ONE

THE IMPORTANCE OF WATER

Citizens, with the exception of residents of arid areas, generally have relatively little knowledge of the importance of water and its multitudinous uses. The continuing population growth in the United States, and increasing agricultural and industrial consumption of water resulted in water shortages in areas that had been blessed with an ample supply of this natural resource. The U.S. General Accounting Office (now U.S. Government Accountability Office) in 2003 noted that "while rainfall averages 30 inches annually nationwide, the average for specific areas . . . generally increases from west to east, from less than 1 inch in some desert areas in the Southwest to more than 60 inches in parts of the Southeast."[1]

The six-year drought in California that began in 1987 promoted numerous water conservation measures by individuals and companies, including semiconductor firms that launched a conservation program reducing by 50 percent water consumption by 2001.[2] Similarly, a California family of five in the Silicon Valley reduced its water consumption by the same percentage. The replacement of many heavy industrial firms by high technology firms also reduced industrial consumption of water. Water shortages nevertheless continue in sections of the United States, and the problem is projected to become more serious with continued growth in population and industrial activities.[3] Compounding the problem in the west of the United States is the diminished Rocky Mountains snow packs. The seriousness of the water problem was highlighted in a *New York Times* headline on September 28, 2010, that referred to the eleven-year drought in the Southwest: "Water Use in Southwest Heads for a Day of Reckoning."[4] Desalination has become relatively common in parts of the world and may be adopted more widely in the United States.[5]

Robert Kunzig reported that the southwest of the United States experienced droughts for centuries as revealed by tree rings, and observed "global warming could make things even uglier."[6] Much of the development in

the Southwest occurred during the twentieth century that was the wettest century during the previous one thousand years. Projections indicate a continued decline in precipitation in the Southwest with forests dying, and new dust bowls developing by the middle of the twenty-first century.[7] A 2009 study of the droughts of the 1950s and 2000s noted "induced significant vegetation mortality in biomes from deserts to forests" caused air pollution, and prolonged the wildfire season.[8]

A 2005 study identified 248 droughts in the United States in the period 1920 to 2003, and reached the following conclusions: (1) The most severe droughts occurred in the 1930s and the 1950s; (2) the drought commencing in 2000 in the West is one of the most severe droughts; and (3) "runoff tends to recover in response to precipitation more quickly than soil moisture. . . ."[9] Rapid population growth in the Southeast of the United States in recent decades, combined with periodic droughts, resulted in serious water shortages, and in common with the Colorado river, led to interstate river water disputes. A 2009 study examined the causes of periodic droughts in the region and the potential for future water shortages, noted an association between changes in El Nino and winters in the Southeast that were wet, and added there is "evidence of some long multiyear droughts" that will occur in the future.[10]

State governments historically regulated water, and Congress generally recognized the primacy of the states relative to the allocation of interstate water, fisheries, and water pollution abatement. In other words, the theory of dual federalism (see below) accurately described federal-state water relations during this time period.

Aspects of water regulation subsequently became subject to federal regulation as the result of United States water treaties with Canada, Mexico, and Indian nations—and the congressional enactment of statutes regulating the use of water and water pollution abatement.[11] Commencing in 1965, Congress adopted a new approach to abatement of the water pollution involving minimum national water quality standards that are described below. This approach comports with the theory of cooperative federalism that explains national-state relations. Congress, however, has not enacted a comprehensive water resources policy since the Water Resources Planning Act of 1965.[12]

The Congressional Research Service (CRS) noted in 2009 that Congress' approach to the regulation of water has not been "done in a coordinated or overarching way. Any attempt to untangle the complexities of current water policy involves many constituencies with differing interests, and becomes politically difficult to sustain. Instead of comprehensive or overarching legislation, Congress enacted numerous incremental changes, agency by agency, statute by statute."[13] The CSR reported that many

problems identified by the national water commission in its 1973 report were present in 2009 because of "the difficulty in reaching agreement among the varied stakeholders as to the proper and respective roles and responsibilities of federal, state, local, tribal, and nongovernmental entities in water management and the distinct dichotomy between agencies, institutions, and constituencies dealing with various aspects of water resources issues on the one hand and water quality issues on the other."[14] The commission's final report contains 17 chapters and appendixes, and 232 recommendations.

