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# Unifying a Federal Nation

Full faith and credit letters of credence were employed in diplomatic practice during the Middle Ages. Historically, full faith and credit is rooted in what is termed *private international law*, comity, and conflict-of-laws, and is based on judicial decisions and the writings of judges.

Kurt H. Nadelmann researched the use of full faith and credit during the colonial period and discovered (1) a 1639 Connecticut act providing for full faith and credit in other colonies, (2) a 1715 Maryland statute according full faith and credit to judgments on debts rendered by courts of sister colonies, (3) a 1731 South Carolina act granting full faith and credit to bonds, deeds, and records of "any of his majesty's plantations in America," and (4) a 1774 Massachusetts act granting full faith and credit to debt judgments of courts in sister colonies.[1]

The Second Continental Congress, which prosecuted the Revolutionary War, recognized the importance of congenial relations between the thirteen states. In consequence, the Congress adopted a resolution providing "full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state." This resolution was included as article IV in the Articles of Confederation and Perpetual Union, and became effective in 1781.

The world's first federal system was established in 1789, when the ninth state, New Hampshire, ratified the proposed U.S. Constitution, which divides exercisable powers between the newly established general government and the state governments. The fundamental document


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delegates specified powers to Congress and other specified powers to the president, reserves the remaining exercisable powers to the states, and authorizes state legislatures to exercise other specified powers with the consent of Congress. A number of powers are concurrent powers that are exercisable by Congress and by state legislatures, as illustrated by the power of taxation.

Included among the reserved powers is the English common law and equity, which states had employed as colonies and as independent nations prior to the ratification of the U.S. Constitution. The common law is a remedial law that includes the police power definable in broad terms as the power of each state to regulate persons and properties in order to protect and promote public health, safety, welfare, morals, and convenience. Equity is a supplement to the common law designed to prevent threatened wrongs from occurring.

The articles' full faith and credit provision was incorporated in section 1 of article IV of the U.S. Constitution in nearly identical language: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Delegates to the constitutional convention of 1787 in Philadelphia were men of wealth and property. The suggestion has been advanced that the clause was added to the Constitution to protect creditors against debtors who move to other states. James Madison in the Federalist, no. 42 argued that the clause would be "a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous states, where the effects liable to justice may be suddenly and secretly transformed in any stage of the process, within a foreign jurisdiction."[2] His comment is preceded by a paragraph on the delegation of the power to Congress to regulate bankruptcies, thereby suggesting a linkage between debt and full faith and credit. Article VI of the U.S. Constitution, providing for the assumption by the new government of debts contracted prior to the Constitution, suggests that the delegates were concerned with the protection of creditors.

Henry J. Friendly in 1928 uncovered evidence from several sources—debates at the constitutional convention and state ratification conventions, and newspaper reports—revealing the grant of diversity of citizenship jurisdiction to U.S. courts was designed to protect creditors in one state "against legislation favorable to debtors" in another state.[3] He examined Connecticut records during the confederacy, involving

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nine diversity-of-citizenship cases, and reported "the record of the court is highly creditable. In only two of them was the domestic party victorious, and these cases could not well have gone the other way."[4] He acknowledged that the court records of other states were not complete, but nevertheless concluded none of the records indicated "undue prejudice on the part of the local tribunal."[5]

Records of the Constitutional Convention reveal that fear was expressed that if Congress was not granted power to prescribe the manner of proving the acts, records, and proceedings, "the provision would amount to nothing more than what now takes place among all independent nations."[6] Madison in the Federalist, no. 42 wrote authorization for Congress to prescribe by general law that the manner of proving public acts, records, and judicial proceedings "is an evident and valuable improvement on the clause relating to this subject in the Articles of Confederation."[7] Concern was expressed by other commentators the grant of diversity of citizenship jurisdiction to courts could be employed to subsume the states' judiciary into the federal judiciary. Hamilton in the Federalist, No. 82 rejected this "alienation of state power by implication" argument by explaining state courts would retain concurrent jurisdiction with the exception of where federal courts were granted exclusive jurisdiction.[8]

