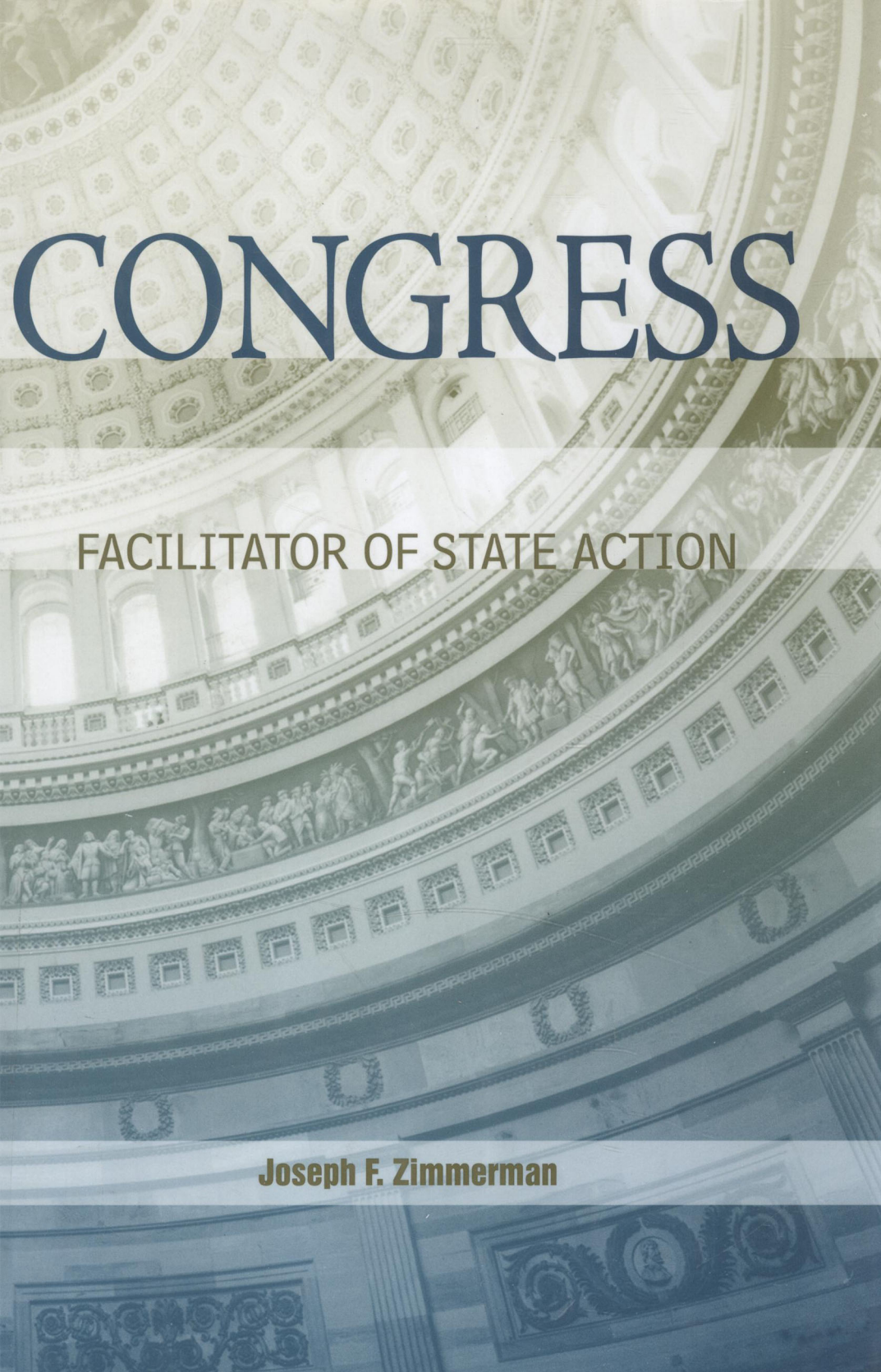

CONGRESS

FACILITATOR OF STATE ACTION

Joseph F. Zimmerman

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For Peggy with love
In appreciation of her continuing support

Preface

The theory of dual federalism was an adequate general explanation of national-state relations in the United States during the early decades of the economic union and the political union. Late-nineteenth-century developments, however, deprived the theory of its full validity and it was replaced in large measure by the theory of cooperative federalism, which is a more accurate explanation with its emphasis on the cooperative efforts of the national government and the state governments to solve public problems. The theory, however, is limited in application as it addresses only national-state relations and stresses primarily categorical national grants-in-aid and block grants. This volume offers a new approach to understanding the complexities of the ever-changing division of powers in the United States federal system encompassing national-state, national-local, state-local, and interstate relations. In other words, there has developed a new linkage of national, state, and local governmental powers.

Numerous state and local government officers over many decades criticized a large number of the conditions attached by Congress to financial grants-in-aid and the removal of state regulatory powers by preemption statutes. Congress responded in part to a number of the complaints as explained in this volume. With the exception of grants-in-aid, there has been relatively little literature examining voluminous congressional statutes, devolution and other types, designed to facilitate implementation of state actions to solve particular public problems.