The Boundary Waters Treaty of 1909 with Canada establishes a cooperative approach to regulation of rivers traversing parts of the two nations, and established the international joint commission with advisory powers pertaining to certain water problems.[15] The United States and Canada also entered into the Columbia River Treaty of 1944, providing for the construction of three water storage dams in British Columbia, and the Pacific Salmon Treaty of 1986 (see chapter 3).[16] Furthermore, the United States and Mexico entered into a 1944 treaty pertaining to the use of the waters of the Colorado, Rio Grande, and Tijuana rivers.[17] This treaty allocated the waters of the Colorado river between the two nations, but Article X stipulates that the United States does not have to fulfill its delivery obligation to Mexico during an extraordinary drought.

Water pollution and/or shortages in many instances generated major interstate controversies—including diversion of water from major rivers such as the Colorado river, the Hudson river, and the Missouri river. The initial approach to resolving an interstate water diversion controversy was the filing by a state(s) of a petition in the U.S. Supreme Court seeking to invoke its original jurisdiction to provide an equitable settlement (see chapter 2). A better approach was adopted when Congress in 1928 granted its consent to the Colorado River Interstate Compact, drafted in 1922, apportioning the waters of the river between the lower-basin states of Arizona, California, and Nevada.[18]

Interstate compacts cover the alphabet from agriculture to water. This volume examines such compacts, federal-interstate compacts, interstate administrative agreements, and federal-interstate administrative agreements pertaining to water for the following purposes: Agriculture, economic development, environmental pollution abatement, fisheries, flood control, and transportation—including bridges over lakes and rivers. Currently, there are twenty-six water apportionment compacts, seven water pollution control compacts, eight water resources and flood control compacts, and numerous interstate administrative agreements. Examples of such compacts and administrative agreements are the Atlantic States Marine Fisheries Compact, the Chesapeake Bay Compact, the Connecticut River Anadromous Fish Restoration Compact, the Connecticut River Flood Control Compact,

the Delaware River Basin Compact, the Lake Michigan Crime Control Compact, the Merrimack River Anadromous Fish Restoration Interstate Administrative Agreement, the New England Interstate Water Pollution Control Compact, the Ohio River Valley Water Sanitation Compact, the Port Authority of New York and the New Jersey Compact, and the Yellowstone River Compact.

Interstate administrative agreements, signed by officers of two or more states, have some of the characteristics of an interstate compact and often are used for the same purpose(s) as that of a compact. A major difference between the state unifying devices is the constitutionally required consent of Congress for interstate compacts that encroach upon the powers of the U.S. government. Administrative agreements are not enacted into law by state legislatures and hence are exempt from the consent requirement. In 1893, the U.S. Supreme Court rendered a most important decision, opining that only interstate compacts encroaching upon the constitutional domain of the U.S. government require congressional consent in order to become effective.[19]

A brief section on current theories of federalism will assist the reader in comprehending the nature of the United States federal system, obstacles to the initiation of remedies for public problems, and the importance of federal-state cooperation and interstate cooperation.

THEORIES OF UNITED STATES FEDERALISM

The theory of dual federalism, the theory of cooperative federalism, and the limited theory of the safeguards of federalism have been developed to explain the United States governance system.

Dual Federalism

The distribution of powers between the national government and the state governments by the U.S. Constitution constitutes the core of the theory of dual federalism that often is described as layer-cake federalism. In 1950, Edward S. Corwin defined dual federalism by developing the following postulates:

1. The national government is one of enumerated powers only;
2. Also the purposes which it may constitutional promote are few;
3. Within their respective sphere the two centers of government are "sovereign" and hence equal;

4. The relations of the two centers with each other is one of tension rather than collaboration.[20]

A fifth postulate is needed today because a number of congressional preemption statutes enacted subsequent to 1950 impose mandates and prohibitions on the states: "One plane of government does not employ coercive powers against the other plane."