In framing the Full Faith and Credit Clause, the convention delegates took special care not to expand the powers of Congress while establishing a national legal principle federalizing separate state legal systems through reciprocity, thereby preventing provincialism in jurisprudence. In 1943, the U.S. Supreme Court opined that the "full faith and credit clause like the commerce clause . . . has become a nationally unifying force."[9]

The constitutional section suggests that the comity command (*comitas jurisdictionum*) is not self-executing, and authorizes Congress "by general law" to "prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof." The Full Faith and Credit Clause appears to mandate interstate reciprocity pertaining to civil matters in contrast to the constitutional authorization for states voluntarily to enter into interstate compacts and agreements provided that Congress grants its consent. U.S. Supreme Court Justice Robert Jackson in 1945 wrote an important law review article titled "Full Faith and Credit: The Lawyer's Clause of the Constitution" that merits reading

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today.[10] He specifically emphasized that the clause "serves to coordinate the administration of Justice among the several independent legal systems which exist in our Federation."[11] He also observed that the application of full faith and credit "to the law of domestic relations is difficult, and the books of the Court will not be closed on it for a long time, if ever."[12]

The constitutional establishment of a federal system automatically results in a number of conflicting national laws and state laws, and conflicts-of-the-laws of two or more sister states. Article VI of the U.S. Constitution resolves the first type of conflicts-of-law by stipulating that "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 Constitutions or laws of any State to the Contrary notwithstanding."

Conflicts-of-laws between sister states are addressed in part by section 1 of article IV: "Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof" (see chapter 2). Interestingly, the Constitution does not require state courts to give some recognition and full faith and credit to the judgments and proceedings of U.S. courts.

State governments and local governments were the principal regulators until the early decades of the twentieth century, when Congress commenced to exercise its regulatory powers more frequently and in new fields. Congress employs its constitutional regulatory powers for multiple purposes and in the process of employment may preempt (remove) completely, or partially, or contingently the regulatory powers of the states.[13]

The United States is relatively unique among the world's federal nations in having a dual judicial system composed of national courts and of state courts that interact with each other. In 1937, Professor William B. Munro noted that "the division of jurisdiction between two sets of courts is in fact so indistinct at some points that even good lawyers are not always sure of their ground. And as for the ordinary layman he is often quite bewildered by the strange things which result from divided judicial authority."[14]

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A decision of a state's highest court may be appealed to the U.S. Supreme Court provided that the appeal involves a federal question. Congress in the Judiciary Act of 1789 authorized the removal of a civil case from a state trial court to the U.S. District Court if a federal question is involved.[15] A U.S. federal trial court and a federal appellate court each, if authorized by the concerned state legislature, may send a certified question(s) to the highest court in the state seeking an interpretation of a state law(s). Currently, forty-five state supreme courts have been authorized to accept interjurisdictional certified questions of state law.[16]

In 1974, John W. Winkle III referred to the limited jurisdiction of federal courts during the early decades of the Republic by explaining that Congress failed to authorize these trial courts to exercise jurisdiction over cases raising federal questions until 1875.[17] He added a redistribution of judicial powers over time "occurred as the once preeminent posture of state adjudication deteriorated. Through congressional legislation and court interpretation, the power of the federal judiciary increased enormously during the past century . . . While subnational courts today still handle the preponderance of litigation, the national subsystem exercises an ever-widening control over the vindication of federal rights."[18]

The nature of the United States governance system is explained today by two general theories. The theory of dual federalism highlights the existence of dual legislatures, national and state; dual chief executives, the president and the governor of each state; and dual or parallel judicial systems. This simple theory adequately explained the nature of the federal system during the early period when interactions between the national government and the state governments were very limited in nature and number. By the late nineteenth century, it was apparent that a new theory was needed to explain the increasingly common cooperative interactions between the two planes of government. The theory of cooperative federalism explains more accurately the nature of the national-state relations.