A detailed examination of such statutes is essential for the development of a more comprehensive theory of federalism in the United States fully explaining national-state relations, national-local, interstate relations, and state-local relations. This volume is the first one to examine congressional devolution of some of its constitutionally delegated regulatory powers to states and other statutes designed to facilitate state actions to solve public problems that need to be included in a general theory of federalism.

Devolution dates to the first Congress in 1789, became relatively common in the latter half of the twentieth century, and affected significantly the nature of the federal union. Devolution comports with the principle

of subsidiarity, incorporated in the current draft of a new European Union Constitution, positing responsibility for a public function should be lodged in the government(s) closest to the people capable of exercising the responsibility in an effective manner. Congressional devolution of powers to states has offset to a minor extent the long-term shift of the public policymaking locus from state and local governments to the national political arena in Washington, D.C., flowing from conditional grants-in-aid and preemption statutes removing regulatory authority from subnational governments.

This volume also is the first one to include a comprehensive listing and explanation of congressional statutes, based upon the foreign and interstate commerce clauses and other delegated powers, designed to facilitate state enforcement of their respective criminal laws. States possess the exceptionally broad constitutional reserved police power—to protect public convenience, health, safety, morals, and welfare—that was adequate when crimes generally were restricted to a state. The current interstate and international nature of criminal activities makes necessary national support of state actions to enforce their criminal statutes.

Congressional financial assistance to states in the form of grants-in-aid and block grants-in-aid are reviewed along with nonfinancial aid: technical assistance and establishment of programs, such as the national driver register, that facilitate state actions. In addition, congressional actions encouraging states to enter into interstate and federal-state compacts are reviewed.

Attention also is focused on several innovative congressional preemption statutes which are labeled state-friendly. They include a complete preemption one requested by governors who reported states were unable to address effectively the problem involving a truck driver holding operator licenses issued by several states who continues to drive after one state has revoked his/her license for a major motor vehicle violation(s). Other preemption acts are state-friendly because they contain an opt-in or opt-out provision or both, allowing a state a degree of flexibility in addressing a problem within the state. Still other state-friendly congressional acts authorize a state to veto an action taken by a national government officer subject to a possible override of the veto by Congress, exempt from preemption any state that has enacted a specified uniform state law drafted by the national conference of commissioners on uniform state laws, provide relief from a burdensome preemption act, allow states to establish regulatory standards more stringent than the national ones, or authorize states to adopt harmonious regulations as an alternative to complete congressional preemption of their regulatory powers in a given field.

To identify congressional devolution, preemption, and other key statutes, a literature search was conducted to locate pertinent books, government

publications, and journal articles. In addition, the index to the *United States Code* was examined to find legal citations for all pertinent statutes.

The concluding chapter (1) reviews the information presented in earlier chapters, (2) offers recommendations to Congress, the president, state legislatures, and governors to initiate actions to strengthen the federal system and make more perfect the economic union and the political union, and (3) advocates a broader nonequilibrium theory of the federal system and use of a kaleidoscope to view the continuing changes in national-state relations, national-local relations, interstate relations, and state-local relations.

Acknowledgments

The author of a scholarly political science book draws heavily upon the published works of other scholars and government publications. Identifying such literature is a daunting task when the subject matter is exceedingly complex.

The identification and collection of all pertinent would have been exceptionally time-consuming for the author if he lacked research associates. I was most fortunate to have two outstanding graduate students, Karl G. Schlegel and Katherine M. Zuber as my research associates. They combed numerous data bases in the fields of political science and public law and successfully located important books, government documents, articles, and unpublished materials relating to the subject of Congress facilitating actions by state governments. As usual, a major debt of appreciation is owed to Addie Napolitano for her expert preparation of the manuscript for publication.

Contents

CHAPTER ONE

The Federal System

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

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

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

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

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

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

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

Constitutional Developments

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

Articles of Confederation

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

Article II emphasized that "each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the united States in Congress assembled." A lower case "u" was used in united to emphasize that a national government had not been established and the Articles were a treaty that united the states for only expressed purposes.

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

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

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

Defects

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

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

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

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

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

The Constitutional Convention

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

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

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

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

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

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

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

Ratification Campaign

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

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

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

The Federalist and Antifederalist Papers

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

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

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

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

which the latter must enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for political power and supremacy."[12]

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

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

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

> It is true the government is limited to certain objects, or to speak more properly, some small degree of power is still left to the States, but a little attention to the powers vested in the general government, will convince every candid man, that if it is capable of being executed, all that is reserved for the individual States must very soon be annihilated, except so far as they are barely necessary to the organization of the government. The powers of the general legislature extend to every case that is of the least importance—there is nothing valuable to human nature, nothing dear to free men, but what is within its power. It has authority to make laws which will affect the lives, the liberty, and property of every man in the United States; nor can the constitution or laws of any State, in any way prevent or impede the full and complete execution of every power given.[14]

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