributions of funds, lack of authority to regulate interstate commerce and enforce its laws, difficulty in obtaining funds from foreign lenders, and inability to suppress disorders within states.

Congress authorized the printing of paper money, which almost immediately became worthless because of the inability to levy taxes to raise

revenue. This problem was not the only serious one. Article VI forbade states to "lay any imposts or duties which may interfere with stipulations in treaties" entered into by Congress with foreign nations, but Article IX stipulated commerce treaties may not prevent a state "from prohibiting the exportation of importation of any species of goods or commodities whatsoever . . ." Furthermore, the Articles did not prohibit state-erected interstate trade barriers that soon brought interstate commerce to a near standstill as illustrated by New York taxing firewood from Connecticut and cabbage from New Jersey.[7]

Captain Daniel Shays, who served in the army during the Revolutionary War, hastened the end of the confederation by leading a rebellion of disgruntled farmers in western Massachusetts in 1786 that spread to within forty-five miles of Boston. The farmers demanded a lowering of real property taxes, cheap money, and suspension of the foreclosure of mortgages. The Commonwealth of Massachusetts was powerless to suppress the rebellion and it was suppressed only when wealthy residents of Boston raised funds for an army led by General Benjamin Lincoln.[8]

The seriousness of the Articles' defects induced Maryland and Virginia boundary commissioners in 1785 to recommend that the states send delegates to a meeting in Annapolis in 1786 to develop remedies. Delegates from only five states participated in the conference and memorialized Congress to call a convention to consider drafting amendments to the Articles. Reluctantly, Congress called a convention to meet in Philadelphia in 1787.

The Constitutional Convention

All states, except Rhode Island, sent delegates to the convention, which met from March 25 to September 17, 1787. Although the states appointed seventy-four delegates, nineteen refused to accept appointments or did not attend the convention. Philosophical and sectional differences divided the assembly with delegates representing the former expressing the fear a stronger national government would be a threat to individual liberties. The latter differences were attributable to the nature of the economy in each region. Five days of negotiations led to a six to one decision to replace the Articles of Confederation and Perpetual Union with a new constitution. Delegates from five states had not arrived by the time of the vote.

Delegates debated whether the proposed Congress should be granted authority to review and invalidate state laws, but decided the constitution should not delegate this power. The controversy over state representation in the proposed unicameral Congress, between states with large and small populations, was resolved by the Connecticut compromise providing for a bicameral national legislature with a senate representing each state

equally and a house representing each state in accordance with its population, with the proviso that each state would have a minimum of one representative.

Slavery was the subject of a third controversy, with the northern states generally advocating the immediate termination of the importation of slaves. The agreed-upon compromise clause provides that slaves could be imported for twenty years and Congress could levy a tax of up to ten dollars on each slave imported.

Whether Congress should be authorized to impose import and export duties generated a fourth controversy, with the northern states in favor as a source of national revenue and southern states opposed because they would be paying most of the duties in view of the fact that they exported the bulk of their products, which were chiefly agricultural, and imported most of their needed manufactured products. The arrived-at compromise provided Congress could tax imports but not exports.

These divisions and compromises should not blind the reader to the fact that there was no serious opposition to fifteen of the eighteen powers proposed to be delegated to Congress. In addition, there was near-unanimous agreement regarding the various prohibitions placed upon Congress and the requirement that states must obtain the permission of Congress to initiate specified proposed actions, including entrance into interstate compacts or agreements or levying of imposts on imports and exports.

The delegates approved a constitution establishing a strong President, a Supreme Court, and a Congress possessing specific delegated powers (see below). Fear of a centralized government was reduced by inclusion of "checks and balances" designed to protect the semi-sovereignty of the states and individual liberties from abuse.

Ratification Campaign

The convention sent the proposed constitution, which was not a popular document, to the state legislatures with the stipulation that each should arrange for the election of delegates to a special convention with the power to ratify or reject the document. The proposed fundamental law was met by several immediate objections: The convention was called to revise the Articles of Confederation and Perpetual Union and not to discard them; The Articles could be amended only with the unanimous consent of the states; The proposed Congress either would be too strong or too weak; And the new government either would be too independent of the states or too dependent upon them. Opposition was strongest in the interior of the nation and regions with a small population. Not surprisingly, farmers and imprisoned debtors favored cheap paper money issued by states.