Most students of federalism find relatively little explanatory value in this theory as it is a simplistic and static model of national-state relations, positing changes in such relations can be accomplished only by formal amendment of the U.S. Constitution or ratification of a new constitution. The inadequacies of this theory are revealed by congressional devolution of powers statutes; preemption statutes; cross-cutting statutes, cross-over and tax sanctions; and constitutionally mandated provisions promoting cooperative national-state relations. Examples of the latter include state conduct of elections of federal officers, state legislatures consideration of constitutional amendments proposed by Congress or a national convention, and state militia trained in accordance with a nationally prescribed discipline.

Cooperative Federalism

This theory is traceable in origin to James Madison of Virginia who wrote the national government "cannot be maintained without the co-operation of the States. . . ."[21] In 1962, Daniel J. Elazar authored a book that proved a rigid dual system of federalism never existed in the United States and the hallmark of national-state relations since the early days of the federal system had been cooperation.[22] The theory of vertical cooperative federalism embodies the existence of two planes of government that is the essential feature of dual federalism, yet differs from it by explaining the that the relations between the national government and the state governments are based on cooperation. It is important to note that the theory of cooperative federalism postulates one plane of government does not coerce or encroach upon the sphere of the other plane. The theory of horizontal cooperative federalism postulates states cooperate with each other to solve common problems as symbolized by their entrance into interstate compacts, enactment of uniform laws and reciprocity laws, and other cooperative actions.

The vertical theory of cooperative federalism promotes a better understanding of the federal system, but fails to explain the structuring of national-state relations by congressional enactment of preemption statutes and devolution statutes, cross-over sanctions attached to grants-in-aid, and tax sanctions.[23]

The federal system today approximates a mutuality model emphasizing interlevel interdependence, with the national government and states each relying on the other(s) for the performance of certain functions—such as standards setting, enforcement of laws, financial assistance, and technical assistance. Minimum-standards preemption, in particular, helps to retain the diffusion of political power to a large extent, thereby preventing over-centralization of political power flowing from complete congressional preemption of state regulatory powers

The theory of cooperative federalism provides a fuller explanation of national-state relations, but does not explain congressional restructuring of such relations by means of preemption statutes containing mandates and restraints; other statutes containing cross-cutting, cross-over, and tax sanctions; and still other statutes devolving congressional powers to states.[24]

Safeguards of Federalism

The kernel of this theory is contained in the 1824 opinion of Chief Justice John Marshall of the U.S. Supreme Court who referred to the delegated powers of Congress and opined "the wisdom and the discretion of Congress, their identity with the people, and the influence which their constituent possess at elections, are . . . the sole restraints on which they have relied to secure them from its abuse."[25]

Herbert Wechsler in 1953 built upon Marshall's statement and developed the political safeguards' theory of federalism, explaining state officers can employ the political process to defeat bills in Congress designed to remove state regulatory powers or otherwise disadvantage states.[26] This theory can be expanded by a thesis positing Congress will respond favorably to strong state pressure for relief from a preemption statute or a U.S. Supreme Court decision imposing a burden on most or all states.

A fuller understanding of the compacting process and interstate compacts will be facilitated by a review of pertinent provisions of The Articles of Confederation and Perpetual Union and the United States Constitution relating to compacts, and relevant U.S. Supreme Court decisions.

INTERSTATE COMITY

The U.S. Constitution established the world's first federal system that may be described as an imperium in imperio (an empire within an empire), a pertinent descriptor as sovereign powers are divided between the U.S. government and the state governments. The establishment of a federal system automatically produces national-state relations and interstate relations that may involve competition, cooperation, and/or conflict. The U.S. Constitution contains interstate provisions based upon provisions in

the Articles of Confederation and Perpetual Union, and a provision for the judicial resolution of interstate controversies.[27]

Articles of Confederation

The second Continental Congress drafted the Articles in 1777 and submitted them to each of the thirteen states for ratification with the proviso that the articles would become effective only upon ratification by all states. Maryland, the thirteenth state, in 1781 ratified the articles, and they became effective.