V. O. Key Jr. in 1940 was the first prominent scholar to recognize state government assistance facilitating implementation of congressional statutes during the New Deal period, and to list the reasons why states assisted the national government. He stressed the speed of state legislatures in enacting assistance statutes, and explained the

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assistance was attributable in part to the fact that "most governors were in sympathy with the general aims of the National Administration."[19] He also emphasized 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."[20] In 1954, Virginia G. Cook investigated state cooperation in the enforcement of the 1938 federal wage-hour law that provides funds to reimburse states for their respective assistance.[21] She concluded that "the mere availability of federal funds . . . is not by itself, in the political and economic climate which has prevailed since 1940, a sufficient inducement to bring federal and state authorities eagerly and promptly into cooperative arrangements."[22]

A brief review of the events leading to the drafting and ratification of the U.S. Constitution and a listing of its key provisions will facilitate an understanding of the role of the Full Faith and Credit Clause in the federal system.

## Constitutional Developments

The Declaration of Independence in 1776 officially dissolved the ties of each of the thirteen former colonies to the United Kingdom, and thereby established each former colony as a nation state that entered into a loose military alliance with sister states to prosecute the Revolutionary War. The superintendence of the prosecution of the war was the responsibility of the Second Continental Congress, a unicameral body composed of an equal number of members from each state. The Treaty of Paris of 1783 officially terminated the Revolutionary War between the revolutionary colonists and the United Kingdom, and produced thirteen new nations recognized by other nation states.

### *Articles of Confederation*

The need for a more permanent governing structure was recognized by the Second Continental Congress that in 1777 proposed the Articles of Confederation and Perpetual Union providing for a league of amity. Boundary disputes, however, delayed ratification until 1781, when the thirteenth state, Maryland, ratified the articles.

Article II declared that "each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is

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not by this confederation expressly delegated to the united States in Congress assembled." The drafters employed a lowercase *u* in united to emphasize that a national government had not been established and the articles were a treaty uniting the states only for expressed purposes.

Article IV incorporates three important provisions promoting harmonious interstate relations: citizens of a state as sojourners were entitled to the privileges and immunities of citizens in each state visited, the governor of the asylum state must return a fugitive(s) from justice to the requesting state, and each state must accord full faith and credit to the legislative acts, records, and final judicial proceedings of each of the other states. Article IV of the U.S. Constitution incorporated these provisions, as they are essential for the successful functioning of a confederacy 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. A state's delegates collectively possessed a single vote. The reader should note that the articles did not establish an executive branch or a judicial branch.

Few powers were granted to the Congress: 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 a quota 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 revealed the defects of the articles and the weakness of Congress. Specific defects included Congress's reliance on 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 individual states.

Congress was authorized to print paper money, but such money almost immediately became worthless because of the lack of authority 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 the Congress

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with foreign nations. Article IX, however, stipulated that commerce treaties may not prevent a state "from prohibiting the exportation or 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.[23]

The demise of the Confederation was hastened by Captain Daniel Shays, who served in the army during the Revolutionary War. He subsequently led 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 powerless to suppress the rebellion, which was suppressed only when wealthy Boston residents raised funds for an army led by General Benjamin Lincoln.[24]

The apparent serious defects of the articles convinced the Maryland and Virginia Boundary Commissioners to recommend in 1785 that each state send delegates to a meeting in Annapolis in 1786 to develop remedies for the defects of the articles. Only five states sent delegates who memorialized Congress to call a convention to consider drafting amendments to the Articles. Congress responded by calling a convention to meet in Philadelphia in 1787.

### *The Constitutional Convention*

The State of Rhode Island and Providence Plantations was the only state to fail to send delegates to the convention that met in Philadelphia from March 25, to September 17, 1787. States appointed seventy-four delegates, but nineteen refused to accept appointments or did not attend the convention. Philosophical and sectional differences divided the Convention with delegates representing the former expressing the fear a stronger national government would be a threat to individual liberties. The sectional differences were based on 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 authorized to review and to invalidate state laws before they would become effective, but decided the proposed constitution should not delegate this power to Congress. A second major controversy related to state

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representation in the proposed unicameral Congress with each state with a small populations arguing for equal representation for each state as under the Articles of Confederation and Perpetual Union. The Connecticut Compromise resolved this controversy by 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.