The proposed fundamental law forbade Congress to suspend the writ of habeas corpus unless a rebellion or invasion threatens public safety. Congress and the states were forbidden to enact a bill of attainder or ex post facto law, and to impair the obligation of contracts. Opponents focused much of their criticism on the lack of a bill of rights, similar to ones in state constitutions, guaranteeing freedom of assembly, petition, press, religion, and speech. Proponents argued that a bill of rights would be superfluous in view of the fact the constitution grants no powers to Congress to limit the liberties of citizens.

Article VII of the proposed fundamental law stipulates it would become effective when ratified by nine states. The Delaware, New Jersey, and Pennsylvania conventions quickly ratified the proposed fundamental law and were followed by the approval of conventions in Connecticut and Georgia. Strong opposition continued in Massachusetts, New York, and Virginia, and their rejection would doom the proposed constitution.

The Federalist and Antifederalist Papers

Alexander Hamilton, John Jay, and James Madison wrote a series of eighty-five letters to editors of New York City newspapers during the winter and spring of 1787–88 to convince delegates to the state convention to ratify the proposed constitution. The first thirty-six letters were published as a book in late March 1788, the remaining letters were published as a second book in late May, and the two books later were consolidated into one.[9] These letters are excellent expositions meriting reading today.

The writer of each letter explained and defended a provision of the proposed constitution and ended the letter with the name *Publius*. Madison in "The Federalist Number 39" explained that the constitution would establish a governance system that would be "neither wholly national nor wholly federal [confederate]."[10] It is important to recall that the words *confederation* and *federation* in the eighteenth century were used interchangeably. Supporters of the constitution termed themselves federalists in an apparent attempt to appeal to persons opposing a strong national government.

Madison in "The Federalist Number 45" emphasized "the powers delegated by the proposed constitution to the federal government are few and defined" and added in "The Federalist Number 46" that "a local spirit will infallibly prevail much more in the members of Congress than a national spirit will prevail in the legislatures of the particular states."[11]

Opponents feared the supremacy of the laws clause would permit Congress to convert the proposed federal governance system into a unitary one. Hamilton in the "Federalist Number 33" sought to allay this fear: "If a number of political societies enter into a larger political society, the laws

which the latter must enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and individuals of whom they are composed. It would otherwise 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."[12]

It is apparent these letters were influential in swaying public opinion in general and in particular the views of delegates to the New York convention, as the latter often lacked a complete understanding of the reasons why each provision was included in the proposed fundamental law.

A series of sixteen letters, signed *Brutus*, was published in the *New York Journal* in the period October 1787 to April 1788 and were designed to rebut the arguments of the proponents. Although not proven conclusively, available evidence suggests the letters were written by Robert Yates, a delegate to the Philadelphia constitutional convention and an associate of Governor George Clinton of New York. These papers were not published in book form as *The Antifederalist Papers and the Constitutional Convention Debates* until 1986.[13]

Brutus, in a letter published on October 18, 1787, attacked the necessary and proper clause and the supremacy of the laws clause and reached the following conclusion:

> It is true the government is limited to certain objects, or to speak more properly, some small degree of power is still left to the States, but a little attention to the powers vested in the general government, will convince every candid man, that if it is capable of being executed, all that is reserved for the individual States must very soon be annihilated, except so far as they are barely necessary to the organization of the government. 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 every power given.[14]

The "Federalist Papers," although influential, did not allay the fear of many citizens that the proposed constitution would create a strong national government. Thomas Jefferson wrote a letter to Madison implying that the Virginia ratification convention would not ratify the proposed document until a bill of rights was incorporated.[15] Proponents, in order to convince the conventions in the larger states to ratify the document, promised the

first action taken by Congress under the constitution would be the proposal of a bill of rights.

The constitution officially was ratified when the New Hampshire ratification convention, the ninth one, approved the fundamental document in June 1788. In consequence, elections were held for presidential and vice presidential electors and members of the U.S. House of Representatives in 1788, each state legislature appointed two U.S. senators, and the new national government became effective in 1789.

The Fundamental Law

The U.S. Constitution incorporates elements of the unitary and confederate systems of governance to form simultaneously a compound republic and a unitary government by granting Congress complete control over the District of Columbia and U.S. territories.[16] The fundamental law delegates to Congress specific regulatory powers and one service provision power, the postal service, including exclusive and concurrent ones. Ratification of the Tenth Amendment in 1791 reserves all other powers not delegated or prohibited to the states and the people.