KEY ARTICLES

Article I entitled the confederacy as "The United States of America," and Article II declared: "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."

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

Three provisions in Article IV sought to ensure harmonious relations between the sister states. A citizen of a member state is entitled to the privileges and immunities of citizens in each state visited, the governor of an asylum state must return a fugitive from justice to the requesting state, and each state must give full faith and credit to the legislative acts, judicial proceedings, and records of sister states. These provisions are incorporated in Article IV of the U.S. Constitution.

Article V grants each state legislature authority to appoint two to seven delegates to the unicameral Congress and to recall them. 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 a state collectively possessed a single vote. The reader should note the articles did not create an executive branch or a judicial branch.

The delegated powers of the Congress were limited to borrowing, coining money, declaring war, establishing a postal system and standards of weights and measures, negotiating treaties with foreign nations, regulating relations with Indian tribes, and setting the quota for each state to furnish men and funds for the army. The lack of authority to levy taxes and the limited powers of Congress suggested the confederacy would not be a viable political institution.

DEFECTS

The articles' defects soon were exposed: the reliance of Congress upon voluntary state contributions of funds, the lack of authority to regulate commerce among the thirteen states and to enforce its enacted laws, the difficulty in obtaining loans from foreign lenders, and the inability to suppress civil disorders within states.

Paper money printed by the confederacy almost immediately became worthless because of the inability of Congress to levy taxes to raise revenue. Another serious problem involved two conflicting articles. 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 or importation of any species of goods or commodities whatsoever. . . ." More importantly, the articles did not forbid states to erect interstate trade barriers, illustrated by New York taxing firewood from Connecticut and cabbage from New Jersey, and commerce among the states was brought to a near standstill.[28]

The confederation's end was hastened by Captain Daniel Shays, an army veteran of the Revolutionary War, who lead a rebellion of disgruntled farmers in western Massachusetts in 1786 that spread to within forty-five miles of Boston. They sought cheap money, a lowering of real property taxes, and suspension of mortgage foreclosures. The Commonwealth of Massachusetts was unable to suppress the rebellion, and it was suppressed only when wealthy residents of Boston raised funds for an army led by General Benjamin Lincoln.[29]

The articles' major defects induced the Maryland and Virginia boundary commissioners in 1785 to recommend that states send delegates to a meeting in Annapolis in 1786 to develop remedies for the defects. Only five states sent delegates to the conference, and they memorialized Congress to call a convention to consider drafting amendments to the articles. Congress reluctantly called a convention to meet in Philadelphia in 1787.

The Constitutional Convention

Rhode Island was the only state that did not send delegates to the convention that met from March 25, to September 17, 1787. States appointed seventy-four delegates, but nineteen refused to accept appointments or did not attend the convention. The assembly was divided by philosophical and sectional differences with delegates representing the former expressing the fear that a stronger national government would be a threat to individual liberties. Other differences were attributable to the nature of the economy in each

region. A decision was made by a six-to-one decision after five days of negotiations to replace the Articles of Confederation and Perpetual Union with a new fundamental law. The vote was taken prior to the arrival of delegates from five states.

Delegates debated and decided the constitution should not delegate power to the proposed Congress to review and invalidate state laws. The Connecticut Compromise resolved the second controversy pertaining to state representation in the proposed unicameral Congress, between states with large and small populations, by establishing 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.

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

A fourth controversy related to the question whether Congress should be authorized to impose import and export duties. The northern states favored the authorization of the duties as a source of national revenue, and southern states opposed them because southerners would be paying most of the duties in view of the facts they exported the bulk of their products, which were chiefly agricultural, and imported most of their needed manufactured products. The compromise solution provided Congress could tax imports but not exports.

Although there were divisions and compromises among convention delegates, there was no serious opposition to fifteen of the eighteen powers proposed to be delegated to Congress. Furthermore, there was a near unanimous agreement regarding the prohibitions placed upon Congress and the requirement 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 convention approved a draft constitution establishing a strong President, the Supreme Court, and a congress possessing specific delegated powers (see below). The fear of a centralized government was reduced by inclusion in the fundamental law of "checks and balances" designed to protect the semi-sovereignty of the states and individual liberties from abuse.