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

The fourth controversy involved whether Congress should be granted the power to impose import duties and export duties. The northern states favored both duties as sources of national revenue, and the southern states opposed the duties because they would be paying most of the duties in view of the facts that they exported the bulk of their products, which were chiefly agricultural, and imported most of their needed manufactured products. The compromise provided Congress could tax imports but not exports.

No serious opposition developed to fifteen of the eighteen powers proposed to be delegated to Congress. In addition, there was near unanimous agreement regarding the various prohibitions placed on Congress, and the requirement states must obtain congressional permission to initiate specified proposed actions, including entrance into interstate compacts or agreements, or levying of imposts on imports and exports.

The draft Constitution would establish 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 semisovereignty of the states and individual liberties from abuse.

### *Ratification Campaign*

The proposed U.S. Constitution, which was not a popular document, was sent by the convention to the state legislatures with the proviso each should arrange for the election of delegates

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to a Special Convention with the power to ratify or reject the document. Four major objections to proposed fundamental law immediately were raised: 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 on them. The strongest opposition was in the interior of the nation and in each region with a small population. Not surprisingly, farmers and imprisoned debtors favored cheap paper money issued by state governments.

The proposed Constitution forbade Congress to suspend the writ of habeas corpus unless a rebellion or an invasion threatened public safety. Congress and the states were forbidden to enact a bill of attainder (legislative declaration of guilt and imposition of punishment) or an ex post facto (retroactive) law. Furthermore, states were forbidden to impair the obligation of contracts. Many of the opponents' criticisms focused on the lack of a Bill of Rights, similar to the rights in each state constitution 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 does not grants powers to Congress to abridge the liberties of citizens.

Article VII of the proposed fundamental law provides it would become effective on ratification by nine states. The proposed fundamental law was ratified quickly by the Delaware, New Jersey, and Pennsylvania conventions, and their approvals 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 the 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 to 1788 to convince delegates to the state convention to ratify the proposed constitution. Thirty-six letters were published as a book in late March 1788, the remaining letters were

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published as a second book in late May, and the two books later were consolidated into one.[25] The excellent exposition contained in each letter merit reading today.

Each letter writer explained and defended one or more provisions of the proposed Constitution and the letter ended with the name *Publius*. Madison, in the Federalist, no. 39," explained that the fundamental law would establish a governance system that would be "neither wholly national nor wholly federal."[26] In the eighteenth century, the words *confederation* and *federation* were used interchangeably. The Constitution's supporters termed themselves *federalists* in an attempt to appeal to persons opposing a strong national government.

Madison in the Federalist, no. 45 emphasized "the powers delegated by the proposed Constitution to the federal government are few and defined," and added in the Federalist no. 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."[27]

Opponents were fearful that the article VI Supremacy of the Laws Clause would permit Congress to convert the proposed federal system into a unitary one. Hamilton, in the Federalist no. 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."[28]

The Federalist Papers generally were influential in swaying public opinion and particularly influenced the views of delegates to the New York convention, as a number of delegates 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* between October 1787 and April 1788 to rebut the proponents' arguments. Available evidence suggests that 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.[29]

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Brutus in an October 18, 1787, letter attacked the necessary and proper clause and the supremacy of the laws clause, and concluded:

> 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.[30]

The Federalist Papers were influential, but did not allay the fear of many citizens that the proposed fundamental law would create a strong national government that would be a threat to the liberties of the citizenry. Thomas Jefferson wrote a letter to Madison implying that the Virginia Convention would not ratify the proposed document until a bill of rights was incorporated.[31] 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 a bill of rights as amendments to the fundamental law.

The Constitution was ratified in June 1788, when the New Hampshire ratification convention, the ninth one, approved the fundamental document. 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

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and a unitary government by granting Congress complete control over the District of Columbia and U.S. territories.[32] The fundamental document delegates to Congress specific regulatory powers: exclusive and concurrent ones, and one service provision power within states, the postal service. The 1791 state ratification of the Tenth Amendment to the Constitution reserves all other powers not delegated or prohibited to the states and the people. The reader should note that the Constitution is full of silences, and courts play a major role in interpreting the fundamental law.