Delegated Powers

Section 8 of Article I delegates the following powers to Congress:

> To lay and collect taxes, duties, imposts and excises, to pay the debts and to provide for the common defence and general welfare of the United States, but all duties, imposts, and excises shall be uniform throughout the United States;
> To borrow money on the credit of the United States;
> To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes;
> To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;
> To coin money, regulate the value thereof, and of foreign coin, and fix the 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, 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 government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; —and
To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Implied Powers

An argument erupted between individuals supporting a loose interpretation of the delegated powers and those favoring a strict interpretation. Hamilton, for example, maintained Congress was empowered to charter a national government bank and Jefferson countered Congress lacked such a power since chartering a bank was not among the delegated powers.

Enactment of the *Alien and Sedition Acts* disturbed Jefferson and Madison. The latter expressed his strong opposition to the acts: "The sedition act presents a scene which was never expected by the early friends of the Constitution. It was then admitted that the State sovereignties were only diminished by powers specifically enumerated, or necessary to carry the specified powers into effect. Now, Federal authority is deduced from implication;

and from the existence of State law, it is inferred that Congress possesses a similar power of legislation; whence Congress will be endowed with a power of legislation in all cases whatsoever; and the States will be stripped of every right reserved, by the concurrent claims of a paramount legislature."[17]

Implied powers are essential for implementation of expressly delegated powers. The necessary and proper clause, also known as the elastic clause, is the basis of the doctrine of implied powers enunciated by the U.S. Supreme Court in *McCullough v. Maryland* in 1819: "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]

Resultant Powers

Two or more expressly delegated powers can be utilized by Congress to infer it possesses a resultant power. For example, Congress expressly is authorized "to establish a uniform rule of naturalization," but is not specifically delegated the power to regulate immigration. The Constitution also grants Congress authority to regulate commerce with foreign nations. This power, the power to regulate the naturalization of aliens, and the power of the Senate to confirm treaties with foreign nations negotiated by the president serve as the constitutional basis for regulation of immigration.

A second example is congressional use of its delegated powers to borrow funds and to coin money as constitutional authority to issue paper money.

The Supremacy of the Laws Clause

This clause, in common with the necessary and proper clause, does not delegate a power to Congress. A compound republic with a national legislature and state legislatures with each possessing concurrent powers is faced with the problem of potential conflicts of laws. To solve such conflicts, Article VI of the constitution stipulates: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the Constitution or Laws of Any state to the contrary notwithstanding."

The reader should be aware the lower U.S. courts and the U.S. Supreme Court do not always invalidate a state constitutional provision or statute facially conflicting with an act of Congress by opining the conflict is not the type conferring jurisdiction upon these courts. It also should be noted courts often negate only one or two sections of a state statute conflicting with a

congressional enactment and the remainder of the state statute remains in effect unless it contains a provision for invalidation of the entire law in the event a section is found to be unconstitutional.

A significant number of congressional statutes do not contain an expressed preemption provision removing regulatory powers from subnational governments, and consequently state and U.S. courts are called upon to rule whether these statutes are preemptive and whether they supersede all state authority in the regulatory field or only part of it.

The General Welfare Clause

A number of observers misinterpret this clause, which does not delegate a power to Congress, as authorizing enactment of any law promoting the general welfare of the United States. Such interpretation would mean the governance system of the United States is a unitary one in view of the supremacy of the laws clause that provides for the supersession of any provision in a state constitution or statutes in direct conflict with a congressional act.

The Constitution authorizes Congress to provide only one service, the postal service, on other than federal property within states; state and local governments provide all other services. Furthermore, the Constitution does not delegate authority to Congress to exercise the police power as it is the exclusive reserved power of states to regulate individuals and property in order to promote and protect public health, safety, welfare, morals, and convenience. Congress, however, encourages provision of services by subnational governments and influences their nature by means of conditional grants-in-aid and employs its interstate commerce regulatory power to protect public health, safety, welfare, and morals of citizens.