RATIFICATION CAMPAIGN

The proposed constitution, which was not a popular document, was sent by the convention to the thirteen state legislatures with the stipulation each

should arrange for the election of delegates to a special state convention with the power to ratify or reject the document. Immediate objections to the proposed fundamental law included: the convention was called to revise the *Articles of Confederation and Perpetual Union* and not to discard them, the articles provided they 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. The strongest opposition was centered in the interior of the nation and regions with a small population. Farmers and imprisoned debtors not surprisingly favored cheap paper money issued by states.

The proposed document 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 an ex post facto law, and to impair the obligation of contracts. Opponents were particularly disturbed by the lack of a bill of rights, similar to ones in state constitutions—ones which guarantees freedom of assembly, petition, press, religion, and speech. Proponents argued a bill of rights would be superfluous in view of the fact the constitution does not grant 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

During the winter and spring of 1787–1788, Alexander Hamilton, John Jay, and James Madison, wrote a series of eighty–five letters to editors of New York City newspapers in an attempt 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.[30] These letters are excellent expositions meriting reading today.

Each letter explained and defended a provision of the proposed constitution, and each letter ended 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]."[31] The reader should note the words *confederation* and *federation* in the eighteenth century were used interchangeably. Supporters

of the proposed constitution termed themselves federalists in an apparent attempt to appeal to persons opposing a strong national government.

Madison in "The Federalist Number 45" contended that "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."[32]

Fear was expressed by opponents of the proposed fundamental law that the supremacy of the laws clause would allow Congress to convert the proposed federal governance system into a unitary one. Hamilton sought to allay this fear in the "Federalist Number 33": "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."[33] These letters were influential in swaying public opinion in general, and in particular, the views of delegates to the New York convention as the delegates often lacked a complete understanding of the reasons why each provision was included in the proposed fundamental law.

Sixteen letters, signed *Brutus*, were published in the *New York Journal* in the period October 1787 to April 1788 and were designed to rebut the arguments of the proponents. 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 published first in book form in 1986 as *The Antifederalist Papers and the Constitutional Convention Debates*.[34]

Brutus, in an October 18, 1787, letter 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.[35]

Although influential, the "Federalist Papers" did not allay the fear of many citizens that the draft constitution would create a too powerful national government. Thomas Jefferson, in a letter to Madison, implied the Virginia constitutional convention would not ratify the proposed document if it did not contain a bill of rights.[36] Proponents sought to convince the conventions in the larger states to ratify the document by promising the first action taken by Congress under the constitution would be the proposal of constitutional amendments incorporating a bill of rights.

The constitution became effective in June 1788 when the New Hampshire ratification convention, the ninth one, approved the fundamental document. Elections were held for the 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 operational in 1789.

THE FUNDAMENTAL LAW

Elements of the unitary and confederate systems of governance are incorporated in the U.S. Constitution to form simultaneously a compound republic and a unitary government by granting Congress complete control over the District of Columbia and U.S. territories.[37] The constitution delegates to Congress specific regulatory powers and one service provision power, the postal service, and includes exclusive and concurrent ones. States in 1791 ratified the Tenth Amendment that reserves to the states and the people all other powers not delegated to the national government or prohibited.

Delegated Powers

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

- 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, 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

The extent of congressional powers became a contentious issue as an argument erupted between individuals favoring 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.

Jefferson and Madison expressed strong opposition to the Alien and Sedition Acts enacted by Congress. Madison explained "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."[38]

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."[39] These powers are essential for the implementation of expressly delegated powers.

Resultant Powers

Congress can infer that two or more expressly delegated powers grant it 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.

Similarly, Congress can use its delegated powers to borrow funds and to coin money as constitutional authority to issue paper money.