### *Delegated Powers*

The following powers are delegated by section 8 of article I to Congress:

> To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and 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;

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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*

A major debate erupted between individuals supporting a loose interpretation of the constitutionally delegated powers and those favoring a strict interpretation. Hamilton, for example, maintained that Congress was empowered to charter a national government bank, and Jefferson countered that the national legislature lacked such a power since chartering a bank was not an enumerated delegated power.

Congressional enactment of the Alien and Sedition Acts disturbed Jefferson, Madison, and many other citizens. Madison, in particular, 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

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States will be stripped of every right reserved, by the concurrent claims of a paramount legislature."[33]

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."[34]

### *Resultant Powers*

Congress can utilize two or more expressly delegated powers to infer that it possesses a resultant power. The national legislature, for example, expressly is authorized "to establish a uniform rule of naturalization," but is not specifically delegated the power to regulate immigration. Congress also is granted constitutional 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 of a resultant power 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 Law 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 conflicts-of-laws. To solve the problem, 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."

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The lower U.S. trial courts and the U.S. Supreme Court do not always invalidate a state constitutional provision or a state statute facially conflicing with an act of Congress by opining that the conflict is not the type conferring jurisdiction on these courts.[35] It also should be noted that courts often negate only one or two sections of a state statute conflicting with a congressional statute, and the remainder of the state statute is 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. In consequence, state and U.S. courts are called on 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 as authorizing the congressional enactment of any law promoting the general welfare of the United States. This clause does not delegate a power to Congress. The misinterpretation, if accurate, would mean the governance system of the United States is a unitary one in view of the Supremacy of the Law Clause that provides for the supersession of any provision in a state constitution or a state statute in direct conflict with a congressional act.

### *Service Provision and the Police Power*

Congress is authorized by the Constitution to provide only one service, the postal service, on other than federal property within states; state and local governments provide all other services. The reader should be aware 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 state and local governments to regulate in a specific manner and to provide services by means of conditional grants-in-aid, and employs its interstate commerce regulatory power and taxation power to protect public health, safety, welfare, and morals of citizens.

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### Congressional Preemption

Delegated powers can be exercised by Congress at its discretion to enact statutes removing partially or completely, contingently, and prospectively and/or retrospectively the regulatory powers of subnational governments in a given field.[36] Furthermore, a preemption provision not based on an expressly delegated power, such as one regulating migratory birds, can become effective by the president negotiating a treaty with a foreign nation subject to 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 the required two-thirds affirmative vote in the Senate for approval of a treaty.[37] Congress occasionally includes a savings clause in a preemption statute preserving part of the regulatory authority of states in what otherwise would be a complete preemption act or authorizes a state to regulate, provided that its regulations are equal to or stricter than the corresponding federal ones.[38]

Critics of congressional preemption object to the costs imposed on state governments and/or local governments by preemption statutes containing mandates requiring subnational governments to initiate specified actions, and restraints prohibiting these units to initiate specified actions. Some critics are convinced that subnational 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 subnational governments applying for and accepting federal conditional grants-in-aid.

Politically powerful special interest groups are responsible for a number of important preemption statutes. An important group was the motor vehicle manufacturers who in the mid-1960s was faced with the spread of nonharmonious state emission standards, feared they might have to develop as many as fifty emission control systems, and lobbied Congress to enact the proposed Air Quality Act of 1967. The environmental movement in particular became politically strong in the 1960s, and helped to persuade President Lyndon B. Johnson to send a message to Congress in 1967 recommending the enactment of a statute removing all air-quality