Congressional Preemption

Knowledge of the constitutional basis of congressional preemption statutes is essential to understand their importance and the changes in the nature of the federal system produced by such statutes removing completely or partially regulatory powers from states and by extension local governments.[19]

The U.S. Constitution delegates powers in broad terms to Congress to be employed in response to challenges and problems, domestic and international, thereby guaranteeing the fluid nature of the federal governance system. The reader should note these powers are latent ones exercisable by Congress on a discretionary basis. The failure of Congress to enact a regulatory power based upon its authority to regulate interstate commerce until 1887 led many writers and the U.S. Supreme Court to refer to the silence

of Congress.[20] Additionally, Congress is free to devolve its legislative powers, except coinage, to state legislatures and has enacted several devolution statutes commencing with a 1789 act devolving to state legislatures the power to regulate marine port pilots (see chapter 2).[21]

Nature of Preemption

The national legislature can utilize its delegated powers to enact at any time statutes removing partially or completely and prospectively and/or retrospectively the regulatory powers of subnational governments in a given field. Furthermore, a preemption provision not based upon an expressly delegated power, such as one regulating migratory birds, can become effective by the president negotiating a treaty with a foreign nation and approval of the treaty by the Senate in accordance with Section 2 of Article II of the U.S. Constitution. Bills implementing free trade concordats with other nations in recent years have been termed agreements, such as the North American Free Trade Agreement, rather than treaties, as the former requires only an affirmative majority vote of each house for passage compared to a two-thirds affirmative vote in the Senate required for approval of a treaty.[22] Occasionally, Congress includes a savings clause in a statute preserving part of the regulatory authority of states in what otherwise would be a complete preemption act (see chapter 2).

Critics of congressional preemption statutes refer to the costs imposed upon states and some suggest subnational governments are becoming little more than administrative subdivisions of the national government. In fact, many complaints about federal mandates and federal restraints do not involve preemption and are the result of subnational governments applying for and accepting federal conditional grants-in-aid.

Important preemption statutes are the product of interest group lobbying. President Lyndon B. Johnson sent a message to Congress in 1967 recommending enactment of an air quality statute removing all regulatory powers from the states. Governor Nelson A. Rockefeller of New York led a campaign to forestall enactment of such a law and proposed as an alternative a series of interstate compacts including the mid-Atlantic states air pollution control compact, which was enacted by the Connecticut, New Jersey, and New York state legislatures. The attempt was unsuccessful as the compact did not receive the constitutionally required consent of Congress, but helped to persuade Congress to enact the *Air Quality Act of 1967* allowing states to continue to regulate air pollution abatement, except emissions from motor vehicles, provided state standards are at least as stringent as the national standards and are enforced by qualified personnel.[23]

The motor vehicle industry, for example, in the mid-1960s was facing the spread of nonharmonious state emissions standards, feared each firm might have to develop as many as fifty emission control systems, and pressured Congress to enact the proposed *Air Quality Act of 1967*. California had stricter motor vehicle air quality emission standards than the proposed national standards that would have been superseded, and lobbied for an exemption that was incorporated in the act.

Although preemption statutes remove regulatory powers from states, the latter do not always oppose enactment of such statutes and occasionally governors request Congress to enact a specific act. The national governors association, for example, requested Congress to enact the *Commercial Motor Vehicle Safety Act of 1986* because states could not solve the problem created by operators of commercial vehicles holding operating licenses from more than one state and continuing to drive after state revocation of their license for dangerous driving by utilizing a license issued by a sister state (see chapter 6).[24]

Most preemption statutes are based upon the interstate commerce clause, but others are based upon constitutional authority to enact laws relating to bankruptcy, copyrights, foreign commerce, naturalization, patents, and taxation. The coverage of a preemption statute may be broadened by enactment of amendments, as illustrated by the *Clean Air Act Amendments of 1990*.[25] A small number of preemption laws each contains a sunset clause providing for the expiration of the law on a specified date unless Congress extends the law.[26] A preemption statute may be as short as one page or several hundred pages in length. Congress increasingly has been including such statutes in detailed and lengthy omnibus appropriation acts and other annual appropriations acts.