THE SUPREMACY OF THE LAWS CLAUSE

The reader should note that 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. The drafters of the U.S. Constitution provided a solution for such conflicts in Article VI: "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 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. Courts often negate only one or two sections of a state statute conflicting with a congressional act, 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 by a court to be unconstitutional.

Numerous congressional statutes lack an expressed preemption provision removing regulatory powers from subnational governments. In consequence, state and U.S. courts are called upon to rule whether these statutes are preemptive and, if preemptive, whether they supersede all state authority in the regulatory field or only part of it.

THE GENERAL WELFARE CLAUSE

This clause often is misinterpreted as delegating a power to Congress, thereby suggesting Congress can enact any law promoting the general welfare of the United States. This interpretation would mean the governance system of the United States is a unitary one in view of the supremacy of the laws clause providing for the supersession of any provision in a state constitution or statutes in direct conflict with a congressional act.

It is important to note the U.S. Constitution authorizes Congress to provide only one service, the postal service, on other than federal property within states. All other public services are provided directly by state and local governments or by private firms holding government contracts. The reader should note that 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. However, Congress encourages the provision of specific services by subnational governments and influences their nature by means of conditional grants-in-aid, and employs its interstate commerce regulatory power to protect the public health, the safety, the welfare, and the morals of U.S. citizens.

CONGRESSIONAL PREEMPTION

Important changes in the nature of the U.S. federal system are the product of congressional preemption statutes removing, completely or partially or contingently, regulatory powers from states and by extension local governments.[40]

Powers are delegated in broad terms to Congress by the U.S. Constitution and may be employed in response to challenges and problems, domestic and international, thereby guaranteeing the fluid nature of the federal governance system. These powers are latent ones exercisable by Congress on a discretionary basis. The term *the silence of Congress* was used by many writers and the U.S. Supreme Court in reference to the failure of Congress to enact a regulatory power based upon its authority to regulate interstate commerce until 1887.[41] 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.[42]

Nature of Preemption

Congress possesses complete discretion to 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. In addition, 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. Congressional statutes 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 required two-thirds affirmative Senate vote required for approval of a treaty.[43] Congress occasionally includes a savings clause in a statute preserving part of the regulatory authority of states in what otherwise would be a complete preemption act.

A number of congressional preemption statutes impose costs upon subnational governments, and some critics suggest these governments are becoming little more than administrative subdivisions of the national government. Many complaints about federal mandates and federal restraints in fact do not involve preemption, and are the result of state and local governments applying for and accepting federal conditional grants-in-aid.

Bills containing preemption provisions often attract intense private and public interest group lobbying. For example, President Lyndon B. Johnson in 1967 urged Congress to enact 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 state legislature in Connecticut, New Jersey, and New York. The compact did not receive the constitutionally required consent of Congress, but helped to persuade Congress to enact the Air Quality Act of 1967, which allowed 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 possessing the requisite equipment.[44]

The motor vehicle industry, in the mid-1960s, for example 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.

Preemption statutes remove regulatory powers from states, yet they do not always oppose enactment of such statutes and occasionally governors request Congress to enact a specific act. For example, the national governors association 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.[45]

The interstate commerce clause serves as the constitutional basis for the majority of preemption statutes, but others are based upon the constitutional authority to enact laws relating to bankruptcy, copyrights, foreign commerce, naturalization, patents, and taxation. The scope of a preemption statute may be broadened by enactment of amendments as illustrated by the Clean Air Act Amendments of 1990.[46] Congress includes in a relatively

small number of preemption laws a sunset clause providing for the expiration of the law on a specified date unless Congress extends the law.[47] A preemption statute may be short as one page or several hundred pages in length. Congress increasingly has been including such statutes or preemptive provisions in detailed and lengthy annual omnibus appropriation acts and other appropriations acts, thereby hiding key provisions from ready review by the public.