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regulatory powers from the states. A campaign was led by Governor Nelson A. Rockefeller of New York, to forestall the enactment of the proposed law, and offered 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, but did not receive congressional consent. Congress decided not to enact a complete preemption act and instead enacted 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 who possess the necessary equipment.[39] California had stricter motor vehicle air-quality emission standards than the proposed national standards, and its standards would have been superseded if the proposal law was enacted. California lobbied Congress 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 that Congress enact a specific preemption act. The National Governors Association, for example, requested that Congress enact the preemptive Commercial Motor Vehicle Safety Act of 1986, because states could not solve the problem created by operators of commercial vehicles holding operating licenses issued by more than one state, and continuing to drive after state revocation of their respective license for dangerous driving by utilizing a license issued by a sister state.[40]

Preemption statutes most commonly are based on the Interstate Commerce Clause, but other preemption statutes are based on constitutional authority to enact laws relating to bankruptcy, copyrights, foreign commerce, naturalization, patents, and taxation. A preemption statute's coverage may be broadened by enactment of amendments as illustrated by the Clean Air Act Amendments of 1990.[41] Each of a small number of preemption laws contains a sunset clause providing for the expiration of the law on a specified date unless Congress extends or removes the expiration date.[42] A preemption statute may be short—less than one page—or as long as several hundred pages. Congress increasingly has been including such statutes in detailed and lengthy omnibus appropriation acts and other annual appropriations acts.

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### *Types*

A complex body of laws has been created by preemption statutes that may be classified generally by type as complete, partial, and contingent. The first type removes all state regulatory authority in a given regulatory field, but may allow states to cooperate in the enforcement of the act. An examination of such statutes reveals that there are eighteen subtypes, including ones dependent on state assistance for the achievement of their respective goal(s).[43]

Partial preemption statutes are of four types. Such a 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 that the state's 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. Twenty-eight minimum standards preemption acts, fifteen more stringent state regulatory standards preemption acts, and one more stringent state procedural standards act have been enacted by Congress to date. The procedural standards act is the first of its type, and is contained in the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005.[44]

A turning point in the nature of the federal system occurred in 1965, when Congress included in the *Water Quality Act* a new type of partial preemption termed *minimum standards preemption*, a state-federal partnership approach, encouraging states to employ their latent reserved regulatory powers in specified areas, provided that they have standards at least as stringent as the federal ones, qualified employees, and necessary equipment.[45] To obtain primacy with respect to water pollution abatement, for example, a state must enter into a memorandum of agreement with the U.S. Environmental Protection Agency. States granted regulatory primacy by a U.S. department or agency are exclusively responsible for regulating, and the concerned national agency's roles are monitoring state performance and providing financial and technical support. This type also may be viewed as congressional devolution of power to the states.[46] A number of congressional statutes, such as the Oil Pollution Act, do not

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contain authorization for the administering federal department or agency to devolve regulatory primacy to states.

### *Enactment Pace*

Congress enacted its first two preemption statutes in 1790: The Copyright Act and the Patent Act.[47] The enactment pace subsequently was slow, with only twenty-nine acts enacted by the end of the nineteenth century. Such statutes continued to be enacted at a slow pace during the first five decades of the twentieth century: fourteen (1900–1909), twenty-two (1910–1919), seventeen (1920–1929), thirty–one (1930–1939), sixteen (1940–1949), and twenty-four (1950–1959). The enactment pace increased sharply commencing in 1965: 47 (1960–1969), 102 (1970–1979), 93 (1980–1989), 89 (1990–1999), 160 (2000–2009), 58 (2010–2012), 2 (2012–2013). By May 2013, 702 preemption statutes had been enacted since 1790.[48]

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 sub-divisions. President George W. Bush, for example, approved 133 preemption acts in the period 2001–2008, yet relatively few 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.[49]

Congress responded 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 imposing financial burdens on subnational governments, but not forbidding the enactment of such mandates.[50] Congress also enacted the Safe Drinking Water Act Amendments of 1996, offering relief from the expensive filtering mandates that would force 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.[51]

### *Administrative Agency Preemption*

Many preemption statutes authorize the secretary of a federal department and the administrator of an administrative agency to promulgate regulations preempting related state and local government laws and administrative rules and regulations. This so-called administrative

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