Types

The body of laws produced by preemption statutes is complex. Such statutes may be classified by type as complete, partial, and contingent.[27] The first type removes all state regulatory authority in a given regulatory field, but may permit states to cooperate in the enforcement of the act. An examination of such statutes reveals there are eighteen subtypes including ones dependent upon state assistance for the achievement of their respective goal(s). A non-preemptive statute—*Do-Not-Call Implementation Act of 2003*—is becoming a de facto complete preemption act as states, which initiated such registries, transfer them to the federal registry.[28]

There are four types of partial preemption statutes. A partial preemption statute may (1) occupy part of a specified regulatory field,

(2) establish minimum regulatory standards allowing a state granted regulatory primacy by the U.S. Environmental Protection Agency (EPA) or the U.S. Department of the Interior to continue to regulate the field completely provided its standards meet or exceed the national ones and are enforced, (3) authorize a state to establish a more stringent regulatory standard in a particular field without advanced approval of a U.S. department or agency, or (4) permit a state to establish a more stringent procedural standard in a specified field without advanced federal approval. Two more stringent state regulatory standards preemption acts and one more stringent state procedural standards act have been enacted to date. The latter act is the first of its type and is contained in the *Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005*.[29]

The type of partial preemption that has had the greatest impact on the nature of the federal union is minimum standards preemption, a state-federal partnership approach, encouraging states to employ their latent reserved powers (see chapter 2). States are completely responsible for regulating, and the concerned national agency's role is monitoring state performance and providing financial and technical support.

Enactment Pace

Congress enacted its first two preemption statutes in 1790: The *Copyright Act* and the *Patent Act*. The enactment pace subsequently was slow, with only twenty-nine acts enacted by the end of the nineteenth century.[30] Such statutes continued to be enacted at a slow pace during the first five decades of the twentieth century: fourteen (1900–09), twenty-two (1910–19), seventeen (1920–29), thirty-one (1930–39), sixteen (1940–49), and twenty-four (1950–59). The enactment pace increased sharply commencing in 1965: 47 (1960–69), 102 (1970–79), 93 (1980–89), 84 (1990–99), 106 (2000–07), and 124 (2000–08). By May 1, 2009, 609 preemption statutes had been enacted since 1790.

It is important to note the number of preemption acts enacted during any given time period is not an accurate indicator of the amount and importance of regulatory authority removed from states and their political subdivisions. For example, President George W. Bush approved eighty-four preemption acts in the period 2001–07, yet relatively little exercised regulatory powers were removed from states although each of the three Internet tax freedom acts prevent states from levying and collecting internet access taxes.[31]

The Republican-controlled Congress (1995–2006) reacted to state and local government officers' criticisms of unfunded mandates by enacting the *Unfunded Mandates Reform Act of 1995* establishing mandatory procedures Congress must follow to enact mandates, but not forbidding the enactment

of such mandates.[32] This Congress also enacted the *Safe Drinking Water Act Amendments of 1996* offering relief from the expensive filtering mandates that were forcing small local governments either to file for bankruptcy protection or to abandon their drinking water supply systems and also were imposing major financial burdens on larger local governments.[33]

Significance of Preemption

The U.S. Constitution does not contain a mechanism ensuring that the initially established division of powers between the national government and the states would continue into the future. Congress was designed with the expectation that it would employ its latent delegated regulatory powers and become the supreme regulator adjusting the nature of the federal union to meet emerging challenges and problems. Extensive congressional use of its preemption powers since 1965 has produced without constitutional amendments what may be labeled a major governance revolution silently transforming the nature of the national economic union and the national political union. It is particularly noteworthy that Congress since 1978 has enacted preemption statutes providing for increased regulation of states as polities and extensively deregulating the banking, electric energy, natural gas, telecommunications industries. Furthermore, Congress enacted statutes providing for the complete economic deregulation of air, bus, and rail transportation companies.

Democratic theory is premised upon active and informed citizens participating in the governance process. Such participation is limited when Congress makes preemption decisions. Although public hearings are held on a number of preemption bills, few citizens possess the necessary funds and time to travel to Washington, D.C., to testify and they also lack the detailed technical information and staff possessed by resource-rich special interest groups.

Many preemption statutes, particularly environmental regulatory ones, are outline or skeleton laws containing broad policy outlines and authorizing heads of departments and agencies to promulgate detailed implementing rules and regulations. The enhanced role of bureaucrats in determining public policy raises questions of the democratic legitimacy of the policymaking process as citizens have limited opportunities to influence the rule-making process compared to interest groups.