Types

The body of laws produced by preemption statutes collectively is complex, and classifiable as complete, partial, and contingent.[48] A complete preemption statute removes all state regulatory authority in a given regulatory field, but may permit states to cooperate in the enforcement of the statute. A review of these statutes reveals there are eighteen subtypes, including ones depended upon state assistance for the achievement of their respective goal(s). A non-preemptive statute—the Do-Not-Call Implementation Act of 2003—interestingly is becoming a de facto complete preemption act as states, which initiated such registries, transfer them to the federal registry.[49]

Four types of partial preemption statutes can be identified. 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 the state has qualified personnel, equipment, and the state standards are as strict or stricter than 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 concerned 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. Congress has enacted fifteen additional more stringent state regulatory standards preemption acts and one more stringent state procedural standards act. The latter act is the first of its type and is contained in the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005.[50]

Congressional minimum standards preemption has had the greatest impact on the nature of the federal union by encouraging states to employ their latent reserved powers. There are two types of minimum standards preemption acts. The first type, a state-federal partnership approach, authorizes the concerned federal department or agency to delegate regulatory primacy to a state that submits a plan containing regulatory standards at least as stringent as the national ones, and possesses qualified personnel and necessary equipment to exercise regulatory authority. States are completely

responsible for regulating, and the concerned national agency's role is confined to monitoring state performance and providing financial and technical support. The second type is a provision in a preemption statute stipulating that a state statute offering greater protection is not preempted. Twenty-five such acts have been enacted to date.

ENACTMENT PACE

Preemption statutes date to 1790 when Congress enacted the Copyright Act and the Patent Act. Subsequently, the enactment pace was slow with only twenty-nine acts enacted by 1899.[51] Preemption statutes continued to be enacted at a slow pace during the first five decades of the twentieth century: 14 (1900–1909), 22 (1910–1919), 17 (1920–1929), 31 (1930–1939), 16 (1940–1949), and 24 (1950–1959). A sharp increase in the enactment pace commenced in 1965; then 47 (1960–1969), 102 (1970–1979), 93 (1980–1989), 84 (1990–1999), 160 (2000–2009), and 28 (2010–June 2011). By January 1, 2012, 671 preemption statutes had been enacted since 1790. The amount of power removed from states in a regulatory field varies from little to all.

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 subnational governments. President George W. Bush, for example, approved 133 preemption acts in the period 2001–2008, yet relatively little exercised regulatory powers were removed from states, although the acts prevent states from levying and collecting Internet access taxes.[52]

The 104th Republican–controlled Congress (1995–1996) reacted to state and local government officers' criticisms of unfunded mandates by enacting the Unfunded Mandates Reform Act of 1995 establishing mandatory procedures that Congress must follow to enact mandates, but not forbidding the enactment of such mandates or requiring reimbursement of mandated costs.[53] 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.[54]

SIGNIFICANCE OF PREEMPTION

The U.S. Constitution does not contain a mechanism designed to ensure that the initially established division of powers between the national government and the states would continue into the future. The drafters of the U.S.

Constitution apparently anticipated that Congress 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. Congressional preemption statutes since 1965 have produced what may be labeled a major governance revolution silently transforming the nature of the national economic union and the national political union.[55] A noteworthy development is congressional enactment since 1978 of preemption statutes providing for increased regulation of states as polities and extensive economic deregulation of the banking, communications, electricity, and natural gas industries. Congress also enacted statutes providing for the complete economic deregulation of air, bus, rail, and trucking companies that remain subject to state safety regulation with the exception of airline companies.

Democratic theory assumes there will be active and informed citizen participation in the governance process at the national, state, and local planes of government. Such participation is limited when Congress makes preemption decisions. Public hearings are held on a number of preemption bills, but 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.

A number of important preemption statutes, particularly environmental regulatory ones, are outline or skeleton laws containing broad policy goals 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 policy-making process as citizens have limited opportunities to influence the rule-making process compared to major 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 policy-making process. Public opinion polls consistently reveal citizens generally have the highest respect for local governments and the least respect for the national government. Participatory democracy suffers 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.

Congress finances in part programs established by preemption statutes by including in them unreimbursed mandates that 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. For example, the Ocean Dumping Ban Act of 1988 prohibits the dumping of sewage sludge in the ocean, and thereby requires municipalities located near an ocean to utilize