In contrast to national decision making, the local government plane, with its relatively small geographical scale, provides citizens with the greatest opportunity to exert effective influence during the policymaking process. To the extent congressional preemption, directly or indirectly through the states by means of minimum standards preemption statutes, limits the discretionary

authority of general-purpose local governments, participatory democracy will suffer. This conclusion is reflected in public opinion polls consistently revealing that citizens generally have the highest respect for local governments and the least respect for the national government.

Congress finances in part programs established by preemption statutes by including in them unreimbursed mandates which often are costly and must be implemented by subnational governments. Several of these statutes also include restraints forbidding these governments to initiate specified actions and necessitating the use of costly alternatives. The *Ocean Dumping Ban Act of 1988*, for example, prohibits dumping of sewage sludge in the ocean and thereby requires municipalities located near an ocean to utilize the expensive alternative of incinerating the sludge or placing it in a landfill.[34] The *Unfunded Mandates Reform Act of 1995* has not provided relief to state and local government from such mandates and restraints. The *Safe Drinking Water Act Amendments of 1996*, on the other hand, offer major relief to public suppliers of drinking water, particularly small suppliers.

The fact that regulatory decision making has become more centralized in Congress, which has become a unitary government in fields it has completely preempted, should not obscure the fact that states retain a broad range of regulatory powers and continue to enact innovative statutes subsequently enacted by Congress and sister states. Somewhat surprisingly, the national government directly administers few programs it did not administer prior to 1965 and continues to rely heavily upon states for assistance in emergencies, inspections and enforcement of national regulatory standards, planning, and technical assistance.

States utilize their concurrent powers to continue to regulate effectively in partially preempted fields and occasionally demonstrate the inadequacy of enforcement by a national department or agency, as illustrated by New York State Attorney General Eliot Spitzer who employed a decades-old state law to sue successfully the ten largest Wall Street brokerage firms for fraud.[35] The U.S. Securities and Exchange Commission, charged with administering ten regulatory statutes, was embarrassed by Spitzer's success in this suit and other suits.

Available evidence indicates Congress will continue to enact preemption statutes, some with innovative state opt-in and/or opt-out provisions, at a relatively rapid pace to cope with problems flowing from growing globalization of the U.S. economy, free trade agreements with foreign nations, interest group lobbying, and technological developments. The foci of such statutes probably will be consumer protection, banking, communications, environmental protection, financial services, and protection from terrorists. If state legislatures fail to harmonize their statutes levying taxes upon inter-

state commerce, it is probable that Congress will break more frequently its silence on such taxation by enacting preemption statutes.

An Overview

The remaining chapters examine the facilitating roles played by Congress in assisting states to achieve their respective goals.

Chapter 2 explains the powers devolved by the U.S. Constitution to the states and focuses primarily upon congressional devolution of certain of its legislative, executive, and administrative powers to states, thereby strengthening their position as residuary sovereigns.

Chapter 3 examines congressional acts designed to facilitate enforcement of state criminal and other laws dating to the *Wilson Act of 1890* stipulating alcoholic beverages entering a state are subject to its police power.

The subjects of chapter 4 are the respective power of Congress and state legislatures to tax, federal direct and indirect financial assistance dating to Congress in 1790 assuming the Revolutionary War debt of the states, and subsequent administrative assistance to states.

Chapter 5 describes congressional actions (1) encouraging state legislatures to enact harmonious regulatory statutes including interstate compacts and uniform state laws drafted by the national conference of commissioners on uniform state laws and other organizations, and (2) facilitating the entrance of states into interstate administrative agreements such as the international fuel plan and the international registration plan.

The subject matter of chapter 6 is state-friendly congressional preemption statutes including ones (1) requested by state officers such as the *Commercial Motor Vehicle Safety Act of 1986*, (2) with innovative provisions containing opt-in and/or opt-out sections as found, for example, in the *Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994*, and (3) directly benefiting states as illustrated by the *Abandoned Shipwreck Act of 1987*, which gives a clear title to a shipwreck to the state in which the wreck is located.

The concluding chapter (1) reviews congressional statutes and resolutions facilitating state governmental action, (2) presents recommendations to enhance the facilitating role of Congress, (3) draws conclusions with respect to the degree to which the current federalism theories adequately explain the functioning of the federal system, and (4) offers the outline of a broader theory of federalism encompassing national-state, national-local, interstate, and state-local relations, and decisions of the U.S. Supreme Court.